Court File No. T-402-19 / T-141-20 / T-1120-21

FEDERAL COURT

CLASS PROCEEDING

B E T W E E N:

XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige), JONAVON JOSEPH MEAWASIGE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT

CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo, CAROLYN BUFFALO, and DICK EUGENE JACKSON also known as RICHARD JACKSON

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT

CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

MOTION RECORD

(Motion for Approval of Class Counsel Fees, Returnable October 27, 2023)

October 6, 2023

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Court File Nos. T-402-19 / T-141-20 / T-1120-21

FEDERAL COURT

CLASS PROCEEDING

B E T W E E N:

XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige), JONAVON JOSEPH MEAWASIGE

Plaintiffs

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ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo, CAROLYN BUFFALO, and DICK EUGENE JACKSON also known as RICHARD JACKSON

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FEDERAL COURT

CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

NOTICE OF MOTION

(Motion for Approval of Class Counsel Fees, Returnable October 27, 2023)

TAKE NOTICE THAT counsel for the class, Fasken Martineau Dumoulin, Kugler Kandestin LLP, Miller Titerle + Co., Nahwegahbow Corbiere, and Sotos LLP will make a motion to be heard before the Honourable Madam Justice Aylen on Friday, October 27, 2023 at 10:00 a.m. or as soon thereafter as the motion can be heard at the courthouse at 301 Wellington St, Ottawa.

THE MOTION IS FOR:

1. an order:

    (a) approving class counsel's fees of eighty million dollars ($80,000,000), plus applicable taxes and disbursements (together, the "**Class Counsel Fees**"), in accordance with section 17.01 of the parties' Final Settlement Agreement in the actions dated April 19, 2023 (the "**Final Settlement Agreement**") for the prosecution of these class actions and services rendered;

    (b) directing the Defendant to pay Class Counsel Fees;

    (c) directing that the Class Counsel Fees shall be paid separately from, and over and above, the Settlement Funds[1] due under the Final Settlement Agreement;

    (d) requiring the defendant to pay to members of class counsel participating on the Settlement Implementation Committee ("**SIC**")

[1] All defined terms have the same meaning as the Final Settlement Agreement, unless specified here otherwise.

legal fees for their work thereon at their applicable hourly rates, plus any taxes and disbursements incurred; and

2. such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

1. These actions are class proceedings;

2. The parties reached the Final Settlement Agreement, which is fair and reasonable and in the best interests of the class;

3. This motion is brought conditional on the approval of the Final Settlement Agreement having been granted;

4. Class counsel and the defendant have not reached an agreement regarding the Class Counsel Fees;

5. The defendant's obligation to pay Class Counsel Fees is contractual and flows from the Final Settlement Agreement;

6. All the factors relating to the approval of legal fees support the fairness and reasonableness of the fees requested;

7. The results achieved are unprecedented;

8. Class counsel undertook substantial risk undertaking and prosecuting these actions and agreed to be paid only in the event of success;

9. Class counsel performed significant work on behalf of class members and achieved significant success;

10. The fees requested by class counsel are fair and reasonable, amongst others, given:

    (a) the results achieved for the class;

    (b) the beneficial terms of the Final Settlement Agreement;

    (c) the risks undertaken by class counsel;

    (d) the amount of work undertaken to advance the actions;

    (e) the complexity of the matters at issue in the actions;

    (f) the importance of these class actions to the class;

    (g) the inability of the class to prosecute the Actions against the Defendant without an accessible fee arrangement;

    (h) the quality and skill of class counsel;

    (i) expectation of the class;

    (j) the importance of incentivizing skilled lawyers to act as class counsel; and

    (k) the reasonableness of the fees requested in light of fees in comparable class proceedings.

11. The Final Settlement Agreement provides that Canada will pay class counsel the amount approved by the Court, plus applicable taxes, in respect of their legal fees and disbursements for the prosecution of the class actions to the date of the Settlement Approval Hearing over and above the Settlement Funds, and that no such amounts will be deducted from the Settlement Funds;

12. Class counsel and the defendant participated in mediation regarding the Class Counsel Legal Fees on September 20, 2023 before the Honourable Mr. Justice Favel, but were unable to reach an agreement;

13. Article 17.03 of the Final Settlement Agreement provides that the defendant shall pay legal fees to the members of class counsel serving on the SIC ("**Class Counsel SIC Members**") on an ongoing basis;

14. Canada has agreed that Class Counsel SIC Members shall be paid their regular, commercial hourly rates and disbursements for their work serving on the SIC;

15. *Federal Courts Rules*, SOR/98-106 at Rule 334.4;

16. Such further and other grounds as counsel may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. Affidavit of Xavier Moushoom, sworn October 2, 2023;

2. Affidavit of Jonavon Joseph Meawasige, sworn October 3, 2023;

3. Affidavit of Zacheus Joseph Trout, sworn October 5, 2023;

4. Affidavit of Carolyn Buffalo, affirmed October 11, 2023;

5. Affidavit of Ashley Dawn Louise Bach, sworn October 6, 2023;

6. Affidavit of Melissa Walterson, sworn October 6, 2023;

7. Affidavit of Dianne G. Corbiere, affirmed October 6, 2023;

8. Affidavit of David Sterns, sworn October 6, 2023;

9. The plaintiffs' motion record for approval of the Final Settlement Agreement, to be filed; and

10. Such further and other evidence as counsel may advise and this Honourable Court may permit.

October 6, 2023

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Dossiers

T-402-19

RECOURS COLLECTIF

ENTRE :

XAVIER MOUSHOOM, JEREMY MEAWASIGE (représenté par son tuteur à l'instance, Jonavon Joseph Meawasige) ET JONAVON JOSEPH MEAWASIGE

Demandeurs

et

LE PROCUREUR GÉNÉRAL DU CANADA

Défendeur

T-141-20

ENTRE :

ASSEMBLÉE DES PREMIÈRES NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON (représenté par sa tutrice à l'instance, Carolyn Buffalo), CAROLYN BUFFALO ET DICK EUGENE JACKSON, également connu sous le nom de RICHARD JACKSON

Demandeurs

et

SA MAJESTÉ LE ROI
REPRÉSENTÉ PAR LE PROCUREUR GÉNÉRAL DU CANADA

Défendeur

T-1120-21

ENTRE :

ASSEMBLÉE DES PREMIÈRES NATIONS et ZACHEUS JOSEPH TROUT

Demandeurs

et

LE PROCUREUR GÉNÉRAL DU CANADA

Défendeur

AFFIDAVIT DE XAVIER MOUSHOOM

Je, Xavier Moushoom, AFFIRME SOLENNELLEMENT QUE :

1. Je suis un des demandeurs-représentants dans le recours collectif contre Le Procureur Général du Canada (le « **Canada** ») dans ce dossier.

2. En date du 10 mai 2019, j'ai signé un affidavit dans lequel j'ai expliqué les raisons pour lesquelles j'ai accepté de m'impliquer à titre de demandeur-représentant. Je joins cet affidavit comme **Annexe A** et je réitère les allégations que j'y aie faites.

3. Pendant mon enfance, j'ai été retiré de ma famille d'origine pour être placé dans pas moins de quatorze (14) familles d'accueil différentes à l'extérieur de ma communauté, ce qui m'a progressivement fait perdre ma langue maternelle algonquienne, ma culture, mes liens avec les membres de ma communauté du Lac-Simon, au Québec et avec ma famille.

4. En sortant du système de placement à l'âge de 18 ans, je me suis retrouvé sans savoir qui j'étais, sans savoir comment vivre ni pratiquer ma culture ni comment parler ma langue, et sans connaître la façon de me réintégrer dans la communauté et la nation au sein de laquelle je suis né et j'ai été retiré.

5. J'ai subi des impacts catastrophiques en raison du système de placement.

6. Je n'aurai jamais accepté d'agir comme demandeur-représentant n'eut-été du soutien que j'ai reçu de mes avocats. Depuis le début de ce dossier, je suis en constante communication avec mes avocats, lesquels m'expliquent les procédures entreprises, les négociations intenses qui ont lieu et ils m'ont toujours demandé mon opinion et mes sentiments.

7. J'approuve sans réserve l'entente historique intervenue pour régler le dossier, dont la version française est jointe comme **Annexe B** (l'« **Entente** »), incluant son Addendum qu'on m'a expliqué.

8. Je comprends qu'en vertu de l'Entente, des milliers de membres auront le droit d'obtenir des indemnisations importantes qui, j'espère, leur permettront de faire des choses positives afin d'améliorer leurs vies. C'est ce que j'espère pour moi-même également.

9. Je suis également très fier que mes avocats aient négocié que Canada paie les honoraires de mes avocats, de sorte que les indemnisations dues aux membres ne seront pas déduites des honoraires légaux. Quand je suis devenu impliqué dans ce dossier, je m'attendais à ce que les honoraires seraient déduits des indemnisations obtenues pour les membres.

10. Pour ma part, je sais que mes avocats ont travaillé d'arrache-pied sur ce dossier. Je sais qu'ils étaient prêts à aller jusqu'au bout pour gagner ce dossier et je sais qu'ils ont participé à des centaines de rencontres pour s'assurer que l'Entente soit la meilleure possible.

11. J'ai toujours senti que mes avocats ont priorisé ce dossier, j'ai toujours senti qu'ils avaient mes intérêts et les intérêts des membres du groupe que je représente à cœur.

12. J'appuie entièrement mes avocats. Un montant de 80 millions $ est un montant qu'il m'est difficile de comprendre, mais je n'ai aucun doute que c'est raisonnable dans les circonstances pour les 5 cabinets qui ont travaillé et qui travaillent toujours si fort sur ce dossier. On m'a expliqué que des cabinets ont reçu des honoraires très importants pour des dossiers qui n'ont pas mené à un résultat aussi impressionnant que le résultat prévu à l'Entente.

13. Le fardeau était très lourd, mais je suis fier d'avoir eu la possibilité de m'impliquer dans un dossier et une Entente qui est historique au niveau du résultat obtenu.

14. Ce recours collectif était pour moi, depuis le tout début, d'une importance primordiale pour que le peuple des Premières Nations puisse obtenir justice pour la discrimination subie par son Peuple pendant des décennies, ce qui est maintenant reconnu à l'Entente.

15. Finalement, mes avocats m'ont expliqué qu'ils vont rester impliqués dans le dossier même après l'approbation de l'Entente en tant que membres d'un comité responsable pour assurer l'exécution de l'Entente. Ceci me réconforte et je suis très content qu'ils demeurent ainsi impliqués.

16. Mon but était également que le système de placement des enfants des Premières Nations change pour le mieux, au bénéfice des enfants d'aujourd'hui et des générations futures des Premières Nations. Je pense que l'Entente atteint également ce but.

17. Je suis donc extrêmement satisfait du travail qui a été accompli par mes avocats.

18. J'approuve donc les honoraires demandés par les avocats en demande dans ce dossier.

Affirmé solennellement devant moi, par voie d'assermentation à distance, à Laval, ce 2IÈME jour d'octobre 2023.

DocuSigned by:
Marilena Zaffiro #212 605
C1C5DD851DC44BA...

10/2/2023 | 09:07 PDT

Commissaire à l'assermentation pour le Québec

DocuSigned by:
Xavier Moushoom
CCA4900155434CA...

10/2/2023 | 09:06 PDT

Xavier Moushoom

COUR FÉDÉRALE
ACTION COLLECTIVE

Dossier No. : T-402-19
ENTRE :

XAVIER MOUSHOOM, JEREMY MEAWASIGE (représenté par son tuteur à l'instance, Jonavon Joseph Meawasige) et Jonavon Joseph Meawasige

Demandeurs

et
LE PROCUREUR GÉNÉRAL DU CANADA

Défendeur

Dossier No. : T-401-20
ENTRE :

ASSEMBLÉE DES PREMIÈRES NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON (représenté par sa tutrice à l'instance, Carolyn Buffalo) CAROLYN BUFFALO ET DICK EUGENE JACKSON, également connu sous le nom de RICHARD JACKSON

Demandeurs

et
SA MAJESTÉ LE ROI REPRÉSENTÉ PAR LE PROCUREUR GÉNÉRAL DU CANADA

Défendeur

Dossier No. : T-1120-21
ENTRE :
ASSEMBLÉE DES PREMIÈRES NATIONS et ZACHEUS JOSEPH TROUT

Demandeurs

et
LE PROCUREUR GÉNÉRAL DU CANADA

Défendeur

AFFIDAVIT DE XAVIER MOUSHOOM
(Assermenté le 2 octobre 2023)

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FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige), JONAVON JOSEPH MEAWASIGE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo, CAROLYN BUFFALO, and DICK EUGENE JACKSON also known as RICHARD JACKSON

Plaintiffs

and

HER MAJESTY THE QUEEN
AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

AFFIDAVIT OF JONAVON JOSEPH MEAWASIGE

(Fee Approval - Sworn October 3, 2023)

I, Jonavon Joseph Meawasige, of the Pictou Landing First Nation in Nova Scotia, AFFIRM:

1. I am a representative plaintiff, and the brother and litigation guardian of another representative plaintiff, Jeremy Meawasige, in this class action. As such, I have personal knowledge of the matters that I depose to in this affidavit.

2. I provide this affidavit in support of my counsel's requested legal fees of $80 million.

3. I have described the background of my brother, Jeremy, and my mother's fight for Jordan's Principle in my affidavits in this case before.

4. My family has been fighting for years for justice for First Nations children with high needs like Jeremy.

5. My mother, Maurina Beadle, was a champion of the Jordan's Principle fight.

6. My mother has been a beacon of light and I have tried to continue in her path after she passed away.

7. My mother swore an affidavit before her passing in support of certification. She described our fee agreement with counsel. I have attached her affidavit of July 9, 2019 as **Exhibit "A"** here, which described the fee agreement:

> I have signed an agreement with Class Counsel respecting fees and disbursements. Class Counsel will only be paid if they are successful at obtaining a judgment or settlement with the defendant. From the total amount of benefits collectively recovered for the class, Class Counsel's fee will be 20% of the first two hundred million dollars, plus 10% of any amounts collectively recovered for the class beyond the first two hundred million dollars. Class Counsel's fees for the benefits obtained for individual class members through an individual inquiry process will be 25%. Any and all of the above fees are subject to the approval of the Court. Under the agreement, disbursements will be paid solely from the recovery, if any, in the class action.

8. I appreciate that my lawyers negotiated so that no legal fee is paid from the money for the class members although we had a different deal.

9. They have always been looking out for us and have achieved the largest settlement in Canada's history. They were relentless and never stopped trying. I have no hesitation in supporting their fees. They earned it.

10. I was advised by my lawyer, Mohsen Seddigh, that class counsel agreed with the Assembly of First Nations to only ask for $80 million if we settled before trial and no matter when that happened and how. They would get nothing if we lost.

11. I appreciate that it was their decision to limit their requested fees to this amount. It will be divided among some five or six law firms.

12. My lawyers have been there for my brother and my family ever since we started this case. I know my mother would have been very happy with what we achieved, just like I am. For myself and for my brother, I ask the Court to approve counsel's fee request of $80 million.

SWORN BEFORE ME BY Jonavon Joseph Meawasige of the Pictou Landing First Nation in Nova Scotia, currently resident in Trenton, Nova Scotia, on October 3, 2023, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits
(or as may be)

Georgia Elizabeth Scott-McLaren, a Commissioner, etc.
Province of Ontario, for
Sotos LLP, Barristers and Solicitors
Expires February 20, 2024

JONAVON JOSEPH MEAWASIGE

This is **Exhibit "A"** to the Affidavit of Jonavon Joseph Meawasige
of the Pictou Landing First Nation in Nova Scotia, currently resident
in Trenton, Nova Scotia sworn remotely
before me in the City of Toronto, in the Province
of Ontario, on October 3, 2023 in accordance with O. Reg.
431/20, Administering Oath or Declaration remotely.

Commissioner for taking Affidavit
(or as may be)

Georgia Elizabeth Scott-McLaren, a Commissioner, etc.
Province of Ontario, for
Sotos LLP, Barristers and Solicitors
Expires February 20, 2024

Court File No. T-402-19

FEDERAL COURT

PROPOSED CLASS PROCEEDING

B E T W E E N:

XAVIER MOUSHOOM and JEREMY MEAWASIGE (by his litigation guardian, Maurina Beadle)

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

AFFIDAVIT OF MAURINA BEADLE
(Certification - Sworn July 9, 2019)

I, Maurina Beadle, of the Pictou Landing First Nation in Nova Scotia, SWEAR THAT:

1. I am the mother and litigation guardian of the plaintiff Jeremy Meawasige. As such, I have personal knowledge of the matters that I depose to in this affidavit. Where the source of information is other than my personal knowledge, I say so and I believe that information to be true.

2. In this motion, I am seeking an order certifying this action as a class proceeding and certain other orders necessary for the proper conduct of this action. I have taken significant time to meet some of the lawyers who are litigating this lawsuit, and to understand the factual and legal matters at issue in this litigation.

3. I live with Jeremy on the Pictou Landing Indian Reserve in Nova Scotia. I am one of the elders of my community.

4. Jeremy was born on December 9, 1994. He has been diagnosed with hydrocephalus, cerebral palsy, spinal curvature and autism. He can only speak a few words and cannot walk unassisted. He is incontinent and needs total personal care including showering, diapering, dressing, spoon feeding, and all personal hygiene needs. He can become self-abusive at times, and needs to be restrained for his own safety.

5. I have been Jeremy's primary caregiver throughout his life. I cared for him in our home without any support or assistance until 2010 when I suffered a stroke. The stroke left me physically unable to continue to care for Jeremy without assistance. I needed help to be able to look after him.

6. The Government of Canada refused to provide care to Jeremy. We had to go to the Federal Court to argue that, under Jordan's Principle, Canada should pay for the services that Jeremy needed. I was an applicant in that proceeding together with the Pictou Landing Band Council. On April 4, 2013, the Court found that Jordan's Principle applied to Jeremy's case, and Canada's refusal to pay for the services violated Jordan's Principle. Attached as **Exhibit "A"** to this affidavit is a copy of the Court's decision. To this date, Canada has not paid for some of the things that Jeremy needs.

7. I retained the law firms of Sotos LLP, Kugler Kandestin LLP and Miller Titerle + Co. as counsel for Jeremy in this proposed class action ("**Class Counsel**").

8. The Court appointed me as Jeremy's litigation guardian on May 28, 2019. Attached as **Exhibit "B"** to this affidavit is a copy of the Court's order.

9. In my capacity as litigation guardian for Jeremy, I am prepared to act on his behalf as representative plaintiff for a class defined as: "all First Nations individuals who were under the applicable provincial/territorial age of majority and who during the Class Period were denied a public service or product, or whose receipt of a public service or product was delayed or disrupted, on the grounds of lack of funding or lack of jurisdiction, or as a result of a jurisdictional dispute with another government or governmental department".

10. I understand that the major steps in this case are as follows:

(a) Class Counsel filed the Amended Statement of Claim under the Court's order of May 28, 2019;

(b) by this motion for certification, I am asking the Court to certify this action as a class proceeding;

(c) if the Court certifies the action as a class proceeding, notice of the certification order is to be given to class members who are given the opportunity to opt out of the class action within a fixed time period;

(d) I must list all relevant documents in an affidavit of documents and the defendant too must list all of its relevant documents in a list of documents;

(e) examinations for discovery will be held during which lawyers for the defendant may ask me questions and my counsel will ask questions of each of the defendant's representatives;

(f) conferences will be held with the Case Management Judge from time to time;

(g) if the action is not settled, there will be a common issues trial;

(h) if the plaintiffs are successful at the common issues trial, notice must be given to the class members to give them an opportunity to participate because their involvement may be necessary at that stage to prove their membership in the class and/or entitlement to damages;

(i) there may be individual inquiries into damages for each class member after the common issues trial;

(j) appeals of judicial decisions may be made at various stages of the action; and

(k) the action may be settled at any stage, but only with the Court's approval.

11. I also understand that, in agreeing to seek and accept an appointment by the Court of Jeremy as a representative plaintiff, it is my responsibility, among other things:

(a) to become familiar with the issues to be decided by the Court;

(b) to review the Amended Statement of Claim and any further amendments;

(c) to assist in the preparation and execution of this affidavit in support of the motion for certification;

(d) to attend, if necessary, with Class Counsel to be cross-examined on my affidavit;

(e) to attend, if necessary, with Class Counsel for my examination for discovery where I will be asked questions;

(f) to assist, if necessary, in the preparation and execution of an affidavit listing the relevant documents that I have or previously had in my possession or under my control;

(g) to attend, if necessary, with Class Counsel at the trial and give evidence;

(h) to receive briefings from Class Counsel from time to time;

(i) to express my opinions on strategy to Class Counsel;

(j) to express my opinion to Class Counsel and to the Court if settlement positions are to be formulated; and

(k) to assist in the preparation of and sign an affidavit in support of Court approval of settlement if there is one.

12. I believe I can fairly and adequately represent the interests of the class and I am committed to fulfilling my responsibilities. To date, I have taken some steps to fairly and adequately represent the interests of potential class members. These include:

(a) I was an applicant in the 2013 application to the Federal Court about Jordan's Principle. I was later awarded the Queen's Diamond Jubilee for my care for Jeremy and his progress, and for my efforts to uphold Jordan's Principle.

(b) I retained Class Counsel. I believe it is in Jeremy's best interest and the best interests of the class to have this counsel team prosecute the class action.

(c) I have met to discuss this case with David Sterns and Mohsen Seddigh of Sotos LLP. I have spoken to Mr. Seddigh and corresponded with him on a number of occasions to inform myself about the litigation and advise Class Counsel about my personal circumstances.

(d) I provided documents and information to Class Counsel.

(e) I helped Class Counsel draft an affidavit for me in support of my motion to be appointed as Jeremy's litigation guardian, and swore it in Toronto.

(f) I reviewed Justice St-Louis' decision dated May 28, 2019, adding Jeremy as a plaintiff to the action and appointing me as a litigation guardian.

(g) I reviewed the Amended Statement of Claim.

(h) I helped Class Counsel in the drafting of this affidavit.

13. Throughout this lawsuit, I will continue to fairly and adequately represent the interests of class members by interacting with and instructing Class Counsel as necessary and ensuring through counsel that the class is kept apprised of developments. I will also make myself available for Court as required.

14. I have reviewed the Litigation Plan, attached hereto as **Exhibit "C"**, which Class Counsel have developed to advance the within proceeding. I do not have experience with litigation plans, but I am advised by Mr. Seddigh, and believe, that the Litigation Plan is consistent with the applicable law. The Litigation Plan provides, among other things, for notice to the class members if the action is certified. I have reviewed the notice program and believe that, if implemented, it is a reasonable way to give notice to all class members.

15. I understand that the common issues presently being asserted in this case are set out in the Notice of Motion.

16. Neither Jeremy nor I have, on any of these issues or issues arising out of them, any interest in conflict with the interests of any other class member. I am not, and never was, employed by the defendant and I have no special relationship with the defendant. I understand that this affidavit will be used in the motion for certification against the defendant.

17. I know of no fact that is material to the certification motion that has not been disclosed in this affidavit.

18. I do not have exact information on the number of Jordan's Principle Class members in this lawsuit. But Mr. Seddigh has advised me, and I believe, that the number of class members is potentially in the hundreds of thousands because the website of the defendant for Jordan's Principle states that between July 2016 and May 31, 2019, the defendant approved more than 240,000 requests under Jordan's Principle. Attached as **Exhibit "D"** to this affidavit is a printout of the Jordan's Principle website [https://www.canada.ca/en/indigenous-services-canada/services/jordans-principle.html] retrieved by Mr. Seddigh on July 2, 2019.

19. I have signed an agreement with Class Counsel respecting fees and disbursements. Class Counsel will only be paid if they are successful at obtaining a judgment or settlement with the defendant. From the total amount of benefits collectively recovered for the class, Class Counsel's fee will be 20% of the first two hundred million dollars, plus 10% of any amounts collectively recovered for the class beyond the first two hundred million dollars. Class Counsel's fees for the benefits obtained for individual class members through an individual inquiry process will be 25%. Any and all of the above fees are subject to the approval of the Court. Under the agreement, disbursements will be paid solely from the recovery, if any, in the class action.

20. I make this affidavit in support of a motion for an Order that this lawsuit be certified as a class proceeding and for no other purpose.

SWORN BEFORE ME at Pictou, in the Province of Nova Scotia on July 9, 2019

Commissioner for Taking Affidavits
(or as the case may be)

Maurina Beadle

MAURINA BEADLE

IAN H. MACLEAN
A Notary Public in and for the Province of Nova Scotia, Canada
My Commission Does Not Expire

IAN H. MACLEAN
NOTARY PUBLIC
COMMISSION DOES NOT EXPIRE
NOVA SCOTIA

This is Exhibit "A" to the Affidavit of Maurina Beadle sworn before me this 9th day of July, 2019.

A Commissioner, etc.

IAN H. MACLEAN
A Notary Public in and for the
Province of Nova Scotia, Canada
My Commission Does Not Expire

IAN H. MACLEAN
NOTARY PUBLIC
COMMISSION DOES NOT EXPIRE
NOVA SCOTIA

Federal Court  Cour fédérale

Date: 20130404

Docket: T-1045-11

Citation: 2013 FC 342

Toronto, Ontario, April 4, 2013

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

PICTOU LANDING BAND COUNCIL AND MAURINA BEADLE

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Pictou Landing Band Council and Ms. Maurina Beadle apply for judicial review of the decision of Ms. Barbara Robinson, Manager, Social Programs, Aboriginal Affairs and Northern Development Canada (AANDC), not to reimburse the Pictou Landing Band Council (PLBC) for in-home health care to one of its members beyond a normative standard of care identified by Ms. Robinson.

[2] The Applicants also request that the Court make an order pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], directing the Respondent to reimburse the PLBC for exceptional costs incurred providing home care to Jeremy Meawasige and his mother, Ms. Beadle, from May 27, 2010 to the present.

[3] I have decided to grant the application for judicial review because I have determined Jordan's Principle is applicable in this case. Having decided as I have, I need not consider the application for an order for reimbursement pursuant to section 24(1) of the *Charter*.

[4] My reasons follow.

Background

[5] The Pictou Landing Band Council is the elected government of the Pictou Landing First Nation and makes governance decisions concerning its members, including the allocation of funding received from the federal government through block contribution agreements. This includes funding from AANDC and Health Canada to deliver continuing care services to members in need on the Pictou Landing Reserve.

[6] The other Applicant is Ms. Maurina Beadle, a 55 year-old member of the Pictou Landing First Nation. Her son, Jeremy Meawasige, is a teenager with multiple disabilities and high care needs. He has been diagnosed with hydrocephalus, cerebral palsy, spinal curvature and autism.

Jeremy can only speak a few words and cannot walk unassisted. He is incontinent and needs total personal care including showering, diapering, dressing, spoon feeding, and all personal hygiene needs. He can become self-abusive at times, and needs to be restrained for his own safety.

[7] Jeremy lives on the Pictou Landing Indian Reserve. Ms. Beadle, his mother, is Jeremy's primary caregiver and she was able to care for her son in the family home without government support or assistance until Ms. Beadle suffered a stroke in May 2010.

[8] After her stroke, Ms. Beadle was unable to continue to care for Jeremy without assistance. She was hospitalized for several weeks, and when she was released, required a wheelchair and assistance with her own personal care. The PLBC immediately started providing 24 hour care for both Ms. Beadle and Jeremy in their home. Between May 27, 2010 and March 31, 2011, the PLBC spent $82,164.00 on in-home care services for Ms. Beadle and Jeremy.

[9] The PLBC continued to provide home care support to Ms. Beadle and Jeremy. In October 2010, the Pictou Landing Health Centre arranged for an assessment of the family's needs. Since that time, the Health Centre has provided the family with in-home services as recommended by the assessment. From Monday to Friday, a personal care worker is present from 8:30 a.m. to 11:30 p.m. Over the weekends, there is 24 hour care. This level of care meets Jeremy's need for 24-hour care, less what his family can provide. The family providers are Ms. Beadle, to the degree she has recovered from her stroke and Jeremy's older brother, Jonavan, who attends to assist.

[10] Ms. Beadle and her son Jeremy have a deep bond with each other. His mother is often the only person who can understand his communication and needs. She spent many hours training him to walk and helping him with special exercises. She discovered his love of music and sings to him when he is upset or does not want to cooperate. Her voice calms him and can make him desist in self-abusive behaviour. She takes him on the pow-wow trail, travelling to communities where pow-wows are held. She says Jeremy is happiest when he is dancing with other First Nations people and singing to traditional music. Jeremy has never engaged in self-abusive behaviour on those occasions.

[11] By February 2011, the costs associated with caring for the family were approximately $8,200 per month. This represented nearly 80% of the PLBC's total monthly budget for personal and home care services funded by AANDC under the Assisted Living Program (ALP) and by Health Canada under the Home and Community Care Program (HCCP).

The Assisted Living Program and the Home and Community Care Program

[12] The ALP is administered by the PLBC and has both an institutional and in-home care component. The ALP provides funding for non-medical, social support services to seniors, adults with chronic illness, and children and adults with disabilities (mental and physical) living on reserve and includes such things as attendant care, housekeeping, laundry, meal preparation, and non-medical transportation.

[13] The Home and Community Care Program is also administered by the PLBC. Under the HCCP, the PLBC is required to prioritize and fund essential services before support services and Health Canada spells out what falls under each of these headings. The HCCP provides funding to assist with delivery of basic in-home health care services which require a licensed/certified health practitioner or the supervision of such a person. The PLBC determines how the contribution agreement dollars for the HCCP are spent in the provision of basic in-home health care services.

[14] The ALP and the HCCP are programs designed to complement each other, but not to provide duplicate funding for the same service. If a type of care, such as respite care, is already being paid for by one of the programs, it will not be an eligible expense under the other.

[15] Under the current block contribution agreement between the PLBC and Aboriginal Affairs and Northern Development Canada [AANDC] the PLBC receives $55,552.00 for funding eligible ALP services. Under the block contribution agreement between PLBC and Health Canada, the PLBC receives $75,364.00.

Request for Funding

[16] On February 16, 2011, Ms. Philippa Pictou, the Health Director at the Pictou Landing First Nation Health Centre contacted Ms. Susan Ross, the Atlantic Regional Home and Community Care Coordinator at Health Canada. Ms. Pictou expressed her opinion that Jeremy's case met the definition of Jordan's Principle and asked Ms. Ross to participate in case conferencing regarding his needs.

[17] Jordan's Principle was developed in response to a sad case involving a severely disabled First Nation child who remained in a hospital for over two years due to jurisdictional disputes between different levels of government over payment of home care on his First Nation community. The child never had the opportunity to live in a family environment because he died before the dispute could be resolved. Jordan's Principle aims to prevent First Nations children from being denied prompt access to services because of jurisdiction disputes between different levels of government.

[18] Jordan's Principle is a child-first principle that says the government department first contacted for a service readily available off reserve must pay for it while pursuing repayment of expenses. Jordan's Principle is a mechanism to prevent First Nations children from being denied equal access to benefits or protections available to other Canadians as a result of Aboriginal status.

[19] On February 28, 2011, a case conference was held regarding Jeremy's needs. In attendance were provincial care assessors from the Nova Scotia Department of Health and Wellness, the Pictou Landing Community Health Nurse, representatives of the PLBC, and Ms. Ross and Ms. Deborah Churchill on behalf of Canada.

[20] On April 19, 2011, a second case conference took place to discuss Jeremy's needs. Because Ms. Pictou had earlier requested that Jeremy's situation be considered a Jordan's Principle case, Ms. Barbara Robinson, the Jordan's Principal focal point for AANDC, was asked to participate. Both Ms. Ross and Ms. Robinson attended the second case conference, as did Mr. Troy Lees, a civil servant with the Nova Scotia provincial Department of Community Services.

[21] At the second case conference, Mr. Lees explained what the province would provide to a child with similar needs and circumstances off reserve. He explained there was a departmental directive that a family living off reserve could receive up to a maximum of $2,200 per month in respite services. Mr. Lees also stated that the province would not provide 24-hour care in the home by funding the equivalent to the costs of institutional care.

[22] On May 12, 2011, Ms. Pictou wrote to Health Canada and AANDC officials to formally request additional funding so that the PLBC could continue to provide home care services to Ms. Beadle and Jeremy. Attached to the request was a briefing note describing Ms. Beadle's and Jeremy's situation and their home care needs. Also attached was a copy of the Nova Scotia Supreme Court's March 29, 2011 decision in *Nova Scotia (Department of Community Services) v Boudreau*, 2011 NSSC 126, 302 NSR (2d) 50 [*Boudreau*].

[23] On May 27, 2011, Ms. Robinson, the Manager for Social Programs and the Jordan's Principle focal point for AANDC, emailed her decision to Ms. Pictou. The decision was delivered on behalf of both AANDC and Health Canada. In her decision, Ms. Robinson concluded there was no jurisdictional dispute in this matter as both levels of government agreed that the funding requested was above what would be provided to a child living on or off reserve. Ms. Robinson determined that Jeremy's case did not meet the federal definition of a Jordan's Principle case.

Decision Under Review

[24] Ms. Robinson [the Manager] informed Ms. Pictou of her decision to refuse the PLBC's request for additional funding for Jeremy's case by an extensive email dated May 27, 2011. She advised that she had an opportunity to confer with provincial health authorities and verified that the request for the provision of 24-hour home care for Jeremy would exceed the normative standard of care.

[25] The Manager recognized the First Nation's right to enhance the services that are provided to this family through own source revenues, but emphasized that services that exceed the normative standard of care and which are outside of the federal funding authorities would not be reimbursed through the AANDC Assisted Living or Health Canada Home and Community Care Programs.

[26] The Manager went on to state that provincial officials had confirmed that Jeremy's care needs would meet the placement criteria for long term institutional care, and that depending upon the classification of the long term care facility, the expenses associated with Jeremy's care would be fully funded by the AANDC Assisted Living, Institutional Care Program and/or the Province of Nova Scotia. However, she recognized this was a personal decision and that Jeremy's mother did not wish to place her child in a long term care facility.

[27] The Manager concluded by noting that although the case did not meet the federal definition of a Jordan's Principle case, AANDC and Health Canada would continue to work with stakeholders and to participate in case conferencing as required.

Relevant Legislation

[28] The *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 provides:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[29] The *Social Assistance Act*, RSNS 1989, c 432 [*SAA*] provides:

> 9 (1) Subject to this Act and the regulations the social services committee shall furnish assistance to all persons in need, as defined by the social services committee, who reside in the municipal unit.
>
> [Emphasis added]

[30] The *Municipal Assistance Regulations*, NS Reg 76-81 provides:

> 1. In these regulations
>
> (e) "assistance" means the provision of money, goods or services to a person in need, including
>
> (i) items of basic requirement: food, clothing, shelter, fuel, utilities, household supplies and personal requirements,

(ii) items of special requirement: furniture, living allowances, moving allowances, special transportation, training allowances, special school requirements, special employment requirements, funeral and burial expenses and comforts allowances. The Director may approve other items of special requirement he deems essential to the well being of the recipient,

(iii) health care services: reasonable medical, surgical, obstetrical, dental, optical and nursing services which are not covered under the Hospital Insurance Plan or under the Medical Services Insurance Plan,

(iv) care in homes for special care,

(v) social services, including family counselling, homemakers, home care and home nursing services,

(vi) rehabilitation services;

[Emphasis added]

Arguments of the Parties

Applicants' Submissions

[31] The Applicants organized their submissions according to the issues they identified.

What is the appropriate standard of review?

[32] The Applicants submit the central issue raised in this judicial review is whether the decision-maker ought to have exercised her discretion to provide additional funding to the PLBC for continuing care services. The Applicants submit that in the particular circumstances of this case, a positive decision was necessary to ensure Jeremy and Ms. Beadle continue to receive equal benefit

under the law as guaranteed by section 15 of the *Charter*. The Applicants submit the appropriate standard of review for issues involving the *Charter* is invariably one of correctness.

[33] The Applicants also submit that the Respondent erred in law by failing to properly interpret and apply the Nova Scotia *SAA* in accordance with the jurisprudence of the Nova Scotia Supreme Court. As an error of law, the Applicants submit the standard of review on this issue must also be correctness.

[34] Finally, the Applicants allege that the impugned decision was based on a serious misapprehension of the evidence following a gravely flawed fact-finding process. The Applicants submit this Court has held that the Government of Canada may be held to a reasonableness standard when exercising discretionary power pursuant to contribution funding agreements with First Nations Bands.

Did the decision-maker err in law in interpreting and applying the Nova Scotia Social Assistance Act?

[35] The Applicants submit the ALP Manual and the relevant funding agreement with the PLBC both state that funding is provided to bands to ensure individuals living on reserve receive services "reasonably comparable" to those provided by the province. The Applicants submit the Respondent denied additional funding to the PLBC on the grounds that Jeremy and Ms. Beadle would only be entitled to home-care services to a maximum of $2,200 per month if they lived off reserve. The Applicants argue that in reaching this decision, the Respondent committed an error of law.

[36] In Nova Scotia, social services and assistance for people with disabilities are provided under the *SAA*. Section 9 of the *SAA* states that, subject to regulations, the government "shall furnish assistance to all persons in need". Section 18 of the *SAA* provides the Governor in Council to make regulations pursuant to the *SAA*. Under s 1(e)(iv) of the *Municipal Assistance Regulations*, NS Reg 76-81 "assistance" is defined to include "home care".

[37] Nova Scotia's Direct Family Support Policy from 2006 states that the funding for respite to people with disabilities "shall not normally exceed" $2,200 per month. The Policy also states that additional funding may be granted in "exceptional circumstances". The Applicants submit Ms. Robinson conceded in cross-examination that Jeremy and Ms. Beadle met much of the criteria under the "exceptional circumstances" portion of the policy. However, the Applicants submit Ms. Robinson concluded this Policy did not reflect Nova Scotia's normative standard of care because a provincial official had issued a separate directive that stated that no funding in excess of $2,200 would ever be provided.

[38] The Applicants submit that in cross-examination Ms. Robinson also indicated that she had read the judgment in *Boudreau*, where the Nova Scotia Supreme Court concluded that the $2,200 monthly cap was not lawful or binding in any way.

[39] The Applicants cited from the Court decision in *Boudreau* at paras 61 & 62 stating:

> What does the SAA obligate the Department to do in the case at Bar? I note s. 27 of the SAA permits regulations "prescribing the maximum amount of assistance that may be granted" but no regulations relevant to the case at Bar are in place.

...

> How much "assistance" as defined in the Municipal Assistance Regulations, is the "care" obligation *vis-à-vis* Brian Boudreau? In my view, the obligations of the Department pursuant to the SAA and Regulations are met when the "assistance" reasonably meets the "need" in each specific case.
>
> [Emphasis added]

[40] The Applicants submit that Ms. Robinson stated in cross-examination that the *Boudreau* judgment was "not relevant" to her decision. They submit this is an error of law and that the decision must be quashed for this reason alone.

Was the decision based on a serious misunderstanding of the evidence?

[41] The Applicants submit that even if the refusal to provide additional funding to the PLBC is not found to be discriminatory, the decision remains unreasonable as it was based on a serious misapprehension of evidence and on a gravely flawed fact finding process.

[42] The Applicants argue that the decision is unreasonable because it was based on an erroneous understanding of what was actually being requested by the PLBC. The Applicants point to Ms. Robinson's decision of May 27, 2011 to illustrate that Ms. Robinson denied the PLBC's request on the basis that 24 hour care was not available off reserve. However, the Applicants submit this was not what was requested by the PLBC.

[43] The Applicants point to a particular paragraph in Ms. Pictou's Briefing Note which was attached to the request for additional funding which states:

> Jeremy Meawasige's reasonable "need" for "homecare" is 24 hours a day, 7 days a week (less the time his family can reasonably attend to his care), but which department is obliged to meet his care needs?

The Applicants submit that this demonstrates that Ms. Robinson erred by characterizing the PLBC's request as funding for 24-hour services as well as additional assistance for meal preparation and light housekeeping.

[44] The Applicants argue that since Ms. Robinson failed to understand what was requested by the PLBC, it cannot be said that the request for additional funding was properly or fairly considered. The Applicants submit that Courts have held that a decision-maker's misapprehension of facts or evidence constitutes a palpable and overriding error. *Crane v Ontario (Director, Disability Support Program)*, (2006), 83 OR (3d) 321 (ON CA) at paras 35-36. The Applicants submit that in this case, Ms. Robinson's misapprehension of the PLBC's request not only affected the fact-finding process, but it formed the very basis for the denial of the request. The Applicants submit this amounts to an unreasonable error.

[45] The Applicants submit Ms. Robinson also ignored relevant information before her. The Applicants argue the provincial Home Care Policy confers up to $6,600 per month in home care services to people with disabilities, and is not capped at $2,200. The Applicants argue that presented

with this evidence, Ms. Robinson's assertion that the normative standard of care off reserve is invariably limited to $2,200 per month is untenable and that this amounts to an error in law.

Did the decision-maker exercise her discretion in a manner that violated section 15(1) of the Charter?

[46] The Applicants claim that the decision to deny additional funding to the PLBC so that it could continue providing Jeremy and Ms. Beadle with home care was discriminatory and contrary to s. 15(1) of the *Charter*. The Applicants submit that while the federal government may enter into contribution agreements with Band Councils to provide services, such agreements cannot supersede its obligations under the *Charter*. The Applicants also submit that the government's exercise of discretionary powers must conform to the *Charter*. The Applicants argue that Ms. Robinson had a duty to consider the requests for additional funding under the relevant agreements in a manner that respects the Beadles' rights to receive equal benefits compared to those residing off reserve in their province of residence.

[47] The Applicants submit that for First Nations people living on reserve, Jordan's Principle is a means by which the fundamental objectives of s. 15(1) can be achieved.

[48] The Applicants argue that the exceptional and unanticipated health needs of the Beadle family jeopardize the PLBC's ability to provide the services the family reasonably requires and would likely be entitled to off reserve. The Applicants submit that Ms. Robinson had a duty to exercise her discretion under the relevant funding agreements in a manner that conforms to s. 15(1) of the *Charter*.

[49] The Applicant also argues that infringement under s. 15(1) cannot be justified under s. 1 of the *Charter*.

Respondent's Submissions

[50] The Respondent's submissions are similarly organized according to the issues identified by the Respondent.

The standard of review is reasonableness

[51] The Respondent submits the question of whether the service provided by the PLBC exceeded the provincial normative standard of care is a question of fact and requires a decision maker to gather facts about the assistance needs of the claimant, the treatments required, and the nature of the disabilities at issue. The Respondent asserts that it also requires fact gathering about the services that are currently available to similar people living off reserve and gathering factual information from provincial authorities and the federal program requirements. The Respondent submits the decision maker is entitled to give significant weight to the definition of the normative standard of care provided by the provincial authorities.

With respect to the assessment of the request made by the Applicants, the Respondent submits the determination of what was actually requested is a question of fact. Ms. Robinson was required to review Jeremy's situation and determine what their request constituted based on all of the material submitted. The Respondent submits that the Supreme Court of Canada in *Dunsmuir v New*

Brunswick, 2008 SCC 9 [*Dunsmuir*] has determined that where a question is a factual determination which depends purely on the weighing of evidence, the applicable standard of review is reasonableness. The Respondent submits that where, as here, the underlying factual and legal issues cannot be separated, the appropriate standard of review is still reasonableness. *Dunsmuir* at paras 53-54.

[52] The Respondent submits that the standard of reasonableness in the present case is particularly appropriate because the decision maker was asked to make a determination of eligibility under a federal policy for which she was the expert designated authority in a discrete and special administrative regime, with particular expertise, and with the unique ability to interact with provincial authorities whose cooperation is required to make the necessary determination. The Respondent submits that the reasonableness standard is the most reflective of the nature of the inquiry and the context in which it takes place.

[53] Regarding the *Charter* issue, the Respondent submits there is no standard of review of this issue in this Court. The Respondent argues that the *Charter* issue is a matter of constitutional law and not administrative law. This is the first time that the s. 15 argument has been raised in this matter. The Respondent submits this is the Court of first instance for the determination of the constitutional question.

Jordan's Principle was not engaged in this case

[54] The Respondent submits that in order to determine whether Jordan's Principle was engaged, Ms. Robinson had to determine if there was a jurisdictional dispute between Canada and Nova Scotia regarding the provision of funding for Jeremy's care and if the funding provided by Canada met the normative standard of care in Nova Scotia.

[55] The Respondent submits there was no jurisdictional dispute. Both Canada and Nova Scotia agreed that Jeremy's situation entitled him to receive institutional care and the Province acknowledged it would pay for those services over and above federal authority.

[56] The Respondent argues that Ms. Robinson determined the normative standard of care for in-home services in Nova Scotia was $2,200 per month as a result of her consultation with provincial officials from multiple departments, and after raising with them the applicability of the *SAA*, the Direct Family Support Policy, the Health and Wellness Program, and the recent decision of the Nova Scotia Supreme Court in *Boudreau*. The Respondent submits Ms. Robinson brought all of the Applicants' concerns and arguments before the provincial officials who informed her that the amount Jeremy would receive if he lived off reserve would be no more than $2,200.

[57] The Respondent asserts that Ms. Robinson's approach to determining the normative standard of care was correct and her conclusion that the request was beyond the normative standard of care was reasonable. The Respondent submits the provincial officials were in the best position to

say what services are available to residents of the province living off reserve and thus using this information as a basis for her decision was reasonable.

[58] Regarding the Applicants' submissions on the applicability of the *Boudreau* case, the Respondent submits *Boudreau* is a case about exceptional circumstances to the provincial standard of care but does not purport to change the standard of care itself. The provincial authority had already determined that Boudreau required in-home care in an amount less than what the PLBC has provided here. Also, the $2,200 limit had not previously been applied in Boudreau's case because he had been "grandfathered".

[59] The Respondent submits that the situation in *Boudreau* is quite different from Jeremy's because Boudreau was receiving exceptional circumstances funding prior to the October 2006 Directive from the Department of Community Services that indicated the maximum for respite in-home care was $2,200 per month, with no exceptions. Moreover, the Respondent submits Canada and Nova Scotia have already determined that the applicable standard for Jeremy is institutional, not respite care. The Respondent submits the Applicants are trying to use the *Boudreau* case to create a new standard of care that neither the Province nor Canada recognizes.

The request for additional funding was properly assessed

[60] The Respondent submits the evidence is clear that the Applicants requested the equivalent of 24-hour per day care, and only for Jeremy, contrary to the Applicants' arguments that Ms. Robinson misapprehended the request for additional funding.

[61] The Respondent submits the Applicants allege that they requested only funding for in-home care 24 hours per day, 7 days per week, less what Jeremy's own family could provide. For this proposition, the Respondent notes the Applicants rely on a specific sentence in the Briefing Note Ms. Pictou prepared on Jeremy's case which was sent to Health Canada and AANDC.

[62] The Respondent submits that in the immediately preceding paragraph in the Briefing Note, Ms. Pictou refers to 24 hour per day, 7 days a week care without any limitation regarding family assistance. Further, the Respondent argues that in the email with the formal request for additional funding (to which the Briefing Note was attached), Ms. Pictou stated:

> Even if it is not a Jordan's Principle case, I would like either the Federal or Provincial Government to reimburse us up to the level that he would qualify for if institutionalized (estimated by Community Services to be $350 per day).

[63] The Respondent submits it was reasonable for Ms. Robinson to conclude that the Applicants had requested the funding equivalent of 24 hour per day in-home care, and to verify whether that need was beyond the normative standard of care that the province would provide for in-home care for any Nova Scotian.

[64] Even if the Applicants' request could be interpreted as 24 hours minus what family members could provide (which is not admitted), the Respondent submits Ms. Robinson's factual finding that the Applicants' funding request exceeded the provincial standard for in-home care is reasonable given the evidence.

The decision does not violate section 15(1) of the Charter.

[65] The Respondent submits the decision not to grant the request for additional funding up to the daily rate of institutional care does not discriminate against Jeremy or any other First Nations child. First, the Respondent submits the benefit the Applicants requested is not a benefit provided by law. Under the ALP and HCCP, the PLBC has funding to provide their community with reasonably comparable services to those that would be available to the off reserve population. The Respondent submits funding for those benefits was and is available to Jeremy, and he is treated no differently from any other Nova Scotian with similar needs. There is no distinction on which a discrimination claim can rest.

[66] The Respondent submits that Jordan's Principle clearly is not engaged in this case. Jordan's Principle was adopted to ensure that no First Nations child would be denied services while governments debated over the jurisdictional responsibility to provide an eligible service. The Respondent argues that what is at stake in this case is not a jurisdictional dispute at all, but a claim that the PLBC's decision to provide in-home care to one of its members beyond the normative provincial standard of care legally obliges Canada to fund such services.

[67] The Respondent submits that the evidence clearly indicates that Jeremy's needs well exceed the levels of in-home care that would be available to anyone living off reserve in Nova Scotia. This was confirmed by the provincial officials who indicated that this level of in-home care would not be available and institutionalization would be the supported option. The Respondent submits this is not a case where the application of federal programs or policies denies a benefit that would otherwise be

available to someone else. The Respondent argues that the Applicants are attempting to create a benefit out of the ALP and HCCP that simply does not exist at law.

[68] The Respondent submits that neither Ms. Robinson's decision, nor the structure of the ALP and HCCP funding itself creates any distinction between Jeremy and a person with similar disabilities and care needs that is not living on a reserve. The Respondent notes that under the ALP and the HCCP, Canada has elected to provide funding for services that are reasonably comparable with people living off reserve so that no such distinction will be created. In this regard, the Respondent submits Ms. Robinson was required to verify the provincial normative standard of care, and did so by specifically enquiring with the provincial authorities whether, if Jeremy was living off reserve, funding for his care needs could be provided in-home. The Respondent submits that the information provided to Ms. Robinson from the provincial authorities was clear that if Jeremy lived off reserve, the supported option would be institutionalization, and that the maximum funding he could receive for in-home care if he remained in the home was $2,200 per month.

Issues

[69] In my view the following issues arise in this case:

1. Was Jordan's Principle engaged in this case?
2. Did the Manager properly assess the request for funding?
3. Did the Manager exercise her discretion in a manner that violated section 15(1) of the *Charter*?

Standard of Review

[70] The Supreme Court of Canada held in *Dunsmuir* that there are only two standards of review: correctness for questions of law and reasonableness involving questions of mixed fact and law and fact. *Dunsmuir* at paras 50 and 53.

[71] The Supreme Court also held that where the standard of review has been previously determined, a standard of review analysis need not be repeated. *Dunsmuir* at para 62.

[72] I have been unable to find any previous jurisprudence in which Jordan's Principle and the appropriate standard of review in determining the "normative standard of care off reserve" has been considered.

[73] I note that this matter involves questions of fact, and questions of mixed law and fact as they relate to a question of policy, that of Jordan's Principle. There is no privative provision and the matters are determined by an official designated as an AANDC departmental "focal point for Jordan's Principle" which is suggestive of expertise.

[74] The Manager was required to determine what it was that the PLBC was requesting. This was a factual determination based on the submissions of Ms. Philippa Pictou and information provided in case assessments. The Manager was also charged with determining whether this case met the criteria for a Jordan's Principle case. As the Jordan's Principle focal point for AANDC the Manager had a specialized expertise in this matter.

[75] Finally, the Manager was required to determine the normative standard of care that would be available from provincial health authorities to individuals living off reserve in the same circumstances as Jeremy. There appears to be no specific procedure for her to follow to determine what the normative standard of care is. The Manager was not specifically tasked with interpreting and applying the *SAA* or any jurisprudence. Essentially, it was a fact-finding exercise which would attract a reasonableness standard of review.

[76] In *Dunsmuir* questions of mixed fact and law and fact give rise to a standard of reasonableness. *Dunsmuir* at paras 50 and 53. Accordingly, I agree with the Respondent that the appropriate standard of review for the Manager's decision with respect to Jordan's Principle is reasonableness.

Analysis

[77] The issues in this case revolve around the question of on-reserve, in-home support for Jeremy, a First Nation child with multiple handicaps who was cared for by his mother until the time of her stroke.

[78] The Applicants submit Canadian children with disabilities and their families rely on continuing care generally provided by provincial governments according to provincial legislation. Provincial governments do not provide the same services to First Nations children who live on reserves. The federal government assumed responsibility for funding delivery of continuing care programs and services on reserve at levels reasonably comparable to those offered in the province of

residence. Such services have been historically funded and provided by the federal government through AANDC and Health Canada as a matter of policy.

[79] AANDC and Health Canada entered into a funding agreement with the PLBC to deliver services offered under the ALP and HCCP. The PLBC is required to administer the programs "according to provincial legislation and standards." The ALP funding agreement states the PLBC can seek additional funding in "exceptional circumstances" which are not "reasonably foreseen" at the time the agreement was entered into. The HCCP agreement has a similar clause which refers to necessary increases due to "unforeseen circumstances".

[80] Personal home care services off reserve for people with disabilities in Nova Scotia are governed by the *Social Assistance Act*. Section 9(1) of the *SAA* provides persons in need shall be provided with assistance, including home care and home nursing services. The Nova Scotia Department of Community Services implements the *SAA* and funds home care for people with disabilities through the Direct Family Support Policy. The policy provides that funding for home care shall not normally exceed $2,200 per month but states additional funding may be granted in exceptional circumstances.

Was Jordan's Principle engaged in this case?

[81] As stated above, Jordan's Principle was developed in response to a case involving a severely disabled First Nation child who remained in a hospital due to jurisdictional disputes between the federal and provincial governments over payment of home care services for Jordan in his First

Nation community. The child never had the opportunity to live in a family environment because he died before the dispute could be resolved. Jordan's Principle aims to prevent First Nations children from being denied prompt access to services because of jurisdiction disputes between different levels of government.

[82] Jordan's Principle says the government department first contacted for a service readily available off reserve must pay for it while pursuing repayment of expenses. While Jordan's Principle is not enacted by legislation, it has been approved by a unanimous vote of the House of Commons. Such a motion is not binding on the government.

[83] In order to understand the status of Jordan's Principle, it is helpful to have regard to the Hansard reports of the debate in the House of Commons. The private member's motion of May 18, 2007 reads:

> That, in the opinion of the House, the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children.

The motion was further debated on October 31, 2007 and again on December 5, 2007. At that time, a member of the governing party stated:

> I support this motion, as does the government. I am pleased to report the Minister of Indian Affairs and Northern Development and officials in his department are working diligently with their partners in other federal departments, provincial and territorial governments, and first nations organizations on child and family services initiatives that will transform the commitment we make here today into a fact of daily life for first nations parents and their children.

> That is not all. In addition to implementing immediate, concrete measures to apply Jordan's principle in aboriginal communities, I would like to inform the House and my colleague that the government is also implementing other measures to improve the well-being of first nations children...

The vote in the House of Commons on December 12, 2007 was unanimous, recording Yeas: 262, Nays: 0.

[84] Clearly, Jordan's principle was implemented by AANDC. Ms. Barbara Robinson, Manager – Social Programs, was designated the Jordan's Principle focal point for AANDC in Atlantic Canada. She described AANDC's implementation of Jordan's Principle in the following terms:

> Jordan's Principle is a child-first principle which exists to resolve jurisdictional disputes between the federal and provincial governments regarding health and social services for on-reserve First Nations children. It ensures that a child will continue to receive care while the jurisdictional dispute between the provincial and federal government is resolved but does not create a right to funding that is beyond the normative standard of care in the child's geographic location.
>
> Jordan's Principle applies when:
>
> a) The First Nations child is living on reserve (or ordinarily resident on reserve); and
>
> b) A First Nations child who has been assessed by health and social service professionals and has been found to have multiple disabilities requiring services from multiple service providers; and
>
> c) The case involves a jurisdictional dispute between a provincial government and the federal government; and
>
> d) Continuity of care – care for the child will continue even if there is a dispute about responsibility. The current service provider that is caring for the child will continue to pay for the necessary services until there is a resolution; and

> e) Services to the child are comparable to the standard of care set by the province – a child living on reserve (or ordinarily resident on reserve) should receive the same level of care as a child with similar needs living off-reserve in similar geographic locations.
>
> [Emphasis added]

[85] The Respondent submits there is no evidence that a jurisdictional dispute exists between the Province of Nova Scotia and the federal government for the provision of in-home care services. Both provincial health authorities and AANDC and Health Canada agree that the maximum Jeremy would receive if he lived on or off the reserve is $2,200 for home care services.

[86] I do not think the principle in a Jordan's Principle case is to be read narrowly. The absence of a monetary dispute cannot be determinative where officials of both levels of government maintain an erroneous position on what is available to persons in need of such services in the province and both then assert there is no jurisdictional dispute.

[87] I would observe that the normative standard of care in this case encompasses the provincial rules for the range of services available to persons in Nova Scotia residing off reserve. Jordan's Principle would have been meant to include services for exceptional cases where allowed for in the province where the child is geographically located.

[88] While there is an administratively prescribed maximum level of $2,200 per month for in-home services in Nova Scotia, the statutorily mandated policy has been found to encompass exceptional cases that may exceed that maximum.

[89] In *Boudreau*, a Nova Scotia Court heard an application for a *certiorari* order by the Department of Community Services of the Assistance Appeal Board decision holding that Boudreau, a 34-year old adult off reserve with multiple handicaps, was entitled to receive increased home care services under the exceptional circumstances provision of the Direct Family Services Policy and also under section 9 of the *SSA*.

[90] The Court found the application for *certiorari* to be valid because the Appeal Board erred in referring to *Employment Support and Income Assistance Act* instead of the *SAA*. However, the Court declined to make a *certiorari* order because it found the Department of Family Community Services had a clear obligation to provide "assistance" to Boudreau as required by section 9 of the *SSA*. In the alternative, the Court found even if the respite decision by the Department was discretionary, the facts accepted established the assistance was essential and the Department's obligations included the additional funding requested.

[91] The effective result in *Boudreau* is that a person with multiple handicaps residing off reserve was entitled to receive home services assistance over the $2,200 maximum limit which the Court observed "cannot override the legislation and regulations".

[92] In the case at hand, the Manager stated in cross-examination that her legal authority to fund is rooted under the Treasury Board authority referencing the applicable provincial policy. She acknowledged she was told by provincial officials that the provincial policy provides they can fund above the $2,200 level but they can't because of the directive. She acknowledged she was informed the Department of Family Services provincial policy says there may be exceptional circumstances

but provincial officials told her there would be no exceptional circumstances recognized. Ms. Robinson stated she needed to ensure she was following the provincial policy as it is being implemented.

[93] The Manager does not need to interpret the *SAA* and *Regulations*. She was clearly informed by provincial officials of the legislatively mandated policy. She knew the legislated provincial policy provided for exceptional circumstances. She knew the provincial officials were administratively disregarding the Department of Social Services legislated policy obligations. She also was put on notice by the PLBC of this issue as they had provided her with a copy the *Boudreau* decision. Ms. Robinson's mandate from Treasury Board does not extend to disregarding legislated provincial policy.

[94] Nova Scotia's Direct Family Support Policy states that the funding for respite to people with disabilities "shall not normally exceed" $2,200 per month. The Policy also states that additional funding may be granted in "exceptional circumstances". Finally, the Direct Family Support Policy explicitly states that First Nations children living on reserves are not eligible to services from the Province.

[95] As I stated, Jordan's principle is not to be narrowly interpreted.

[96] In this case, there is a legislatively mandated provincial assistance policy regarding provision of home care services for exceptional cases concerning persons with multiple handicaps which is not available on reserve.

[97] The Nova Scotia Court held an off reserve person with multiple handicaps is entitled to receive home care services according to his needs. His needs were exceptional and the *SAA* and its *Regulations* provide for exceptional cases. Yet a severely handicapped teenager on a First Nation reserve is not eligible, under express provincial policy, to be considered despite being in similar dire straits. This, in my view, engages consideration under Jordan's Principle which exists precisely to address situations such as Jeremy's.

[98] I find the Manager's finding that Jordan's Principle was not engaged is unreasonable.

Did the decision-maker properly assess the request for funding?

[99] The Manager took part in case conferences in which provincial health officials, First Nation officials and other AANDC and Health Canada officials took part. As a result of taking part in these case conferences, she had a full understanding of the issues and care needs Jeremy required. She was able to obtain opinions from the health assessors as to what was needed in Jeremy's case.

[100] I begin by addressing the factual issue in the PLBC request for funding. The monetary amount is necessarily linked to the extent of care home care support required for Jeremy although not for Ms. Beadle's personal needs who, presumably is within the normal scope of the ALP and HCCP funded home care services.

[101] The Applicants have stated that the request for additional funding was for "Jeremy Meawasige's reasonable 'need' for 'homecare' [as] 24 hours a day, 7 days a week, less the time his

family can reasonable attend to his care." [Emphasis added] This paragraph is found in the briefing note attached to the request for additional funding. On the other hand, the Respondent submits that the paragraph preceding the paragraph cited by the Applicants indicates that the request is for 24 hour care, 7 days a week.

[102] It is clear from the PLBC's submissions that at the time of the Manager's decision, the Pictou Landing Health Centre provided the family with a personal care worker from 8:30 am to 11:30 pm from Monday to Friday, and 24 hour care over the weekends by an off reserve agency. As I understand it, the 24 hour care on the weekends was in response to the Pictou Landing Health Centre being closed over the weekend rather than the need for 24-hour home care. On the evidence, the request for in home support did not cover the overnight period during weekdays.

[103] Moreover, one has to have regard for the extent of family support. It must be remembered that, before her stroke, Ms. Beadle provided for all of Jeremy's needs without government assistance. Ms. Beadle has recovered to some extent from her stroke and helps Jeremy as she can. Jeremy's older brother stays overnight to also assist. When one considers the importance of Ms. Beadle to Jeremy's communicative and personal needs, it seems to me that the family support is not inconsequential. I find the request for Jeremy's in home support was not for 24 hours a day, 7 days a week.

[104] It is not entirely clear exactly what amount is being requested. I do note, as the Respondent pointed out, the PLBC requested it would like to be reimbursed up to the level that Jeremy would qualify for if institutionalized. This amount, as estimated by the Department of Community

Services, was $350 per day. The $350 per day represents the equivalent expense to have Jeremy live in an institution. However, it is clear the PLBC was not asking to institutionalize Jeremy; rather, it was proposing that as a means of quantifying the request for funding.

[105] The Manager was required to assess the factual circumstances, the submissions made and the recommendations and information provided by the in-home assessors. I conclude that the Manager erred in determining that what was being requested was 24 hour in home care. This was an unreasonable finding based on all the information provided.

Application of Jordan's Principle

[106] Issues involving Jordan's Principle are new. The principle requires the first agency contacted respond with child-first decisions leaving jurisdictional and funding decisions to be sorted out later. Parliament has unanimously endorsed Jordan's Principle and the government, while not bound by the House of Commons resolution, has undertaken to implement this important principle.

[107] The PLBC is required by its contributions agreements with AANDC and Health Canada to administer the programs and services "according to provincial legislation and standards". When Ms. Beadle suffered her stroke, the PLBC responded and provided the needed services for her and Jeremy.

[108] The PLBC is a small First Nation with some 600 members. The exceptional circumstances here have required nearly 80% of the costs of the PLBC total monthly ALP and HCCP budget for personal and home care services. In short, this is not a cost that the PLBC can sustain.

[109] Jordan's Principle applies between the two levels of government. In this case the PLBC was delivering program and services as required by AANDC and Health Canada in accordance with provincial legislative standards. The PLBC is entitled to turn to the federal government and seek reimbursement for exceptional costs incurred because Jeremy's caregiver, his mother, can no longer care for him as she did before.

[110] I also note that the only other option for Jeremy would be institutionalization and separation from his mother and his community. His mother is the only person who, at times, is able to understand and communicate with him. Jeremy would be disconnected from his community and his culture. He, like sad little Jordan, would be institutionalized, removed from family and the only home he has known. He would be placed in the same situation as was little Jordan.

[111] I am satisfied that the federal government took on the obligation espoused in Jordan's Principle. As result, I come to much the same conclusions as the Court in *Boudreau*. The federal government contribution agreements required the PLBC to deliver programs and services in accordance with the same standards of provincial legislation and policy. The *SAA* and *Regulations* require the providing provincial department to provide assistance, home services, in accordance with the needs of the person who requires those services. PLBC did. Jeremy does. As a consequence, I conclude AANDC and Health Canada must provide reimbursement to the PLBC.

[112] It is to be observed that AANDC does not deny that home services be provided for Jeremy; rather it denies funding home services above the $2,200 administratively imposed provincial maximum which the Court found in *Boudreau* cannot override provincial legislation and regulation.

[113] The PLBC has met its obligations under its funding agreement with AANDC and Health Canada. The participating federal departments, particularly AANDC, have adopted Jordan's Principle. In my view, they are now required by their adoption of Jordan's Principle to fulfil this assumed obligation and adequately reimburse the PLBC for carrying out the terms of the funding agreements and in accordance with Jordan's Principle.

[114] In the alternative, much as in *Boudreau*, if the implementation of Jordan's Principle is discretionary, the federal government undertook to apply Jordan's Principle when exceptional circumstances arose. The facts of Jeremy's situation clearly establish the exceptional circumstances necessary to meet this requirement. The federal government cannot deny is obligation to provide additional funding not requested by PLBC for Jeremy.

[115] In either situation, the PLBC is, in my view, due reimbursement and additional funding from AANDC and Health Canada for Jeremy's needs. I note both AANC and Health Canada have expressed willingness to continue to work with PLBC to resolve the situation.

[116] Jordan's Principle is not an open ended principle. It requires complimentary social or health services be legally available to persons off reserve. It also requires assessment of the services and

costs that meet the needs of the on reserve First Nation child. The funding amount is not definitively determined in accordance with these requirements, in that the needs of Jeremy and Ms. Beadle are somewhat mixed, the case conferences did not appear to quantify the costs involved, and alternative reimbursement amounts were proposed. In result, the amount remains to be addressed by the parties.

[117] I conclude the decision-maker did not properly assess the PLBC request for funding to meet Jeremy's needs. The request for judicial review succeeds and the Manager's decision is quashed.

[118] There remains the question of whether or not, in the circumstances, reconsideration should be ordered. Clearly, deference is due to the administrative entity that makes decisions within the realm of its expertise.

[119] In *Stetler v the Ontario Flue-Cured Tobacco Growers' Marketing Board*, 2009 ONCA 234 at paragraph 42, the Ontario Court of Appeal stated:

> While "[a] court may not substitute its decision for that of an administrative decision-maker lightly or arbitrarily", exceptional circumstances may warrant the court rendering a final decision on the merits. Such circumstances include situations where remitting a final decision would be "pointless", where the tribunal is no longer "fit to act", and cases where, "in light of the circumstances and the evidence in the record, only one interpretation or solution is possible, that is, where any other interpretation or solution would be unreasonable": *Giguère v. Chambre des notaires du Quebec*, 2004 SCC 1 (CanLII), [2004] 1 S.C.R. 3 at para. 66.

[120] When one considers Jordan's Principle calls for an immediate timely response regardless of jurisdictional questions and the exceptional circumstances that arise here in Jeremy's case, I am of the view this constitutes an exceptional circumstance warranting this Court to not remit the matter back for reconsideration but to direct the that the PLBC is entitled to reimbursement beyond the $2,200 maximum as it relates to Jeremy's needs for assistance. The remaining question is the amount of reimbursement which I consider must be left to the parties.

Did the decision-maker exercise her discretion in a manner that violated section 15(1) of the Charter?

[121] Having decided as I did, I need not consider the *Charter* submissions by the Applicant and Respondent.

Costs

[122] In oral submissions, the Respondent did not oppose the Applicants' submission for costs, should the latter be successful, acknowledging the matter to be complex but suggesting the middle range of Column 3.

[123] I thank both parties for their able submissions in addressing this complex but important matter.

Conclusion

[124] I conclude the Manager failed to consider the application of Jordan's Principle in Jeremy's case as required.

[125] I also find the Manager's refusal of the PLBC reimbursement request was unreasonable.

[126] The application for judicial review is granted and I hereby quash the impugned decision.

[127] I do not remit the matter back for reconsideration but direct that the PLBC is entitled to reimbursement by the Respondent beyond the $2,200 maximum as it relates to Jeremy's needs for assistance.

[128] I would award costs to the Applicants for two counsel at the middle range of Column 3.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The May 27, 2011 decision of the Manager is quashed.

3. I direct that Applicant PLBC is entitled to reimbursement beyond the $2,200 maximum by the Respondent as it relates to Jeremy's needs for assistance.

4. Costs for the Applicants for two counsel at the middle range of Column 3.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1045-11
STYLE OF CAUSE:	PICTOU LANDING BAND COUNCIL AND MAURINA BEADLE v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	JUNE 11, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	MANDAMIN J.
DATED:	APRIL 4, 2013

APPEARANCES:

Paul Champ Anne Levesque	FOR THE APPLICANTS
Jonathan D.N. Tarlton Melissa Chan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Champ & Associates Ottawa, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT

This is Exhibit "B" to the Affidavit of Maurina Beadle sworn before me this 9th day of July, 2019.

A Commissioner, etc.

IAN H. MACLEAN
A Notary Public in and for the
Province of Nova Scotia, Canada
My Commission Does Not Expire

IAN H. MACLEAN
NOTARY PUBLIC
COMMISSION DOES NOT EXPIRE
NOVA SCOTIA

Federal Court Cour fédérale

Date: 20190528

Docket: T-402-19

Montréal, Quebec, May 28, 2019

PRESENT: Madam Justice St-Louis

BETWEEN:

XAVIER MOUSHOOM and JEREMY MEAWASIGE (by his litigation guardian, Maurina Beadle)

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

ORDER

UPON Motion by the Plaintiff for pleadings amendment and appointment of litigation Guardian, based on Rules 3-4, 75-76, 78-79, 115, 200-202, 334.11, 334.39 of the *Federal Courts Rules*, SOR/98-106;

HAVING READ the Motion record of the Plaintiff, and noted that the Defendant does not oppose the Motion;

CONSIDERING the grounds for the Motion;

THIS COURT ORDERS that:

1. The Plaintiff is granted leave to serve and file the Amended Statement of Claim substantially in the form attached hereto as Schedule "A", within five (5) days of the date of the present Order;
2. Jeremy Meawasige is added as a Plaintiff to this action;
3. Maurina Beadle is appointed as representative and litigation guardian for Jeremy Meawasige;
4. The style of cause is amended accordingly.

"Martine St-Louis"
Judge

Schedule "A"

Court File No. T-402-19

FEDERAL COURT

PROPOSED CLASS PROCEEDING

BETWEEN:

(Court Seal)

XAVIER MOUSHOOM and JEREMY MEAWASIGE (by his litigation guardian, Maurina Beadle)

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the *Federal Courts Rules* serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

Date:_____ Issued by _____
(Registry Officer)

Address of local office: 30 McGill Street
Montréal, Québec
H2Y 3Z7

TO: **ATTORNEY GENERAL OF CANADA**
National Litigation Sector
Department of Justice Canada
50 O'Connor Street
Ottawa ON K1A 0H8

Travis Henderson, Lawyer
Tel: 613-670-6374
Fax: 613-941-1920

I. DEFINED TERMS

1. In this Fresh as Amended Statement of Claim, in addition to the terms that are defined elsewhere herein, the following terms have the following meanings:

(a) "**1965 Agreement**" means the Memorandum of Agreement Respecting Welfare Programs for Indians of 1965, a cost-sharing agreement between the **Crown** and the Province of Ontario for the provision of certain services to **First Nations** in Ontario, including but not limited to child and family services, child care, and social assistance.

(b) "***Child and Family Services Act***" means the *Child and Family Services Act*, R.S.O. 1990, c. C.11.

(c) "***CHRA***" means *Canadian Human Rights Act*, R.S.C., 1985, c. H-6.

(d) "**Class**" means the **On-Reserve Class, the Family Class** and the **Jordan's Principle Class**, collectively.

(e) "**Class Period**" means the period of time beginning on April 1, 1991 and ending on March 1, 2019.

(f) "**Crown**" means Her Majesty in right of Canada as defined under the *Crown Liability and Proceedings Act*, R.S.C., 1985, c. C-50 and the agents of Her Majesty in right of Canada, including the various federal departments responsible for the funding formulas, policies and practices at issue in this action relating to **First Nations** children in Canada during the **Class Period**, as follows: the Department of Indian Affairs and Northern Development using the title Indian and Northern Affairs Canada

("**INAC**") until 2011; Aboriginal Affairs and Northern Development Canada ("**AANDC**") from 2011 to 2015; Indigenous and Northern Affairs Canada ("**INAC**") from 2015 to 2017; and Indigenous Services Canada and Crown-Indigenous Relations and Northern Affairs Canada, following the 2017 dissolution of **INAC**.

(g) "**Directive 20-1**" means **INAC**'s national policy statement on the **FNCFS Program**, establishing **FNCFS Agencies** under the provincial or territorial child welfare legislation and requiring that **FNCFS Agencies** comply with provincial or territorial legislation and standards.

(h) "**EPFA**" means the Enhanced Prevention Focused Approach, which the **Crown** implemented in 2007 in response to criticisms of **Directive 20-1**, starting in Alberta and later adding Saskatchewan, Manitoba, Quebec, Nova Scotia, and Prince Edward Island.

(i) "**Family Class**" means an individual who is the brother, sister, mother, father, grandmother or grandfather of a member of the **On-Reserve Class**.

~~(i)~~(j) "**First Nation(s)**" means Indigenous peoples in Canada who are neither Inuit nor Métis, including individuals who have Indian status pursuant to the ***Indian Act***, are eligible for such status, or are recognized as citizens by their respective **First Nation** community, including **First Nations** in the Yukon and the Northwest Territories.

~~(j)~~(k) "**FNCFS Agencies**" means agencies that provided child and family services, in whole or in part, to the **Class** members pursuant to the **FNCFS Program** and other

agreements except where such services were exclusively provided by the province or territory in which the community was located.

~~(k)~~(l) **"FNCFS"** or **"FNCFS Program"** means **INAC**'s First Nations Child and Family Services Program which funded, and continues to fund public services, including **Prevention Services** and **Protection Services**, to **First Nations** children and communities.

~~(l)~~(m) **"Impugned Conduct"** means the totality of the **Crown**'s discriminatory practices, including unlawful underfunding and the breach of **Jordan's Principle** as pleaded at paragraphs 12-~~57~~62, below.

~~(m)~~(n) *"Indian Act"* means the *Indian Act*, R.S.C., 1985, c. I-5.

~~(n)~~(o) **"Jordan's Principle"** means a child-first principle intended to ensure that all **First Nations** children living on **Reserve** or off **Reserve** receive needed services and products that are substantively equal, taking into account their best interests and cultural rights, free of adverse differentiation.

~~(o)~~(p) **"Jordan's Principle Class"** means all **First Nations** individuals who were under the applicable provincial/territorial age of majority and who during the **Class Period** were denied a public service or product, or whose receipt of a public service or product was delayed or disrupted, on the grounds of lack of funding or lack of jurisdiction, or as a result of a jurisdictional dispute with another government or governmental department.

~~(p)~~(q) **"On-Reserve Class"** means all **First Nations** individuals who:

(i) were under the applicable provincial/territorial age of majority at any time during the **Class Period**; and

(ii) were taken into out-of-home care during the **Class Period** while they, or at least one of their parent(s), were ordinarily resident on a **Reserve**.

~~(q)~~(r) **"Post-Majority Services"** means a range of services provided to individuals who were formerly in out-of-home care as children, to assist them with their transition to adulthood upon reaching the age of majority in the province or territory in which they reside.

~~(r)~~(s) **"Prevention Services"** means three categories of "least disruptive" services intended to secure the best interests of children, while promoting the distinct cultural and linguistic needs of **First Nations** children, without disrupting the bond between these children and their families and communities. **Prevention Services** include:

(i) services aimed at the community as a whole, such as public awareness and educational initiatives to promote healthy families and prevent or respond to child maltreatment;

(ii) services responding to emerging child maltreatment risks; and

(iii) services that target specific families where a crisis or risks to a child have been identified.

~~(s)~~(t) **"Protection Services"** means those services that are triggered when the safety or the well-being of a child is reported to be at risk. These services include the receipt and

assessment of child maltreatment reports, development of plans to remediate the risk to the child, if possible, and the removal of children from their families into out-of-home care where the risk to the child cannot be remediated by least disruptive measures.

~~(t)~~(u) "**Provincial/Territorial Funding Agreements**" means funding agreements signed by the **Crown** with a province or territory, other than Ontario, or with a non-**First Nations** operated child and family service entity, for the provision of child and family services in whole, or in part, to **First Nations** children.

~~(u)~~(v) "**Reserve**" means a tract of land, as defined under the ***Indian Act***, the legal title to which is vested in the **Crown** and has been set apart for the use and benefit of an Indian band.

~~(v)~~(w) "**Residential Schools**" means schools for **First Nations**, Métis and Inuit children funded by the **Crown** from the 19th century until 1996, which had the objective of assimilating children into Christian, Euro-Canadian society by stripping away their **First Nations**, Metis and Inuit rights, cultures, languages, and identities, a practice subsequently recognized as "cultural genocide".

~~(w)~~(x) "**Sixties Scoop**" means the decades-long practice in Canada of taking Indigenous children, including **First Nations**, from their families and communities for placement in non-Indigenous foster homes or for adoption by non-Indigenous parents.

~~(x)~~(y) "**Tribunal**" means the Canadian Human Rights Tribunal.

II. RELIEF SOUGHT

2. The Plaintiff, on behalf of the Class, claims:

(a) an order certifying this action as a class proceeding and appointing the ~~P~~plaintiffs as representative plaintiffs for the On-Reserve Class, Family Class and Jordan's Principle Class and any appropriate sub-class thereof;

(b) a declaration that the Crown breached its common law and fiduciary duties to the ~~P~~plaintiffs and the Class;

(c) a declaration that the Crown breached section 15(1) of the *Charter of Rights and Freedoms* ("***Charter***"), and that such breach was not justified under section 1 of the *Charter*;

(d) aggregate damages for breach of fiduciary duty, negligence, and under section 24(1) of the *Charter* in the amount of ~~$3~~6,000,000,000, and an order that any undistributed damages be awarded for the benefit of Class members, pursuant to rule 334.28 of the *Federal Courts Rules*;

(e) an order pursuant to rule 334.26 of the *Federal Courts Rules* for the assessment of the individual damages of Class members;

(f) punitive and exemplary damages of $50,000,000 or such other sum as this Honourable Court deems appropriate;

(g) the costs of notice and of administering the plan of distribution of the recovery in this action, plus applicable taxes, pursuant to rule 334.38 of the *Federal Courts Rules*;

(h) costs of the action on a substantial indemnity basis or in an amount that provides full indemnity;

(i) pre-judgment and post-judgment interest pursuant to the *Federal Courts Act*, R.S.C., 1985, c. F-7; and

(j) such further and other relief as this Honourable Court deems just and appropriate in the circumstances.

III. NATURE OF THE ACTION

3. For decades, the Crown has systematically discriminated against First Nations children on the grounds of race and national or ethnic origin. The discrimination has taken two forms.

4. **First**, the Crown has knowingly underfunded child and family services for First Nations children living on Reserve and in the Yukon. This underfunding has prevented child welfare service agencies from providing adequate Prevention Services to First Nations children and families. The underfunding persists despite the heightened need for such services on Reserve due to the inter-generational trauma inflicted on First Nations peoples by the legacy of the Residential Schools and the Sixties Scoop, and despite numerous calls to action by several official, independent fact-finders. The Crown has known about the severe inadequacies of its funding formulas, policies, and practices for years, but has not adequately addressed them.

5. At the same time that the Crown has underfunded Prevention Services to First Nations children and families living on Reserve and in the Yukon, it has fully funded the costs of care for First Nations children who are removed from their homes and placed into out-of-home care. This practice has created an incentive on the part of First Nations child welfare service agencies to remove First Nations children living on Reserve and in the Yukon from their homes and place

them in out-of-home care. Because of these funding formulas, policies, and practices, a child on Reserve must often be removed from their home in order to receive public services that are available to children off Reserve.

6. The removal of a child from their home necessarily causes severe and, in some cases, permanent trauma to that child and his or her family. It is therefore only used as a last resort for children who do not live on a Reserve. Because of the underfunding of Prevention Services and the full funding of out-of-home care, however, First Nations children on Reserve and in the Yukon have been removed from their homes as a first resort, and not as a last resort. The funding incentive to remove First Nations children from their homes accounts for the staggering number of First Nations children in state care. There are approximately three times the numbers of First Nations children in state care now than there were in Residential Schools at their apex in the 1940s.

7. The incentivized removal of First Nations children from their homes has caused traumatic and enduring consequences to First Nations children and their families. Many of these children already suffer the effects of trauma inflicted by the Crown on their parents, grandparents and ancestors by the Residential Schools and Sixties Scoop. This action seeks individual compensation for on Reserve First Nations children and their family members who were victims of this systemic discrimination.

8. **Second,** the Crown has failed to comply with Jordan's Principle, a legal requirement designed to safeguard First Nations children's substantive equality rights. Jordan's Principle aims to prevent First Nations children from suffering gaps, delays, disruptions or denials in receiving necessary services and products while governments determine which level (federal, provincial or territorial) or which governmental department will pay for such services or products. Jordan's

Principle is admitted by the Crown to be a "legal requirement" on it and thus a duty that carries civil consequences. However, the Crown has essentially ignored Jordan's Principle and thereby denied crucial services and products to tens of thousands of First Nations children in breach of Jordan's Principle. This action seeks compensation for those First Nations children who suffered or died while awaiting the services or products that the Crown was legally required to provide but did not provide, in breach of Jordan's Principle.

9. Both forms of discrimination were directed at the Class because they were First Nations ~~and because they were children.~~

10. In a landmark decision released in 2016, the Tribunal found that the Crown had systematically discriminated against First Nations children on both of the above grounds, contrary to the *CHRA*.

11. The Crown's discriminatory policies and practices alleged herein breached section 15(1) of the *Charter*, the Crown's fiduciary duties to First Nations~~ children,~~ and constituted negligence. ~~No individual~~Full compensation for the victims of these discriminatory practices has not resulted nor will it result from the Tribunal ~~decision~~proceeding. This action seeks compensation for First Nations individuals who were victims of the Crown's systemic discrimination while they were under the age of majority and for family members who suffered the break-up of their families when their children were removed from their homes.

IV. THE PARTIES

A. The Plaintiffs

i. ~~The Plaintiff, Xavier Moushoom,~~ **- Member and Proposed Representative of the On-Reserve Class and Family Member Class**

12. Xavier Moushoom was born in Lac Simon in 1987 and is a member of the Anishnabe Nation. Both of his parents are Residential Schools survivors. From 1987 to 1995, Mr. Moushoom lived with his mother—who suffered from alcohol abuse—and his brother on the Lac Simon Reserve. Mr. Moushoom's father also battled alcohol abuse problems and sought treatment in Montreal, away from the family. As a child, Mr. Moushoom spoke Algonquin fluently with his grandmother.

13. In 1996, Mr. Moushoom was removed from his home and placed in out-of-home care in Lac Simon. To this day, he does not know the reason for his apprehension. Mr. Moushoom's brother was also apprehended and placed in a different foster home. Mr. Moushoom was thus entirely isolated from his family.

14. In 1997, Mr. Moushoom was moved to a different foster family outside of his community in Val D'Or. From the age of 9 until 18, Mr. Moushoom was moved from one foster family to another. In total, he lived in fourteen different foster homes in Val D'Or.

15. Mr. Moushoom was rarely granted access to his mother and family. As a result, Mr. Moushoom gradually lost his native Algonquin language, his culture, and his ties to the Lac Simon community.

16. By the time he became an adult, Mr. Moushoom had lost his roots, his culture, and his language. At 18, Mr. Moushoom was forced to leave his foster family because the Crown did not

fund Post-Majority Services for First Nations individuals like Mr. Moushoom. He felt completely lost and unprepared for life.

17. After staying with his foster family for an additional three months without financial support, Mr. Moushoom returned to live with his mother in Lac Simon. In the years that followed, Mr. Moushoom suffered from anxiety attacks and developed substance abuse problems that he would eventually overcome through his own determination with the help of his community.

ii. Jeremy Meawasige (by his litigation guardian, Maurina Beadle) - Member and Proposed Representative of the Jordan's Principle Class

18. Jeremy Meawasige is a member of the Pictou Landing First Nation in Nova Scotia. He was born in 1994, and has suffered from multiple disabilities and high care needs throughout his life. As a child, Mr. Meawasige was diagnosed with hydrocephalus, cerebral palsy, spinal curvature, and autism. During the relevant time and up to this day, he can only speak a few words and cannot walk unassisted. He requires total personal care, and depends on the assistance of others for showering, diapering, dressing, spoon feeding, and all other personal hygiene needs.

19. Mr. Meawasige lives on the Pictou Landing Indian Reserve.

20. Maurina Beadle is Mr. Meawasige's mother and proposed litigation guardian. She has been his primary caregiver for most of his life. Ms. Beadle was able to care for her son in the family home without government support or assistance until she suffered a stroke in 2010. At that point, the Pictou Landing Band Council stepped in and started providing necessary services to Mr. Meawasige.

21. However, the funding that the Council received from the Crown was insufficient to meet Mr. Meawasige's needs. The Council applied for funding from the Crown for Mr. Meawasige under Jordan's Principle. The Crown refused that application on the ground that Mr. Meawasige did not meet the test, particularized below, that the Crown had established for Jordan's Principle. The Council and Ms. Beadle sought judicial review of the refusal decision. In April 2013, the Federal Court granted *certiorari*, quashed the refusal decision and ordered the Crown to pay for the services under Jordan's Principle.

22. The Crown's improper interpretation of Jordan's Principle caused the denial, delay and disruption of the receipt of public services and products that were essential to Mr. Meawasige. While Mr. Meawasige received funding for certain services after the Federal Court's 2013 decision, he has not received some other essential public services and products to this date.

B. The Defendant

~~18.~~23. The Defendant, the Attorney General of Canada, represents the Crown, and is liable and vicariously liable for the Impugned Conduct.

~~19.~~24. In particular, the Crown is liable and vicariously liable for the acts and omissions of its agents—INAC and its predecessors and successors—which funded the services provided to the Class members by the FNCFS Agencies or the province/territory. In this claim, INAC and its predecessors or successors, are referred to interchangeably as the Crown, unless specifically named.

V. THE CROWN'S TREATMENT OF FIRST NATIONS CHILDREN

~~20.~~25. Pursuant to section 91(24) of the *Constitution Act, 1867*, the Crown has jurisdiction over First Nations peoples. Provinces and territories have jurisdiction over child and family welfare generally. Each province and territory has its own child and family services legislation.

~~21.~~26. Child and family services, also referred to as "child welfare", consist of a range of services intended to prevent and respond to child maltreatment and to promote family wellness.

~~22.~~27. Starting in the 19th century, the Crown systematically separated First Nations children from their families and placed them in Residential Schools. Among other things, the Crown used the Residential Schools as child welfare care providers for the First Nations children who allegedly needed child and family services.

~~23.~~28. Following the closure of the Residential Schools, the Crown undertook the provision of child and family services for First Nations children and their families. However, Parliament did not pass federal legislation regarding First Nations child and family services.

~~24.~~29. Rather, the Crown chose to operate child welfare services in a federal legislative vacuum filled by two statutory provisions:

(a) section 4 of the *Department of Indian Affairs and Northern Development Act*, R.S.C., 1985, c. I-6, gave the Minister of Indian Affairs and Northern Development authority over all "Indian affairs" and "Yukon, the Northwest Territories and Nunavut and their resources and affairs"; and

(b) section 88 of the *Indian Act* provided for the application of provincial or territorial child welfare legislation to First Nations as provincial or territorial "laws of general application", with funding for those services from the Crown.

~~25.~~30. The Crown, through INAC and its predecessors and successors, required that FNCFS Agencies use provincial/territorial child welfare laws as a condition of funding. The funding itself was provided on the basis of formulas crafted by the Crown.

~~26.~~31. Thus, Parliament did not enact laws to govern the way essential services were to be provided to Class members and to ensure that they were provided fairly and adequately.

~~27.~~32. The Crown provided funding during the Class Period through four channels that worked on the basis of uniform policies, objectives, and short-comings common to the Class:

(a) the 1965 Agreement;

(b) Directive 20-1;

(c) the EPFA; and

(d) the Provincial/Territorial Funding Agreements.

~~28.~~33. Directive 20-1, which came into effect on April 1, 1991, was a cabinet-level spending measure that established uniform funding standards for the On-Reserve Class and Family Class members. It governed and controlled federal funding to FNCFS Agencies for child and family services to On-Reserve Class and Family Class members where an agreement did not exist between the Crown and the province or territory.

~~29.~~34. The Crown designed its funding channels, including Directive 20-1, based on assumptions ill-suited to the Crown's stated objectives and without regard to the realities of First Nations communities.

~~30.~~35. This approach directly and foreseeably resulted in systemic shortcomings, ultimately assuring the chronic under-provision of essential services on which the On-Reserve Class and Family Class members relied. These shortcomings included the following:

(a) funding models that incentivized the removal of On-Reserve Class members from their homes and placed them in out-of-home care;

(b) inflexible funding mechanisms that could not account for the particular needs of diverse First Nations communities on Reserves and in the Yukon, and the operating costs of an agency delivering services therein;

(c) funding models that ignored the pressing need for Prevention Services, family support and culturally appropriate services;

(d) inadequate funding for essential programs and services, and in particular inadequate funding to align services with standards set by provincial or territorial legislation;

(e) a 22% disparity in per-capita funding for On-Reserve Class and Family Class members, compared with services delivered to children and families off Reserve, despite the heightened needs of On-Reserve Class and Family Class members and the increased costs of delivering those services to ~~the Class~~them; and

(f) a self-serving, parsimonious interpretation by the Crown of Jordan's Principle, leading to Jordan's Principle Class members receiving delayed or inadequate public services or products or none at all.

~~31.~~36. In 2007, the Crown admitted these systemic deficiencies, and sought to rectify them in some provinces by implementing the EPFA. The Crown announced that the EPFA was designed to allow for a more flexible funding formula and an allocation of funds for Prevention Services.

~~32.~~37. Nonetheless, the implementation of the EPFA failed to remedy the systemic discriminatory funding of services to On-Reserve Class and Family Class members. The EPFA suffered from the same shortcomings and false underlying assumptions that plagued Directive 20-1 and the Crown's other funding formulas.

~~33.~~38. These longstanding, systemic failures of the Crown's funding formulas effectively paralyzed the FNCFS Program and harmed generations of First Nations children and families, whose care the Crown undertook to provide.

~~34.~~39. In some instances, the Crown's funding methods and practices imposed on First Nations families what is known as "Care by Agreement", which follows provisions in provincial and territorial child-welfare legislation that allow for parents to voluntarily place their children in child-welfare custody often while maintaining parental guardianship. Care by Agreement became another mechanism through which On-Reserve Class members were separated from their families and placed in out-of-home care to receive the essential services that they required.

~~35.~~40. The Crown was well aware of these chronic problems. Over the course of the Class Period, numerous independent reviews, reports, and audits, including two reviews by the Auditor General

of Canada and a joint review by INAC and the Assembly of First Nations, identified these deficiencies and decried their devastating impact on First Nations children and families.

~~36.~~41. The Report of the Truth and Reconciliation Commission of Canada also called on the Crown to adequately fund child and family services and fully implement Jordan's Principle. In so doing, the Truth and Reconciliation Commission found, ~~amongst others~~among other things, that:

(a) 3.6% of all First Nations children under the age of 14 were in out-of-home care, compared with 0.3% of non-Aboriginal children;

(b) the rate of investigations involving First Nations children was 4.2 times the rate of non-Aboriginal investigations, and maltreatment allegations were more likely to be substantiated in the cases of First Nations children;

(c) investigations of First Nations families for neglect were substantiated at a rate eight times greater than for the non-Aboriginal population;

(d) the Crown's child-welfare system simply continued the assimilation that the Residential Schools system started; and

(e) First Nations children are still being taken away from their parents because their parents are poor.

~~37.~~42. These reviews, reports, and audits fell largely on deaf ears.

~~38.~~43. Faced with the Crown's inaction and apathy, the First Nations Child and Family Caring Society, an umbrella service organization, and the Assembly of First Nations, a national First Nations political organization, filed a complaint with the Canadian Human Rights Commission in

February 2007. The complaint alleged that the Crown discriminated against First Nations peoples on Reserve and in the Yukon in the provision of child and family services and by its failure to properly implement Jordan's Principle, in violation of section 5 of the *CHRA*.

~~39.~~44. In 2008, the Canadian Human Rights Commission referred the complaint to the Tribunal.

~~40.~~45. On January 26, 2016, the Tribunal rendered a 176-page decision, finding that the Crown systematically discriminated against First Nations children on Reserve and in the Yukon in providing services contrary to section 5 of the *CHRA*.

~~41.~~46. Since then, the Tribunal has retained jurisdiction over the complaint and has issued no fewer than five non-compliance orders against the Crown.

C. Tribunal's Findings Regarding Crown's Funding Practices

~~42.~~47. The Tribunal found that, despite changes made to the FNCFS Program, the following systemic flaws plagued the delivery of child and family services:

(a) The design and application of the Directive 20-1 funding formula provided funding based on flawed assumptions about children in out-of-home care and based on population thresholds that did not accurately reflect the service needs of many on Reserve communities. This resulted in inadequate fixed funding for operation (such as capital costs, multiple offices, cost of living adjustment, staff salaries and benefits, training, legal, remoteness, and travel) and Prevention Service costs. The inadequate fixed funding hindered the ability of FNCFS Agencies to provide provincially/territorially mandated child-welfare services, and prevented FNCFS Agencies from providing culturally appropriate services to First Nations children and families.

(b) While the Crown systematically underfunded Prevention Services, it fully funded out-of-home care by reimbursing all such expenses at cost with the exception of Post-Majority Services.

(c) The Crown's practice of under-funding prevention and least disruptive measures while fully reimbursing the cost of children in out-of-home care created a perverse incentive to remove First Nations children from their homes as a first, not a last, resort, in order to ensure that a child received necessary services.

(d) The structure and implementation of the EPFA funding formula perpetuated the incentives to remove children from their homes and incorporated the flawed assumptions of Directive 20-1 in determining funding for operations and prevention, and perpetuating the adverse impacts of Directive 20-1 in many communities.

(e) The Crown failed to adjust Directive 20-1 funding levels, since 1995, along with funding levels under the EPFA since its implementation, to account for inflation and cost of living.

(f) The Crown failed to update the 1965 Agreement in Ontario to ensure that on Reserve child and family services comply fully with the *Child and Family Services Act*.

(g) The Crown failed to coordinate the FNCFS Program and the Provincial/Territorial Funding Agreements with other federal departments and government programs and services for First Nations children on Reserve, resulting in service gaps, delays, and denials for First Nations children and families.

D. Tribunal's Findings Regarding the Application of Jordan's Principle

~~43.~~48. Jordan's Principle is a child-first legal rule that guides the provision of public services and products to First Nations children. The Crown has admitted that Jordan's Principle is a legal rule, not merely a principle or aspiration. Jordan's Principle incorporates the Crown's longstanding obligations to treat Class members without discrimination and with a view to safeguarding their substantive equality.

~~44.~~49. In the mid-2000s, this existing legal rule was named Jordan's Principle to honour the memory of Jordan River Anderson, a First Nation child who died in a hospital bed while officials from the governments of Canada and Manitoba bickered over who should pay for his specialized care close to his hospital. The Tribunal summarized Jordan's life story as follows:

> Jordan River Anderson [was] a child who was born to a family of the Norway House Cree Nation in 1999. Jordan had a serious medical condition, and because of a lack of services on reserve, Jordan's family surrendered him to provincial care in order to get the medical treatment he needed. After spending the first two years of his life in a hospital, he could have gone into care at a specialized foster home close to his medical facilities in Winnipeg. However, for the next two years, AANDC, Health Canada and the Province of Manitoba argued over who should pay for Jordan's foster home costs and Jordan remained in hospital. They were still arguing when Jordan passed away, at the age of five, having spent his entire life in hospital.

~~45.~~50. Jordan's Principle mandates that all First Nations children should receive the public services and/or products they need, when they need them and in a manner consistent with substantive equality and reflective of their cultural needs. The need for the legal rule arose from the Crown's practice of denying, delaying or disrupting services to First Nations children due to, among other reasons, jurisdictional payment disputes within the federal government or with provinces or territories.

~~46.~~51. Jordan's Principle reaffirms existing *Charter* and quasi-constitutional rights of First Nations children to substantive equality, and seeks to ensure substantive equality and the provision of culturally-appropriate services. For that purpose, the needs of each individual child must be considered and evaluated, including by taking into account any needs that stem from historical disadvantage and the lack of on Reserve or surrounding services.

~~47.~~52. Jordan's Principle preserves human dignity by providing First Nations children with essential services and products without adverse differentiation including denials, disruptions or delays because of intergovernmental/interdepartmental funding squabbles. Jordan's Principle requires the government (federal, provincial or territorial) or department that first received the request to pay for the service or product. Once it has paid and the child has received the service or product, the payor can resolve jurisdictional issues about who was responsible to pay.

~~48.~~53. In October 2007, the House of Commons formally supported Jordan's Principle, unanimously passing a motion to the effect that "the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children".

~~49.~~54. In breach of the letter and spirit of Jordan's Principle and the rights that underlie it, the Crown's bureaucratic arm unilaterally restricted its application to cases that could meet the following three criteria:

(a) a jurisdictional dispute has arisen **between a provincial government and the federal government;**

(b) the child has **multiple** disabilities requiring services from **multiple** service providers; and

(c) the service in question is a service that would be available to a child residing off Reserve **in the same location**.

~~50.~~55. The Tribunal found that the processes set up by the Crown (via memorandums of understanding between Health Canada and AANDC) to respond to Jordan's Principle requests made delays inevitable: the processes included a review of policy and programs, case conferencing and approvals from the Assistant Deputy Minister, before interim funding was provided. These processes exacerbated the very delay and disruption that Jordan's Principle was designed to prevent.

~~51.~~56. Not surprisingly, the Crown's narrow interpretation of Jordan's Principle resulted in no cases meeting its stringent criteria for Jordan's Principle. The Tribunal found that the Crown's stringent definition and its layered assessment of each case "defeats the purpose of Jordan's Principle and results in service gaps, delays and denials for First Nations children on reserve".

~~52.~~57. In fact, the Crown's application of Jordan's Principle was so stingy that an $11-million fund set up by the Crown with Health Canada to address Jordan's Principle requests was never accessed. In essence, the Crown interpreted away Jordan's Principle, leaving tens of thousands of First Nations children to suffer or to be placed in out-of-home care in order to receive the public services or products that they needed and that they relied on the Crown to provide.

~~53.~~58. The Crown's wrongful application of Jordan's Principle further exacerbated the numbers of First Nations children in out-of-home care. Due to a lack of public services on Reserve, many

First Nations children were placed in out-of-home care in order to access the services and products that they needed.

~~54.~~59. In light of the above, the Tribunal ordered the Crown to cease its discriminatory practices, reform the FNCFS Program, and take measures to implement the full meaning and scope of Jordan's Principle.

E. The Binding Effect of Tribunal Findings

~~55.~~60. The Tribunal made numerous factual findings against the Crown. Neither the Crown nor the complainants sought judicial review of the Tribunal's decision. The decision became final on March 2, 2016. Accordingly, the Crown is estopped in this action from re-litigating or denying the Tribunal's findings.

~~56.~~61. Prior to the Tribunal's decision and subsequent orders, the Crown took the position that no Jordan's Principle cases were made out. The Crown's Jordan's Principle fund was never accessed. After the Tribunal's decision and subsequent orders, the Crown issued over 165,000 remedial orders to address its previous failures to comply with Jordan's Principle and the fundamental substantive equality rights that underlie it.

~~57.~~62. None of the children whose necessary services were delayed, disrupted or denied as a result of the Crown's disregard for Jordan's Principle or who were denied access to Prevention Services due to the design of the Crown's funding formulas, policies, and practices have received, or will receive, ~~any individual~~full compensation, if any, as a result of the Tribunal proceedings. It is only through the mechanism of this action that full and fair compensation ~~will be provided~~is possible.

VI. THE CROWN'S DUTIES TO THE CLASS

A. The Crown Owes a Common Law Duty of Care to the Class

~~58.~~63. The Crown owes a duty of care to all Class members. Section 91(24) of the *Constitution Act, 1867* gave Parliament exclusive jurisdiction over Indians, including the Class.

~~59.~~64. The Crown had full control over the provision of public services and products to the Class members throughout Canada by virtue of the application of its funding formulas and by its application of Jordan's Principle.

~~60.~~65. The Crown chose to not legislate on child and family and other public services provided to the Class members, but instead used various funding formulas, policies, and practices that were established bureaucratically. Using these funding mechanisms, the Crown created, planned, established, operated, financed, supervised, controlled and/or regulated the provision of services and products to the Class members throughout Canada.

~~61.~~66. The Crown has known for decades that its funding formulas and policies were wholly insufficient for the provision of essential services and products to the Class members. The Crown knew or ought to have known that its policies and practices were having a devastating impact on the Class members~~,~~ and their ~~families, and~~ communities.

~~62.~~67. This was especially true because all of the On-reserve Class and Jordan's Principle Class members are, or were at the relevant time, vulnerable children at the mercy of the Crown for essential services. The Crown's duty of care to the On-Reserve Class and the Family Class included a duty to adequately fund Prevention Services and least disruptive measures in the best interests of the children.

~~63.~~68. Furthermore, Jordan's Principle prescribed the content of the Crown's duty of care to the Class—and particularly the Jordan's Principle Class. This included the duty to ensure substantive equality for First Nations children, provide culturally appropriate services, and avoid gaps, delays, disruption, and denial of services to these children.

~~64.~~69. The Crown's proximity to the Class members is reinforced by the fiduciary relationship that exists between them, and by the fiduciary obligations it owes to the Class members in respect of their specific interests, including their health and welfare, and their essential connection to their First Nation histories, cultures, languages, customs, and traditions. Moreover, the Crown assumed an obligation towards First Nations peoples regarding the provision of child and family and other public services by virtue of its funding formulas, policies and practices.

B. The Crown Owed Fiduciary Obligations to the Class

~~65.~~70. The Crown stands in a special, fiduciary relationship with First Nations in Canada.

~~66.~~71. The Crown has exclusive constitutional and common law jurisdiction in respect of the Class, and has been specifically entrusted to recognize and affirm the rights of Aboriginal peoples in Canada, under section 35(1) of the *Constitution Act, 1982*.

~~67.~~72. The Crown has assumed and maintains a large degree of discretionary control over First Nations peoples' lives and interests in general, and the care and welfare of the Class members in particular.

~~68.~~73. Under section 18 of the *Indian Act*, the Crown holds Reserve lands for the use and benefit of First Nations for whom they were set apart. The Crown has discretionary authority over the use of such lands for the purpose of the administration of First Nations affairs including, but not limited to, early childhood, education, social and health services.

~~69.~~74. Moreover, the Crown has expressly and impliedly undertaken to protect specific First Nations interests in the provision of child and family and certain other services and products to the Class members. These undertakings require the Crown to act loyally and in the best interests of First Nations, particularly children, on Reserve, in the Yukon and in The Northwest Territories.

~~70.~~75. The Crown's duties toward First Nations in general, and Class members specifically, are grounded in the honour of the Crown, which require the Crown to act at all times honourably, fairly, and in good faith in the exercise of its discretion towards the Class members.

~~71.~~76. The Crown's constitutional and statutory obligations, policies, and the common law required the Crown to take steps to monitor, influence, safeguard, secure, and otherwise protect the vital interests of First Nations, including the Class members. These obligations required particular care with respect to the interests of children and their families, whose wellbeing and security were vulnerable to the Crown's exercise of its discretion.

~~72.~~77. The Crown's fiduciary duties as described in this claim are non-delegable in nature and continue notwithstanding any agreements between the Crown and its agents, or agreements with other levels of government.

VII. THE CROWN BREACHED ITS DUTIES TO THE CLASS

A. The Crown Breached *Charter* Equality Rights of the Class

~~73.~~78. Section 15(1) of the *Charter* entrenches equality rights for every individual:

> **Equality before and under law and equal protection and benefit of law**
>
> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

~~74.~~79. The Crown's Impugned Conduct violated section 15(1) of the *Charter* and is not saved by section 1 of the *Charter*. The Impugned Conduct was directed exclusively to First Nations ~~children~~people and therefore discriminated on an enumerated ground, *i.e.*, race, national or ethnic origin. This distinction created a disadvantage for the Class by perpetuating historical prejudice caused by the legacy of the Residential Schools and Sixties Scoop. The distinction was substantively discriminatory. No pressing or substantial concern justified the Impugned Conduct under section 1 of the *Charter*.

i. The Impugned Conduct Created a Distinction Based on Race, National or Ethnic Origin

~~75.~~80. The Class members, as First Nations, possessed the enumerated characteristics of race, national and ethnic origin. The Impugned Conduct had a prejudicial effect on the Class members based on their membership in that group.

~~76.~~81. Through its funding formulas, policies, and practices, the Crown played an essential role in the provision of child and family services ~~provided~~and other public services and products to the Class members.

~~77.~~82. Child and family services under the FNCFS Program and the Provincial/Territorial Funding Agreements were aimed at the members of the On-Reserve Class and Family Class because they were First Nations. The determination of the persons to whom the services were offered was based entirely on the racial, national or ethnic identity of the On-Reserve Class~~,~~ and Family Class.

~~78.~~83. Likewise, the members of the Jordan's Principle Class qualified for public services or products under Jordan's Principle expressly on the ground that they were First Nations children who needed a public service or product. The racial, national or ethnic identity of the Jordan's

Principle Class members was the very reason for which Jordan's Principle and its substantive equality purpose applied to them.

~~79.~~84. The Tribunal found as a fact that the Crown's underfunding and other Impugned Conduct differentiated and adversely impacted First Nations children in the provision of certain services because of their race and national or ethnic origin. The Crown is estopped from challenging that finding.

ii. The Impugned Conduct Reinforced and Exacerbated Disadvantages

~~80.~~85. First Nations in Canada have historically suffered from the continuing effects of colonialism, systemic discrimination, and other disadvantages often directly linked to the Crown's legislation, policies, and practices. This discrimination has manifested itself in numerous ways, including the tragic history of the Residential Schools and the Sixties Scoop.

~~81.~~86. The social and economic context in which the claims of the Class members have arisen further aggravated the negative impact of the Impugned Conduct on the Class members. The Impugned Conduct widened the gap between the historically disadvantaged group of the Class members on the one hand, and the rest of society on the other, rather than narrowing it. The Crown added to the historical disadvantages suffered by the Class, and condemned many children to separation from their families, communities, and cultural identity.

~~82.~~87. More specifically, the Crown's design, management and control of the FNCFS Program, its funding formulas, and its restrictive interpretation of Jordan's Principle resulted in delays, disruptions, and denials of services and products, and created adverse impacts to the Class. For example:

(a) The structure and implementation of the Crown's funding formulas created built-in incentives to remove the On-reserve Class members from their homes as a first, not a last, resort. This practice had the opposite effect of provincial/territorial child welfare legislation and standards, which focus on prevention and least disruptive measures. The Impugned Conduct had a devastating impact on ~~Class members who were separated from~~these children and their families~~and communities~~.

(b) The Crown directed funding based on flawed assumptions about children in out-of-home care and population thresholds that did not accurately reflect the ~~service~~ needs of the Class members.

(c) The Crown provided inadequate fixed funding for operation and Prevention Service costs, hindering the ability of FNCFS Agencies to provide provincially/territorially mandated services to the Class.

(d) The Crown's inadequate funding deprived the Class members of culturally appropriate services.

(e) The structure and implementation of the Crown's funding formulas perpetuated the adverse impacts of Directive 20-1 on Class members and their communities.

(f) The Crown failed to adjust Directive 20-1 funding levels for decades, and failed to adjust funding levels under the EPFA, since its implementation, to account for inflation and cost of living.

(g) The Crown failed to update the 1965 Agreement in Ontario to ensure on Reserve communities could comply fully with the *Child and Family Services Act* and meet the needs of children in the context of their distinct First Nations cultures and realities.

(h) The Crown failed to coordinate the FNCFS Program and other related funding formulas with other federal departments and government programs and services for First Nations on Reserve, resulting in service gaps, delays and denials for First Nations children and families.

(i) The Crown failed to fund Post-Majority Services to Class members who were formerly in out-of-home care to assist them with the transition to adulthood.

(j) The Crown narrowly defined and inadequately implemented Jordan's Principle, resulting in public service and product gaps, delays and denials in the provision of services to the members of the Jordan's Principle Class, causing them harm. As Jordan's Principle aims at its core to ensure the substantive equality guaranteed by section 15 of the *Charter*, the Crown's emasculation of Jordan's Principle was a direct affront to the Class members' section 15 equality right.

~~83.~~88. The discriminatory impact on the Class members was and is apparent and immediate. As a result of the Impugned Conduct, the Crown differentiated adversely in the provision of child and family, and other public services and products to the Class members compared to non-First Nations children and families, and children and families in similar circumstances off Reserve. The members of the Class were denied equal child and family services because of their First Nations race, national or ethnic origin.

iii. Section 15 Violation Was not Justified Under Section 1

a. No Pressing or Substantial Objective for the Impugned Conduct

~~84.~~89. The Impugned Conduct had no pressing or substantial objective. It worked counter to and frustrated the Crown's professed objectives in the provision of ~~child and family~~essential services and products to the Class members.

~~85.~~90. The objectives of the FNCFS Program and other related funding formulas were to "ensure", "arrange", "support" and/or "make available" child and family services to First Nations children. More specifically, the principles of Directive 20-1 included a commitment to "expanding First Nations Child and Family Services on-reserve **to a level comparable to the services provided off reserve in similar circumstances** [...] in accordance with the applicable provincial child and family services legislation" [emphasis added].

~~86.~~91. In 2005, INAC issued the "First Nations Child and Family Services National Program Manual" in which the Crown listed the following objectives for the FNCFS Program:

(a) to support culturally appropriate child and family services for First Nations children, in the best interest of the child, in accordance with the legislation and standards of the reference province;

(b) to protect children from neglect and abuse;

(c) to manage the FNCFS Program in accordance with provincial or territorial legislation and standards;

(d) to provide to First Nations child and family services that are culturally relevant and comparable to those offered by the reference province or territory to residents living off Reserve in similar circumstances;

(e) to increase the ability and capacity of First Nations families to remain together and to support the needs of First Nations children in their parental homes and communities; and

(f) to ensure that the First Nations children receive a full range of child and family services reasonably comparable to those provided off Reserve by the reference province or territory.

~~87.~~92. The Impugned Conduct was counter to these objectives and other objectives announced by the Crown for the betterment of public services and products provided to the Class members. The Crown methodically implemented funding formulas and interpreted Jordan's Principle in ways that it knew, or ought to have known, would hinder these objectives and perpetuate the systematic, historic disadvantages suffered by the Class members.

b. The Means Adopted Were Not Proportional or Minimal

~~88.~~93. The Crown chose not to legislate on the provision of public services and products to Class members. Instead, the Crown filled the federal statutory vacuum that ensued with funding formulas, policies, and practices that gave rise to the Impugned Conduct.

c. No Rational Connection Between the Discriminatory Distinction and Any Valid Objective

~~89.~~94. No rational connection existed between the Impugned Conduct toward the Class members on the one hand and the Crown's objectives in this respect. The Impugned Conduct disadvantaged the ~~P~~plaintiffs and the Class, and did not advance any of the stated objectives of the Crown regarding ~~child and family~~the provision of public services and products to Class members.

d. Impugned Conduct Did Not Fall Within a Range of Reasonable Alternatives

~~90.~~95. There was no clear legislative goal to be attained by the Impugned Conduct. The Crown's conduct was contrary to its stated policy goals ~~with respect to the provision of public services to the Class members~~. The Crown's conduct was also contrary to its constitutional and fiduciary obligations to the Class members. Therefore, the Impugned Conduct falls outside a range of reasonable alternatives available to the Crown.

~~91.~~96. Only one alternative was constitutionally available to the Crown: to provide non-discriminatory public services and products to Class members consistent with its historic,

constitutional, and statutory obligations to First Nations children~~,~~ and their families. The Crown failed to do that.

e. Detrimental Effects of Impugned Conduct on Equality Rights Disproportionate to Any Legislative Objective

~~92.~~97. The Impugned Conduct has detrimentally impacted the *Charter*-protected equality rights of the Class members, ~~who~~many of whom are or were children and were affected because they were children. Children who are denied essential services, who receive deficient care, and/or who are separated from their families suffer detrimental effects often far more serious and lasting than adults. Similarly, family members of apprehended children suffer serious and lasting harm. The Impugned Conduct has had a disproportionate effect on the equality rights of the Class members.

VIII. THE CROWN BREACHED ITS FIDUCIARY DUTIES AND DUTY OF CARE

~~93.~~98. The Crown's Impugned Conduct during the Class Period, including the following particulars, constituted a systematic breach of its common law duty of care and its fiduciary duties to the Class:

(a) The Crown's funding formulas incentivized, and foreseeably caused, the removal of On-Reserve Class members from their homes as a first resort rather than as a last resort, by covering maintenance expenses at cost and providing insufficient fixed budgets for Prevention Services and least disruptive measures.

(b) The Crown failed to ensure that an appropriate child welfare program for the Class members, as First Nations children, was delivered in the provinces and territories.

(c) By separating the On-Reserve Class members from their homes and communities, the Crown's funding formulas deprived Class members of their right to the non-discriminatory provision of essential services, denied many the On-Reserve Class

~~members~~and ~~their families~~ Family Class members the opportunity to remain together or be reunited in a timely manner, and further deprived On-Reserve Class members of their language and cultural identity.

(d) The Crown created funding formulas without consideration for the specific needs of the First Nations communities or the individual families and children residing therein.

(e) The assumptions built into the Crown's funding formulas, in terms of children in out-of-home care, families in need and population levels, did not reflect the actual needs of the Class members or their communities, making provincial or territorial operational standards unattainable for them.

(f) In cases where the Crown provided separate funding for Prevention Services, the Crown's static funding formula did not provide for the increasing operational costs of FNCFS Agencies, including the costs of salaries, benefits, capital expenditures, cost of living, and travel for FNCFS Agencies to attract and retain staff and, generally, to provide service levels in line with provincial or territorial requirements.

(g) The Crown did not fund Post-Majority Services to On-Reserve Class members who were formerly in out-of-home care to assist them with the transition to adulthood.

~~94.~~99. The Crown breached its common law and fiduciary duties to the Jordan's Principle Class through its narrow interpretation, and complete disregard, of Jordan's Principle. The Crown's approach deprived the Jordan's Principle Class members of essential protections on which they relied, and which the Crown undertook to provide.

~~95.~~100. Specifically, the Crown, through its adoption of Jordan's Principle, acknowledged its longstanding duty to protect the unique interests of First Nations children, including the Jordan's Principle Class. Its performance of this duty constituted a dishonourable exercise of discretion that critically affected these children, who it knew were eminently vulnerable.

~~96.~~101. In the aftermath of the Residential Schools and Sixties Scoop, the Crown undertook to assist ~~Canada's~~ First Nations in their journey ~~of~~toward reconciliation and recovery. In particular, it undertook to support their communities, culture and welfare, and protect them from further disadvantage and abuse. In so doing, it encouraged First Nations peoples, and particularly First Nations children in the Class, to repose trust in the Crown. The Impugned Conduct constituted a dishonest, disloyal and dishonourable betrayal of this trust, placing the interests of the Crown and others ahead of the interests of Class members.

~~97.~~102. At all times during the Class Period, the Crown retained a degree of supervisory jurisdiction over the Class. It did not, and could not, delegate its fiduciary and common law duties in respect of the important interests it undertook to protect.

IX. DAMAGES

B. Damages Suffered by the Plaintiffs and Class Members

~~98.~~103. As a result of the Crown's breach of its constitutional, statutory, common law, and fiduciary duties, including breaches by agents of the Crown, the ~~P~~plaintiffs and other Class members suffered injuries and damages, including but not limited to the following:

(a) the Impugned Conduct denied the Class members non-discriminatory child and family services;

(b) Class members were removed from their homes and communities to be placed in care and lost their cultural identity;

(c) Class members suffered physical, emotional, spiritual, and mental pain and disabilities;

(d) Class members suffered sexual, physical, and emotional abuse while being in out-of-home care;

(e) Class members lost the opportunity to access essential public services and products in a timely manner; and/or

(f) Class members had to fund out of pocket substitutes, where available, for public services and products delayed or improperly denied by the Crown.

C. Section 24(1) *Charter* Damages

~~99.~~104. The ~~P~~plaintiffs and Class members suffered loss as a result of the Crown's breach of section 15(1) of the *Charter*. An award of damages under section 24(1) the *Charter* is appropriate in this case because it would compensate the Class members for the loss they have suffered. *Charter* damages would also vindicate the Class members' equality rights under the *Charter* and deter future discriminatory funding of child and family services by the Crown.

D. Disgorgement

~~100.~~105. The Crown's failure to provide adequate and equal funding for services and products to the Class members constituted a breach of its fiduciary duties, through which the Crown inequitably obtained quantifiable monetary benefits over the course of the Class Period. The Crown should be required to disgorge those benefits, plus interest.

E. Punitive and Exemplary Damages

~~101.~~106. The high-handed manner in which the Crown conducted its affairs warrants the condemnation of this Court. The Crown, including its agents, had complete knowledge of the fact and effect of its negligent and discriminatory conduct with respect to the provision of public services and products to Class members. It proceeded in callous indifference to the foreseeable injuries that the Class members would, and did suffer. The Crown had already caused unimaginable harm and suffering to First Nations through Residential Schools and the Sixties Scoop, and knew, or should have known, that the Impugned Conduct would perpetuate and exacerbate those harms to First Nations children and their families.

X. *CIVIL CODE OF QUEBEC* AND STATUTES

107. In addition to the foregoing, the Impugned Conduct breached the Family Class members' rights under the *Family Compensation Act*, R.S.B.C. 1996, c. 126, *Fatal Accidents Act*, R.S.A. 2000, c. F-8, *Tort-Feasors Act*, R.S.A. 2000, c. T-5, *The Fatal Accidents Act*, R.S.S. 1978 c.F-11, *Fatal Accidents Act*, C.C.S.M. c. F150, *Family Law Act*, R.S.O. 1990, c. F.3, *Fatal Accidents Act*, R.S.P.E.I. 1988, c. F-5, *Fatal Accidents Act*, R.S.N. 1990, c. F-6, *Fatal Accidents Act*, R.S.N.B. 2012, c. 104, *Fatal Injuries Act*, R.S.N.S. 1989, c. 163, *Fatal Accidents Act*, R.S.Y. 2002, c. 86, *Fatal Accidents Act*, R.S.N.W.T., 1988, c. F-3, and *Fatal Accidents Act*, R.S.N.W.T. 1988, c. F-3, all as amended.

~~102.~~108. Where the actions of the Crown and its agents and servants took place in Quebec, the Impugned Conduct constituted a fault pursuant to Article 1457 of the *Civil Code of Quebec*. The Crown knew or ought to have known that the Impugned Conduct, including its denials of service and adverse impacts, would cause tremendous harm to the Class members. The Members of the On-Reserve Class sustained bodily and moral injuries as a direct and immediate consequence of

This is Exhibit "C" to the Affidavit of Maurina Beadle sworn before me this 9th day of July, 2019.

A Commissioner, etc.

IAN H. MACLEAN
A Notary Public in and for the
Province of Nova Scotia, Canada
My Commission Does Not Expire

IAN H. MACLEAN
NOTARY PUBLIC
COMMISSION DOES NOT EXPIRE
NOVA SCOTIA

Court File No. T-402-19

FEDERAL COURT

PROPOSED CLASS PROCEEDING

B E T W E E N:

XAVIER MOUSHOOM and JEREMY MEAWASIGE (by his litigation guardian, Maurina Beadle)

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

LITIGATION PLAN

July 9, 2019

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I. DEFINITIONS

1. The definitions below will be used throughout this Litigation Plan. Any term defined in the Amended Statement of Claim that is also used in this Litigation Plan has the same meaning as that included in the Amended Statement of Claim or as otherwise defined by the Court.

Aggregate Damages Distribution Process means the system directed by the Court for the **Class Action Administrator** to distribute aggregate damages to **Approved Class Members**;

Approved Class Member(s) means **Approved On-Reserve Class Member(s)** and/or **Approved Jordan's Principle Class Member(s)** and/or **Approved Family Class Members**;

Approved Family Class Member(s) means a Family Class Member who has been approved by the **Class Action Administrator** as meeting the criteria for being a Family Class Member, including the brother, sister, mother, father, grandmother or grandfather of an Approved On-Reserve Class Member (regardless of whether the Approved On-Reserve Class Member is alive) and whose approval as a Family Class Member has not been successfully challenged;

Approved Jordan's Principle Class Member(s) means a Jordan's Principle Class Member who has been approved by the **Class Action Administrator** as meeting the criteria for being a Jordan's Principle Class Member and whose approval as a Jordan's Principle Class Member has not been successfully challenged;

Approved On-Reserve Class Member(s) means an On-Reserve Class Member who has been approved by the **Class Action Administrator** as meeting the criteria for being an On-Reserve Class Member and whose approval as an On-Reserve Class Member has not been successfully challenged;

Certification Notice means the information set out in Schedule A to this Litigation Plan, as may be subsequently amended and as approved by the Court;

CHRT Decision means the decision of the **CHRT** in the **CHRT Proceeding** dated January 26, 2016, bearing citation 2016 CHRT 2;

CHRT means the Canadian Human Rights Tribunal;

CHRT Proceeding means the proceeding before the **CHRT** under file number T1340/7008;

Claim Form means the form set out in Schedule C to this Litigation Plan used by the On-Reserve Class Members and/or the Jordan's Principle Class Members and/or the Family Class Members to submit a claim, as may be subsequently amended and as approved by the Court;

Class Action Administrator means any settlement administrator or other appropriate firm appointed by the Court to assist in the administration of the class proceeding;

Class Counsel means the consortium of law firms acting as co-counsel in this class proceeding, with the firms of Sotos LLP, Kugler Kandestin LLP and Miller Titerle + Company as Solicitors of Record;

Class Member(s) means an individual who falls within the definition of the On-Reserve Class and/or the Jordan's Principle Class and/or the Family Class, as pleaded in the Amended Statement of Claim and as approved by the Court;

Common Issues means the issues listed in the Notice of Motion for Certification, or as found by the Court, as may be subsequently amended and as approved by the Court;

Common Issues Notice means the information set out in the notice regarding the **Common Issues** to be certified by the Court at Certification, as may be subsequently amended and as approved by the Court;

Crown Class Member Information means information to be provided by the Crown, at the request of the plaintiffs and/or as ordered by the Court, to the **Class Action Administrator** and/or **Class Counsel** regarding the names and last known contact information of all individuals who meet the criteria of Class Members as set out in the Amended Statement of Claim or as otherwise defined by the Court, including: (a) a list of all known Class Members' names and last known addresses using the information in the Crown's possession or under its control[1] as well as all individuals who received a product or service pursuant to Jordan's Principle following the CHRT Decision (estimated by the Crown in its representations to the CHRT to be individuals having received over 165,000 services under Jordan's Principle as of October 2018).

Individual Damage Assessment Form means the form set out in Schedule D to this Litigation Plan, as may be subsequently amended and as approved by the Court, to be used by **Approved Class Member(s)** to elect an individual assessment of their damages and commence an individual damage assessment under the **Individual Damage Assessment Process**;

Individual Damage Assessment Process means the procedure and system to be approved by the Court following the **Common Issues** trial to be used to assess and distribute damages to **Approved Class Member(s)** who have requested an individual damage assessment by submitting an **Individual Damage Assessment Form**;

Notice Program means the process, set out in the Litigation Plan, for communicating the **Certification Notice** and/or the **Common Issues Notice** to **Class Members**, as may be subsequently amended and as approved by the Court;

---

[1] Where Class Members are known to be represented by counsel, only their name should be provided along with their counsel's name and address.

Opt Out Form means the form set out in Schedule B to this Litigation Plan used by Class Members to opt out of the class proceeding, as may be subsequently amended and as approved by the Court;

Opt Out Period means the deadline, proposed by the plaintiffs as 180 days post Certification or as determined by the Court, to opt out of the class proceeding;

Opt Out Procedures means the procedures, set out in the Litigation Plan, for Class Members to opt out of this class proceeding, as may be subsequently amended and as approved by the Court; and

Special Opt Out Procedures means the procedures, set out in the Litigation Plan, for Class Members who have already commenced a civil proceeding in Canada or who are known by the Crown to have already retained legal counsel to opt out of this class proceeding, as may be subsequently amended and as approved by the Court.

II. OVERVIEW

2. The plaintiffs have commenced this action on behalf of First Nations individuals who allege that the Crown has engaged in the discriminatory underfunding of child and family services and breached the equality obligations underlying Jordan's Principle. The class action advances the rights of tens of thousands of First Nations children, former children and family members.

3. This Litigation Plan is advanced as a workable method of advancing the proceeding on behalf of the Class and of notifying Class Members as to how the class proceeding is progressing, pursuant to rule 334.16(1)(e)(ii) of the *Federal Court Rules*. The Litigation Plan is modelled on the class action relating to the Indian Residential Schools.[2]

4. This Litigation Plan sets out a detailed plan for the common stages of this litigation, and sets out, on a without prejudice basis, an early plan for how the individual stage of the action may

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[2] See *Baxter v Canada (Attorney General)*, 2006 CanLII 41673 (Ont Sup Ct), and subsequent orders of the Court. See also information available on the website of the Indian Residential Schools Adjudication Secretariat, online <http://www.iap-pei.ca/home-eng.php>.

progress. Given the early stage of the litigation, the plan is necessarily subject to substantial revisions as the case progresses.

5. The plaintiffs are mindful that the CHRT currently has under reserve a decision in which statutory compensation is sought on behalf of a subset of the Class Members pursuant to section 53 of the CHRA. If the CHRT awards such statutory compensation to any Class Members through the CHRT Proceeding, the plaintiffs will seek a determination from the Court as to whether the Crown is entitled to a set-off or deduction of damages in this action for such amounts.

III. PRE-CERTIFICATION PROCESS

A. The Parties

i. The Plaintiffs

6. The plaintiffs have proposed three classes:

(a) the On-Reserve Class, represented by Xavier Moushoom;

(b) the Family Class, represented by Xavier Moushoom; and

(c) the Jordan's Principle Class, represented by Jeremy Meawasige (by his litigation guardian, Maurina Beadle).

ii. The Defendant

7. The defendant is the Crown.

B. The Pleadings

i. Statement of Claim

8. The plaintiffs have delivered an Amended Statement of Claim.

ii. Statement of Defence

9. The Crown has not delivered a Statement of Defence.

iii. Third Party Claim

10. The Crown has not issued any Third Party Claim.

C. Preliminary Motions

11. The plaintiffs propose that any preliminary motions be dealt with at the Motion for Certification or as directed by the Court.

D. Pre-Certification Communication Strategy

i. Responding to Inquiries from Putative Class Members

12. Both before and since the commencement of this class proceeding, Class Counsel have received many communications from Class Members affected by this class proceeding.

13. With respect to each inquiry, the individual's name, address, email and telephone number is added to a confidential database. Class Members are asked to register on the websites of Class Counsel. Once registered, they receive regular updates on the progress of the class proceeding in French and English. Any individual Class Members who contact Class Counsel are responded to in their preferred language.

ii. Pre-Certification Status Reports

14. In addition to responding to individual inquiries, Class Counsel have created a webpage concerning the class proceeding in English and French (see: https://sotosclassactions.com/cases/current-cases/first-nations-youth/). The most current information on the status of the class proceeding is posted and is updated regularly in English and French.

15. Copies of the publicly filed court documents and court decisions are accessible from the webpage. In addition, phone numbers for Class Counsel in Quebec and Ontario as well as email contact information are provided.

16. Class Counsel sends update reports to Class Members who have provided their contact information and have indicated an interest in being notified of further developments in the class proceeding.

iii. Pre-certification outreach

17. Class Counsel have presented the proposed class action to a council of First Nations social services delivery personnel for the Province of Québec and the region of Labrador, as well as the First Nations youth directors forum in British Columbia. Class Counsel are in the process of arranging similar presentations to affected communities in Québec and elsewhere in Canada.

E. Settlement Conference

i. Pre-Certification Settlement Conference

18. The plaintiffs will participate in a pre-Certification Settlement Conference to determine whether any or all of the issues arising in the class proceeding can be resolved.

19. The plaintiffs propose that a pre-Certification Settlement Conference be conducted at least one month after the Motion for Certification and responding materials, if any, have been filed with the Court.

F. Timetable

i. Plaintiffs' Proposed Timetable for the Pre-Certification Process

20. The plaintiffs propose that the pre-Certification process timetable set out below be imposed by Court Order at an early case conference.

	Deadline
Plaintiffs' Certification Motion Record	Date of Serving and Filing the Notice of Motion for

	Certification and Motion Record ("**DOF**")
Respondent's Motion Record, if any	Within 90 days from DOF
Plaintiffs' Reply Motion Record, if any	Within 120 days from DOF
Cross-examinations, if any, to be completed	Within 150 days from DOF
Undertakings answered	Within 180 days from DOF
Motions arising from cross-examinations, if any, heard	Within 210 days from DOF
Further cross-examinations, if necessary, completed by	Within 230 days from DOF
Plaintiffs' Memorandum of Fact and Law	Within 250 days from DOF
Respondent's Memorandum of Fact and Law	Within 280 days from DOF
Plaintiffs' Reply, if any	Within 300 days from DOF
Motion for Certification and all other Motions commencing	Within 310 days from DOF

IV. POST-CERTIFICATION PROCESS

A. Timetable

i. Plaintiffs' Timetable for the Post-Certification Process

21. The plaintiffs intend to proceed to trial on an expedited basis or a hybrid summary judgment/*viva voce* trial. It is anticipated that all of the documentary evidence produced by the Crown in the CHRT Proceeding will be relevant and producible in this class proceeding. Because of the extensive documentary production in the CHRT Proceeding, the plaintiffs expect few, if any, disputes as to documentary productions in this case. Furthermore, in light of the extensive

testimony given at the CHRT Proceeding, it is anticipated that oral discovery can proceed quickly after certification and can be completed in a limited period of time.

22. The plaintiffs propose that the following post-Certification process timetable, as explained in detail below, be imposed by the Court upon Certification:

Certification Notice to Class Members commences	Upon Certification
Exchange Affidavits of Documents within	30 days
Motions for Production of Documents, Multiple Examinations of Crown representatives or for Examinations of Non-Parties to be conducted within	60 days
Examinations for Discovery to be conducted within	90 days
Certification Notice to Class Members completed within	90 days
Trial Management Conference re: Expert Evidence	100 days
Motions arising from Examinations for Discovery within	120 days
Undertakings answered within	135 days
Further Examinations, if necessary, within	150 days
Common Issues Pre-Trial to be conducted	150 days
Opt Out Period deadline	180 days
Common Issues Trial or Hybrid Trial to be conducted within	240 days

B. Certification Notice, Notice Program and Opt Out Procedures

i. Certification Notice

23. The Certification Notice and all other notices to Class Members provided by the plaintiffs will, once finalized and approved by the Court, be translated into French. The plaintiffs will explore whether it will be necessary to translate the Certification Notice and/or other notices into some First Nations languages, subject to Court approval.

24. The Certification Notice will, subject to further amendments, be in the form set out in Schedule A hereto.

ii. Notice Program

25. The plaintiffs propose to communicate the Certification Notice to Class Members through the following Notice Program.

26. The plaintiffs will provide Certification Notice to Class Members by arranging to have the Certification Notice (and its translated versions whenever possible) communicated/published in the following media within 90 days of Certification, as frequently as may be reasonable or as directed by the Court under rule 334.32 of the *Federal Courts Rules*. In particular, the plaintiffs propose the following means of providing Certification Notice:

(a) A press release within 15 days of the Certification order being issued;

(b) Direct communication with Class Members:

(i) by email or regular mail to the last known contact information of Class Members provided by the Crown (*i.e.*, Crown Class Member Information);

(ii) by email or regular mail to all Class Members who have provided their contact information to Class Counsel, including through the Class Proceeding's webpage;

(iii) by regular mail to the last known addresses of all Status Card holders in Canada born on or after April 1, 1991;

(c) Distribution to the Assembly of First Nations for circulation to its membership of First Nations bands across Canada;

(d) Email to First Nations children's aid societies across Canada;

(e) Circulation through the following media:

(i) Aboriginal newspapers/publications such as First Nations Drum, The Windspeaker, Mi'kmaq Maliseet Nations News, APTN National News;

(ii) radio outlets, such as Aboriginal radio CFWE, CBC national and CBC regional;

(iii) television outlets, such as on The Aboriginal Peoples Television Network; and / or

(iv) social media outlets, such as Facebook and Instagram.

iii. Opt Out Procedures

27. The plaintiffs propose Opt Out Procedures for Class Members who do not wish to participate in the class proceeding.

28. The Certification Notice will include information about how to Opt Out of the class proceeding and will provide information about how to obtain and submit the appropriate Opt Out Forms to the Class Action Administrator and/or Class Counsel.

29. There will be one standard Opt Out Form for all Class Members.

30. Class Members will be required to file the Opt Out Form with the Class Action Administrator and/or Class Counsel within the Opt Out Period, proposed by the plaintiffs as 60 days post Certification or as directed by the Court.

31. The Class Action Administrator or Class Counsel shall, within 30 days after the expiration of the Opt Out Period, deliver to the Court and the Parties an affidavit listing the names of all persons who have opted out of the Class Action.

iv. Special Opt Out Procedures

32. The plaintiffs propose Special Opt Out Procedures for Class Members who are either named party plaintiffs in a civil proceeding in Canada or who are known by the Crown to have retained legal counsel in respect of the subject matter of this action with the express purpose of starting a separate action against the Crown.

33. Ongoing civil actions by Class Members who do not opt out of the Class Action should be dealt with in a manner to be determined by this Court or by the Court in which such proceedings are brought.

C. Identifying and Communicating with Class Members

i. Identifying Class Members

34. As stated above, the plaintiffs intend to request the Crown Class Member Information.

ii. Database of Class Members

35. Class Counsel will maintain a confidential database of all Class Members who contact Class Counsel. The database will include each individual's name, address, telephone number, and email address where available.

iii. Responding to Inquiries from Class Members

36. Class Counsel and their staff will respond to each inquiry by Class Members.

37. Class Counsel will have a system in place to allow for responses to inquiries by Class Members in their language of choice whenever possible.

iv. Post Certification Status Reports

38. In addition to responding to individual inquiries, Class Counsel will continually update the webpage dedicated to this class action with information concerning the status of the class proceeding.

39. Class Counsel will send update reports to Class Members who have provided their contact information. These update reports will be sent as necessary or as directed by the Court.

D. Documentary Production

i. Affidavit/List of Documents

40. The plaintiffs will be required to deliver an Affidavit of Documents within 30 days after Certification. The Crown will similarly be required to deliver a List of Documents within 30 days after Certification.

41. The Parties are expected to serve Supplementary Affidavits (or Lists) of Documents as additional relevant documents are located.

ii. Production of Documents

42. All Parties are expected to provide, at their own expense, electronic copies of all Schedule "A" productions at the time of delivering their Affidavit of Documents. All productions are to be made in electronic format.

43. Documentary productions are to include, but not be limited to, all documents produced and exhibits tendered in the CHRT Proceedings.

iii. Motions for Documentary Production

44. Any motions for documentary production shall be made within 60 days of Certification.

iv. Document Management

45. The Parties will each manage their productions with a compatible document management system, or as directed by the Court. All documents are to be produced in OCR format.

46. All productions should be numbered and scanned electronically to enable quick access and efficient organization of documents.

E. Examinations for Discovery

47. Examinations for Discovery will take place within 90 days after Certification.

48. The plaintiffs expect to request the Crown's consent to examine more than one Crown representative. In the event that a dispute arises in this regard, the plaintiffs propose to bring a motion within 60 days after Certification.

49. The plaintiffs anticipate that the Examination for Discovery of a properly selected and informed officer of the Crown will take approximately 10 days, subject to refusals and undertakings.

50. The plaintiffs anticipate that the Examination for Discovery of the representative plaintiffs will take approximately one day, subject to refusals and undertakings.

F. Interlocutory Matters

i. Motions for Refusals and Undertakings

51. Specific dates for motions for undertakings and refusals that arise from the Examinations for Discovery will be requested upon Certification. Motions for refusals and undertakings will be heard within 120 days of Certification.

ii. Undertakings

52. Undertakings are to be answered within 35 days of Certification.

iii. Re-attendances and Further Examinations for Discovery

53. Any re-attendances or further Examinations for Discovery required as a result of answers to undertakings or as a result of the outcome of the motions for refusals and undertakings should be completed within 150 days of Certification.

G. Expert Evidence

i. Identifying Experts and Issues

54. A Trial Management Conference will take place following Examinations for Discovery at which guidelines for identifying experts and their proposed evidence at trial will be determined.

H. Determination of the Common Issues

i. Pre-Trial of the Common Issues

55. Upon Certification, the Court will be asked to assign a date for a Pre-Trial relating to the Common Issues trial.

56. The plaintiffs expect that a full day will be required for a Pre-Trial and will request that the Pre-Trial be held 150 days after Certification and, in any event, at least 90 days before the date of the Common Issues trial.

ii. Trial of the Common Issues

57. Upon Certification, the Court will be asked to assign a date for the Common Issues trial.

58. The plaintiffs propose that the trial of the Common Issues be held 240 days after Certification.

59. The length of time required for the Common Issues trial will depend on many factors and will be determined at the Trial Management Conference.

V. POST COMMON ISSUES DECISION PROCESS

A. Timetable

i. Plaintiffs' Timetable for the Post-Common Issues Decision Process

60. The plaintiffs propose that the following timetable be imposed by the Court following the Court's judgment on the Common Issues:

Common Issues Notice provided	Within 90 days of Common Issues decision
Individual Issue Hearings, if any, begin	120 days after decision
Individual Damage Assessments, if any, begin	240 days after decision
Deadline to Submit Claim Forms (as of right)	Within 1 year of decision
Deadline to Submit Claim Forms (as of right in prescribed circumstances or with leave of the Court)	1 year after decision

B. Common Issues Notice

i. Notifying Class Members

61. The Common Issues Notice will, subject to further amendments, be substantially in the form approved by the Court at the Common Issues trial. The Common Issues Notice may contain, amongst others, information on any aggregate damages awarded and any issues requiring individual determination, as approved by the Court.

62. The plaintiffs propose to circulate the Common Issues Notice within 90 days after the Common Issues judgment.

63. The Common Issues Notice will be circulated in the same manner as set out above dealing with the Certification Notice or as directed by the Court.

C. Claim Forms

i. Use of Claim Forms

64. The Court will be asked to approve under rule 334.37 the use of standardized Claim Forms by Class Members who may be entitled to a portion of the aggregate damage award or who may be entitled to have an individual assessment.

ii. Obtaining and Filing Claim Forms

65. The procedure for obtaining and filing Claim Forms will be set out in the Common Issues Notice.

66. The plaintiffs propose to use a single standard Claim Form, substantially in the form attached as Schedule C, for all three classes, subject to further amendments and as approved by the Court.

67. The plaintiffs propose that counselling be made available to Class Members in need of support and assistance when completing the Claim Forms. Where necessary, a process for appointing a guardian or trustee to assist the Class Members will be developed.

68. Before completing a Claim Form, Class Members will be able to review information about them in the possession of Canada relevant to their claim (the Crown Class Member Information). That information may include:

(a) any records relating to the Class Member's voluntary or involuntary placement in out-of-home care during the Class Period;

(b) any records relating to a need by the Class Member for a service or product;

(c) any records relating to a request made by the Class Member for a service or product;

(d) any records relating to the denial of a service or product to the Class Member;

(e) any records relating to any service(s) or product(s) provided by the Crown to the Class Member; and/or

(f) any records relating to the family status or family relationship between a Family Class Member and an On-Reserve Class Member or a Jordan's Principle Class Member.

69. Class Members will be required to file the appropriate Claim Form with the Class Action Administrator and/or Class Counsel within the deadlines set out below or as directed by the Court.

70. The Class Action Administrator will be responsible for receiving all Claim Forms.

iii. Deadline for Filing Claim Forms

71. Class Members will be advised of the deadline for filing Claim Forms in the Common Issues Notice.

72. The plaintiffs propose that Class Members be given one year, or such period as set out by the Court, after the Common Issues judgment to file Claim Forms as of right.

73. The plaintiffs propose that Class Members be entitled to file Claim Forms more than one year after the Court's judgment on the Common Issues in certain circumstances prescribed by the Court (*i.e.*, lack of awareness of entitlement, etc.) or with leave of the Court (*i.e.*, based on mental or physical health issues, etc.).

D. Determining and Categorizing Class Membership

i. Approving On-Reserve Class Members

74. The Class Action Administrator will determine whether an individual submitting a Claim Form as an On-Reserve Class Member properly qualifies as a Class Member.

75. In addition, the Class Action Administrator will determine and categorize the duration of the On-Reserve Class Member's presence in out-of-home care. The Class Action Administrator

will also determine the number of out-of-home care locations that the On-Reserve Class Member was placed in, as well as whether such locations were on or off Reserve and whether such locations were within the community of the Class Member.

76. The Class Action Administrator will make these determinations by referring to the information set out in the Claim Form as well as the Crown Class Member Information.

77. The Class Action Administrator will, where appropriate and necessary, request in writing further information from the individual filing the On-Reserve Class Claim Form or the Crown to make these determinations.

ii. Approving Jordan's Principle Class Members

78. The Class Action Administrator will determine whether an individual submitting a Claim Form as a Jordan's Principle Class Member properly qualifies as a Class Member.

79. The Class Action Administrator will make these determinations following guidelines determined by the Court at the Common Issues trial in part by referring to the information set out in the Claim Form. Such guidelines may include: (a) whether the Class Member needed a service or product at any point during the Class Period; (b) whether the Class Member was denied that service or product; (c) whether the Class Member's receipt of a service or product was delayed or disrupted; (d) whether such denial, delay or disruption was based on lack of funding, lack of jurisdiction or a jurisdictional dispute between governments or government departments; and/or (e) whether such denial, disruption or delay happened while the Class Member was under the applicable provincial/territorial age of majority.

80. The Class Action Administrator will also make these determinations in part by referring to the Crown Class Member Information regarding the number of Class Members who have received a service or product under Jordan's Principle since the CHRT Decision.

81. The Class Action Administrator will, where appropriate and necessary, request in writing further information from the individual submitting the Jordan's Principle Class Claim Form or the Crown to make these determinations.

iii. Approving Family Class Members

82. The Class Action Administrator will determine whether an individual submitting a Family Class Claim Form properly qualifies as a Family Class Member.

83. These determinations will be made by the Class Action Administrator by referring to Crown Class Member Information and the information set out in the Claim Form with respect to the relationship of the proposed Family Class Member with an Approved On-Reserve Class Member.

84. The Class Action Administrator will, where appropriate and necessary, request in writing further information from the individual filing the Claim Form to make these determinations.

iv. Deceased Class Members

85. The estate of a deceased Class Member may submit a Claim Form if the deceased Class Member died on or after April 1, 1991.

86. If the deceased Class Member would otherwise have qualified as an Approved Class Member, the estate will be entitled to be compensated in accordance with the Aggregate Damages

Distribution Process. The estate will not have the option to proceed under the Individual Damage Assessment Process except with leave of the Court.

v. Notifying Class Members, Challenging and Recording Decisions

87. Within 30 days of receipt of a Claim Form, the Class Action Administrator will notify the individual of its decision on whether the individual is an Approved Class Member. Individuals who are not approved as Class Members will be provided with information on the procedures to follow to challenge the decision of the Class Action Administrator. The plaintiffs propose that these procedures include an opportunity to resubmit an amended Claim Form with supporting documentation capable of verifying that the individual is a Class Member.

88. All interested parties will be provided with the ability to appeal a decision by the Class Action Administrator to the Court or in a manner to be prescribed. Class Counsel may challenge the decision on behalf of affected individuals.

89. The Class Action Administrator will keep records of all Approved Class Members and their respective Claim Forms and will provide this information to Class Counsel, the Crown and other interested parties on a monthly basis. Class Counsel and/or other interested parties will have 30 days after receiving this information to challenge the Class Action Administrator's decision by advising the Class Action Administrator and the other affected parties in writing of the basis for their challenge. The responding party will be given 30 days thereafter to respond in writing to the challenge at which time the Class Action Administrator will reconsider its decision and advise all parties.

E. Aggregate Damages Distribution Process

i. Distribution of Aggregate Damages

90. The Class Action Administrator will distribute the aggregate damages to all Approved Class Members in the manner directed by the Court.

91. The plaintiffs will propose that Approved Class Members be entitled to a proportion of the aggregate damages as determined by the Class Action Administrator based on factors to be approved by the Court, including but not limited to: (a) the duration of the Class Member's presence in out-of-home care; (b) the number of out-of-home care locations where the Class Member was placed as a child; (c) the duration of deprivation from a service or product as a result of a delay, denial or disruption contrary to Jordan's Principle; and (d) the family relationship of the Family Class Member to a given On-Reserve Class Member.

92. The Class Action Administrator, upon advising Approved Class Members of its decision on their membership as set out above, will within a reasonable period of time to be determined by the Court, advise the Approved Class Members of the proportion of aggregate damages owing to each Approved Class Member under the Aggregate Damages Distribution Process to be approved by the Court.

93. In addition, if applicable, the Class Action Administrator will provide Approved Class Members with a package of materials including: information on how to collect their aggregate damage awards, information on Class Members' ability to proceed through the Individual Damage Assessment Process, copies of the Individual Damage Assessment Form along with a guide on how to complete the form, and contact information for obtaining independent legal advice and counselling. Such information is to be provided in a culturally responsive and appropriate style, making full use of interactive media, including video tutorials.

ii. Seeking an Individual Damage Assessment

94. Approved Class Members, when notified of their entitlement to aggregate damages, may be given information on their right to have their compensation individually assessed under the Individual Damage Assessment Process set out below.

F. Individual Damage Assessment Process

i. Individual Damage Assessment Forms

95. When Approved Class Members are notified of their aggregate damage entitlement and information on their right to proceed under the Individual Damage Assessment Process, they will be provided with an Individual Damage Assessment Form as set out in Schedule D.

96. If applicable, the plaintiffs propose that a request for individual damages be made by sending an Individual Damage Assessment Form to the Class Action Administrator, and that only those individuals who wish to proceed through the Individual Damage Assessment Process be required to submit Individual Damage Assessment Forms.

ii. Individual Damage Assessments

97. The Court may be asked to approve the use of an Individual Damage Assessment Process after a judgment on the Common Issues or otherwise as directed by the Court.

98. The Individual Damage Assessment Process would be available to all Approved Class Members except those who are found by the Court not to be entitled to individual damages following the Common Issues trial.

iii. Individual Issue Hearings

99. The Court will be asked to provide directions, or to appoint persons to conduct references under rule 334.26 of the *Federal Courts Rules* or appoint a judge to conduct test cases involving selected Approved Class Members who are proceeding under the Individual Damage Assessment

Process to assist with the matters that may or may not remain in issue after the determination of the Common Issues, such as:

(a) Hearing rules for individual assessments;

(b) A compensation matrix for individual damages;

(c) Assistance in resolving disputes relating to the definitions of key terms such as "cultural and language loss", "pain and suffering", "physical abuse", and "sexual abuse"; and

(d) Other matters raised by the Court or the parties during the Common Issues litigation.

G. Class Proceeding Funding and Fees

i. Plaintiffs' Legal Fees

100. The plaintiffs' fees are to be paid on a contingency basis, subject to the Court's approval under rule 334.4 of the *Federal Courts Rules*.

101. The agreement between the representative plaintiffs and Class Counsel states that legal fees and disbursements to be paid to Class Counsel shall be on the following basis:

(a) Aggregate damages recovery: 20% of the first two hundred million dollars ($200,000,000) in recovery by settlement or judgment, plus 10% of any amounts recovered by settlement or judgment beyond the first two hundred million dollars; and

(b) Individual damages recovery: 25% of settlement or judgment.

ii. Funding of Disbursements

102. Funding of legal disbursements for the representative plaintiffs has been, and will continue to be, available through Class Counsel, unless the plaintiffs and Class Counsel subsequently deem it to be in the best interests of the Class to obtain third-party funding. Class

Counsel will advise the Court of such third-party funding and seek approval thereof if required.

H. Settlement Issues

i. Settlement Offers and Negotiations

103. The plaintiffs will conduct settlement negotiations with the Crown from time to time with a view to achieving a fair and timely resolution.

ii. Mediation and Other Non Binding Dispute Resolution Mechanisms

104. The plaintiffs will participate in mediation or other non-binding dispute resolution mechanisms, if and when appropriate, in an effort to try to resolve the dispute or narrow the issues in dispute between the Parties.

I. Review of the Litigation Plan

i. Flexibility of the Litigation Plan

105. This Litigation Plan will be reconsidered on an ongoing basis and may be revised under the continued case management authority of the Court before or after the determination of the Common Issues or as the Court sees fit.

July 9, 2019

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Lawyers for the Plaintiffs

SCHEDULE "A"

FIRST NATIONS YOUTH CARE (THE MILLENNIUM SCOOP) CLASS ACTION

PROPOSED NOTICE OF CERTIFICATION

THIS NOTICE MAY AFFECT YOUR RIGHTS. PLEASE READ CAREFULLY.

The Nature of the Lawsuit

In March 2019, Sotos LLP, Kugler Kandestin LLP and Miller Titerle + Co. (collectively "Class Counsel") commenced an action on behalf of First Nations plaintiffs in the Federal Court of Canada in Montreal, against the Attorney General of Canada (the "Crown").

The lawsuit claims that starting in 1991 the Crown instituted discriminatory funding policies across Canada that led to First Nations children being removed from their homes and communities and placed in out-of-home care. The lawsuit also claims that the Crown delayed, disrupted or denied the delivery of needed public services and products to First Nations youth contrary to Jordan's Principle.

The action was brought on behalf of a Class of:

(a) all First Nations youths who were taken into out-of-home care since April 1, 1991, while they or at least one of their parents were ordinarily resident on a Reserve;

(b) all First Nations youths who were denied a public service or product, or whose receipt of a public service or product was delayed or disrupted, on the grounds of lack of funding or lack of jurisdiction, or as a result of a jurisdictional dispute with another government or governmental department (contrary to Jordan's Principle);

(c) family members of the Class Members cited in (a) above.

By order dated **[INSERT DATE]**, The Honourable Justice St-Louis certified the action as a class proceeding, appointing Xavier Moushoom and Jeremy Meawasige (by his litigation guardian, Maurina Beadle) as representative plaintiffs for the class.

The Court found that the following issues affecting the Class will be tried at a Common Issues trial:

- **[INSERT CERTIFIED COMMON ISSUE]**
- ...

Participation in the Class Action

If you fall within the class definition, you are automatically included as a member of the Class, unless you choose to opt out of the Class Action, as explained below. All members of the Class will be bound by the judgment of the Court, or any settlement reached by the parties and approved by the Court.

At this juncture, the Court has not taken a position as to the likelihood of recovery for the representative plaintiffs or the Class, or with respect to the merits of the claims or defences asserted by the Crown.

Fees and Disbursements

You do not need to pay any legal fees out of your own pocket. A retainer agreement has been entered into between the representative plaintiffs and Class Counsel with respect to legal fees. The agreement provides that the law firms have been retained on a contingency fee basis, which means they will only be paid their fees in the event of a successful result in the litigation or a Court-approved settlement.

You will not be responsible for Defendant's legal costs if the class action is unsuccessful.

Any fee paid to lawyers for the Class is subject to the Court's approval.

Opt Out

If you are a class member and wish to exclude yourself from this class proceeding ("opt out"), you must complete and return the "Class Member Opt Out" form by no later than [**INSERT DATE**]. The Opt Out form may be downloaded at: [**INSERT WEBSITE ADDRESS**].

Class members who choose to opt out within the above noted deadline will not recover any monies if the representative plaintiffs are successful in this action. If class members do not choose to opt out by the deadline, they will be bound by any judgment ultimately obtained in this class action, whether favourable or not, or any settlement if approved by the Court.

Contact Information

If you have any questions or concerns about the matters in this Notice or the status of the class action, you may contact Class Counsel in a number of ways.

By phone: [**INSERT PHONE NUMBER**]

By email: [**INSERT EMAIL**]

Toll-Free Hotline: [**INSERT TELEPHONE**]

By mail: [**INSERT ADDRESS**]

SCHEDULE "B"

OPT OUT FORM

TO:
[CLASS ACTION ADMINISTRATOR TO BE APPOINTED]
[Address]
[Email]
[Fax]
[Phone number]

ATTN: [CLASS ACTION ADMINISTRATOR TO BE APPOINTED]

I do not want to participate in the class action styled as ***Xavier Moushoom et al v. The Attorney General of Canada*** regarding the claims of discrimination against First Nations children. I understand that by opting out, I will not be eligible for the payment of any amounts awarded or paid in the class action, and if I want an opportunity to be compensated, I will have to make an individual claim and decide whether to engage a lawyer at my own expense.

Dated: _____ _____
Signature

_____
Full Name

_____
Address

_____
City, Province, Postal Code

_____
Telephone

_____
Email

This Notice must be delivered by regular mail, email or fax on or before_____, 201_ to be effective.

SCHEDULE "C"

CLAIM FORM

TO:
[CLASS ACTION ADMINISTRATOR TO BE APPOINTED]
[Address]
[Email]
[Fax]
[Phone number]

ATTN: [CLASS ACTION ADMINISTRATOR TO BE APPOINTED]

I, _____ (insert full name(s), including maiden name if applicable), have received Notice of the National Class Action styled as ***Xavier Moushoom et al v. The Attorney General of Canada*** regarding the claims of discrimination against First Nations children. My date of birth is _____ (insert day, month, year of birth).

I believe that I am a Class Member and I wish to submit a claim as a member of the following Class or Classes (mark the applicable item(s) with an X):

[_] On-Reserve Class

[_] Jordan's Principle Class

[_] Family Class

If you selected the On-Reserve Class, please summarize below your placement(s) in out-of-home care since April 1, 1991:

Number of foster home(s)	**Number of years of placement in foster home(s)**	**Was foster home(s) on-reserve or off-reserve?**	**Was foster home(s) within your own First Nations community?**

If you selected the Jordan's Principle Class, please summarize below the public services or products that you needed since April 1, 1991, and that were denied, delayed or disrupted:

Product(s) or service(s) needed	**Was a request made for the service(s) or product(s)?**	**Was the service(s) or product(s) denied, delayed or disrupted?**	**The date(s) of need, request, and/or denial, delay or**

			disruption

If you selected the Family Class, please summarize below your relationship to the member(s) of the On-Reserve Class:

Full name(s) and claim number of the Approved On-Reserve Class Member in your family	**Your relationship to the Class Member (only the brother, sister, mother, father, grandmother or grandfather of an Approved On-Reserve Class Member)**

My mailing address is:

_____

Street name, Apartment #

_____

City, Province

_____

Postal Code

_____

Telephone Number(s)

_____

Email address

Signed: _____ Date: _____

SCHEDULE "D"

INDIVIDUAL DAMAGE ASSESSMENT FORM

TO:
[CLASS ACTION ADMINISTRATOR TO BE APPOINTED]
[Address]
[Email]
[Fax]
[Phone number]

ATTN: [CLASS ACTION ADMINISTRATOR TO BE APPOINTED]

I, _____ [insert full name(s), including maiden name if applicable], have been notified that I am an Approved On-Reserve Class Member or Approved Jordan's Principle Class Member. My claim number is _____ [insert assigned claim number].

I have been provided with a package of information outlining and explaining my option to request an individual damage assessment in accordance with the Individual Damage Assessment Process.

I am also aware that I can obtain independent legal advice with respect to this request and can obtain assistance to complete this form at no charge to me by contacting [insert assigned contact #].

Below is information relating to my experience in out-of-home care and the impacts and harms that resulted from my experience:

[The Individual Damage Assessment Form will be designed after a Court decision on the Common Issues. The goal of the Individual Damage Assessment Form though will be to obtain, amongst others, the following information from Approved Class Members:

- *Information relating to the Class Member's age at apprehension, the foster households where the Class Member was placed, duration of out-of-home care;*
- *Information relating to any abuse on the Class Member, including each incident of a compensable harm/wrong, such as the dates, places, times of the incidents and information about the alleged perpetrator for each incident;*
- *Information relating to compensable impacts, including cultural and language impacts;*
- *A narrative relating to the experience of the individual while in care;*
- *The reason(s) for apprehension;*
- *Whether expert evidence will be provided to support a claim for certain consequential harms such as past and future income loss;*

- *Information on the treatment records including records of customary or traditional counsellors or healers they will be submitting to assist in proving either the abuse or the harm suffered or both;*
- *Authorizations for the Crown to obtain documents; and*
- *Such further and other information that is deemed necessary and appropriate.]*

Below is information relating to my experience with the denial/delay/disruption of the receipt of a public service or product and the impacts and harms that resulted from my experience:

[The Individual Damage Assessment Form will be designed after a Court decision on the Common Issues. The goal of the Individual Damage Assessment Form though will be to obtain, amongst others, the following information from Approved Class Members:

- *Any conditions or circumstances that required a public service or product;*
- *Reasons for denial of a public service or product;*
- *Department(s) of contact;*
- *Authorizations for the Crown to obtain documents; and*
- *Such further and other information that is deemed necessary and appropriate.]*

Signed: _____ Date: _____

This is Exhibit "D" to the Affidavit of Maurina Beadle sworn before me this 9th day of July, 2019.

A Commissioner, etc.

IAN H. MACLEAN
A Notary Public in and for the
Province of Nova Scotia, Canada
My Commission Does Not Expire

IAN H. MACLEAN
NOTARY PUBLIC
COMMISSION DOES NOT EXPIRE
NOVA SCOTIA

Government of Canada / Gouvernement du Canada

Jordan's Principle

Services

- Access Jordan's Principle
- Find a contact person in your region
- Submit a request under Jordan's Principle
- Seek a reimbursement
- Appeal a decision
- Download posters to print

The current eligibility criteria under Jordan's Principle include:

- registered First Nations children living on or off reserve
- First Nations children entitled to be registered under the *Indian Act*, including those who became entitled to register under the December 22, 2017 amended provisions of the *Indian Act* under Bill S-3
- non-status Indigenous children who are ordinarily resident on reserve

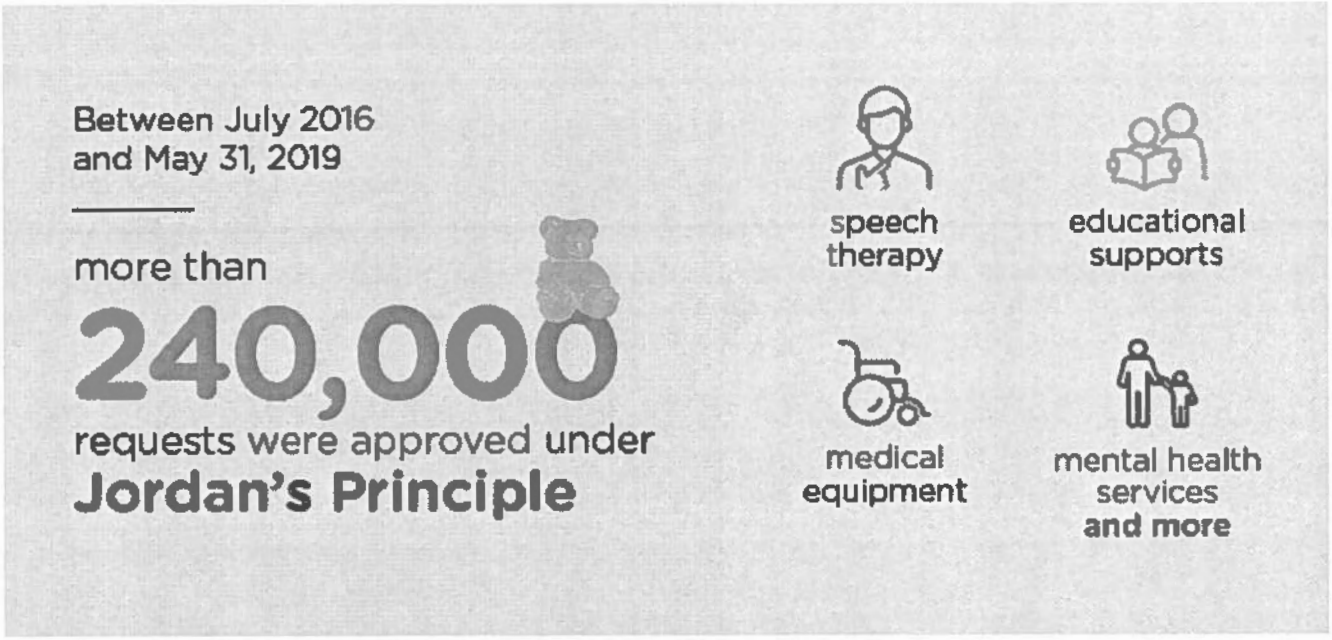
Following the Canadian Human Rights Tribunal Interim Motion Ruling in February 2019, First Nations children without *Indian Act* status, or not eligible for *Indian Act* status, who are living off reserve but are recognized as members by their Nation, and who have urgent or life-

> threatening needs, will be provided with the services required to meet those urgent needs or life threatening needs, pursuant to Jordan's Principle.
>
> For more information, contact us.

Jordan's Principle makes sure all First Nations children can access the products, services and supports they need, when they need them. It can help with a wide range of health, social and educational needs.

Jordan's Principle is named in memory of Jordan River Anderson. He was a young boy from Norway House Cree Nation in Manitoba.

Helping First Nations children



▼ Description: Helping First Nations children

Between July 2016 and May 31, 2019, **more than 240,000 requests were approved** under Jordan's Principle. These included:

- speech therapy

- educational supports
- medical equipment
- mental health services
- and more

A legal rule

In 2016, the Canadian Human Rights Tribunal (CHRT) determined that our approach to services for First Nations children was discriminatory. One way we are addressing this is through a renewed approach to Jordan's Principle.

Since the ruling, the CHRT has issued a number of follow-up orders about Jordan's Principle. In May 2017, the CHRT ordered "substantive equality" under Jordan's Principle for First Nations children. This means giving extra help when it is needed so First Nations children have an equal chance to thrive.

What we are doing

We are supporting children who need help right away and making long-term changes for the future.

For the long-term, we are working to build better structures and funding models. These will make sure First Nations children get the products, services and supports they need, when they need them. To do this, we are working closely with:

- provinces
- territories

- Indigenous partners
- service organizations

Since 2016, the Government has made available $679.9 million to Jordan's Principle to help with health, social and education services that are needed right away.

Local service coordinators have been hired in communities across Canada. They can help families who:

- have questions about Jordan's Principle
- would like to submit a request for products, services or supports under Jordan's Principle

We fund these coordinators, who are staffed by:

- local tribal councils
- First Nations communities
- regional health authorities
- Indigenous non-governmental organizations, etc.

We also have staff across the country dedicated full-time to Jordan's Principle. They work closely with the local coordinators to make sure all requests are processed as quickly as possible.

Related links

- The boy behind Jordan's Principle
- CHRT definition of Jordan's Principle
- Video: Jordan's Principle: Making sure First Nations children can get the services they need
- Video: Jordan's Principle Youth Public Service Announcements (developed and made available by the First Nations Child & Family

Caring Society of Canada)

- Jordan's Principle Handbook (developed and made available by the Assembly of First Nations)

Date modified:
2019-06-25

Court File No. T-402-19

FEDERAL COURT
PROPOSED CLASS ACTION PROCEEDING

B E T W E E N

XAVIER MOUSHOOM and JEREMY MEAWASIGE (by his litigation guardian, Maurina Beadle)

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

AFFIDAVIT OF MAURINA BEADLE (Certification - Sworn July 9, 2019)

SOTOS LLP
David Sterns/Mohsen Seddigh/Jonathan Schachter
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KUGLER KANDESTIN LLP
Me Robert Kugler/Me Pierre Boivin/Me William Colish
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MILLER TITERLE + CO.
Joelle Walker/ Tamara Napoleon/ Erin Reimer
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joelle@millertiterle.com/tamara@millertiterle.com/
erin@millertiterle.com

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige), JONAVON JOSEPH MEAWASIGE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo, CAROLYN BUFFALO, and DICK EUGENE JACKSON also known as RICHARD JACKSON

Plaintiffs

and

HER MAJESTY THE QUEEN
AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

AFFIDAVIT OF ZACHEUS JOSEPH TROUT

(Fee Approval - Sworn October 5, 2023)

I, Zacheus Joseph Trout, of the Cross Lake First Nation in northern Manitoba, SWEAR THAT:

1. I am a representative plaintiff in this action. As such, I have personal knowledge of the matters that I depose to in this affidavit. Where the source of information is other than my personal knowledge, I say so and I believe that information to be true.

2. I swear this affidavit in support of my lawyers' request for legal fees.

3. I described my family's and my late children's story and saga in my affidavit in support of certification two years ago. I do not wish to repeat that again here.

4. I retained the law firms of Sotos LLP, Kugler Kandestin LLP and Miller Titerle + Co. as counsel in this proposed class action. They have been working together with Nahwegahbow Corbiere and Fasken LLP who act for the Assembly of First Nations and other representative plaintiffs. I have always supported this collaboration.

5. Before starting what has now become known as the Trout class action (named after my late children, Sanaye and Jacob Trout), I signed an agreement with class counsel about legal fees and disbursements. I described the retainer agreement in my certification affidavit submitted to the Court.

6. I agreed that class counsel would only be paid if they were successful at obtaining a judgment or settlement with the defendant. From the total amount of benefits collectively recovered for the class, under my retainer agreement, class counsel's fee would be 20% of the first two hundred million dollars, plus 10% of any amounts collectively recovered for the class beyond the first two hundred million dollars. Class counsel's fees for the benefits obtained for individual class members through an individual inquiry process would be 25%. Any and all of the above fees would depend on the approval of the Court. Under the agreement, disbursements would be paid only from the recovery in the class action.

7. I am not an expert in these fee agreements but I believed the retainer agreement was reasonable and the only practical option available to me to advance my claims. That is why I signed the retainer.

8. Because Canada always fought my case, I was never allowed to attend the many months of mediation that took place with the other plaintiffs. I was always talking to my lawyer and telling him I felt shut out of that process and could not even get the opportunity to speak my mind in that process.

9. I welcomed Canada's last minute change of heart, and I fully supported and support the final settlement agreement that was achieved last year and its revised form now. I swore an affidavit in support of the settlement last year.

10. I was pleased that my lawyers negotiated that their fees would not be paid out of the settlement funds for survivors. I do think that it is a good thing that they decided not to seek their pay under our retainer agreements but instead to seek their fees directly from Canada. They didn't have to do that, but now that they did, I support them. This means all the settlement funds go to the kids and their parents.

11. I have been advised that my counsel agreed early on with the Assembly of First Nations to cap their fees at $80 million. They are now respecting that agreement and only asking for their fees at $80 million. I fully support that.

12. What I do not understand or support is Canada trying to take advantage of my counsel's decision not to negotiate their fees as part of the settlement agreement or their offer not to receive their fees from the settlement amounts, to pay them less.

13. I know that legal fees are normally high in these types of settlements. I don't think my counsel's request of $80 million is unreasonable, especially when compared to the largest settlement that they achieved. For example, I am advised by my lawyer Mohsen Seddigh and believe that the legal fees in the residential schools settlement in 2006 was $100 million.

14. Considering that we achieved a settlement four times bigger than residential schools, I would have supported my lawyers even if there asked for four times the fees in residentials schools. I respect their decision to limit their fees to $80 million. Canada shouldn't be taking advantage of that.

15. I especially think my case, the Trout case named after my kids, which has settled for about $3 billion is important.

16. I became involved as a representative plaintiff because Canada said for years that I and people like me had no claim. There was no Jordan's Principle when my kids suffered. I spoke out about this a lot. This 2020 news article from Winnipeg Free Press about my family and kids is one example: "Seeking compassion, seeking change" https://www.winnipegfreepress.com/breakingnews/2020/05/04/seeking-compensation-seeking-compassion.

17. But my complaints and advocacy went nowhere until we brought this class action.

18. My case is itself one of the largest cases ever and I am very proud of it. I think the settlement for my case alone justifies the fees.

19. One last thing I will say is that I have had a professional and satisfactory relationship with my lawyers all this time. I want them to get their fair fees. They ask for $80 million and I think that is fair. I want good lawyers like them to be able to continue bringing these cases up against wrongdoers like Canada that caused me and my kids unimaginable suffering.

SWORN BEFORE ME BY Zacheus Joseph Trout of the Cross Lake First Nation in Manitoba, on October 5, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits
(or as the case may be)

Georgia Elizabeth Scott-McLaren, a Commissioner, etc.
Province of Ontario, for
Sotos LLP, Barristers and Solicitors
Expires February 20, 2024

ZACHEUS JOSEPH TROUT

Court File Nos. T-402-19 / T-141-20 / T-1120-21

FEDERAL COURT CLASS PROCEEDING B E T W E E N: **XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige), JONAVON JOSEPH MEAWASIGE** Plaintiffs and **THE ATTORNEY GENERAL OF CANADA** Defendant
FEDERAL COURT CLASS PROCEEDING B E T W E E N: **ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo, CAROLYN BUFFALO, and DICK EUGENE JACKSON also known as RICHARD JACKSON** Plaintiffs and **HER MAJESTY THE QUEEN AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA** Defendant
FEDERAL COURT CLASS PROCEEDING B E T W E E N: **ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT** Plaintiffs and **THE ATTORNEY GENERAL OF CANADA** Defendant

AFFIDAVIT OF CAROLYN BUFFALO

(Affirmed October 11, 2023)

I, Carolyn Buffalo, of the community of Maskwacis, in the Province of Alberta, AFFIRM AS FOLLOWS:

1. I make this affidavit in support of an application to obtain approval of the settlement agreement. I am one of the Representative Plaintiffs in the within action and as such have knowledge of the matters hereinafter deposed to. Where I make statements in this affidavit which are not within my personal knowledge, I have identified the source of that information and belief. All of the information I have deposed to I verily believe to be true

2. I provide this affidavit in support of my counsel's requested legal fees of $80 million.

3. I have described the background of myself and my family, including one of my three children, Noah Buffalo-Jackson, in my affidavits in this case before.

4. My given legal name is Carolyn Marie Buffalo. My Cree name is Askih-guyaht, which means "One who has earth/land." I am a descendant of Chief Bobtail, who signed the adhesion to Treaty No. 6 of 1876 at Blackfoot Crossing (where Treaty No. 7 was signed). This adhesion added the Maskwacis Cree nations to Treaty No. 6 of 1876.

5. The Buffalo-Jackson family is from the Montana Cree Nation ("Montana"), one of the four nations of the Maskwacis Cree, located in Treaty Six Territory, in what is now called Alberta.

6. I and my family have been fighting for years for justice for First Nations children with high needs like my son, Noah. Noah was born on December 2, 2001, and was eventually diagnosed with Spastic Quadriparetic Cerebral Palsy Level 5 on the Gross Motor Function Classification System. Throughout his life, Noah has, and continues to be, dependent upon me and my husband.

7. I have outlined my family's struggle to obtain from Canada the supports and services that Noah requires for his day-to-day life, and the impacts it has had upon my own life. In short, the impacts have been immense and life-altering.

8. On or about February 12, 2020, I retained Nahwegahbow Corbiere ("NC") to represent me and my son Noah Buffalo-Jackson in this class action. I understand that NC has been working collaboratively with other law firms to resolve the difficult and complex issues in this class action.

9. Throughout the case, I have observed the lawyers working diligently, without relenting, to obtain a successful resolution for people like me, and Noah. I appreciate that my lawyers negotiated so that no legal fee is paid from the money for the class members, which will ensure that all compensation money will be paid towards the survivors of Canada's discrimination.

10. In my view, the lawyers have been working tirelessly to achieve the best possible result for the class. I understand that they have now achieved the larges settlement in Canada's history. At various points, there were significant setbacks in the negotiations, including with respect to compensation for the Jordan's Principle Class and the Jordan's Principle Family Class. It was far from certain that Canada would agree to negotiate settlement of these aspects of the litigation and I know that the lawyers were taking a risk in pursuing these claims.

11. I am grateful that the lawyers have obtained Canada's recommendation to the Prime Minister that the Prime Minister apologize to all victims and survivors of Canada's discrimination. While the monetary compensation is important, and the quantum is impressive, it is of paramount importance to me that Canada apologize for its discrimination against First Nations children.

12. I was advised by my lawyer, Dianne Corbiere, that class counsel agreed with the Assembly of First Nations to only ask for $80 million if we settled before trial, no matter how and when that happened. I also understand that they would get nothing if we were unsuccessful. The years of negotiation and hard work have paid off, and I have no hesitation in supporting their fees.

13. My lawyers have been there for my family and my son ever since we started this case. I know that Noah, and my family, will be very happy with the result we achieved.

I ask the Court to approve counsel's fee request of $80 million.

14. I make this affidavit in support of the relief sought in the Notice of Motion and for no other or improper purpose.

AFFIRMED BEFORE ME in the City of Calgary, in the Province of Alberta, this 11th day of October, 2023

Commissioner for taking affidavits

Adam H White
A Commissioner for Oaths
in and for Alberta
My Commission Expires Dec. 8, 2025

CAROLYN BUFFALO

Court File No.: T-402-19 / T-141-20 / T-1120-21

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige), JONAVON JOSEPH MEAWASIGE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo, CAROLYN BUFFALO, and DICK EUGENE JACKSON also known as RICHARD JACKSON

Plaintiffs

and

HER MAJESTY THE QUEEN
AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

AFFIDAVIT OF ASHLEY DAWN LOUISE BACH
(affirmed October 6, 2023)

I, Ashley Dawn Louise Bach, of the City of Thunder Bay, in the Province of Ontario, AFFIRM:

1. I make this affidavit in support of an application to obtain approval of the settlement agreement. I am one of the Representative Plaintiffs in the within action and as such have knowledge of the matters hereinafter deposed to. Where I make statements in this affidavit which are not within my personal knowledge, I have identified the source of that information and belief. All of the information I have deposed to I verily believe to be true

2. I provide this affidavit in support of my counsel's requested legal fees of $80 million.

3. I have described my background and experience with the First Nations Child and Family Services ("**FNCFS**") system in my affidavits in this case before.

4. My mother was a member of the Mishkeegogamang First Nation in northern Ontario. I was born in 1994 and was removed at birth from my mother. I was not placed on a reserve, but instead was placed in a non-native foster care home in Langley, British Columbia. At the age of five, I was adopted by the non-native foster family, and had no access to First Nation culture.

5. On or about January 24, 2020, I retained Nahwegahbow Corbiere ("NC") to represent me in this class action. I understand that NC has been working with other law firms who have been working collaboratively to resolve the difficult issues in the class action.

6. It is important to me that the lawyers in this case negotiated so that no legal fee is paid from the money for the class members, including from my own compensation money.

7. In my view, the lawyers have been trying to achieve the best result for the class, and have put in significant effort to accomplish this goal. I understand that they have now achieved the largest settlement in Canada's history. At various points,

there were significant setbacks in the negotiations, and it was far from certain that the negotiations would ultimately lead to resolution. I also understand that the lawyers would not get paid at all if they were unsuccessful in their efforts to resolve the case.

8. I have talked to my lawyers on multiple occasions, throughout this case about the settlement process and agreement. I knew that it was important to resolve this matter so that the class members could begin their process of healing.

9. I have been advised by my lawyer, Dianne Corbiere, that class counsel agreed with the Assembly of First Nations to only ask for $80 million if the class action was settled prior to trial. I have no hesitation in supporting their fees. I appreciate that it was their decision to limit their requested fees to this amount, and that it will be divided among multiple law firms, including the law firms representing Xavier Moushoom and others.

10. I believe that the lawyers have earned their fee, and I ask the Court to approve counsel's fee request of $80 million.

11. I make this affidavit in support of the relief sought in the Notice of Motion and for no other or improper purpose.

AFFIRMED remotely Ashley Dawn Louise Bach in the City of Thunder Bay, in the Province of Ontario, before me in the City of Orillia, in the County of Simcoe, in the Province of Ontario on this 6th day of October, 2023, in accordance with O.Reg. 431/20,

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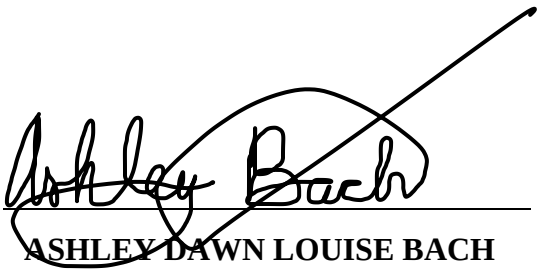
LAURA CHRISTINE SHARP
LSO # 80265D
Commissioner for taking affidavits



ASHLEY DAWN LOUISE BACH

Court File No.: T-402-19 / T-141-20 / T-1120-21

FEDERAL COURT
CLASS PROCEEDING

BETWEEN:

XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige), JONAVON JOSEPH MEAWASIGE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
CLASS PROCEEDING

BETWEEN:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo, CAROLYN BUFFALO, and DICK EUGENE JACKSON also known as RICHARD JACKSON

Plaintiffs

and

HER MAJESTY THE QUEEN
AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
CLASS PROCEEDING

BETWEEN:

ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

AFFIDAVIT OF MELISSA WALTERSON
(affirmed October 6, 2023)

I, Melissa Walterson, of the City of Winnipeg, in the Province of Manitoba, AFFIRM:

1. I make this affidavit in support of an application to obtain approval of the settlement agreement. I am one of the Representative Plaintiffs in the within action and as such have knowledge of the matters hereinafter deposed to. Where I make statements in this affidavit which are not within my personal knowledge, I have identified the source of that information and belief. All of the information I have deposed to I verily believe to be true

2. I provide this affidavit in support of my counsel's requested legal fees of $80 million.

3. I have described my background in my affidavits in this case before.

4. I was born in Winnipeg Manitoba, and I am registered on Nisichawayasihk Cree Nation in Manitoba. I currently reside in Manitoba. I am a sister of the representative plaintiff Karen Osachoff. She is a representative plaintiff for the Removed Child Class and I am a representative plaintiff for the Removed Child Family Class. I reconnected with Ms. Osachoff in December 2019, but before this time I did not know about any sisters that I may have been related to, because I was adopted at birth, and grew up in Lake Francis, Manitoba.

5. On or about January 24, 2020, I retained Nahwegahbow Corbiere ("NC") to represent me in this class action. I understand that NC has been working collaboratively with other law firms to resolve the difficult and complex issues in this class action.

6. Throughout this case, I have observed the lawyers working unrelentingly. I know that they had the best interests of the members of the class at the heart of their motivation, and they worked diligently to obtain the best result possible for the class. Their tireless work and dedication has been excellent.

7. I was advised by my lawyer, Dianne Corbiere, that class counsel agreed with the Assembly of First Nations to only ask for $80 million if we settled before trial and no matter when that happened and how. I understand that this will be shared among the various law firms who have worked tirelessly on the file. I also understand that they were taking a risk, because it was far from certain whether the case could be settled, or won at trial.

8. At various points, we were uncertain whether settlement could be achieved, as the negotiations were not easy. I am grateful that the lawyers persisted in the face of such adversity, and that they have achieved a significant result for First Nations children and their families who were the subject of Canada's discrimination.

9. I appreciate that my lawyers negotiated so that no legal fee is paid from the money for the class members, so that all of the compensation money can go towards helping young people and their families who have suffered due to Canada's discrimination.

10. The years of negotiation and hard work has been worth it in the end, and we have achieved the largest settlement in Canada's history. I have no hesitation in supporting their fees.

AFFIRMED BEFORE ME at the City of Winnipeg, in the Province of Manitoba, this 6th day of October, 2023

Commissioner for taking affidavits

MWalterson

MELISSA WALTERSON

A Notary Public in and for
the Province of Manitoba
86 Shier Dr. WPG, MB, R3R 2H8
Eric B. Martens
204 - 791 - 2633

Court File Nos. T-402-19 / T-141-20 / T-1120-21

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige), JONAVON JOSEPH MEAWASIGE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo, CAROLYN BUFFALO, and DICK EUGENE JACKSON also known as RICHARD JACKSON

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

AFFIDAVIT OF DIANNE CORBIERE
(Affirmed October 6, 2023)

I, **Dianne Corbiere**, of Minesing, in the Township of Springwater, in the Province of Ontario, AFFIRM THAT:

I. Introduction

1. I am a partner at Nahwegahbow, Corbiere, co-counsel with Fasken Martineau Dumoulin LLP ("**Fasken**") (together, "**AFN Counsel**"), which are the lawyers representing the representative plaintiffs:

   (a) Ashley Dawn Louise Bach, Karen Osachoff, Melissa Walterson, Noah Buffalo Jackson (by his litigation guardian, Carolyn Buffalo), and Carolyn Buffalo and Richard Jackson (collectively, the "**AFN Plaintiffs**") and the Assembly of First Nations in the Federal Court class action, Court File No. T-141-20, filed January 28, 2020 (the "**AFN Action**"); and

2. Nahwegahbow Corbiere and Fasken are working together with Moushoom and Trout Counsel Sotos LLP, Kugler Kandestin and Miller Titerle + Co. (collectively, "**Moushoom/Trout Counsel**"), who represent:

   (a) Xavier Moushoom, Jeremy Meawasige (by his litigation guardian, Jonavon Joseph Meawasige), and Jonavon Joseph Meawasige (collectively, the "**Moushoom Plaintiffs**") in the Federal Court class action, Court File No. T-402-19, filed March 4, 2019 (the "**Moushoom Action**"); and

(b) Zacheus Joseph Trout in the Federal Court class action, Court File No. T-1120-21, filed July 16, 2021 (the "**Trout Action**"),

in the Federal Court class action, Court File No. T-402-19, filed March 4, 2019 (the "**Moushoom Action**") and Court File No. T-1120-21, filed July 16, 2021 (the "**Trout Action**").

3. In this affidavit:

(a) "**Class Actions**" means the Moushoom Action, the Trout Action, and the AFN Action;

(b) "**Class Counsel**" means Moushoom and Trout Counsel and AFN Counsel; and

(c) "**Representative Plaintiffs**" means the Moushoom Plaintiffs, Mr. Trout, and the AFN Plaintiffs.

4. I have reviewed the affidavit submitted for this motion by my co-counsel David Sterns, dated October 6, 2023. I provide the following statements in addition to the statements of Mr. Sterns and seek to avoid duplication of the statements therein.

5. I have been a First Nations rights lawyer since 1998, and my firm only represent First Nations, First Nations organizations and their members. This is a highly specialized area of legal practice that requires a breadth of knowledge of all areas of law, including class actions.

6. As such, I have personal knowledge of the facts and matters hereinafter deposed to, save and except where the same are stated to be based on information and belief and, where so stated, I verily believe the same to be true.

7. I affirm this affidavit in support of a motion for an order that the defendant pay Class Counsel's legal fees. This motion is brought following the hearing of the motion seeking approval of the Final Settlement Agreement ("**FSA**") among the parties for settlement of the Class Actions. Class Counsel's fee request is contingent on the approval of the FSA.

8. Nothing in this affidavit is intended to waive, nor should it be understood or interpreted to be a waiver of solicitor-client privilege.

II. The Contingency Fee Retainer Agreements

9. In 2020, AFN Counsel entered into contingency fee retainer agreements with co-counsel as well as the AFN Plaintiffs for the AFN Action.

   (a) The contingency fee retainer agreement between Strosberg Sasso Sutts LLP and Nahwegahbow, Corbiere was executed on February 3, 2020.

   (b) The contingency fee retainer agreement between the Assembly of First Nations and Fasken was executed on June 10, 2021.

   (c) Contingency fee retainer agreements were executed between AFN Counsel and Ashley Dawn Louise Bach (January 24, 2020), Karen Osachoff (February 3, 2020) and Melissa Walterson (January 24, 2020).

(d) A contingency fee retainer agreement between AFN counsel and Noah Buffalo Jackson (by his litigation guardian, Carolyn Buffalo), and Carolyn Buffalo and Richard Jackson were executed February 12, 2020.

10. All of the above contingency fee retainer agreements contained the following standard percentages fees:

(a) **TEN PERCENT (10%)** of any Recovery achieved prior to the commencement of the trial, subject to a cap of $80 million; and thereafter,

(b) **FIFTEEN PERCENT (15%)** when the common issues trial begins, subject to a cap of $100 million.

III. The Consortium Agreement

11. The Moushoom Action was filed first, on March 4, 2019. Moushoom and Trout Counsel acted for the plaintiffs.

12. The AFN Action was filed next, on January 28, 2020. AFN Counsel acted for the plaintiffs.

13. The AFN Action was filed upon the instruction of the AFN because First Nations in Canada were aware that the manner in which previous class actions involving First Nations peoples were administered had caused re-traumatization to our people. The AFN wanted this to be the first truly First Nations-led class action.

14. Class Counsel sought to avoid a carriage battle, and to instead collaborate in the best interests of the class. Discussions over the course of the following months resulted in a consortium agreement in June 2020 (the "**Consortium Agreement**") wherein counsel agreed to work together to prosecute the Class Actions. A copy of the Consortium Agreement dated June 26, 2020 between Class Counsel is attached to my colleague, Mr. Sterns' affidavit.

15. In negotiating the Consortium Agreement, I advised Moushoom Counsel that the AFN required that the Consortium Agreement include certain provisions designed to improve upon past experiences in class actions instituted on behalf of First Nations individuals. To this end, the AFN also wished to include an appropriate cap on Class Counsel legal fees.

16. In over two decades of practicing in First Nations and Aboriginal law, our firm has not agreed to a hard cap on fees at the start of a case. Neither had Moushoom and Trout Counsel.

17. We nevertheless agreed to a cap on legal fees despite substantial risks and protracted litigation described below. This is due to the knowledge we have about previous class actions (i.e. Residential Schools, 60's Scoop, Day Schools) for Indigenous peoples and our understanding that at times claimants receive significantly reduced compensation amounts while lawyers receive a large percentage of the global compensation upon resolution of a class action. We sought to strike a balance between the significant risk that this litigation would

require a significant investment of time and resources, and the knowledge that the vast majority of the compensation should be directed towards the claimants, who suffered discrimination at the hands of Canada.

18. Given our Firms experience with working for First Nations since 1982 and the AFN since 1997 we agreed with AFN to a cap on Class Counsel's legal fees of $80 million in the event of settlement pre-trial. The Consortium Agreement provides, in part, as follows:

> 17. The Parties [Class Counsel] **shall seek** the following fees ("Fees"), subject to Court approval:
>
> > (a) Ten percent (10%) of any payment received by the Class by way of settlement or judgment ("Proceeds") obtained prior to the commencement of a common issues trial, **subject to a cap of $80 million** (emphasis added)

19. All Class Counsel have honoured the cap and have limited the amount of legal fees sought to $80 million. That is substantially less than the amount that Class Counsel could have sought under the contingency fee retainer agreements that were executed with individual claimants.

IV. <u>Risks to Class Counsel</u>

20. I am limited in what I can say because settlement discussions are without prejudice and are protected by settlement privilege. I will limit what is said below to what is in the public record and do not hereby waive settlement privilege, nor do I have instructions to do so.

(i) *Our firm worked on the CHRT matter since 2007*

21. Our firm, Nahwegahbow, Corbiere has been working alongside the AFN General Counsel, in the Canadian Human Rights Tribunal File No. T1340/7008 (the "**CHRT Proceeding**") since 2007. We have invested significant time and resources in the CHRT Proceeding and now the Class Actions. My partner David Nahwegahbow was the co-lead of the CHRT Proceeding with my support and now, I am leading Nahwegahbow, Corbiere's efforts in the Class Actions with his and my firm's support.

22. Overall, the Complainants were successful at the CHRT Proceeding. The CHRT Proceeding provided various orders, including ordering that Canada pay compensation and reform the First Nations Child and Family Services ("**FNCFS**") Program to remedy the discrimination, along with various orders with respect to individual compensation for the violation of fundamental human rights. Canada unsuccessfully sought judicial review of certain of the CHRT's compensation orders, and subsequently appealed the Federal Court's decision dismissing the judicial review. Canada's appeal of the judicial review is currently held in abeyance at the Federal Court of Appeal.

23. While the CHRT orders with respect to compensation provided incentive for Canada to participate in the negotiation of individual compensation, Canada insisted that the negotiation of long-term reform be conducted in parallel with the negotiations for individual compensation in the Class Actions. This injected significant uncertainty into the negotiation of the Class Action. The long-term

reform of the FNCFS program was subject to the agreement of AFN leadership and First Nations across the country.

24. This presented elevated risk to the settlement of the Class Actions, even if we reached a negotiated resolution with respect to individual compensation. If we were unable to reach an agreement-in-principle with respect to *either* compensation (the subject of the Class Action) or long-term reform (which was not the subject of the Class Action), both negotiated resolutions would fail. Canada's insistence on settling both long-term reform and compensation (the subject matter of the Class Actions) required us, as Class Counsel, to take on the risk of failure at the long-term reform negotiation table bringing down the entire negotiation for the Class Actions.

25. Given the uncertainty with the long-term reform package from Canada, there was serious risk from the outset that we would be unable to reach an agreement-in-principle with respect to *either* compensation (the subject of the Class Actions) or long-term reform. From my experience, it can be difficult to reach consensus across the various First Nations communities, especially on a fundamental principle: the protection of our children from Canada's discrimination. If *either* agreement was rejected by First Nations leadership, it was uncertain whether Canada would accept a negotiated settlement of the parallel negotiation. This was explicitly set out in the terms of the Agreement-in-Principle, attached to my colleague Mr. Sterns' affidavit.

26. Further, the negotiation of government funding commitments is fraught with uncertainty. In my experience, these negotiations are subject to the ever-present risk that a new government may be elected, mandates and priorities shift, and negotiations fail. If this were to occur, we were prepared to litigate the Class Actions.

27. I personally participated in both the long-term reform negotiations and compensation, given my firm's expertise and experience in both aspects of the CHRT Proceeding.

28. Eventually, after over a year of negotiations, we were able to reach two separate agreements-in-principle for: (A) the long-term reform of the FNCFS program, and (B) individual compensation in the Class Actions.

29. Even with the execution of the Agreements-in-Principle, there were still significant risks to the Class Actions. A matter of paramount importance to the AFN was the manner that the compensation would be disbursed, including ensuring that it would be accomplished in a culturally-sensitive and non-traumatizing manner. While we had secured an impressive global sum, we wanted to ensure that the distribution of compensation would reflect the First Nations-led nature of the Class Actions. We worked diligently over the following months to discuss and draft a final settlement agreement.

30. Even once a final settlement agreement was executed on June 30, 2022 (the "First FSA"), certain risks remained. In particular, Canada required a condition

precedent in any settlement that the resolution of the Class Actions satisfied the CHRT's jurisdiction over individual compensation.

31. As outlined in my colleague Mr. Sterns' affidavit, Class Counsel for AFN and AFN General Counsel, with input and assistance from Moushoom/Trout Class Counsel prepared significant materials and dedicated significant effort to persuade the CHRT that the compensation-related orders were satisfied by the First FSA. As outlined by Mr. Sterns, we were ultimately unsuccessful in our efforts, and the CHRT rejected the motion sought on October 24, 2022, with full reasons to follow (eventually released and indexed as 2022 CHRT 41) (the "**CHRT Decision**").

32. Following the CHRT Decision, the First FSA was at an end, as a condition precedent had not been satisfied. AFN Counsel did not know at this point that further negotiations would be feasible and we were prepared to litigate to salvage the First FSA. In an attempt to salvage the settlement, the AFN sought to judicially review the CHRT Decision. At this point, there appeared to be no other manner to salvage a negotiated settlement. A copy of the Notice of Application for Judicial Review of the AFN, dated November 23, 2022, is attached hereto and marked as **Exhibit "A"**.

33. The CHRT Decision was a significant set-back to both Class Counsel and our representative plaintiffs. In the months that immediately followed, Class Counsel and the representative plaintiffs faced significant uncertainty as to

whether we would be able to achieve a global resolution again. Class Counsel believed that the significant progress that had been made to date was lost, and the path forward was uncertain. Class Counsel was fully prepared to litigate the Class Action, which had been certified, on behalf of the Class in its entirety.

34. Eventually, AFN Counsel were presented with a mandate from First Nations leadership and our representative plaintiffs to attempt to negotiate resolution of whatever aspects of compensation in the Class Actions that we could, even if it meant we had to wait for those also covered by the CHRT Decisions and Orders. A copy of the Special Chiefs Assembly Resolution dated December 7, 2022 is attached as **Exhibit "B".**

35. The uncertainty persisted into the beginning of 2022, when the parties met to probe the possibility of addressing the CHRT Decision. The parties to the Class Actions, with the participation of the First Nations Child and Caring Society, sought to work collaboratively to negotiate a new settlement that would improve upon the First FSA.

36. The parties met for numerous rounds of intensive negotiations between January and April, 2023.

37. Eventually, the parties were able to resolve the numerous outstanding issues and negotiate a new settlement, which addressed the outstanding issues and increased the overall amount of compensation available to the Class by several billion dollars. I, along with some of the AFN Representative Plaintiffs,

presented the Final Settlement Agreement to the AFN Chiefs-in-Assembly, which was endorsed by the First Nations leadership. The Final Settlement Agreement was executed by the parties April 19, 2023. A copy of the Special Chiefs Assembly Resolution dated April 4, 2023, is attached as **Exhibit "C"**.

38. Despite the endorsement of the First Nations leadership, and the execution of the Final Settlement Agreement, we were still required to seek the satisfaction of the CHRT with respect to its compensation-related orders. AFN Counsel and AFN general counsel, supported by Moushoom/Trout Class Counsel, prepared significant materials with respect to the Final Settlement Agreement for a motion before the CHRT. The joint motion with Canada was brought before the CHRT on June 30, 2023. Given the previous CHRT Decision, there remained significant uncertainty as to whether the CHRT would find that the Final Settlement Agreement would satisfy its compensation-related orders. However, on July 26, 2023, the CHRT issued a letter decision granting the motion, with reasons to follow. On September 26, 2023, the CHRT issued its full reasons, indexed as 2023 CHRT 44.

39. In prosecuting the Class Actions, Class Counsel were exclusively focused upon advancing the best interests of the class members, and upon achieving the best result for the Class. The Final Settlement Agreement, with its sum of $23.34 billion in compensation, achieves the best resolution for the Class, and will ensure that some of the most vulnerable First Nations individuals who deserve to be compensated will receive compensation without protracted litigation.

Class Counsel has expended considerable resources to advance the interests of the Class, without any assurance of payment. Class Counsel will fulfill its obligations to the Class up to the transfer of responsibilities to the SIC regardless of the quantum of fees and disbursements that the Court approves in the within motion.

AFFIRMED remotely by Dianne Corbiere in the village of Minesing, in the Province of Ontario, before me in the City of Orillia, in the Province of Ontario, on October 6, 2023 in accordance with O. Reg. 431/20

Laura Christine Sharp
LSO #80265D
Commissioner for Taking Affidavits
(or as may be)

Dianne Corbiere

The following is Exhibit “A” referred to in the
Affidavit of Dianne Corbiere
Affirmed before me this __6th___ day of
October, 2023

_____

A Commissioner, Public Notary, etc.

Court File No. _____

FEDERAL COURT

BETWEEN:

THE ASSEMBLY OF FIRST NATIONS

APPLICANT

-and-

THE ATTORNEY GENERAL OF CANADA, FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA, CANADIAN HUMAN RIGHTS COMMISSION, CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL and NISHNAWBE ASKI NATION

RESPONDENTS

NOTICE OF APPLICATION FOR JUDICIAL REVIEW

TO THE RESPONDENTS:

A PROCEEDINGS HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this Application be heard at **Ottawa, Ontario.**

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Court Rules* and serve it on the Applicant's solicitor, or where the Applicant is self-represented, on the Applicant, **WITHIN 10 DAYS** after being served with this Notice of Application.

Copies of the *Federal Court Rules*, information concerning the local offices of the Court and other necessary information may be obtained on a request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

November 23, 2022 Issued by: _____

Address of Local Office: Thomas D'Arcy McGee Building
90 Sparks Street, 5th Floor
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Counsel for Amnesty International

AND TO: Canadian Human Rights Tribunal
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Email: registry.office@chrt-tcdp.gc.ca

APPLICATION

This is an application for judicial review in respect of the Canadian Human Rights Tribunal's ("**Tribunal**") summary decision in File No. T1340/7008, dated October 24, 2022 (the "**Summary Decision**"). In the Summary Decision, the Tribunal refused to grant the order sought in the Applicant's motion that the Final Settlement Agreement agreed to by the parties ("**FSA**") in the related class proceedings, Federal Court File Nos. T-402-19, T-141-20, T-1120-21, satisfied its orders in decisions 2019 CHRT 39, 2020 CHRT 7, 2020 CHRT 15, 2021 CHRT 6 and 2021 CHRT 7 (the "**Compensation Decisions**"), or in the alternative, that the Tribunal vary its Compensation Decision, Compensation Framework, and other compensation related orders to, to conform to the terms of the proposed FSA.

The Summary Decision was intended to convey the results of the Panel's deliberations to the parties immediately, as the full decision and supporting analysis was determined to be lengthy and would take more time to complete. The Panel confirmed in the Summary Decision that it was continuing to work on the reasons and authorities supporting its conclusions in the hopes of releasing its full reasons for judgment (the "**Final Decision**") in short order.

The Applicant makes application for:

1. An order quashing or setting aside the Summary Decision and confirming that the Tribunal has the jurisdiction to adopt the FSA to satisfy its orders in the Compensation Decisions;

2. In the alternative, an order setting aside the Summary Decision and referring the matter to a differently constituted Panel for determination in accordance with the directions of this Court;

3. The costs of this Application; and

4. Such further and other relief as this Honourable Court may deem appropriate and just in the circumstances.

The grounds for the application are that the Tribunal erred in:

1. Determining that it could not find that the FSA satisfies the Tribunal's orders, on the basis which included, but is not limited to, that the FSA compromised categories of victims from the Tribunal's Compensation Decisions, despite the Tribunal's jurisdiction to consider the FSA as satisfactory as these issues remained under dispute and appeal;

2. Determining that it could not amend its Compensation Decisions to conform to the terms of the proposed FSA;

3. Incorrectly and unreasonably determining that the principle of free, prior, and informed consent ("**FPIC**") applies to the Assembly of First Nations;

4. Drawing a negative inference from the fact that a resolution by the First Nations-in-Assembly was not obtained by the Assembly of First Nations;

5. The foregoing errors were made without jurisdiction or beyond the Tribunal's jurisdiction, reflect errors in law and the interpretation of the *Canadian Human Rights Act*, erroneously relied on factual material, failed to observe procedural fairness and were otherwise unreasonable, and thus there are permissible grounds for review under s. 18.1 of the *Federal Courts Act*;

6. Such further and other grounds as counsel may advise and this Honourable Court may permit.

This application will be supported by the following material:

1. The Certified Tribunal Record;

2. Such further and other material as counsel may advise and this Honourable Court should permit.

The Applicant requests:

1. Leave to amend this Notice of Application within 30 days of the release of the Final Decision by the Tribunal;

2. That the Canadian Human Rights Tribunal send a certified copy of the record upon which its decision was based to the Applicant and to the Registry within 20 days;

3. That a case management judge be assigned to this matter; and,

4. That this matter be heard in Ottawa, Ontario.

DATED AT OTTAWA, ONTARIO, the 23rd day of November, 2022.

THE ASSEMBLY OF FIRST NATIONS

Per: Dianne Corbiere

Nahwegahbow Corbiere
Barristers & Solicitors
5884 Rama Road, Suite 109
Rama, ON L3V 6H6

Tel: 705-325-0520
Email: dgcorbiere@nncfirm.ca

Assembly of First Nations
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Per: Stuart Wuttke
Adam Williamson

General Counsel
Tel: 613-241-6789 ext 228
Email: swuttke@afn.ca
awilliamson@afn.ca

Counsel for the Applicant

The following is Exhibit “B” referred to in the
Affidavit of Dianne Corbiere
Affirmed before me this __6th___ day of October,
2023

_____

A Commissioner, Public Notary, etc.

Assembly of First Nations

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Assemblée des Premières Nations

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SPECIAL CHIEFS ASSEMBLY
December 6,7,8, 2022, Ottawa, ON

Resolution no. 28/2022

TITLE:	**Final Settlement Agreement on Compensation for First Nations Children and Families**
SUBJECT:	Child and Family Services
MOVED BY:	Council Chairperson Khelsilem, Squamish Nation, BC.
SECONDED BY:	Chief Patsy Corbiere, Aundeck Omni Kaning First Nation
DECISION	Carried by consensus

WHEREAS:

A. The Assembly of First Nations (AFN) Chiefs-in-Assembly honour all the children, youth, and families, those with us and those lost, who experienced egregious harms by Canada and its colonial structures, the impacts of which continue to be felt today. We dedicate ourselves to ensuring justice for all affected children and families.

B. The United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) states that:

   i. Article 2: Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

   ii. Article 7(2): Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

   iii. Article 22 (2): States shall take measures, in conjunction with Indigenous peoples, to ensure that Indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Certified copy of a resolution adopted on the 7th day of December, 2022 in Ottawa, Ontario

ROSEANNE ARCHIBALD, NATIONAL CHIEF

28 – 2022

Head Office / Siège Social
46 Irene Roundpoint Lane, Akwesasne, ON K6H 0G5 Tel. / Tél.: 613-241-6789 Fax / Téléc.: 613-932-0415

iv. Article 40: Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

C. The First Nations Child and Family Caring Society (Caring Society), as represented by Cindy Blackstock, and AFN, as represented by the former National Chief Phil Fontaine, filed a human rights claim in 2007 alleging that Canada's inequitable provision of First Nations child and family services and its choice not to implement Jordan's Principle was discriminatory.

D. The Canadian Human Rights Tribunal (CHRT) substantiated the claim in 2016 CHRT 2 and ordered Canada to immediately cease its discriminatory conduct towards First Nations children and families.

E. Consistent with the direction of the First Nations-in-Assembly *AFN Resolution 85/2018, Financial Compensation for Victims of Discrimination in the Child Welfare System* pursuant to the Canadian Human Rights Act, the CHRT ordered Canada to pay $40,000.00 per eligible victim for Canada's "willful and reckless" discrimination of the worst kind.

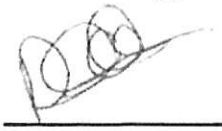
F. On September 28, 2021, the Federal Court dismissed the Government of Canada's application for judicial review of the Canadian Human Rights Tribunal's compensation orders.

G. The Government of Canada then appealed the 2021 Federal Court Decision and announced it wished to address the human rights damages within two larger class actions: *Moushoom et al. v. Attorney General of Canada* and the Assembly of First Nations class action.

H. In 2022, the AFN and Canada engaged in negotiations and concluded a settlement of $20 billion for compensation to be paid to victims of Canada's discrimination. The agreement provided additional compensation above that which the CHRT awarded and deviated from the CHRT orders in some regards.

I. Canada and AFN filed a joint motion to have their Final Agreement approved by the Tribunal, and on October 24, 2022, the CHRT issued a letter decision confirming that the Final Settlement Agreement on compensation signed by Canada, the AFN, and other class action parties does not fully satisfy its orders.

Certified copy of a resolution adopted on the 7th day of December, 2022 in Ottawa, Ontario

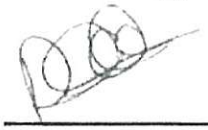


SPECIAL CHIEFS ASSEMBLY
December 6,7,8, 2022, Ottawa, ON **Resolution no. 28/2022**

THEREFORE, BE IT RESOLVED that the First Nations-in-Assembly:

1. Support compensation for victims covered by the proposed Final Settlement Agreement (FSA) on compensation and those already legally entitled to $40,000 plus interest under the Canadian Human Rights Tribunal (CHRT) compensation orders to ensure that all victims receive compensation for Canada's willful and reckless discrimination.
2. Direct Canada to fund post-majority supports tailored to the specific needs of each child and young adult victims up to age 26 who are eligible for compensation until such time that community-based supports funded by Canada can adequately support all victims for the duration of the compensation period.
3. Direct the Assembly of First Nations (AFN) to immediately seek a minimum of 12 months following the announcement of a revised Final Settlement Agreement for claimants to determine whether they will participate in the class action. Persons entitled to compensation shall determine whether they will participate in the class action based on complete information, including the terms of any settlement.
4. Call upon Canada to immediately place the minimum of $20 billion earmarked for compensation in an interest-bearing account held by an independent and reputable major financial institution and immediately pay the compensation to all victims of Canada's discrimination, including those eligible under the class action and under the CHRT orders.
5. Support the principles on which the FSA is built, including taking a trauma-informed approach, employing objective and non-invasive criteria, and ensuring a First Nations-driven and culturally-informed approach to compensating individuals.
6. Continue to support the Representative Plaintiffs and all victims of Canada's discrimination by ensuring that compensation is paid as quickly as possible to all those who can be immediately identified and to continue to work efficiently to compensate those who may need more time.
7. Ensure that the AFN returns to the First Nations-in-Assembly to provide regular progress reports and seek direction on any outstanding implementation issues.

Certified copy of a resolution adopted on the 7th day of December, 2022 in Ottawa, Ontario



ROSEANNE ARCHIBALD, NATIONAL CHIEF

The following is Exhibit “C” referred to in the
Affidavit of Dianne Corbiere
Affirmed before me this ___6th__ day of October,
2023

_____

A Commissioner, Public Notary, etc.

Assembly of First Nations

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www.afn.ca

SPECIAL CHIEFS' ASSEMBLY
APRIL 3, 4, 5 & 6, 2023; OTTAWA, ON

Resolution no.04/2023

TITLE:	**Revised Final Settlement Agreement on Compensation for First Nations Children and Families**
SUBJECT:	Child and Family Services
MOVED BY:	Ogimaa Kwe Linda Debassige, M'Chigeeng First Nation, ON
SECONDED BY:	Chief Derek Nepinak, Pine Creek First Nation, MB
DECISION	Carried by Consensus

WHEREAS:

A. The First Nations-in-Assembly honour all the children, youth, and families, those with us and those lost, who experienced egregious harms by Canada and its colonial structures, the impacts of which continue to be felt today. We dedicate ourselves to ensuring justice for all affected children, youth, and families.

B. The United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) states:

   i. Article 2: Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

   ii. Article 7 (2): Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

   iii. Article 22 (2): States shall take measures, in conjunction with Indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Certified copy of a resolution adopted on the 4th day of April 2023 in Ottawa, Ontario

ROSEANNE ARCHIBALD, NATIONAL CHIEF

04 – 2023

Head Office / Siège Social
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iv. Article 40: Indigenous peoples have the right to access to prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

C. The First Nations-in-Assembly commend the Representative Plaintiffs for their strength and resilience in pursuing the Class Action against Canada's discrimination under the First Nations Child and Family Services (FNCFS) Program and the improper implementation of Jordan's Principle seeking fair and equitable compensation for individuals impacted by this profound discrimination.

D. In 2022, Canada and the Assembly of First Nations (AFN) sought the Canadian Human Rights Tribunal's (CHRT) approval of the $20 billion Final Settlement Agreement (FSA) on Compensation. On October 24, 2022, the CHRT issued a letter decision confirming that the FSA on Compensation substantially, but not fully, satisfied its orders on compensation. The CHRT provided its full reasons on December 20, 2022 (2022 CHRT 41).

E. The First Nations-in-Assembly mandated the AFN by way of Resolution 28/2022, *Final Settlement Agreement on Compensation for First Nations Children and Families*, to, among other items:

i. support compensation for those entitled under the FSA and those entitled to $40,000 plus interest under the CHRT compensation orders;

ii. direct the AFN to return to the First Nations-in-Assembly to provide regular progress reports and seek direction on implementation issues, and,

iii. expressed support for the Representative Plaintiffs and all victims and survivors of Canada's discrimination and sought to ensure that compensation would be paid as quickly as possible.

F. The Representative Plaintiffs, youth in care and formerly in care, and those with lived experience in other class actions have expressed that supports for class members are imperative to their wellbeing, including mental wellness supports, financial literacy, and supports for youth past the age of majority, including for high needs Jordan's Principle recipients.

G. Canada, the AFN, Moushoom counsel, and the First Nations Child and Family Caring Society of Canada ('Caring Society') thereafter came together to amend the FSA on Compensation to address the concerns identified by the CHRT in 2022 CHRT 41. In these negotiations, the AFN advanced the mandates directed by the First Nations-Assembly in Resolution 28/2022.

Certified copy of a resolution adopted on the 4th day of April 2023 in Ottawa, Ontario

ROSEANNE ARCHIBALD, NATIONAL CHIEF

H. The Parties have negotiated a revised Final Settlement Agreement (Revised FSA) on Compensation, providing over $23 billion in compensation for the survivors and victims of Canada's discrimination, while addressing the issues highlighted by the CHRT in 2022 CHRT 41 and pursuing fair compensation for the Classes dating back to 1991.

I. The Representative Plaintiffs, the AFN, and the Caring Society are recommending that the First Nations-in-Assembly endorse the Revised FSA on Compensation.

J. Pending approval of the Revised FSA, the AFN will present the revised agreement to the CHRT for approval. Once approved by the CHRT, the revised agreement will then be presented to the Federal Court of Canada for approval to ensure the timely distribution of compensation to the survivors and victims of Canada's discrimination.

THEREFORE BE IT RESOLVED that the First Nations-in-Assembly:

1. Fully support the Revised Final Settlement Agreement (Revised FSA) on Compensation in principle and authorize the Assembly of First Nations (AFN) negotiators to make the necessary minor edits to complete the Revised FSA.
2. Support the AFN in seeking an order from the Canadian Human Rights Tribunal (CHRT) confirming that the Revised FSA on compensation fully satisfies its compensation orders.
3. Direct the AFN, upon the endorsement of the Revised FSA on Compensation by the CHRT, to seek approval of Revised FSA on Compensation by the Federal Court of Canada on an expedited basis.
4. Call on the Prime Minister of Canada to make a formal and meaningful apology to the Representative Plaintiffs and the survivors of Canada's discrimination and those who have passed away.
5. Continue to support the Representative Plaintiffs and all survivors and victims of Canada's discrimination by ensuring that compensation is paid, and adequate supports are provided as quickly as possible to all those who can be immediately identified and to continue to work efficiently to ensure that compensation reaches all those who are eligible.
6. Direct the AFN to return to the First Nations-in-Assembly to provide regular progress reports on supports, implementation and the claims process and seek direction where required.

Certified copy of a resolution adopted on the 4th day of April 2023 in Ottawa, Ontario

ROSEANNE ARCHIBALD, NATIONAL CHIEF

Court File Nos. T-402-19 / T-141-20 / T-1120-21

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige), JONAVON JOSEPH MEAWASIGE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo, CAROLYN BUFFALO, and DICK EUGENE JACKSON also known as RICHARD JACKSON

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

AFFIDAVIT OF DAVID STERNS
(Affirmed October 6, 2023)

I, **David Sterns**, of City of Toronto, in the Province of Ontario, AFFIRM THAT:

I. Introduction and Definitions

1. I am a partner at Sotos LLP, co-counsel with Kugler Kandestin LLP and Miller Titerle + Company ("**Moushoom and Trout Counsel**"), which are the lawyers representing the representative plaintiffs:

   (a) Xavier Moushoom, Jeremy Meawasige (by his litigation guardian, Jonavon Joseph Meawasige), and Jonavon Joseph Meawasige (collectively, the "**Moushoom Plaintiffs**") in the Federal Court class action, Court File No. T-402-19, filed March 4, 2019 (the "**Moushoom Action**"); and

   (b) Zacheus Joseph Trout in the Federal Court class action, Court File No. T-1120-21, filed July 16, 2021 (the "**Trout Action**").

2. Moushoom and Trout Counsel are working together with Nahwegahbow Corbiere and Fasken Martineau DuMoulin ("**AFN Counsel**"), who represent:

   (a) The plaintiff Assembly of First Nations ("**AFN**"); and

   (b) The representative plaintiffs, Ashley Dawn Louise Bach, Karen Osachoff, Melissa Walterson, Noah Buffalo-Jackson (by his Litigation Guardian, Carolyn Buffalo), Carolyn Buffalo, and Dick Eugene Jackson also known as Richard Jackson (collectively, the "**AFN Plaintiffs**"),

in the Federal Court class action, Court File No. T-141-20, filed January 28, 2020 (the "**AFN Action**").

3. For simplicity, in this affidavit:

   (a) "**Class Actions**" means the Moushoom Action, the Trout Action, and the AFN Action;

   (b) "**Class Counsel**" means Moushoom and Trout Counsel and AFN Counsel; and

   (c) "**Representative Plaintiffs**" means the Moushoom Plaintiffs, Mr. Trout, and the AFN Plaintiffs.

4. I have been a litigator since 1992, and focusing on class actions since 1999. I have been class counsel on many cases over the course of these years.

5. As such, I have personal knowledge of the facts and matters hereinafter deposed to, save and except where the same are stated to be based on information and belief and, where so stated, I verily believe the same to be true.

6. I affirm this affidavit in support of a motion for approval of Class Counsel's legal fees. This motion is brought following the hearing of the motion seeking approval of the Final Settlement Agreement ("**FSA**") among the parties for settlement of the Class Actions. Class Counsel's fee request is contingent on the approval of the FSA.

7. Nothing in this affidavit is intended to waive, nor should it be understood or interpreted to be a waiver of solicitor-client or settlement privilege.

II. The Contingency Fee Retainer Agreements

8. In 2019, Moushoom and Trout Counsel entered into contingency fee retainer agreements with the Moushoom Plaintiffs for the Moushoom Action.

   (a) A copy of the contingency fee retainer agreement between Sotos LLP, Kugler Kandestin LLP, and Xavier Moushoom executed March 3, 2019 is attached as **Exhibit "A"**.

   (b) A copy of the contingency fee retainer agreement between Moushoom Counsel and Jeremy Meawasige (by his proposed litigation guardian, Maurina Beadle) executed May 8, 2019 is attached as **Exhibit "B"**. Subsequently, Ms. Beadle passed away. Mr. Meawasige's brother, Jonavon Joseph Meawasige, was substituted as his litigation guardian.

9. In 2020, Moushoom and Trout Counsel entered into a contingency fee retainer agreement with Mr. Trout for the Trout Action. A copy of the contingency fee retainer agreement between Moushoom Counsel and Mr. Trout executed September 23, 2020 is attached as **Exhibit "C"**.

10. All three of those contingency fee retainer agreements contained the following standard percentages fees:

> (a) For any Aggregate Amount Recovered for the Class: twenty percent (20%) of the first two hundred million dollars of the Aggregate Amount Recovered, plus ten percent (10%) of any Aggregate Amount Recovered beyond the first two hundred million dollars (the percentages in this subparagraph shall not apply to any Individual Inquiry Recovery); plus
>
> (b) For any Individual Inquiry Recovery for individual Class members: twenty five percent (25%) of any such amounts; plus
>
> (c) Any amount of costs ordered by the Court in favour of the Client or the Class.

11. But for the fee cap (described next), Class Counsel could have claimed up to $2.35 billion under these contingency fee retainer agreements. Class Counsel are seeking approval of fees of $80 million.

III. The Consortium Agreement

12. The Moushoom Action was filed first, on March 4, 2019. Moushoom and Trout Counsel acted for the plaintiff.

13. The AFN Action was filed next, on January 28, 2020. AFN Counsel acted for the plaintiffs.

14. After the AFN Action was filed, Class Counsel sought to avoid a carriage battle, and to instead collaborate in the best interests of the class. Discussions over the course of the following months resulted in a consortium agreement in June 2020 (the "**Consortium Agreement**") wherein counsel agreed to work together to prosecute the Class Actions. A copy of the Consortium Agreement dated June 26, 2020 between Class Counsel is attached as **Exhibit "D"**.

15. In negotiating the Consortium Agreement, AFN counsel advised that the AFN required that the Consortium Agreement include certain provisions designed to improve upon past experiences in class actions instituted on behalf of First Nations individuals. To this end, the AFN wished to include an appropriate cap on Class Counsel legal fees.

16. In over two decades of practicing in the area of class actions, our firm had never before agreed to a hard cap on fees at the start of a case. Neither had the other Moushoom and Trout Counsel.

17. We were reluctant to agree to a cap on legal fees as there were substantial risks and protracted litigation seemed likely, as described under part VII below.

18. In the end, despite our reservations and despite our own separate and uncapped fee agreements with our clients, we agreed with AFN Counsel to a cap on Class Counsel's legal fees of $80 million in the event of settlement pre-trial. The Consortium Agreement provides, in part, as follows:

> 17. The Parties [Class Counsel] **shall seek** the following fees ("Fees"), subject to Court approval:
>
> > (a) Ten percent (10%) of any payment received by the Class by way of settlement or judgment ("Proceeds") obtained prior to the commencement of a common issues trial, **subject to a cap of $80 million** (emphasis added)

19. We did so because the AFN was a sophisticated and experienced party who had legitimate concerns based on lessons learned through previous class actions

involving Indigenous peoples that it wished to have reflected in the Consortium Agreement. As the AFN was lending its support to the Class Actions, in the view of Class Counsel, it was reasonable to agree to this condition. To override this concern would have started our relationship off on the wrong foot. We understood the concern that motivated the cap and were prepared to accept it as a legitimate pre-condition to us working together.

20. Class Counsel have honoured the cap, and have limited the amount of legal fees sought to $80 million. That is substantially less than the amount that Class Counsel could have sought under the contingency fee retainer agreements.

21. But for the cap, I believe Class Counsel would have sought significantly higher fees, and I believe that a substantially higher fee would have been fair and reasonable, for all of the reasons described below.

IV. Bifurcation & Certification

22. On July 7, 2021, Madam Justice St-Louis formally consolidated the Moushoom Action and the AFN Action.

23. Canada consented to certification of claims on behalf of part of the class in the Consolidated Action. However, it argued that Jordan's Principle did not exist before December 12, 2007, so it contested certification on behalf of those claiming a denial of essential services (including family claimants) before that date.

24. We brought a motion to bifurcate the case so that the claims which Canada consented to certifying could be certified on consent, while the rest would be left to a separate action.

25. The Court had concerns about the proposed bifurcation. The case management judges at the time, Justice Phelan and St-Louis, inquired as to why the parties were not negotiating all of the claims at once. The simple answer was that Canada refused to do so. We informed the Court of this in our submissions, a copy of which is attached as **Exhibit "E"**.

26. Not satisfied with this explanation, Justices Phelan and St-Louis appointed *amicus* to assess whether we were acting in the best interests of the class. *Amicus* concluded that we were acting appropriately and supported the motion to bifurcate. A copy of his submissions is attached as **Exhibit "F"**.

27. Madam Justice St-Louis bifurcated the proceeding, and granted leave for Mr. Trout to commence the Trout Action on behalf of those left out of the Consolidated Action as a result.

28. On November 26, 2021, Madam Justice Aylen certified the Consolidated Action.

29. Canada contested the Trout Action, and initially refused to negotiate those claims. Canada only agreed to negotiate those claims following months of intense and arduous negotiation on the Consolidated Action. By that time, a

contested certification hearing had been scheduled and most of the preparatory work for that hearing had already been done.

30. Ultimately, Canada consented to the certification of the Trout Action. On February 11, 2022, Madam Justice Aylen certified the Trout Action on consent.

V. The CHRT Proceeding

31. The Class Actions partly overlap with a proceeding before the CHRT (the "**CHRT Proceeding**"), described below.

32. In 2007, the AFN and the First Nations Child and Family Caring Society of Canada (the "**Caring Society**") filed a complaint (the "**CHRT Complaint**") with the Canadian Human Rights Commission (the "**Commission**") against Canada.

33. On October 14, 2008, the Commission referred the CHRT Complaint to the Canadian Human Rights Tribunal ("**CHRT**").

A. Canada's Submissions on the Merits

34. After years of procedural battles with Canada, the parties reached the merits hearing in 2013. The hearing spanned 72 days from February 2013 to October 2014.

35. At the merits hearing, individual compensation was sought as a remedy, which Canada opposed. A copy of the relevant passages of Canada's closing arguments, dated October 3, 2014, is attached as **Exhibit "G"**.

B. The Merits Decision

36. The CHRT rendered its decision on the merits of the CHRT Complaint on January 26, 2016 ("**Merits Decision**"). The CHRT found that Canada had discriminated against First Nations children and families on reserves and in the Yukon by underfunding, and in structuring its funding of child and family services under the FNCFS Program and by Canada's prohibitively restrictive interpretation of Jordan's Principle.

37. The CHRT did not decide the question of compensation in the Merits Decision, but expressly left it for future determination.

38. On March 4, 2019, our clients commenced the Moushoom Action, seeking damages for a far broader class of individuals who had suffered harm both through child welfare and the lack of essential services than those covered by the Merits Decision.

C. Canada's Submissions on Compensation

39. After the Moushoom Action was filed, the CHRT resumed its consideration of remedies, including compensation to victims of substantiated discrimination.

40. In April 2019, Canada made further submissions to the CHRT in response to the CHRT's specific questions with respect to compensation following the Merits Decision. In its further submissions, Canada maintained its position opposing any entitlement to federal compensation.

41. In opposing compensation at the CHRT, Canada pointed to the Moushoom Action, not as a proceeding where Canada would agree to compensation, but as a preferable forum where the question of damages would be decided by the Federal Court. It argued that:

> This class action will determine **whether** the individuals harmed by the discrimination identified in this complaint are entitled to compensation and will do so with the benefit of the robust powers granted to courts hearing class actions. (emphasis added)

42. A copy of Canada's submissions on compensation in the CHRT Proceeding dated April 16, 2019, is attached as **Exhibit "H"**.

D. The Compensation Decision

43. In September 2019, the CHRT found that the First Nations children and their caregiving parents and grandparents who were covered by the CHRT's merits findings were entitled to human rights compensation (the "**Compensation Decision**"). The Compensation Decision relates to removed children between 2006 and 2022, and Jordan's Principle children between 2007 and 2017.

44. Canada subsequently sought judicial review of the Compensation Decision which was dismissed by this Court in *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2021 FC 969.

45. Canada appealed that decision to the Federal Court of Appeal and that appeal remains pending subject to approval of the FSA.

E. The First Round of Agreements

46. Canada insisted throughout that all CHRT matters be settled at the same time as the Class Actions.

47. The parties spent nearly a year in mediation (November 2020 – September 2021) before the Honourable L. Mandamin. That failed to resolve the dispute. At that point, we were poised to resume litigation.

48. The parties then engaged in months of intensive negotiation. We engaged the Honourable Murray Sinclair and had dozens of in-person meetings. In her affidavit, my colleague, Dianne Corbiere, provides more details on the discussions and the work that she and other Class Counsel were required to do on the parallel long-term reform negotiations among the parties to the CHRT Proceeding. Because long-term reform was tied to the resolution of the compensation issues, Class Counsel were required to participate in those discussions.

49. At the conclusion of the negotiations with Canada over numerous meetings, the parties executed Agreements in Principle on December 31, 2021. Class Counsel consulted extensively with the Representative Plaintiffs and drafted and redrafted the agreement in principle. A copy of the Agreement in Principle between the Representative Plaintiffs and Canada dated December 31, 2021 is attached as **Exhibit "I"**.

50. Despite the Agreements in Principles being reached in late 2021, we still had to reduce it to a final agreement. The road to the FSA remained uncertain, with a number of complex and highly sensitive issues still to be resolved. The risk of a litigated outcome was present throughout.

51. We engaged in extensive negotiations with Canada to develop the terms of a final agreement. We obtained instructions from the Representative Plaintiffs and drafted and redrafted the agreement. We also engaged and instructed subject matter experts in health and social work, tax, trusts, estates, and corporate law to obtain guidance on various aspects of the agreement.

52. On June 30, 2022, after six months of intensive negotiations, and multiple rounds of drafting and redrafting, the parties finalized a historic settlement of $20 billion (the "**First FSA**"), which was intended to settle the Class Actions and the partially overlapping CHRT Proceeding.

53. Given that the First FSA was intended to be a settlement of all litigation, it included a precondition, demanded by Canada, that the CHRT also grant an order finding that it satisfied its decisions providing human rights compensation to a subset of the class, reported in various decisions, including 2019 CHRT 39, 2020 CHRT 15, 2020 CHRT 7, 2020 CHRT 15, 2020 CHRT 20, 2020 CHRT 36 and 2021 CHRT 7.

F. The CHRT Rejection

54. In July 2022, the Representative Plaintiffs brought and briefed the settlement approval motion to the Court.

55. On July 22, 2022, the AFN and Canada jointly sought the CHRT's approval of the 2022 FSA as satisfying the CHRT's compensation orders.

56. Of the parties to the CHRT Proceeding, only the First Nations Child and Family Caring Society and the Commission opposed the CHRT Motion on the First FSA. The others supported it or took no position.

57. AFN Counsel participated fully in the CHRT Proceeding. Moushoom and Trout Counsel, although not parties to the CHRT Proceeding, reviewed and assisted with submissions as the fate of the FSA hung in the balance.

58. The CHRT heard the motion on September 15-16, 2022 and did not make an immediate ruling. With no decision from the CHRT approving the First FSA, the settlement approval hearing that had been fully briefed and scheduled before this Court for September 2022 was adjourned.

59. On October 24, 2022, the CHRT delivered a letter decision with full reasons to follow, dismissing the motion sought by the AFN and Canada. A copy of the CHRT's letter decision in the CHRT Motion on the First FSA dated October 24, 2022 is attached as **Exhibit "J"**.

60. On December 20, 2022, the CHRT released its ruling, indexed as 2022 CHRT 41, on the joint motion ("**CHRT Rejection**"). The CHRT stated that the 2022 First FSA substantially, but not fully, satisfied the CHRT's compensation orders. The CHRT listed four reasons:

(a) First Nation children ordinarily living on a reserve who were voluntarily sent by their caregivers to stay with non-kin off-reserve (the parties have named this group "**Kith**") were entitled to compensation;

(b) The estates of deceased parents and grandparents of affected children were entitled to compensation;

(c) While affected children were limited to the CHRT's damages cap of $40,000, certain parents and grandparents who had more than one child affected were entitled to that amount for each child—meaning that if, for example, a father had 4 children removed from his care, he should be entitled to $160,000; and

(d) The CHRT needed more certainty and clarity on the parties' approach to Jordan's Principle and a longer opt-out period.

61. The CHRT concluded that it would not grant the order requested unless the settlement, to the extent that it overlapped with the CHRT's decisions, did in fact mirror its decisions as a baseline.

62. As I explain further below:

(a) Item (a) – compensation for Kith – had not been in the parties' contemplation given that these proceedings were focused on children who had been *removed* from their families, as opposed to those sent to stay with a family friend off-reserve albeit with some child welfare personnel involvement;

(b) Items (b) and (c) were deliberate choices in the First FSA to ensure some degree of proportionality between payments to children – who were directly affected – over payments to their parents and grandparents. For example, instead of a grandparent with four children receiving $160,000 but each of the children only receiving $40,000, the First FSA reduced the amount paid to the grandparent while increasing substantially the amount paid to each child. This position was adopted pursuant to AFN consultations with First Nations communities and stakeholders.

G. Events After the CHRT Rejection

63. Class Counsel devoted significant time to negotiating a resolution of the Class Actions under the First FSA. However, the CHRT Rejection meant the end of the First FSA.

64. The CHRT Rejection also meant that any future motion brought to the CHRT for the approval of a revised settlement that was not on consent of all parties to the CHRT proceeding would risk a similar fate—which we as Class Counsel

saw first-hand caused extreme distress, harm, and re-traumatization to the Representative Plaintiffs and class members.

65. Thus, achieving a revised settlement required the full agreement of all parties to the CHRT Proceeding, including the Caring Society. Unlike the AFN, however, the Caring Society did not have a mandate to advocate or negotiate for the broader class.

66. As a result, in the months that immediately followed, Class Counsel and the representative plaintiffs faced significant uncertainty as to whether we would be able to achieve a global resolution.

67. We faced a dilemma. On the one hand, we had two certified class proceedings that we needed and intended to move forward to trial without delay if settlement was not realistically achievable. On the other hand, we could not responsibly avoid exploring the possibility of salvaging the First FSA if there was a realistic chance of success.

68. This uncertainty continued until January of this year, when the parties were able to meet in Ottawa with the presence of the Caring Society to probe the possibility of addressing the CHRT Rejection.

69. The parties met for numerous rounds of intensive in-person and remote, plenary and bilateral, negotiations in various locations between January and April 2023.

70. Eventually, the parties were able to resolve the major outstanding issues and sign the final settlement agreement on April 19, 2023. A copy of the final settlement agreement between Canada, the AFN Plaintiffs, the Moushoom Plaintiffs and the Trout Plaintiffs dated April 19, 2023 ("**FSA**") is attached as **Exhibit "K"**.

71. Concurrent with the FSA, the negotiating parties to the CHRT Proceeding (the AFN, Canada, and the Caring Society) signed minutes of settlement to govern their relationship and obligations with respect to the FSA and a renewed motion to the CHRT. A copy of the minutes of settlement is attached as **Exhibit "L"**.

72. Up until April 19, 2023, and the signing of the FSA and minutes of settlement, it was never certain that an agreement would be achieved given the complexity of the issues, the ever-present need for First Nations consultation, and stark differences in mandates of the various parties to the Class Actions and the CHRT Proceeding.

73. At several points where there were no apparent prospects of a resolution, we pressed for the continuation of the litigation. At one point, we gave the parties an ultimatum that if there was not a resumption of the negotiations with all parties, we would press for a schedule for Canada's Statement of Defence and an expedited timetable. I communicated to the Court that we would be seeking a "next case management conference at which the parties will present scheduling positions". A copy of our letter to the Court setting this out is

attached as **Exhibit "M"**. At no time were we content to let discussions stall. We had two cases that we had every intention of litigating.

H. The CHRT Approval

74. On June 30, 2023, the AFN and Canada brought a joint motion before the CHRT for an order that the FSA satisfies the Compensation Decision.

75. On July 26, 2023, the CHRT issued a letter decision granting the motion, with reasons to follow. A copy of that letter is attached as **Exhibit "N"**.

VI. The Settlement

76. The FSA requires Canada to pay $23.34 billion in compensation to the class members, without any deduction or reversion to Canada. As far as I am aware, this is four times more compensation than the next biggest class action settlement in Canadian history.

77. Additionally, these funds will earn interest for approximately 20 years. Euan Reid, an actuarial expert, has estimated that this interest in one year alone will be worth between $815 million and $1.05 billion. A copy of his letter calculating that figure and explaining his assumptions is attached as **Exhibit "O"**.

78. The FSA will enable hundreds of thousands of Canada's most vulnerable and marginalized people to benefit from, in some cases, life-changing compensation.

79. In addition to the historic quantum, the FSA has the following exceptional features, among others.

(a) The claims process will not require any class member to testify to the trauma and suffering they endured as a result of their removals or Essential Services claim. This was an absolute requirement for a trauma-informed settlement process, that all parties insisted on.

(b) The claims process will be as simple as possible. Contrary to previous class actions on behalf of First Nations, we have negotiated that Canada must fully fund navigators who will assist class members in submitting claims forms free of charge.

(c) The third-party lawyers protocol, if accepted by the Court, will ensure an unprecedented level of protection for the class from third-party lawyers seeking to exploit or take advantage of the class.

(d) The FSA provides for a First Nations-led Settlement Implementation Committee ("**SIC**"), a majority of whose members will be Indigenous people with relevant experience and cultural competency. The SIC will have oversight over the distribution process for the entire 20-plus years. The First Nations-led nature of the SIC represents an important milestone toward reconciliation. It will help ensure that the FSA is implemented as intended and that inevitable unforeseen problems in the

distribution process will be addressed quickly and effectively, with cultural sensitivity.

(e) The FSA provides for experts to serve as actuary, investment consultant, investment committee, auditor, navigator, trauma support specialists, etc., in order to ensure that this Settlement is carried out in a culturally-sensitive and trauma-informed manner with proper oversight.

(f) Care has gone into ensuring that class members who may be incapable of managing their share of settlement funds or may be vulnerable to exploitation by others are able to receive their settlement funds through a risk-free structured settlement if they so choose. It is my understanding, in speaking with McKellar Structured Settlements, that this would be the first class action in Canada to use a structured settlement. More details on this option will be provided to the Court at a later date as part of the distribution protocol. We are also exploring investment options that may be offered to class members who seek a higher return than a structured settlement but with slightly more risk.

(g) Class members will receive limited financial literacy education to assist with their decision.

(h) Class Counsel's fee is payable over-and-above the settlement amount.

80. The FSA, if approved by the Court, finally resolves all litigation related to the Compensation Decision, including Canada's ongoing appeal of same. The FSA

also provides for an orderly, trauma-informed, and culturally appropriate process supervised by the Federal Court to satisfy the Compensation Decision. That alone is a material achievement of the Class Actions that we had not contemplated when commencing that action.

81. The FSA also provides significantly more compensation and to far more class members impacted by Canada's discrimination than what was covered under the Compensation Decision.

82. The following chart summarizes what was achieved through the FSA beyond the award in the Compensation Decision. Some of the assumptions are drawn from a report from the Office of the Parliamentary Budget Officer ("**PBO**") titled "First Nations Child Welfare: Compensation for Removals" (the "**PBO Report**"). A copy of the PBO Report is attached as **Exhibit "P"**.

Award in Compensation Decision	FSA	Excess of FSA over award in Compensation Decision
Removed Children		
Children removed from homes, families, and communities between January 1, 2006 and December 31, 2020[1] • $1.308 billion for 32,700 children ($40,000 each) Children removed from homes, families and communities between January 1, 2021 and March 31, 2022 • $292 million for 7,300[2] children ($40,000 each) Total • $1.6 billion for 40,000 children ($40,000 each)	Children removed between January 1, 1991 and March 31, 2022 (INCLUDING those who were removed and remained in care on reserves): • $7.25 billion for 115,000 children	The FSA provides **$5.65 billion more money**. The FSA benefits **75,000 more children**.

[1] PBO Report, page 4.
[2] This is our estimate based on Professor Trocmé and Mr. Gorham assuming 8,800 removed children from 2020-2022.

Award in Compensation Decision	FSA	Excess of FSA over award in Compensation Decision
Caregivers of Removed Children		
Caregivers EXCLUDING 30% who engaged in actions that fall within a broad definition of abuse • $1.568 billion for 39,200[3] caregivers ($40,000 each)	Caregivers EXCLUDING only those who engaged in physical or sexual abuse[4] • $5.75 billion for more than 39,200 caregivers	The FSA provides **$4.182 billion more money**. The FSA benefits **many more caregivers**, who meet Canada's broad (and somewhat discriminatory) definition of an abuser but did not engage in physical or sexual abuse.
Jordan's Principle Claimants		
Children • $2.6 billion for 65,000[5] children ($40,000 each) Families • $1 billion	Children • $3 billion for 65,000 children Families • $1 billion	The FSA provides **$400 million more money**.

[3] According to the PBO Report:
- 1/3 of Removed Children were removed because of abuse (CHRT excluded caregivers whose children were removed due to abuse); and
- There are 1.47 caregivers per Removed Child.

Therefore, the number of children removed from their homes, families and communities that were removed for reasons other than abuse = 2/3 x 40,000 = 26,667. The number of caregivers for these children = 26,667 x 1.47 = 39,200.

[4] This narrower definition was reached in consultation with First Nations.

[5] This is the assumed number of Jordan's Principle children.

Award in Compensation Decision	FSA	Excess of FSA over award in Compensation Decision
Trout Claimants		
None	Children • $2 billion Families • $1 billion	The FSA provides **$3 billion more money**
Families with Multiple Removed Children		
• $477 million	• $997 million	The FSA provides **$520 million more money**.

83. Total compensation in the FSA over and above what the CHRT awarded for the above claimants amounts to approximately **$13.752 billion**.[6] Even if one disregarded the amount awarded in the Compensation Decision, the additional $13.752 billion recovered in the FSA would still be more than double the size of the next-largest settlement in Canadian history.

84. In short, we have achieved a result that is unprecedented in terms of the quantum recovered and the safeguards put in place to ensure that class members benefit as much as possible from the settlement. This was achieved as a result of a number of factors, not least of which was steadfast representation by a

[6] In addition to the amounts listed in the table, Canada agreed to pay $600 million to Kith children, $702 million to Kith family, $560 million to estates of removed children, and $900 million in interest.

highly-qualified team of lawyers single-mindedly focused on the best interest of the class, working with the AFN and Representative Plaintiffs.

85. In saying this, I do not wish to underplay or negate the role played by others in achieving this result. In particular, I fully acknowledge the extraordinary role of AFN leadership, the Caring Society, and its exceptional counsel. As well, I fully acknowledge the political will that was required to achieve the settlement and move the country closer to reconciliation. We did not count on these factors coming together as they did when we started the case.

VII. Risks to Class Counsel

A. Challenges Posed by Complexity

86. In my experience, all class actions have substantial risks, and often the size of the risk increases with the size of the action. The Class Actions were incredibly large in terms of class size, temporal scope, novelty, and complexity of legal and factual issues. All of that imported high risk. After the Compensation Decision was released and the judicial review was dismissed, the expectation bar was very high. At times, I believed that the case was too big to settle.

87. Class Counsel consulted with many experts on child welfare, including:

(a) Nico Trocmé (Director and professor, School of Social Work, McGill University);

(b) Marie Saint-Girons (Research Coordinator, Centre for Research on Children and Families, McGill University);

(c) Peter Gorham (President and actuary, JDM Actuarial Expert Services);

(d) John Loxley (Professor, Department of Economics, University of Manitoba; now deceased); and

(e) Gerald Cradock (Professor, Department of Sociology and Criminology, University of Windsor).

88. Jordan's Principle and essential services are incredibly complex and novel health and social questions. This work is being done for the first time in Canada, and we took the lead on it. In addition to the First Nations representation and expertise engaged by the AFN, our team worked extensively with experts to develop a methodology unique to this class. Those experts included:

(a) Dr. Lucyna Lach (Associate Professor, School of Social Work, McGill University; Associate Member, Department of Paediatrics, Faculty of Medicine, McGill University; Associate Member, Department of Neurology/Neurosurgery, Faculty of Medicine, McGill University);

(b) Barbara Fallon (Professor, Faculty of Social Work, University of Toronto);

(c) Peter Rosenbaum (Professor, Department of Paediatrics, McMaster University; Canada Research Chair in Childhood Disability, 2001-14; Co-Founder, CanChild Centre for Childhood Disability Research).

(d) David Streiner (Emeritus Professor, Department of Psychiatry & Behavioural Neurosciences, McMaster University; Professor, Department of Psychiatry, University of Toronto);

(e) Dr. Sabrina Eliason (Assistant Professor, Department of Pediatrics, University of Alberta; President, Canadian Pediatric Society Section of Developmental Pediatrics, 2021-2023);

(f) Joanna Mills (Executive Director of Indigenous Relations, Community Living British Columbia);

(g) Jackie Watts (Provincial Advisor, Aboriginal Supported Child Development Programs of BC);

(h) Diana Elliott (Provincial Advisor, Aboriginal Infant Development Programs of BC);

(i) Gordon Bruyere (MSW Coordinator, Old Sun Community College).

(j) Marlyn Bennett (Associate Professor, Faculty of Social Work, University of Calgary).

(k) Richard Sullivan (Professor Emeritus, School of Social Work, University of British Columbia).

(l) Dr. Anamaria Richardson (Assistant Professor, University of British Columbia).

(m) Dr. Rubab Arim (Chief, Social Analysis and Modelling Division, Statistics Canada).

(n) Dr. Dafna Kohen (Assistant Director, Health Analysis Division, Statistics Canada).

(o) Mike Burns (Disability and Accessibility Program, Statistics Canada);

(p) Susan Wallace (Unit Head, Disability and Accessibility Program, Diversity and Sociocultural Statistics, Statistics Canada).

(q) Tara Hahmann (Research Analyst, Statistics Canada);

(r) Hailegh McDonald (Health Analyst, Statistics Canada);

(s) Shawn Brule (Health Analyst, Statistics Canada);

(t) Mohan Kumar (Research Analyst, Statistics Canada);

(u) Haaris Jafri (Unit Head, Statistics Canada);

(v) Fatemeh Hosseininasabnajar (Analyst, Statistics Canada); and

(w) Anne Munro (Analyst, Statistics Canada).

89. The complexity made settlement difficult. The parties negotiated intensively, often on a daily basis, for several years over complex and novel issues, and the settlement negotiations were at a dead-end at least twice during the course of the litigation. Teams of lawyers and parties attended dozens of meetings to fully debate the many barriers to a negotiated resolution.

B. Settlement Was Not Guaranteed; At Times, It Seemed Unlikely

90. Although Canada indicated after the commencement of the Moushoom Action that it wished to negotiate, settlement was by no means a foregone conclusion.

91. I am severely limited in what I say because settlement discussions are without prejudice. I will limit what is said below to what is in the public record and do not hereby waive settlement privilege, nor do I have instructions to do so.

(i) *Canada Demonstrated a Willingness to Litigate*

92. Canada spent 11 years litigating the CHRT Proceeding until the Compensation Decision. At one point, it brought a judicial review of a CHRT decision, and when it lost, it appealed.

93. The unique risks posed in the Class Actions and the significant litigation risks were noted by Canada itself in the PBO Report. It explained that:

> there may be barriers to the success of a class action. Federal funding for child welfare differs dramatically between provinces, between agencies, and over time. Families differ in the prevention services they received, the reasons their child was taken into care, and where their child was placed. Responsibility

> for removals and the circumstances leading to removals are shared among many parties.
>
> … it may be necessary [for] lawyers representing the plaintiffs to dramatically limit the scope of who is eligible for compensation, or the harm for which they are being compensated. For example, in the Sixties Scoop class action, the group eligible for compensation was limited to children who were placed in non-aboriginal foster homes, and only included compensation for loss of culture.
>
> In terms of the amount of compensation, previous class action settlements regarding the removal of children from their homes, families and communities suggest that compensation for each removed child would not necessarily be any more than the $40,000 maximum awarded by the CHRT.

94. Thus, notwithstanding Canada's stated intention to negotiate the Moushoom Action, the success of those negotiations was always in question.

(ii) *Canada was Initially Unwilling to Negotiate the Trout Action*

95. Canada was not willing to negotiate the Trout Action. Canada would initially not even consent to certification of those claims, because it did not want any members of what is now the Trout Action class or their caregiving parents or grandparents to have any expectations that Canada was willing to settle this case. This class included tens of thousands of individuals.

96. The essential service claims in the Trout Action had no overlap with the CHRT Proceeding. In the Merits Decisions, the CHRT refused to recognize Jordan's Principle human rights victims prior to December 12, 2007. This was seen as an added risk to the Trout Action.

97. As a result, Canada insisted on severing what is now the Trout Action class members from the rest of the Consolidated Actions.

98. As set out above, in order to enable at least part of the class to have the possibility of earlier resolution, we agreed to the bifurcation of the essential service claims pre-dating 2007.

99. I advised the Court that we were going to litigate what is now the Trout Action, and mediate the remaining actions. Mr. Justice Phelan, who was case-managing the AFN Action, requested submissions on why we should be permitted to bifurcate the Trout Action. It appeared to us that the Court was questioning why we were insisting on litigating Trout instead of negotiating. The simple reason was that Canada refused. After receiving our submissions to that effect (both sets of submissions are attached as Exhibit "E" above), Mr. Justice Phelan appointed an *amicus* to provide submissions on the propriety of our conduct. The *amicus* filed a brief with the Court supporting our request. A copy of the submissions of *amicus* are attached as **Exhibit "Q"**. Justices Phelan and St-Louis (who was initially case-managing Moushoom) ultimately concluded that what we were proposing was reasonable, and severance was granted.

100. Canada only agreed to negotiate the Trout Action after almost a year spent in mediation before the Hon. L. Mandamin, as part of the intensive negotiations before the Honourable Murray Sinclair. In the intervening period, Class Counsel prepared the Trout Action certification record and scheduled the

hearing, expecting it would be contested. Class Counsel did not ask Canada to include the Trout Action class members and its caregiving parent and grandparent class in the settlement discussions before Mr. Sinclair in November 2021. It was Canada that requested.

101. As a result, the Trout Action was novel and separate from the CHRT. We did not waiver in our commitment to obtaining compensation for the individuals covered by the Trout Action.

C. Challenges Posed by the CHRT Proceeding

102. While the CHRT's Merits Decision would have been extremely helpful in a contest on the merits, it did not remove the risk of the case; in significant respects, it made a resolution harder.

103. Canada insisted on a comprehensive resolution, so any resolution of the Class Actions also had to satisfy the Compensation Decision, and satisfy all parties to the CHRT Proceeding, including the Caring Society.

104. The Caring Society's mandate was to protect the Compensation Decision. It had no mandate beyond that with regards to compensation.

105. It fell to Class Counsel to maintain a strong position and not compromise the interests of the majority of the class members who did not benefit from the Compensation Decision. The results achieved speak to our success in upholding their rights.

106. The requirement for CHRT approval was another serious complication. When the CHRT refused to approve the $20 billion First FSA, it became clear that this case might never settle. At that time, we were expecting that the Class Actions were going to be litigated to trial.

107. The fact that all parties, including the Caring Society, were eventually able to bridge their gaps to modify the First FSA and arrive at the FSA was partly beyond our control.

108. Throughout the case, we faced the risk that settlement would not be achievable or that the government would balk at paying what it would ultimately cost to settle. At no point did we waiver in our commitment to the class members. Litigation was always the alternative, which we were fully prepared for. This helped drive the settlement to what it is.

D. Challenges Posed by Suing a Government

109. Cases against governments are notoriously uncertain.

(a) Governments do not typically respond to litigation the way a corporate defendant would. Sometimes, governments will insist on going to trial, or appealing, even when they know that a case is meritorious, because it is easier politically to lose in Court than to make the political decision to settle a massive case for large sums.

(b) There is also a risk of changes in government or government priorities. An action may be high priority for a government one day, but then put on the backburner by the same or the next government the next day, sometimes for years. These proceedings spanned a federal election which could have led to a different course of litigation and negotiations.

(c) Actions involving the government also face a unique risk of legislative abrogation. There have been cases in recent history where governments have legislatively abrogated meritorious class actions, even after trial and appeals.

(i) *Authorson v. Canada (Attorney General)*, 2003 SCC 39 was a well-known case on behalf of disabled veterans claiming that the government had mismanaged their pension funds. After many years of litigation, the plaintiffs obtained summary judgment, and won on appeal to the Court of Appeal for Ontario. But there was legislation extinguishing the claim, so the Supreme Court of Canada dismissed the claim.

(ii) In *Hughes v. Liquor Control Board of Ontario*, 2019 ONCA 305, the plaintiffs brought a class action in 2014. After seeing that claim, in 2015, Ontario passed legislation to retroactively extinguish the claims. The Court of Appeal for Ontario agreed

that this extinguished the claims. The plaintiff had to pay costs of more than $2.3 million.

110. There were no guarantees that, even if we had gone to trial and appeals all the way to the Supreme Court of Canada, a future government would not have used legislation to retroactively extinguish its liability.

VIII. Class Counsel's Investment

111. Over the course of approximately four years, up to August 31, 2023, Class Counsel have spent more than 20,000 hours – worth more than $16.2 million at usual and ordinary billable rates, but not including taxes. Class Counsel also incurred out of pocket expenses of more than $600,000 (not including taxes) in disbursements. A detailed break-down of the hours and value of docketed time spent advancing the Class Actions up to August 31, 2023, is attached as **Exhibit "R"**.

112. A conservative estimate of docketed time through approval of the settlement and distribution protocol, including all work until carriage is transferred to the Settlement Implementation Committee, is $18.5 million (not including taxes). That is in addition to disbursements.

IX. Class Counsel's Efficiency

113. Class Counsel have worked on the Class Actions efficiently and effectively. For example, they have assigned tasks to the firms and lawyers with the most

expertise and experience with an issue, reducing the amount of time it takes to complete those tasks. They have also delegated tasks to lawyers with more recent years of call and lower hourly rates where possible.

114. Class Counsel's hourly rates are reasonable in their respective markets. For example, I practise in downtown Toronto, I was called in 1992 in Quebec and 1994 in Canada, and my current hourly rate is $975. Attached as **Exhibit "S"** is a blog post from Dutton Law, which I believe is also based in downtown Toronto, saying that average hourly rates for employment lawyers range from $300 to $1,500. I am personally aware of lawyers in Toronto at small and mid-sized firms who charge $1,400 per hour.

115. Additionally, Class Counsel kept fees from increasing dramatically by not filing the same case in other jurisdictions. It is common practice for class counsel to file parallel claims in provincial courts to forestall or to win carriage disputes. For example, that occurred in the cases that resulted in the Indian Residential Schools Settlement Agreement. Filing the same case in multiple jurisdictions for "turf claiming" uses scarce judicial resources and results in a proliferation of repetitive motions in each jurisdiction causing the docketed time to increase. In this case, Class Counsel decided not to do so, even though that decision increased the risk for Class Counsel that others might file overlapping claims in provincial courts.

X. Publication of Fee Approval Materials

116. Pursuant to the Court's order we are posting these fee approval materials upon service and filing on the website of the Administrator indicated by the Court's approved short-form and long-form notices to the class regarding the settlement approval hearing.

XI. Conclusion

117. As required by the FSA, Class Counsel negotiated with counsel for Canada to settle the payment of Class Counsel's fees and disbursements. These negotiations took place after the parties executed the FSA.

118. To the best of my knowledge, no member of Class Counsel discussed the payment of our fees and disbursements with counsel for Canada before the parties had resolved the other terms of the FSA. Our objective was to secure the best possible outcome for the class members before addressing Class Counsel's fees and disbursements.

119. On September 20, 2023, Class Counsel and Canada participated in mediation before the Honourable Mr. Justice Favel in an attempt to resolve the issue of Class Counsel fees and as required under the FSA. No resolution was reached.

120. In prosecuting the Class Actions, Class Counsel were exclusively focused on advancing the interests of the class members. The FSA secures the best possible resolution for the Class. Class Counsel have expended considerable resources to advance the interests of the Class, without any assurance of payment. Class

Counsel undertakes to fulfill their obligations to the Class up to the transfer of responsibilities to the SIC regardless of the quantum of fees and disbursements that the Court approves.

SWORN by David Stems of Toronto, in the Province of Ontario, before me in the City of Toronto, in the Province of Ontario, on October 6, 2023

Commissioner for Taking Affidavits
(or as may be)

David Sterns

Georgia Elizabeth Scott-McLaren, a Commissioner, etc.
Province of Ontario, for
Sotos LLP, Barristers and Solicitors
Expires February 20, 2024

This is **Exhibit "A"** to the Affidavit of David Sterns, Affirmed remotely before me in the City of Toronto, in the Province of Ontario, on October 6, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration remotely

Commissioner for taking Affidavit
(or as may be)

Georgia Elizabeth Scott-McLaren, a Commissioner, etc.
Province of Ontario, for
Sotos LLP, Barristers and Solicitors
Expires February 20, 2024

:"MANDAT·iE·T_CONVENTIO.N;:o. H0N0RAtRES

Je, soussigne, **XAVIER MOUSHOOM,** personnellement et en ma qualite de representant propose des membres du groupe dans une action collective, consens par Jes presentes a retenir les services de l'etude **KUGLER KANDESTIN, s.e.n.c.r.l.,** pour intenter une action collective (ci-apres l'« Action collective») visant a obtenir des dommages-interets compensatoires et punitifs contre **SA MAJESTE LA REINE DU CANADA,** ses representants et mandataires et toute autre entite (ci-apres, collectivement, la « **DEFENDERESSE** ») pouvant etre responsables du Programme des services a l'enfance et a la famille des Premieres Nations de Services aux Autochtones Canada et du respect du Principe de Jordan, pour les dommages causes a mon endroit et a l'endroit des autres membres du groupe tel que defini a !'Action collective.

A cet egard, je conviens d'agir a titre de demandeur et representant du groupe et je donne le mandat a l'etude **KUGLER KANDESTIN, s.e.n.c.r.l.** de me representer a titre de demandeur et de representant du groupe et d'agir a titre d'avocats des membres du groupe dans l'Action collective.

Je conviens, tant personnellement qu'en ma qualite de demandeur et representant des membres du groupe, que l'etude **KUGLER KANDESTIN, s.e.n.c.r.l.** aura droit aux honoraires extrajudiciaires suivants, selon le mode de recouvrement ordonne par le Tribunal ou consenti par la **DEFENDERESSE:**

1. Recouvrement collectif: des honoraires extrajudiciaires equivalant a **VINGT POUR CENT (20%)** des premiers deux cent millions de dollars (200,000,000$) des montants et/ou des benefices recuperes tant pour moi que pour tous les membres du groupe, que ce soit a la suite d'une entente de reglement hors cour ou d'un jugement, plus toutes les taxes applicables, en plus d'honoraires extrajudiciaires equivalant a **DIX POUR CENT (10%)** de toutes autres sommes et/au benefices recuperes au-dela des premiers deux cent millions de dollars (200,000,000$) du montant total recupere tant pour moi que pour tous les membres du groupe, que ce soit a la suite d'une entente de reglement hors cour ou d'un jugement, plus toutes les taxes applicables; OU

2. Recouvrement individuel : **VINGT-CINQ POUR CENT (25%)** sur tout montant ou benefice recupere par un membre du groupe dans le cadre d'un recouvrement individuel, le cas echeant, plus toutes les taxes applicables; OU

3. Recouvrement hybride: dans le cadre d'un recouvrement hybride, c'est-a dire en partie collectif et en partie individuel, les pourcentages applicables au recouvrement collectif indiques au paragraphe 1 ci-dessus s'appliquent a la partie des montants ou des benefices recuperes de fac;on collective, et

le pourcentage applicable au recouvrement individuel tel qu'indiqué au paragraphe 2 ci-dessus s'applique à la partie des montants ou des bénéfices récupérés de façon individuelle. En aucun cas, les pourcentages du recouvrement individuel et du recouvrement collectif ne s'appliqueront de façon cumulative à une somme reçue collectivement ou individuellement.

Je reconnais que l'étude **KUGLER KANDESTIN s.e.n.c.r.l.** travaille et continuera à travailler avec l'étude **SOTOS LLP** dans le cadre de l'Action collective et d'autres actions collectives similaires à être intentées dans d'autres juridictions. Je reconnais que les études **KUGLER KANDESTIN s.e.n.c.r.l.** et **SOTOS LLP** partageront les honoraires extrajudiciaires approuvés par les tribunaux.

Je reconnais de plus que les études **KUGLER KANDESTIN s.e.n.c.r.l.** et **SOTOS LLP** auront le droit de procéder à une demande d'aide au Fonds d'aide aux actions collectives et, à cet égard, je m'engage à coopérer avec eux pour l'obtention de cette aide. Je reconnais également que les études **KUGLER KANDESTIN s.e.n.c.r.l.** et **SOTOS LLP** auront le droit d'être remboursées par le Fonds d'aide aux actions collectives ou par la Défenderesse pour tous les frais judiciaires et extrajudiciaires qu'elles auront encourus dans le cadre de l'Action collective, incluant tous les frais d'experts et de consultants (ci-après, collectivement, les « Frais »), le tout en sus des honoraires extrajudiciaires. Il est par ailleurs entendu qu'en ma qualité de demandeur ou de représentant dans l'Action collective, je ne pourrai en aucun cas être tenu de rembourser aux études **KUGLER KANDESTIN, s.e.n.c.r.l.**. et **SOTOS LLP** les Frais encourus.

EN FOI DE QUOI, J'AI SIGNÉ À LOUVICOURT, le 28 février 2019

Xavier Moushoom
XAVIER MOUSHOOM

ACCEPTÉ À MONTRÉAL, le 28 février 2019

Kugler Kandestin sencrl
KUGLER KANDESTIN S.E.N.C.R.L.

ACCEPTÉ À TORONTO, le 3 mars 2019

SOTOS LLP

This is **Exhibit "B"** to the Affidavit of David Sterns, Affirmed remotely before me in the City of Toronto, in the Province of Ontario, on October 6, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration remotely

Commissioner for taking Affidavit
(or as may be)

Georgia Elizabeth Scott-McLaren, a Commissioner, etc.
Province of Ontario, for
Sotos LLP, Barristers and Solicitors
Expires February 20, 2024

CONTINGENCY FEE RETAINER AGREEMENT

BETWEEN:

JEREMY MEAWASIGE

(by his proposed litigation guardian, Maurina Beadle)

(herein called the "Client")

- and -

SOTOS LLP

- and -

KUGLER KANDESTIN LLP

- and -

MILLER TITERLE + CO.

(herein called collectively "Class Counsel")

1. The Client hereby retains the services of Class Counsel to prosecute a class proceeding pursuant to *Federal Courts Rules*, SOR/98-106 ("*Rules*") or a provincial class action statute, as Class Counsel deem appropriate, arising from the discriminatory funding of public services and products, including child and family services, to First Nations children. The class proceeding is brought on the Client's behalf, as representative plaintiff, and on behalf of a class of individuals with similar or related claims regarding the discrimination (the "Class").

2. The Client has authorized Class Counsel to commence proceedings on behalf of the Class against the Attorney General of Canada.

3. A proposed class proceeding must be certified by the Court as a class proceeding in order that the proposed representative plaintiff can represent the Class.

4. The Client authorizes Class Counsel to take such actions and conduct the class proceeding as they consider appropriate. However, the Client retains the right to make all critical decisions regarding the conduct of the class proceeding, but always with a view to the best interests of the Class. If the Client makes a decision regarding the conduct of the class proceeding that Class Counsel do not consider to be in the best interests of the Class, Class Counsel may seek directions from the Court on the issue.

5. The amount of a reasonable settlement or judgment in this class proceeding will depend on a number of factors, including the number of First Nations peoples affected in Canada, the strength of the evidence that is obtained in the course of investigating and prosecuting the proceeding, and the defendant's defences.

Costs and Funding

6. Under the *Rules*, the Court is not permitted to order a costs award unless exceptional circumstances are present.

7. In the exceptional event of an adverse costs award (i.e., if the Court orders that the Client is required to pay some or all of the costs incurred by the defendant in this proceeding) while Class Counsel are counsel of record, Class Counsel will indemnify the Client against any such award and the Client will not personally have to satisfy such an award. In no circumstances will the Client be required to pay any funds, including costs awards, while Class Counsel are counsel of record.

8. Class Counsel may, on the Client's behalf, obtain an indemnification against adverse costs and/or funding of disbursements from a third party litigation funder, and the third party litigation funder might be entitled to a percentage of recovery obtained on behalf of the Class. The Client authorizes Class Counsel, in their discretion, to seek such indemnification and/or disbursement funding.

Contingency Fee

9. The proceeding will be pursued on a contingency basis. Legal fees, disbursements and applicable taxes will be payable only in the event of a success.

10. "Success" in a class proceeding includes:

    (a) judgment on the common issues in favour of some or all Class members; and

    (b) a settlement, including a partial settlement.

11. The legal fee will be calculated based on (a) all benefits obtained for the Class by settlement, judgment or award, including, without limitation, settlement funds, damages award, pre-judgment interest and/or post-judgment interest, plus interest earned on such benefits while held in trust (collectively, the "Aggregate Amount Recovered"), and (b) all benefits obtained for individual Class members by settlement, judgment or award through an individual inquiry into the circumstances of individual Class members ("Individual Inquiry Recovery").

12. Legal fees will be charged on a percentage basis. The applicable percentage rate shall be on the following scale:

    (a) For any Aggregate Amount Recovered for the Class: twenty percent (20%) of the first two hundred million dollars of the Aggregate Amount Recovered, plus ten percent (10%) of any Aggregate Amount Recovered beyond the first two hundred million dollars (the percentages in this subparagraph shall not apply to any Individual Inquiry Recovery); plus

    (b) For any Individual Inquiry Recovery for individual Class members: twenty five percent (25%) of any such amounts; plus

    (c) Any amount of costs ordered by the Court in favour of the Client or the Class.

13. If no recovery is made in the litigation, the Client will not be indebted to Class Counsel for the fees, disbursements and applicable taxes incurred by Class Counsel in prosecuting this proceeding. If a recovery is made in the proceeding, any fees, disbursements and applicable taxes incurred by Class Counsel will be paid solely from the recovery in the class proceeding.

14. The Client confirms that:

    (a) The Client has been provided with options for retaining Class Counsel other than by way of a contingency fee agreement, including retaining Class Counsel by way of an hourly-rate retainer – the legal professionals who will be working on this proceeding have hourly rates ranging from $175.00/hour to $850.00/hour, or higher;

    (b) The Client has been advised that hourly rates may vary among solicitors and the Client can speak with other solicitors to compare rates;

    (c) The Client has chosen to retain Class Counsel by way of a contingency fee agreement, as outlined in this Retainer Agreement;

    (d) The work done in the class proceeding will be conducted by the retained firm, Class Counsel, and not by particular lawyers; and

    (e) All usual protections and controls on retainer agreements between a solicitor and a client, as defined by the Law Society of Ontario, Barreau du Québec, the Law Society of British Columbia and the common law, apply to this Retainer Agreement.

15. Class Counsel may associate with other law firms in Canada in the prosecution of this proceeding. No additional fees will be payable by the Class to such firms in respect of their assistance in the prosecution of this proceeding.

16. Court proceedings are expensive and uncertain and in spite of Class Counsel's efforts on the Client's behalf, there is no assurance or guarantee of the outcome, the length of time it

may take, or the potential costs involved. All estimates of fees and disbursements the Client has been or may be given, whether orally or in writing, are estimates only.

Taxes and Disbursements

17. Harmonized Sales Tax ("H.S.T."), currently at the rate in force in the relevant jurisdiction, is payable on legal fees and disbursements. H.S.T. and any other taxes payable will be paid at the prevailing rate.

18. Disbursements will include the costs of obtaining financial reports, expert opinions and such items as postage, courier charges, long distance telephone charges, photocopies, fax charges, and all costs associated with the proceeding such as court filing fees, service of documents, court reporter fees and transcript costs, as well as other disbursements such as experts' fees to quantify economic losses, mediation costs, travel and accommodation costs, and other miscellaneous expenses, including the taxes thereon.

19. The Client confirms that Class Counsel are authorized to retain such experts as may be advisable to advance the proceeding.

Example Fee Calculation

20. In the event of a success, Class Counsel's fee will be calculated pursuant to paragraph 12, above, plus Court ordered costs, plus disbursements, interest on disbursements and applicable taxes. By way of example:

    (a) If the proceeding leads to success for damages in the form of an Aggregate Amount Recovered, and prejudgment interest, of $250,000,000.00, and Class Counsel have incurred $100,000.00 in disbursements, for which the interest is $1000.00, Class Counsel fee will be calculated as follows:

Class Counsel fee ($200,000,000.00 x 20% + $50,000,000.00 x 10%)	$45,000,000.00
H.S.T. on fee ($45,000,000.00 x 13%)	$5,850,000.00
Disbursements	$100,000.00
Court ordered costs	$100,000.00
Interest on disbursements	$1,000.00
H.S.T. on disbursements ($100,000.00 x 13%)	$13,000.00
Total Class Counsel account	$51,064,000.00

In this example the net Aggregate Amount Recovered for the Class after the legal fee and H.S.T. thereon, plus costs, and disbursements and H.S.T. would be $198,936,000.00, calculated as follows:

Total Aggregate Amount Recovered (inclusive of damages, pre-judgment interest, interest while held in trust, and defendant's contribution to costs)	$250,000,000.00
Class Counsel account	$51,064,000.00
Net proceeds of Aggregate Amount Recovered (to be distributed among Class members)	$198,936,000.00

(b) If the proceeding leads to success for damages for an individual Class member in the form of an Individual Inquiry Recovery, plus prejudgment interest, of $100,000.00, and Class Counsel have incurred $10,000.00 in disbursements, for which the interest is $100.00, plus no costs, Class Counsel fee will be calculated as follows:

Class Counsel fee ($100,000.00 x 25%)	$25,000.00
H.S.T. on fee ($25,000.00 x 13%)	$3,250.00
Disbursements	$10,000.00
Interest on disbursements	$100.00
H.S.T. on disbursements ($10,000.00 x 13%)	$1,300.00
Total Class Counsel account	$39,650.00

In this example the net Individual Inquiry Recovery for that Class member after the legal fee and H.S.T. thereon and disbursements and H.S.T. would be $60,350.00, calculated as follows:

Total Individual Inquiry Recovery	$100,000.00
Class Counsel account	$39,650.00
Net proceeds of Individual Inquiry Recovery (to be distributed to the Class member)	$60,350.00

Court Approval Necessary

21. If the class proceeding is successful, the legal fees, disbursements and applicable taxes of Class Counsel are subject to the approval of the Court. In considering Class Counsel's fee request, the Court may consider, among other things, this Retainer Agreement, the results achieved in the proceeding, the risk assumed by Class Counsel in prosecuting the

proceeding, and the time and expense incurred by Class Counsel in prosecuting the proceeding.

22. Class Counsel will not recover more in fees than the Class recovers as damages or receives by way of settlement. Notwithstanding the foregoing, in the event of a success, subject to Court approval, Class Counsel can retain settlement funds to finance already incurred disbursements, ongoing disbursements incurred for the benefit of the Class and/or any future adverse costs awards.

Payment of Settlement Monies

23. The Client authorizes and directs that settlement funds be payable to Class Counsel, In Trust, and that settlement funds will be applied to fees, H.S.T. and disbursements owing to Class Counsel, prior to settlement funds being distributed to the Class.

Discontinuance, Abandonment and Settlement of the Class Proceeding

24. The Client understands that, in accordance with the *Rules*, the discontinuance, abandonment and settlement of a class proceeding requires approval of the Court, on such terms as the Court considers appropriate.

Termination of Relationship

25. If either the Client or Class Counsel wish to terminate this relationship, the Client or Class Counsel will move before the Court for directions. The Client acknowledges that Class Counsel have incurred and will continue to incur significant time and financial risk in the prosecution of this proceeding. Accordingly, if the Client engages another lawyer to act in this proceeding or if the Client otherwise terminates this Retainer Agreement and the proceeding is successful, Class Counsel will be paid fees, disbursements, applicable taxes and interest in accordance with the terms of this Retainer Agreement. In the event of termination, the Client will consent to an order to remove Class Counsel as solicitors of record.

26. If the Client desires to withdraw as representative plaintiff in this action, the Client shall (i) notify Class Counsel of the same, in writing; and (ii) take reasonable steps to assist in securing a substitute representative plaintiff. Notwithstanding the foregoing, the Client cannot withdraw as representative plaintiff if doing so will or might harm the Class in any way. A Court order might be required in order to withdraw as representative plaintiff and, if so, the Client will take no steps to withdraw, other than seeking such an order, until such an order is finally granted.

Privacy & Protection of Information

27. The Client understands and agrees that, in having retained Class Counsel to provide the legal services described in this Retainer Agreement, the collection, use, retention, and disclosure of personal and other sensitive information may be required in order to fulfil those services and related obligations. The Client has read the Class Counsel Privacy Policy respecting the management of personal and sensitive information and understands that such information will be used by Class Counsel for only the purposes set out in this Retainer

Agreement and for no other purpose without express written consent pursuant to this Privacy Policy.

28. Regarding the transmission of personal information by email, the Client acknowledges that no method of transmitting or storing data is completely secure and that, notwithstanding the technological safeguards used by Class Counsel, all Internet transmissions are susceptible to possible loss, misrouting, interception and misuse. Notwithstanding the potential risk, the Client specifically consents to Class Counsel transmitting the Client's personal information electronically.

29. The Client understands that, as of July 1, 2014, federal legislation requires Class Counsel to obtain consent to send certain electronic communications. The Client specifically consents and agrees herein to receive electronic communications from Class Counsel, including, without limitation, emails regarding class actions, practice updates, newsletters, publications, event invitations or other information that may be of interest. Class Counsel are committed to sending only relevant and useful information to the Client. Consent to receive these electronic communications may be withdrawn at any time by contacting Class Counsel at info@sotosllp.com or by mail.

Conflicts of Interest

30. Because Class Counsel is a multi-disciplinary firm, Class Counsel frequently represents clients that are competitors, customers or suppliers, or have other commercial, and at times legal, interests that are adverse to one another. It is possible that during or following the time Class Counsel represents the Client, another existing or new client may have disputes with the Client that are unrelated to the matters that Class Counsel is handling or has handled for the Client. Class Counsel will represent the Client in this and future matters on the understanding that Class Counsel represents other clients and may accept engagements from them on other matters that may be adverse to the Client. However, Class Counsel will not act for another client against the Client's interests if the matter is substantially related to any matter in which Class Counsel is representing the Client. If the foregoing conditions are satisfied, the Client agrees that Class Counsel may undertake the adverse representation and that all conflict of interest issues will be deemed to have been waived by the Client.

Enforcement

31. This Retainer Agreement shall not confer any rights or remedies upon any person other than the parties hereto and their respective heirs, executors, successors and permitted assigns.

32. This agreement may be executed in counterparts, each of which when so executed and delivered shall be an original, but all such counterparts together constitute one and the same instrument.

33. This Retainer Agreement replaces any former agreement(s) that the Client may have previously executed and shall remain in full force and effect until cancelled in writing.

Guaranteed Income Certificate

34. The Client hereby authorizes Class Counsel, in their sole and absolute discretion, to temporarily invest any settlement or judgment funds received from a defendant in this action in a guaranteed income certificate (GIC) or similar interest-bearing instrument. Such instrument shall be held in a segregated account in trust for the members of the Class. This shall be the Client's good and sufficient authority to make such investment; Class Counsel shall be under no obligation to make such investment unless required by order of the Court.

The Client accepts the terms and conditions as outlined herein, and acknowledges receipt of a copy of this Retainer Agreement.

[*Signatures on the next page*]

DATED at Toronto, Ontario, this 7th day of May, 2019

WITNESS	**JEREMY MEAWASIGE** **(by his proposed litigation guardian, Maurina Beadle)** 84 Eagle Road, Pictou Landing, Nova Scotia Tel: 9027553176 E-mail: metallict@outlook.com

DATED at Toronto, Ontario, this 7th day of May, 2019

WITNESS	**Sotos LLP** Suite 1200, 180 Dundas Street West Toronto, Ontario M5G 1A8 Tel: (416) 977-0007

DATED at Montreal, Quebec, this 8th day of May, 2019

WITNESS	**Kugler Kandestin LLP** 1 Place Ville Marie #1170, Montréal, QC H3B 2A7 Tel: (514) 878-2861

DATED at Vancouver, BC, this 8th day of May, 2019

WITNESS	**MILLER TITERLE + CO.** 300 - 638 Smithe Street Vancouver BC V6B 1E3 Tel: (604) 681-4112

This is **Exhibit "C"** to the Affidavit of David Sterns, Affirmed remotely before me in the City of Toronto, in the Province of Ontario, on October 6, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration remotely

Commissioner for taking Affidavit
(or as may be)

Georgia Elizabeth Scott-McLaren, a Commissioner, etc.
Province of Ontario, for
Sotos LLP, Barristers and Solicitors
Expires February 20, 2024

CONTINGENCY FEE RETAINER AGREEMENT

BETWEEN:

ZACHEUS JOSEPH TROUT

(herein called the "Client")

- and -

SOTOS LLP

- and -

KUGLER KANDESTIN LLP

- and -

MILLER TITERLE + CO.

(herein called collectively "Class Counsel")

1. The Client hereby retains the services of Class Counsel to prosecute a class proceeding pursuant to *Federal Courts Rules*, SOR/98-106 ("*Rules*") or a provincial class action statute, as Class Counsel deem appropriate, arising from the discriminatory funding of public services and products, including child and family services, to First Nations children. The class proceeding is brought on the Client's behalf, as representative plaintiff, and on behalf of a class of individuals with similar or related claims regarding the discrimination (the "Class").

2. The Client has authorized Class Counsel to commence proceedings on behalf of the Class against the Attorney General of Canada.

3. A proposed class proceeding must be certified by the Court as a class proceeding in order that the proposed representative plaintiff can represent the Class.

4. The Client authorizes Class Counsel to take such actions and conduct the class proceeding as they consider appropriate. However, the Client retains the right to make all critical decisions regarding the conduct of the class proceeding, but always with a view to the best interests of the Class. If the Client makes a decision regarding the conduct of the class proceeding that Class Counsel do not consider to be in the best interests of the Class, Class Counsel may seek directions from the Court on the issue.

5. The amount of a reasonable settlement or judgment in this class proceeding will depend on a number of factors, including the number of First Nations peoples affected in Canada, the strength of the evidence that is obtained in the course of investigating and prosecuting the proceeding, and the defendant's defences.

Costs and Funding

6. Under the *Rules*, the Court is not permitted to order a costs award unless exceptional circumstances are present.

7. In the exceptional event of an adverse costs award (i.e., if the Court orders that the Client is required to pay some or all of the costs incurred by the defendant in this proceeding) while Class Counsel are counsel of record, Class Counsel will indemnify the Client against any such award and the Client will not personally have to satisfy such an award. In no circumstances will the Client be required to pay any funds, including costs awards, while Class Counsel are counsel of record.

8. Class Counsel may, on the Client's behalf, obtain an indemnification against adverse costs and/or funding of disbursements from a third party litigation funder, and the third party litigation funder might be entitled to a percentage of recovery obtained on behalf of the Class. The Client authorizes Class Counsel, in their discretion, to seek such indemnification and/or disbursement funding.

Contingency Fee

9. The proceeding will be pursued on a contingency basis. Legal fees, disbursements and applicable taxes will be payable only in the event of a success.

10. "Success" in a class proceeding includes:

    (a) judgment on the common issues in favour of some or all Class members; and

    (b) a settlement, including a partial settlement.

11. The legal fee will be calculated based on (a) all benefits obtained for the Class by settlement, judgment or award, including, without limitation, settlement funds, damages award, pre-judgment interest and/or post-judgment interest, plus interest earned on such benefits while held in trust (collectively, the "Aggregate Amount Recovered"), and (b) all benefits obtained for individual Class members by settlement, judgment or award through an individual inquiry into the circumstances of individual Class members ("Individual Inquiry Recovery").

12. Legal fees will be charged on a percentage basis. The applicable percentage rate shall be on the following scale:

    (a) For any Aggregate Amount Recovered for the Class: twenty percent (20%) of the first two hundred million dollars of the Aggregate Amount Recovered, plus ten percent (10%) of any Aggregate Amount Recovered beyond the first two hundred million dollars (the percentages in this subparagraph shall not apply to any Individual Inquiry Recovery); plus

    (b) For any Individual Inquiry Recovery for individual Class members: twenty five percent (25%) of any such amounts; plus

    (c) Any amount of costs ordered by the Court in favour of the Client or the Class.

13. If no recovery is made in the litigation, the Client will not be indebted to Class Counsel for the fees, disbursements and applicable taxes incurred by Class Counsel in prosecuting this proceeding. If a recovery is made in the proceeding, any fees, disbursements and applicable taxes incurred by Class Counsel will be paid solely from the recovery in the class proceeding.

14. The Client confirms that:

    (a) The Client has been provided with options for retaining Class Counsel other than by way of a contingency fee agreement, including retaining Class Counsel by way of an hourly-rate retainer – the legal professionals who will be working on this proceeding have hourly rates ranging from $175.00/hour to $850.00/hour, or higher;

    (b) The Client has been advised that hourly rates may vary among solicitors and the Client can speak with other solicitors to compare rates;

    (c) The Client has chosen to retain Class Counsel by way of a contingency fee agreement, as outlined in this Retainer Agreement;

    (d) The work done in the class proceeding will be conducted by the retained firm, Class Counsel, and not by particular lawyers; and

    (e) All usual protections and controls on retainer agreements between a solicitor and a client, as defined by the Law Society of Ontario, Barreau du Québec, the Law Society of British Columbia and the common law, apply to this Retainer Agreement.

15. Class Counsel may associate with other law firms in Canada in the prosecution of this proceeding. No additional fees will be payable by the Class to such firms in respect of their assistance in the prosecution of this proceeding.

16. Court proceedings are expensive and uncertain and in spite of Class Counsel's efforts on the Client's behalf, there is no assurance or guarantee of the outcome, the length of time it

may take, or the potential costs involved. All estimates of fees and disbursements the Client has been or may be given, whether orally or in writing, are estimates only.

Taxes and Disbursements

17. Harmonized Sales Tax ("H.S.T."), currently at the rate in force in the relevant jurisdiction, is payable on legal fees and disbursements. H.S.T. and any other taxes payable will be paid at the prevailing rate.

18. Disbursements will include the costs of obtaining financial reports, expert opinions and such items as postage, courier charges, long distance telephone charges, photocopies, fax charges, and all costs associated with the proceeding such as court filing fees, service of documents, court reporter fees and transcript costs, as well as other disbursements such as experts' fees to quantify economic losses, mediation costs, travel and accommodation costs, and other miscellaneous expenses, including the taxes thereon.

19. The Client confirms that Class Counsel are authorized to retain such experts as may be advisable to advance the proceeding.

Example Fee Calculation

20. In the event of a success, Class Counsel's fee will be calculated pursuant to paragraph 12, above, plus Court ordered costs, plus disbursements, interest on disbursements and applicable taxes. By way of example:

    (a) If the proceeding leads to success for damages in the form of an Aggregate Amount Recovered, and prejudgment interest, of $250,000,000.00, and Class Counsel have incurred $100,000.00 in disbursements, for which the interest is $1000.00, Class Counsel fee will be calculated as follows:

Class Counsel fee ($200,000,000.00 x 20% + $50,000,000.00 x 10%)	$45,000,000.00
H.S.T. on fee ($45,000,000.00 x 13%)	$5,850,000.00
Disbursements	$100,000.00
Court ordered costs	$100,000.00
Interest on disbursements	$1,000.00
H.S.T. on disbursements ($100,000.00 x 13%)	$13,000.00
Total Class Counsel account	$51,064,000.00

In this example the net Aggregate Amount Recovered for the Class after the legal fee and H.S.T. thereon, plus costs, and disbursements and H.S.T. would be $198,936,000.00, calculated as follows:

Total Aggregate Amount Recovered (inclusive of damages, pre-judgment interest, interest while held in trust, and defendant's contribution to costs)	$250,000,000.00
Class Counsel account	$51,064,000.00
Net proceeds of Aggregate Amount Recovered (to be distributed among Class members)	$198,936,000.00

(b) If the proceeding leads to success for damages for an individual Class member in the form of an Individual Inquiry Recovery, plus prejudgment interest, of $100,000.00, and Class Counsel have incurred $10,000.00 in disbursements, for which the interest is $100.00, plus no costs, Class Counsel fee will be calculated as follows:

Class Counsel fee ($100,000.00 x 25%)	$25,000.00
H.S.T. on fee ($25,000.00 x 13%)	$3,250.00
Disbursements	$10,000.00
Interest on disbursements	$100.00
H.S.T. on disbursements ($10,000.00 x 13%)	$1,300.00
Total Class Counsel account	$39,650.00

In this example the net Individual Inquiry Recovery for that Class member after the legal fee and H.S.T. thereon and disbursements and H.S.T. would be $60,350.00, calculated as follows:

Total Individual Inquiry Recovery	$100,000.00
Class Counsel account	$39,650.00
Net proceeds of Individual Inquiry Recovery (to be distributed to the Class member)	$60,350.00

Court Approval Necessary

21. If the class proceeding is successful, the legal fees, disbursements and applicable taxes of Class Counsel are subject to the approval of the Court. In considering Class Counsel's fee request, the Court may consider, among other things, this Retainer Agreement, the results achieved in the proceeding, the risk assumed by Class Counsel in prosecuting the

proceeding, and the time and expense incurred by Class Counsel in prosecuting the proceeding.

22. Class Counsel will not recover more in fees than the Class recovers as damages or receives by way of settlement. Notwithstanding the foregoing, in the event of a success, subject to Court approval, Class Counsel can retain settlement funds to finance already incurred disbursements, ongoing disbursements incurred for the benefit of the Class and/or any future adverse costs awards.

Payment of Settlement Monies

23. The Client authorizes and directs that settlement funds be payable to Class Counsel, In Trust, and that settlement funds will be applied to fees, H.S.T. and disbursements owing to Class Counsel, prior to settlement funds being distributed to the Class.

Discontinuance, Abandonment and Settlement of the Class Proceeding

24. The Client understands that, in accordance with the *Rules*, the discontinuance, abandonment and settlement of a class proceeding requires approval of the Court, on such terms as the Court considers appropriate.

Termination of Relationship

25. If either the Client or Class Counsel wish to terminate this relationship, the Client or Class Counsel will move before the Court for directions. The Client acknowledges that Class Counsel have incurred and will continue to incur significant time and financial risk in the prosecution of this proceeding. Accordingly, if the Client engages another lawyer to act in this proceeding or if the Client otherwise terminates this Retainer Agreement and the proceeding is successful, Class Counsel will be paid fees, disbursements, applicable taxes and interest in accordance with the terms of this Retainer Agreement. In the event of termination, the Client will consent to an order to remove Class Counsel as solicitors of record.

26. If the Client desires to withdraw as representative plaintiff in this action, the Client shall (i) notify Class Counsel of the same, in writing; and (ii) take reasonable steps to assist in securing a substitute representative plaintiff. Notwithstanding the foregoing, the Client cannot withdraw as representative plaintiff if doing so will or might harm the Class in any way. A Court order might be required in order to withdraw as representative plaintiff and, if so, the Client will take no steps to withdraw, other than seeking such an order, until such an order is finally granted.

Privacy & Protection of Information

27. The Client understands and agrees that, in having retained Class Counsel to provide the legal services described in this Retainer Agreement, the collection, use, retention, and disclosure of personal and other sensitive information may be required in order to fulfil those services and related obligations. The Client has read the Class Counsel Privacy Policy respecting the management of personal and sensitive information and understands that such information will be used by Class Counsel for only the purposes set out in this Retainer

Agreement and for no other purpose without express written consent pursuant to this Privacy Policy.

28. Regarding the transmission of personal information by email, the Client acknowledges that no method of transmitting or storing data is completely secure and that, notwithstanding the technological safeguards used by Class Counsel, all Internet transmissions are susceptible to possible loss, misrouting, interception and misuse. Notwithstanding the potential risk, the Client specifically consents to Class Counsel transmitting the Client's personal information electronically.

29. The Client understands that, as of July 1, 2014, federal legislation requires Class Counsel to obtain consent to send certain electronic communications. The Client specifically consents and agrees herein to receive electronic communications from Class Counsel, including, without limitation, emails regarding class actions, practice updates, newsletters, publications, event invitations or other information that may be of interest. Class Counsel are committed to sending only relevant and useful information to the Client. Consent to receive these electronic communications may be withdrawn at any time by contacting Class Counsel at info@sotosllp.com or by mail.

Conflicts of Interest

30. Because Class Counsel is a multi-disciplinary firm, Class Counsel frequently represents clients that are competitors, customers or suppliers, or have other commercial, and at times legal, interests that are adverse to one another. It is possible that during or following the time Class Counsel represents the Client, another existing or new client may have disputes with the Client that are unrelated to the matters that Class Counsel is handling or has handled for the Client. Class Counsel will represent the Client in this and future matters on the understanding that Class Counsel represents other clients and may accept engagements from them on other matters that may be adverse to the Client. However, Class Counsel will not act for another client against the Client's interests if the matter is substantially related to any matter in which Class Counsel is representing the Client. If the foregoing conditions are satisfied, the Client agrees that Class Counsel may undertake the adverse representation and that all conflict of interest issues will be deemed to have been waived by the Client.

Enforcement

31. This Retainer Agreement shall not confer any rights or remedies upon any person other than the parties hereto and their respective heirs, executors, successors and permitted assigns.

32. This agreement may be executed in counterparts, each of which when so executed and delivered shall be an original, but all such counterparts together constitute one and the same instrument.

33. This Retainer Agreement replaces any former agreement(s) that the Client may have previously executed and shall remain in full force and effect until cancelled in writing.

Guaranteed Income Certificate

34. The Client hereby authorizes Class Counsel, in their sole and absolute discretion, to temporarily invest any settlement or judgment funds received from a defendant in this action in a guaranteed income certificate (GIC) or similar interest-bearing instrument. Such instrument shall be held in a segregated account in trust for the members of the Class. This shall be the Client's good and sufficient authority to make such investment; Class Counsel shall be under no obligation to make such investment unless required by order of the Court.

The Client accepts the terms and conditions as outlined herein, and acknowledges receipt of a copy of this Retainer Agreement.

[*Signatures on the next page*]

DATED at Cross Lake, Manitoba, this 23 day of September, 2020

WITNESS Veronica Trout House 185 CROSS LAKE, MB R0B-0J0 P.O Box 1022 Tel: 204 301 7765 204 301-7765		**ZACHEUS JOSEPH TROUT** House 185 Cross Lake MB R0B 0J0 P.O. Box: 1022 Tel: 204-307-0968 E-mail: <zacheus_trout@hotmail.com>

DATED at Toronto, Ontario, this ___ day of September, 2020

WITNESS		**Sotos LLP** Suite 1200, 180 Dundas Street West Toronto, Ontario M5G 1A8 Tel: (416) 977-0007

DATED at Montreal, Quebec, this ___ day of September, 2020

WITNESS		**Kugler Kandestin LLP** 1 Place Ville Marie #1170, Montréal, QC H3B 2A7 Tel: (514) 878-2861

DATED at Vancouver, BC, this ___ day of September, 2020

WITNESS		**MILLER TITERLE + CO.** 300 - 638 Smithe Street Vancouver BC V6B 1E3 Tel: (604) 681-4112

This is **Exhibit "D"** to the Affidavit of David Sterns, Affirmed remotely before me in the City of Toronto, in the Province of Ontario, on October 6, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration remotely

Commissioner for taking Affidavit
(or as may be)

Georgia Elizabeth Scott-McLaren, a Commissioner, etc.
Province of Ontario, for
Sotos LLP, Barristers and Solicitors
Expires February 20, 2024

CONSORTIUM AGREEMENT
(DISCRIMINATION AGAINST FIRST NATIONS CHILDREN)

B E T W E E N:

Sotos LLP ("Sotos")

– and –

Kugler Kandestin LLP ("KKL")

-and-

Miller Titerle + Co. ("Miller")

(Sotos, KKL and Miller collectively the "Moushoom Group")

– and –

Fasken LLP ("Fasken")

– and –

Nahwegahbow Corbiere ("Nahwegahbow")

(Fasken and Nahwegahbow collectively the "AFN Group")

(Moushoom Group and AFN Group collectively the "Parties", and each Group respectively the "Party")

WHEREAS on March 4, 2019, the Moushoom Group commenced a class action (the "**Moushoom Case**") in the Federal Court on behalf of plaintiffs seeking to represent a Canada-wide class ("**Class**") alleging, among other things, unlawful discriminatory underfunding of child and family services by the Federal Government during a class period commencing in 1991;

AND WHEREAS the Moushoom Group have litigated the Moushoom Case to the point that the federal government announced its intention to consent to certification and try to resolve the matter out of court;

AND WHEREAS the Assembly of First Nations ("**AFN**"), represented in the Federal Court class action matter by the AFN Group, and the First Nations Child and Family Caring Society, commenced a matter before the Canadian Human Rights Tribunal ("**CHRT**") to address unlawful discriminatory underfunding of child and family services by the Federal Government ("**CHRT Matter**"), and obtained a favourable decision from the CHRT on September 6, 2019 which included an award of $40,000 per affected individual for a period commencing in 2006;

AND WHEREAS on or about January 28, 2020, the AFN Group also filed a class action in the Federal Court on behalf of plaintiffs seeking to represent substantially the same class as the Class alleging, among other things, unlawful discriminatory underfunding of child and family services by the Federal Government during a class period commencing in 1991 (the "**AFN Case**") (the Moushoom Case and the AFN Case are hereinafter referred to collectively as, the "**Case**");

AND WHEREAS the Parties have agreed to come together, to combine the Moushoom Case and the AFN Case, advance the best interests of the individuals envisaged in the Case and the CHRT Matter, divide work on the Case, and share fees as between each Party according to this Agreement;

NOW THEREFORE:

Objective

1. The Parties agree to work together to advance the Case for the collective benefit of their respective clients and the members of the Class, whether through litigation or through a negotiated settlement.

2. The Parties shall seek, as a consequence of the Case, compensation for all members of the Class, as well as permanent, systemic changes that address the historical discrimination against First Nations children and improve Indigenous child welfare in Canada.

Legal Proceeding

3. The two class actions shall be consolidated into one pleading bearing the styles of cause and court file numbers of both the Moushoom Case and the AFN Case. The Consolidated case shall maintain the issuance date of the Moushoom Case. Each Party shall continue to represent their existing respective clients; however all Parties shall be counsel to the Class. The Parties shall work together as stated in this Agreement to advance the Case for the benefit of all plaintiffs and members of the Class. The proceeding shall be litigated in a manner that best advances the common interests of all the plaintiffs and the members of the Class.

4. Any communications with Class members shall be done in a sensitive manner that considers Indigenous culture, trauma suffered by victims, and historical injustice.

5. Portals on the Internet have been setup to register and communicate with class members. The portals shall be consolidated and the Parties shall endeavour to combine the best of both portals. The portal shall be:

    (a) Culturally sensitive;

    (b) Supported by elders and mental health professionals to assist class members suffering from trauma as a result of the subject matter of the Case;

    (c) Kept up to date;

(d) Secure and encrypted;

(e) Managed by third party professionals.

6. While all Parties shall work collaboratively to advance the Case, and shall be involved in all steps of the Case, the following Parties or law firms are expected to assume a more prominent role with respect to the following tasks:

(a) Certification – Moushoom Group;

(b) Indigenous law – Nahwegahbow and, if requested, Miller;

(c) Negotiations with the federal government regarding eliminating systemic discrimination and restoring jurisdiction over child welfare – AFN Group;

(d) Negotiations with federal government regarding compensation –AFN Group and Moushoom Group;

(e) Trial of the common issues – Moushoom Group;

(f) Notice to the Class – Moushoom Group and AFN Group;

(g) Oversight of the portal – Moushoom Group and Nahwegahbow.

7. The Parties recognize the unique position of the AFN as a representative of First Nations in Canada, and its ability to make a meaningful contribution to the Case.

8. The Parties also recognize the meaningful contribution that can be made by all the representative plaintiffs in this case.

9. If and when negotiations with the federal government take place, the Parties shall seek a global settlement that encompasses the Case and the CHRT matter.

Quarterly Meetings and Work

10. The Parties shall confer shortly after execution of the present agreement, and thereafter on a quarterly basis, at which time they shall address and approve the following:

(a) *Upcoming work* – Anticipated or upcoming work required to advance the Case or settlement of the Case;

(b) *Division of work* - For upcoming work, which lawyers and clerks will do the work, an estimate of the time and cost required to complete the work;

(i) *Criteria* - In determining who will do upcoming work, the Parties shall be guided by the following criteria:

A. ability of a Party to obtain desired outcomes;

B. knowledge and experience of respective lawyers and clerks;

C. availability of persons;

D. efficiency;

E. avoidance of duplication; and,

F. cost;

(c) *Adjustment to work* – For work being done, or that has been planned, or whether revisions should be made to better align with the "Criteria" above;

(d) *Communication with the Class* – Communication with class members, including through any portal or other method of notice;

(e) *Strategy* – Strategy in advancing the Case or obtaining a favourable settlement;

(f) *Report* – Developments of the past quarter in relation to the Case;

(g) *Report on Costs* - The lawyers and clerks for the Parties will docket their time at the agreed-upon hourly rates. These rates may be adjusted from time to time as agreed upon by the Parties. A report of docketed time and disbursements incurred shall be exchanged at or prior to the quarterly meetings;

(h) *Concern with work* - Where a Party has concerns with the work done or fees docketed by the other Party, those concerns shall be raised at the quarterly meeting, and resolved on a mutually acceptable manner, failing which resort should be made to the arbitration process described below;

(i) *Other* - any other matter that may better advance the Case and the interests of class members.

11. In addition to the quarterly conferences described above, the Parties shall communicate regularly and as soon as possible where there has been a significant development in the Case.

12. All Parties are expected, and will have a right, to participate in all tasks required to advance the Case, or obtain settlement of the Case. However, wherever possible, the Parties shall take steps to minimize cost, and adhere to their quarterly plan as described above.

13. The Parties shall take steps to regularly confer with and report to the representative class plaintiffs, and where possible, involve them in the Case. Such involvement is particularly important considering their unique strengths and knowledge which are expected to make a meaningful contribution to the Case.

14. The Parties shall provide full and meaningful disclosure to the other of any information or documents that are relevant to advancing the Case or settlement of the Case. All such information provided shall be treated as confidential and privileged unless agreed to otherwise by the Parties.

Fees and Disbursements

15. The Parties shall recover their fees and disbursements on the basis below, and subject to court approval. This formula shall apply whether fees and disbursements result from a court-ordered judgment, court ordered costs or settlement with the defendant.

16. At all times, in seeking recovery of their fees and disbursements, the Parties shall be guided by the following principles:

    (a) Fairness to class members;

    (b) Relationship between the value of the fees and disbursements incurred, and payment received by the Parties;

    (c) Assumption of risk and the carrying of disbursements by the Parties.

(i) Fees

17. The Parties shall seek the following fees ("**Fees**"), subject to Court approval:

    (a) Ten percent (10%) of any payment received by the Class by way of settlement or judgment ("Proceeds") obtained prior to the commencement of a common issues trial, subject to a cap of $80 million; and thereafter,

    (b) Fifteen percent (15%) of any payment obtained after the commencement of a common issues trial but prior to judgment or settlement, subject to a cap of $100 million; and thereafter,

    (c) Twenty percent (20%) of any payment obtained after the completion of a common issues trial in first instance, subject to a cap of $120 million.

    (d) The above amounts are exclusive of applicable taxes.

18. The Parties may, by agreement, seek a lower amount where doing so would be reasonable, appropriate and consistent with the principles stated in this Agreement.

19. Amounts received on account of Fees shall be divided between as between the Moushoom Group on the one hand and the AFN Group on the other hand in proportion to the value of each group's respective accumulated fees (or work in progress) in the Case, subject to any adjustment by agreement of the Parties, a court or arbitrator ("**Docketed Fees**"). For example, assume total court-approved Fees are $50 million plus HST and the Moushoom Group's Docketed Fees are $12.5 million plus HST and the AFN Group's Docketed Fees

are $8 million plus HST. The Moushoom Group will receive 61% of the Fees and the AFN Group will receive 39% of the Fees.

20. Both groups may divide Fees among their member firms as separately agreed among themselves.

21. Docketed Fees shall include accumulated Docketed Fees of the Parties to the date of entering into this Agreement, and shall also include the accumulated Docketed Fees of the law firm of Strosberg Sasso Sutts ("Strosberg"). Prior to the execution of this Agreement, the parties shall exchange their accumulated Docketed Fees and Disbursements to date. The Parties shall continue to exchange the total amount of their Docketed Fees and Disbursements, if any, on at least a quarterly basis and the Parties (which for this purpose shall include Strosberg) shall exchange the details of their Docketed Fees and Disbursements upon request.

(ii) Disbursements

22. Disbursements may include expenses incurred by the Parties' clients, and the AFN, provided that any such expenses are directly related to the Case, are reasonable and are approved by the Court. These expenses shall include the reasonable fees and expenses of elders to advise the Parties. These expenses may also include the reasonable fees and expenses of the representative plaintiffs in support of the Case, provided that such fees and expenses are directly related to the Case, are reasonable and are approved by the Court.

23. Disbursements include:

"Case Expenses" which are disbursements incurred in the Case related to service fees, expert fees, cost of transcripts, witness travel, filing fees, arbitration/mediation costs, class notice costs, and any other exceptional costs to which the Parties agree.

"Firm Expenses" which are all other disbursements incurred in the Case, including but not limited to non-witness travel, telephone, fax, internal photocopies (to be billed at no more than CDN$0.25 per page), postage, computer research, meals, courier, etc.

24. The Parties shall carry their own disbursements until such time as they may be recovered, as set forth in this agreement, or as otherwise agreed to by the Parties.

25. In incurring Disbursements, the Parties shall abide by the following guidelines, unless otherwise agreed to:

(a) the Parties shall make reasonable best efforts to avoid any unnecessary or duplicative disbursements;

(b) a Party shall not incur significant disbursements without prior approval of the other Parties;

(c) accommodations shall be at standard business hotels (i.e., Sheraton, Hilton, Marriott) or similarly priced alternatives. If a Party elects to stay at a more expensive hotel, the Party shall only claim the costs of a standard business hotel;

(d) meal expenses shall be reasonable and not extravagant, with any difference in price not claimed as a reimbursement;

(e) air travel shall be booked as economically as possible, with reimbursement for business class travel only being claimed for flights in excess of four hours unless exceptional circumstances exist; and

(f) mileage shall be claimed at a rate of no more than CDN$0.48 per kilometre. However, the Parties can agree to increase mileage should fuel increase significantly during the duration of the Case.

26. Any funds received on account of Fees by way of settlement, judgment or interim costs awards will be distributed in the following order, and in accordance with the formula described above:

(a) Disbursements;

(b) Docketed Fees in accordance with the division described above in paragraph 19 above.

27. Some portion or all of the payment received may also be held back for future Case Expenses and any costs indemnity in favour of the representative plaintiffs[1], as agreed upon by the Parties.

28. In advance of the execution of this Agreement, the parties shall disclose to each other all Docketed Fees and Disbursements accumulated to date which may be subject to recovery under this Agreement. By entering into this Agreement, the Parties reserve the right to assert that any such Docketed Fees and Disbursements to date are not reasonable. Any dispute as to Docketed Fees and Disbursements accumulated to date that cannot be resolved amicably shall be resolved pursuant to the Dispute Resolution process set out in section 31 and following below. The Parties agree that the time limitations for disputing Docketed Fees and Disbursements shall not begin to run until the entering into of a settlement with the Defendant or a final judgment of the Court on the merits.

Agreement Disclosure

29. The Parties agree that this Agreement can be disclosed to the:

(a) Court;

[1] Since the Federal Court does not award adverse costs against parties in class actions absent exceptional circumstances, a costs indemnity is not likely to be an issue in this case. However, in the unlikely event that a cost award is made against any representative plaintiff, the Parties shall indemnify the representative plaintiff(s) in the proportions set out in paragraph 19 above.

(b) Arbitrator for the purpose of arbitration as set out in this agreement;

(c) Representative plaintiffs;

(d) AFN;

(e) Strosberg.

Assignment

30. No Party may assign its rights in this Agreement without approval of the other Party.

Dispute Resolution

31. In the event of a dispute that cannot be resolved amicably regarding this Agreement or if a Party concludes that there has been a serious breakdown in the working relationship between the Parties, the dispute shall proceed to mediation in Ontario before a mutually-agreeable neutral third party. Failing resolution, the dispute shall be submitted to confidential binding arbitration in Ontario by a retired judge or other mutually agreeable neutral third party.

32. The arbitrator in his or her discretion may, *inter alia*, make any decision or order deemed necessary to maintain an effective team of lawyers to prosecute the Case and may re-formulate any provision of this Agreement to achieve this goal, save for removal of one or more of the Parties from this Consortium; such removal may only be effected by the court. The arbitrator's paramount consideration shall be the best interests of the class.

33. If the Parties cannot agree on the identity of the mediator or arbitrator within seven days after a Party first requests mediation or arbitration in writing, the administrator of ADR Chambers shall designate a retired judge to be the mediator or arbitrator, and shall use the expedited rules of ADR Chambers.

34. The arbitrator shall make his or her decision as expeditiously as possible and may in his or her discretion give any directions regarding procedures, relaxation of rules of evidence, etc., which are deemed necessary to meet that goal.

35. The arbitrator's decision shall be final and binding and, to the fullest extent permitted by law, the Parties waive all rights of appeal and judicial review.

Time Records

36. The Parties shall keep good and accurate records of the time spent and disbursements incurred in connection with the Case.

37. The Parties shall use their best efforts to assist in any assessment of costs or other proceeding in which the work done by them may be in issue.

Termination

38. This Agreement shall expire after the payment of all costs and fees as contemplated by this Agreement, unless otherwise agreed in writing.

No Partnership Created

39. Nothing in this Agreement shall constitute a partnership, joint venture or agency agreement between the Parties.

Successor Firms

40. In the event a Party merges with another law firm, this Consortium Agreement shall be binding on the successor firm.

Governing Law

41. This Agreement shall be governed by and construed and interpreted in accordance with the laws of the Province of Ontario.

Entire Agreement

42. The Parties agree that no representation, warranty, collateral agreement, or condition affects this Agreement except as expressed in it. Any amendments hereto shall be in writing signed by the Parties.

Electronic Execution

43. This Agreement may be signed by electronic means and in separate counterparts. This Agreement will be effective once it has been executed by all parties and an executed copy or copies of the Agreement has been delivered to all the parties.

This Agreement, executed by the duly authorized representatives of the Parties below, is effective as of June 26, 2020.

[*Signatures on the next page*]

Sotos LLP
Per: DAVID STERNS

Kugler Kandestin LLP
Per:

Miller Titlerle & Company
Per: Joelle Walker

Fasken LLP
Per: Peter Mantas

Nahwegahbow Corbiere
Per: Dianne Corbiere

This is **Exhibit "E"** to the Affidavit of David Sterns, Affirmed remotely before me in the City of Toronto, in the Province of Ontario, on October 6, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration remotely

Commissioner for taking Affidavit
(or as may be)

Georgia Elizabeth Scott-McLaren, a Commissioner, etc.
Province of Ontario, for
Sotos LLP, Barristers and Solicitors
Expires February 20, 2024

Court File Nos. T-402-19 / T-141-20

FEDERAL COURT
PROPOSED CLASS PROCEEDING

B E T W E E N:

XAVIER MOUSHOOM and JEREMY MEAWASIGE (by his litigation guardian, Maurina Beadle)

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
PROPOSED CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, and MELISSA WALTERSON

Plaintiffs

and

HER MAJESTY THE QUEEN
AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Defendant

WRITTEN REPRESENTATIONS OF THE MOVING PARTIES

November 2, 2020

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Lawyers for the Defendant

Court File Nos. T-402-19 / T-141-20

FEDERAL COURT
PROPOSED CLASS PROCEEDING

B E T W E E N:

XAVIER MOUSHOOM and JEREMY MEAWASIGE (by his litigation guardian, Maurina Beadle)

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and

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FEDERAL COURT
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Plaintiffs

and

HER MAJESTY THE QUEEN
AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Defendant

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OVERVIEW

1. The plaintiffs move for Orders relating to multiple procedural and housekeeping matters in this proposed class proceeding. These Orders include, amongst others:

(a) Leave to commence proceedings under the Court's Preclusion Order of May 28, 2020;

(b) The consolidation of the proceedings;

(c) The separate prosecution of the class action on behalf of some class members;

(d) The addition of several plaintiffs;

(e) The appointment of litigation guardians for two of the plaintiffs with legal disability; and

(f) The amendment of pleadings.

2. This motion will be heard at the same time as a companion motion for the consent certification, subject to the Court's approval, of the majority of the class in this litigation. However, Canada has not consented to certification of the claims of all class members. Certain class members whose claims pre-date 2007 are excluded from the consent certification. This motion addresses, among other things, those class members whose claims will be advanced in a separate action and will proceed to a contested certification hearing in 2021.

3. While consent to certification of the entire claim would have been preferable for all class members, the class members who will not be part of the consent certification preserve all of their rights and will proceed to a contested certification hearing on an expedited timeline as a result of an agreement reached with the parties.

4. By proceeding in this fashion, the majority of the class members will be part of a certified class that will not face any risk of litigation otherwise faced in a contested certification hearing. Their claim will also proceed to mediation without delay.

5. No class member will be prejudiced by proceeding in this bifurcated fashion. Class counsel are prepared to vigorously advance the claim on behalf of the class members whose claims will not be certified on consent. Those class members will be represented by a plaintiff who represents their interests exclusively.

6. The relief sought on this motion will ensure the fair and expeditious resolution of the claims of the majority of the class members and will result in a focussed and expeditious contested hearing for the class members whose claims will not be certified on consent. This will promote resolution where possible and avoid delay, consistent with the principles of reconciliation incorporated in the Federal Court practice.

PART I - STATEMENT OF FACTS

A. Nature of the Proceedings

7. The underlying claims relate to the defendant Crown's systematic discrimination against First Nations children and families. The discrimination has taken two forms.

8. *First*, the Crown has systemically underfunded child and family services for First Nations children living on reserve. This underfunding has directly contributed to the disproportionate numbers of First Nations children being removed from their homes and communities on reserve, and placed in state care. The statements of claim, which the plaintiffs seek to amend and consolidate on this motion, have referred to this group as the "On-Reserve Class" and "Removed Child Class".[1] This group will be referred to as "Removed Child Class" in these written representations.[2]

9. *Second*, the plaintiffs allege that the Crown breached First Nations children and families' constitutionally protected equality rights to essential services, such as social and health services, both on and off reserve. These equality rights have been grouped in recent years under the title of "Jordan's Principle". The plaintiffs allege that the Crown's failure to remedy funding gaps and jurisdictional disputes with other governments and government departments denied them timely access to essential services or denied them such services altogether. The pleadings have referred to this group as the "Jordan's Principle Class" and "Jordan's Class".[3] This group will be referred to as "Jordan's Class" in these written representations.[4]

10. The plaintiffs allege that the Crown subjected them and their families to the above treatment because they were First Nations. The proceedings collectively cover four categories of class members since 1991 as follows:

---

[1] Affidavit of Erin Reimer sworn October 20, 2020 [Reimer Affidavit], Exhibits B, D.
[2] Consistent with the terminology used in the proposed Consolidated Statement of Claim.
[3] Reimer Affidavit, Exhibits B, D.
[4] Consistent with the terminology used in the proposed Consolidated Statement of Claim.

Class Members	Time Period
Removed Child Class	April 1, 1991 – present[5]
Family members of Removed Child Class	April 1, 1991 – present
Jordan's Class	April 1, 1991 – present
Family members of Jordan's Class	April 1, 1991 – present

B. Procedural Background

11. On March 4, 2019, Xavier Moushoom commenced a proposed class action under Court File Number T-402-19 ("**Moushoom Action**"), seeking compensation for the class on account of the discrimination.[6]

12. On May 28, 2019, the Court ordered that no other proposed class proceeding may be commenced in this Court in respect of the allegations in the Moushoom Action without leave of the Court ("**Preclusion Order**"). The Court made its order effective *nunc pro tunc* as of May 8, 2019.[7]

13. Thereafter, the plaintiffs in the Moushoom Action served their certification motion record and expert evidence on the defendant. The Crown served its responding

[5] While the two claims list the end of the Class Period as the date of issuance of the respective claim (Court File No. T-402-19), any date after January 1, 2016 (Court File No. T-141-20), or any date the Court decides, for the sake of simplicity the proposed end date for the class period will be indicated as "present" here. This is consistent with the plaintiffs' submission to the Court on certification that the date of certification most appropriately marks the end of the Class Period.
[6] Reimer Affidavit, Exhibit B.
[7] Reimer Affidavit, Exhibit C.

affidavits. The parties set a certification timetable and scheduled the certification hearing for September 2020.[8]

14. On January 28, 2020, the Assembly of First Nations ("**AFN**") and other plaintiffs filed a proposed class action under Court File Number T-141-20 regarding similar allegations ("**AFN Action**"). The plaintiffs in the AFN Action were unaware of the Preclusion Order when issuing their statement of claim.[9]

15. All parties recognized that the Preclusion Order applied to the AFN Action and barred its prosecution absent leave of the Court.[10] However, instead of engaging in a dispute about whether leave should be granted to the AFN Action under the Preclusion Order or engaging in a carriage dispute as to which action should proceed, the parties in the Moushoom Action and the AFN Action first embarked on without prejudice discussions to explore whether cooperation presented a superior option. The parties kept the Court apprised of the circumstances and the progress of their talks.[11]

16. The parties' talks led to an agreement to cooperate in prosecuting a single consolidated action in the best interests of the class. Acknowledging that both actions and plaintiffs shared the same goals and in recognition of the AFN's longstanding advocacy for the rights of First Nations children and its unique representative status within the First Nations community, the plaintiffs in the Moushoom Action and the AFN Action agreed to combine efforts and prosecute one action. The parties agreed that,

[8] Reimer Affidavit at para 7.
[9] Reimer Affidavit at paras 8-9. Affidavit of Jonathan Thompson sworn October 14, 2020 [Thompson Affidavit] at para 9.
[10] Thompson Affidavit, Exhibit B.
[11] Thompson Affidavit, Exhibit B.

subject to the Court's leave, the consolidated action be inclusive of all plaintiffs, class members, and claims in both the Moushoom Action and the AFN Action. In so doing, the parties sought to pool their resources in support of a unified front for the class, and to avoid the litigation delay and uncertainty that would be caused by a carriage dispute.[12]

C. The Crown's Partial Settlement of Certification, Proposed Mediation

17. Following the parties' agreement to cooperate, the Crown consented to certification of the class proceeding with respect to the following class members:[13]

Class Members	Time Period
Removed Child Class	April 1, 1991 – present
Family members of Removed Child Class	April 1, 1991 – present
Jordan's Class	~~April 1, 1991~~ December 12, 2007 – present
Family members of Jordan's Class	~~April 1, 1991~~ December 12, 2007 – present

18. The Crown also agreed to enter into mediation regarding this portion of the claim facilitated by a retired Federal Court Judge with First Nation subject matter expertise.[14]

[12] Thompson Affidavit at para 12.
[13] Thompson Affidavit at para 18.
[14] Thompson Affidavit at paras 16-18.

19. The Crown has maintained its right and intention to contest the certification of the case on behalf of the following class members:[15]

Class Members	Time Period
Jordan's Class	April 1, 1991 – December 11, 2007
Family members of Jordan's Class	April 1, 1991 – December 11, 2007

20. The Crown conditioned its consent on the plaintiffs' removal of the above class members from the consolidated proceeding and the separate prosecution of their claims. The Crown has agreed to an expedited process for the certification hearing for this group that will take place sometime in or after February 2021, depending on the Court's direction and availability.[16]

21. The plaintiffs have welcomed this development. While clearly consent to the certification of the entire proposed class would have been preferable, the Crown is within its right to consent to certification of a large portion of the class and contest the certification of the remainder of the class. The remainder of the class have given up none of their rights. Class counsel will vigorously advance their claims. Proceeding in this bifurcated manner, will advance the litigation for a large portion of the class without affecting or compromising the interests of those class members whose claim does not

[15] Thompson Affidavit at para 19.
[16] Reimer Affidavit at para 15.

fall within the Crown's consent to certification.[17] These class members benefit from the work done to date in preparation for contested certification in the Moushoom Action.[18]

22. As a result, the plaintiffs seek the Court's permission on this motion to advance the case in the following manner:

(a) Consolidate the existing Moushoom Action and AFN Action into one proceeding with the existing and proposed new representative plaintiffs on behalf of the class members subject to the consent to certification ("**Consolidated Proceeding**"); and

(b) Commence a separate proposed class action by the AFN and a different proposed representative plaintiff on behalf of the class members the certification of whose claims the Crown seeks to oppose ("**Separated Proceeding**").

D. This Motion

23. On this motion, the plaintiffs seek certain procedural relief from the Court.[19] Several new plaintiffs seek to be added to the Consolidated Proceeding. Two of the plaintiffs in the Consolidated Proceeding have legal disabilities that require them to have litigation guardians for the purposes of this litigation. The Consolidated Proceeding seeks leave to introduce amendments to capture all of the claims pleaded in the Moushoom Action and the AFN Action, except for the portion that is being advanced

[17] Thompson Affidavit at para 19.
[18] Thompson Affidavit at para 21.
[19] On a separate, concurrent motion, the plaintiffs seek the consent certification of the Consolidated Proceeding.

through the Separated Proceeding. The plaintiffs seek leave under the Preclusion Order to commence the AFN Action and the Separated Proceeding.

PART II - POINTS IN ISSUE

24. This motion raises the following issues:

(a) whether leave should be granted to the plaintiffs in Court File No. T-141-20 under the Preclusion Order to commence and prosecute the proposed class proceeding in Court File No. T-141-20;

(b) whether the actions in Court File No. T-402-19 and Court File No. T-141-20 should be consolidated;

(c) whether Jonavon Joseph Meawasige, Noah Buffalo-Jackson, Carolyn Buffalo, and Dick Eugene Jackson also known as Richard Jackson should be added as plaintiffs to the Consolidated Proceeding;

(d) whether Jonavon Joseph Meawasige should be appointed as representative and litigation guardian for the plaintiff Jeremy Meawasige;

(e) whether Carolyn Buffalo should be appointed as representative and litigation guardian for the plaintiff Noah Buffalo-Jackson;

(f) whether leave under the Preclusion Order should be granted to Zacheus Joseph Trout to commence the proposed class action on behalf of the claimants separated from the Consolidated Proceeding; and

(g) whether the Court's Preclusion Order should be extended to the Consolidated Proceeding and the new Separated Proceeding.

25. The plaintiffs respectfully submit that all of the issues should be answered in the affirmative.

PART III - STATEMENT OF SUBMISSIONS

A. The Court Has Jurisdiction to Grant the Relief Sought

26. The Court has jurisdiction to grant the heads of relief sought on this motion:

(a) Rules 75 and 76 permit the amendment of any documents, including pleadings, by the Court's order;

(b) Rule 104 states that the Court may order the addition of parties;

(c) Rule 105 permits the Court to consolidate two or more proceedings;

(d) Rule 107 of the *Federal Courts Rules*[20] grants the Court jurisdiction to sever certain issues from a proceeding and order their separate determination;

(e) Rule 115 allows the appointment of representatives or litigation guardians for persons under a legal disability; and

[20] SOR/98-106 [Rules].

(f) The Court's jurisprudence on section 17 of the *Federal Courts Act*[21] and Rules 3, 385, and 387 has affirmed that the Court has jurisdiction over the Preclusion Order and the relief requested thereunder.

27. To the extent that the specific circumstances of the proceedings at bar and this motion may require flexibility, the Court has broad powers under the Rules to tailor the proceedings to meet special circumstances. Amongst others, the following Rules apply in this respect:

> **General principle**
>
> **3** These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.
>
> **Orders on terms**
>
> **53 (1)** In making an order under these Rules, the Court may impose such conditions and give such directions as it considers just.
>
> **Other orders**
>
> **(2)** Where these Rules provide that the Court may make an order of a specified nature, the Court may make any other order that it considers just.
>
> **Varying rule and dispensing with compliance**
>
> **55** In special circumstances, in a proceeding, the Court may vary a rule or dispense with compliance with a rule.

28. Further, the Court has broad jurisdiction and powers in case management. Proposed class actions are conducted as specially managed pursuant to Rule 384.1. Under Rule 385(1)(a), a case management judge may "give any directions or make any

[21] RSC, 1985, c F-7, s 17.

orders that are necessary for the just, most expeditious and least expensive determination of the proceeding on its merits".

B. Partial Settlement of Certification and Mediation Will Benefit the Class

29. As was previously submitted, the parties have agreed to partially settle the issue of certification, subject to the Court's approval. The Crown has consented to the certification of the Consolidated Proceeding, but not the Separated Proceeding. The parties have agreed to mediation in order to try to resolve the Consolidated Proceeding through a mediated settlement.

30. The parties have agreed to terms that ensure the litigation on behalf of class members in the Separated Proceeding proceeds promptly without any impact from the separation from the Consolidated Proceeding.

31. The Court has jurisdiction to allow the separate prosecution of the Consolidated Proceeding and the Separated Proceeding and can determine the appropriate process for the determination of the matters. Rule 107 provides:

> **Separate determination of issues**
>
> 107 (1) The Court may, at any time, order the trial of an issue or that issues in a proceeding be determined separately.
>
> **Court may stipulate procedure**
>
> (2) In an order under subsection (1), the Court may give directions regarding the procedures to be followed, including those applicable to examinations for discovery and the discovery of documents.

32. Rule 389(2) gives this Court broad jurisdiction over the partial settlement of issues such that where "a settlement of only part of a proceeding is reached at a dispute

resolution conference, the case management judge shall make an order setting out the issues that have not been resolved and giving such directions as he or she considers necessary for their adjudication".

33. This proceeding relates to First Nations and therefore falls under the Federal Court's Practice Guidelines for Aboriginal Law Proceedings (April 2016).[22] The Aboriginal Guidelines call for flexibility in disposing of Indigenous cases:

> This flexible procedural framework for the resolution of litigation involving Aboriginal peoples also advances the goal of reconciliation, the importance of which has been affirmed by the Supreme Court of Canada in numerous cases.[23]

34. Citing Rules 107 and 389,[24] the Aboriginal Guidelines emphasize the value of partial agreements to settle issues in advancing the goals of reconciliation:

> Although the Court will encourage parties to reach a settlement or narrow their issues in dispute through agreement, ultimately the parties must decide whether they want to pursue this avenue, understanding that there is also a cost to settlement discussions, which do not always lead to a settlement of the dispute. *It is recognized that if successful, settlement by agreement helps to restore the relationship and trust between the parties, a form of reconciliation*.
>
> It is important to keep in mind that there is often overlap between settlement and judicial adjudication: many disputes that begin as adversarial proceedings may shift over to dialogue and resolution by agreement, *even if only for some of the issues in dispute*.[25] [emphasis added]

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[22] See: <https://www.fct-cf.gc.ca/content/assets/pdf/base/Aboriginal%20Law%20Practice%20Guidelines%20April-2016%20(En).pdf> [Aboriginal Guidelines].
[23] Aboriginal Guidelines at 4.
[24] Aboriginal Guidelines at 7, 14.
[25] Aboriginal Guidelines at 5.

35. Here, the proposed partial settlement of the issue of certification and culturally appropriate mediation will materially benefit the class. The class members in the Consolidated Proceeding form a majority of the affected individuals. These include all Removed Child Class members who were apprehended and their family members since April 1, 1991, and Jordan's Class members and their families since December 12, 2007. Only Jordan's Class members and their families between April 1, 1991 and December 11, 2007 will advance their claims separately through contested certification.[26]

36. The plaintiffs believe that this agreement will save the majority of the class the uncertainty and delay of contested certification and protracted litigation and get them closer to a resolution.[27] The plaintiffs make their submissions on whether the Consolidated Proceeding meets the certification test under Rule 334.16 in the Memorandum of Fact and Law filed concurrently in support of that certification motion.

37. The separate prosecution of the claims in the Separated Proceeding will not prejudice the class members in that action for several reasons. *First*, these class members give up no claim.[28] They retain all of their rights to seek certification and advance their claims. Plaintiffs' counsel are instructed to move expeditiously to seek certification of this class.[29] Canada has agreed to an expedited process for the certification hearing that will take place sometime in or after February 2021, depending on the Court's direction

[26] Thompson Affidavit at para 19.
[27] Thompson Affidavit at para 19.
[28] Schedule "B" to Notice of Motion.
[29] Thompson Affidavit at para 20.

and availability.[30] The hearing of the certification motion will not be delayed due to the mediation of the Consolidated Proceeding.[31]

38. *Second*, these class members retain the benefits of the extensive preparatory certification work done to date. The plaintiffs have served certification motion records including substantial documentary and expert evidence and their litigation plan in the Moushoom Action.[32]

39. *Third*, a separate proposed representative plaintiff, Mr. Trout, seeks leave of the Court on this motion to advance the Separated Proceeding in the best interests of those class members. Mr. Trout has lost two of his children to extreme illness and the essential service shortages that they suffered during the proposed class period for the Separated Proceeding (*i.e.*, 1991-2007). He is motivated to vigorously advance the cause of the class members in the Separated Proceeding regardless of the outcome of the Consolidated Proceeding.

C. No Conflict of Interest Will Arise as a Result of Separation of Claims

40. The circumstances before the Court do not raise any issues regarding class counsel's duty of loyalty to the plaintiffs and the putative class members, particularly the duty to avoid conflicting interests.[33] The principal issue here is whether the separation of the Consolidated Proceeding and the Separated Proceeding, where the defendant Crown consents to certification and mediation of the former, but contests the

[30] Thompson Affidavit at para 20.
[31] Thompson Affidavit at para 21.
[32] Thompson Affidavit at para 21.
[33] *Canadian National Railway Co. v. McKercher LLP,* 2013 SCC 39 at para 19 [*McKercher*].

certification of the latter, creates a conflict for class counsel who represent both groups. The answer is no.

41. Conflict of interests for lawyers concerns: (a) whether the immediate legal interests of clients are directly adverse in the matters on which the lawyer is acting;[34] (b) the misuse of confidential information to a client's disadvantage; [35] and (c) ineffective representation where the lawyer is tempted to prefer other interests over those of his client: the lawyer's own interests, those of a current client, of a former client, or of a third person.[36]

i. No adverse legal interest

42. The legal interests of the plaintiffs or the class members in the Consolidated Proceeding and the Separated Proceeding will not be adverse in the matters on which class counsel are acting. No direct relationship exists between these class members' claims. The class members in the Separated Proceeding advance claims against the Crown that relate to the period between April 1, 1991 and December 11, 2007. The Jordan's Class members in the Consolidated Proceeding advance claims that date between December 12, 2007 and the present. All of these class members advance the same rights of action against the Crown, but their claims arose at different times. These First Nations individuals are not adverse in their immediate legal interests, whether their

[34] *McKercher* at paras 32-34.
[35] *McKercher* at paras 23-24.
[36] *McKercher* at paras 25-26.

claims are prosecuted in one proceeding or in a separate interrelated proceeding as is proposed here.

43. Nor does the separation raise any spectre of adverse interests in the future. Both the Consolidated Proceeding and the Separated Proceeding move in parallel against the same defendant advancing collective claims that relate to a time span of almost three decades. The Crown consents to certification and mediation of the claims on behalf of the 2007-present class (along with the entirety of the Removed Child Class of 1991-present), but believes it has grounds to oppose the certification of the Jordan's Class of 1991-2007. The plaintiffs strongly disagree with the Crown. The Court will therefore decide that contested issue for the Jordan's Class of 1991-2007, regardless of whether that class is separated from the balance of the proceeding.

44. Case law on the existence of a conflict where counsel act both for the class and for opt-outs from that same class in individual lawsuits does not apply.[37] The putative class in the Separated Proceeding is not an opt-out of the same class. These class members' claims remain effective and viable whether advanced separately or together with the classes in the Consolidated Proceeding.

ii. No confidential information to be misused

45. No confidential information[38] exists or will exist in this case that could disadvantage either group over the other.[39] The class members in the Consolidated

[37] See *e.g.*, *Vaeth v North American Palladium Ltd*, 2016 ONSC 5015; *Persaud v Talon International Inc,* 2018 ONSC 5377.
[38] See *McLean v Tallcree First Nation*, 2018 FC 962 at para 28.
[39] Reimer Affidavit at para 16.

Proceeding and the Separated Proceeding advance similar claims but relating to different time periods. The temporal separation of the classes and their respective claims guarantees that class counsel will not receive confidential information in the course of one of the proceedings that could be misused to prejudice the other group.

iii. No prospect of ineffective representation

46. No concerns of ineffective representation bar the relief sought for multiple reasons.

47. *First*, the plaintiffs' agreement with the Crown does not forego any rights, claims or interests of the putative class members in the Separated Proceeding. The Statement of Claim proposed by the AFN and Mr. Trout includes all of the claims advanced on behalf of those class members in the Moushoom Action and/or the AFN Action.[40]

48. *Second*, none of the claims of these class members is being stayed or delayed. The Crown has agreed to the expedited litigation of the certification motion for these class members. Class counsel have been instructed to advance to certification without delay regardless of the parties' mediation on the Consolidated Proceeding.[41]

49. *Third*, the class members in the Separated Proceeding benefit from the preparatory litigation work done to date in the Moushoom Action in advancing toward contested certification. This preparatory work includes expert evidence, extensive

[40] See claims in Exhibits B and D to Reimer Affidavit.
[41] Thompson Affidavit at para 21.

documentary evidence, and a litigation plan. These class members will benefit from this work as if their claims had remained within the Consolidated Proceeding.[42]

50. *Fourth*, the plaintiffs seek on this motion to extend the Court's Preclusion Order to these class members.

51. *Fifth*, a proposed separate representative plaintiff ensures effective representation for the class defined in the Separated Proceeding regardless of the outcome of the Consolidated Proceeding. With a separate proposed representative plaintiff for the Separated Proceeding, no concerns exist that a possible resolution of the Consolidated Proceeding might leave the Separated Proceeding with disinterested representative plaintiffs. Mr. Trout and his family primarily suffered discrimination during the class period proposed in the Separated Proceeding.

D. Leave Should Be Granted Under the Preclusion Order

i. Leave should be granted to commence the AFN Action

52. The AFN's general mandate under its Charter and resolutions by the AFN Chiefs in Assembly require it to pursue systemic reform and compensation for First Nation Children and youth in care and other First Nations victims of discrimination.[43] The AFN has been committed to the cause underlying the present litigation for many years. The AFN and some other parties have been litigating over the same discriminatory conduct before the Canadian Human Rights Commission and Tribunal since 2007.[44] Through

[42] Thompson Affidavit at para 21.
[43] Thompson Affidavit at paras 4-7.
[44] Thompson Affidavit at para 6.

that process, the AFN has acquired valuable experience and obtained significant results for the class, including a finding of discrimination[45] contrary to the *Canadian Human Rights Act*[46] and compensation for some class members.[47] The AFN has the support of First Nations Chiefs nationally. The AFN is in a unique position to contribute to the successful prosecution of these proposed class proceedings, and its exclusion could silence First Nations voices around the country.

53. The addition of the AFN's resources and experience to these proceedings will benefit the class. Granting the AFN and related plaintiffs leave to commence the AFN Action makes possible the prosecution of a consolidated proceeding in the best interests of the class. Doing so within the entire context of this motion supports the goal of facilitating a just and expeditious resolution of the action as outlined by the Court in its reasons for the Preclusion Order.[48] It would also promote the goal of reconciliation.[49]

ii. Consolidation of the existing proceedings into the Consolidated Proceeding

54. Should the Court grant leave to commence the AFN Action, the two actions meet the test to be consolidated under Rule 105(a). The Federal Court of Appeal recently examined the principles governing consolidations in *Apotex Inc v Bayer Inc*:[50]

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[45] *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2.
[46] RSC, 1985, c H-6.
[47] *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39.
[48] Reimer Affidavit, Exhibit C.
[49] Thompson Affidavit at paras 10-11.
[50] 2020 FCA 86 [*Apotex*].

(a) The purpose of an order under Rule 105 is to avoid a multiplicity of proceedings and promote expeditious and inexpensive determination of those proceedings;[51] and

(b) In determining whether an order sought under Rule 105 should be made, the Court must consider a number of factors, namely, the commonality of parties, issues, facts and remedies, and whether and to what extent prejudice will result from the making of the order.[52]

55. The consolidation of the Moushoom Action and the AFN Action will avoid a multiplicity of proceedings. Consolidation would also avoid the delay and costs involved in prosecuting two parallel class actions or engaging in a carriage battle to determine which claim should proceed despite the parties' agreement to cooperate. The plaintiffs seek to advance a unified front against the Crown.[53] Consolidation will constitute a major step in that direction.

56. The plaintiffs in the Moushoom Action and the AFN Action plead the same facts, advance the same issues and seek the same remedies against the same defendant.[54]

57. No prejudice will result to any party from the consolidation. The plaintiffs in the Moushoom Action and the AFN Action seek consolidation. The defendant Crown consents to the consolidation. There are safeguards, detailed above, to protect and leave intact the interests of the class members in the Separated Proceeding.

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[51] *Apotex* at para 45.
[52] *Apotex* at para 46.
[53] Thompson Affidavit at para 10-11.
[54] Reimer Affidavit, Exhibits B, D.

iii. Leave should be granted to issue the Separated Proceeding

58. Should the Court grant the relief sought, including the separation of the Separated Proceeding from the Consolidated Proceeding as outlined above, leave will be required under the Preclusion Order to issue the Statement of Claim proposed by the AFN and Mr. Trout. Within the totality of this motion, leave is appropriate to enable the class members in the Separated Proceeding to advance their claims expeditiously and without any interruption.

iv. The Preclusion Order should be extended

59. In granting the Preclusion Order, the Court gave the following reasons:

> [T]he Court is satisfied the order sought (1) is consistent with Federal Court jurisprudence; (2) is necessary and in the best interests of the Plaintiff and the members of the class, and will allow for the orderly progression of exploratory discussions and litigations on behalf of a national class; (3) will facilitate a just and expeditious resolution of the action; (4) is in accordance with the Federal Court's national jurisdiction over class actions; and (5) is consistent with the principle of judicial economy and will avoid a multiplicity of proceedings…[55]

60. These reasons equally apply to the Consolidated Proceeding and the Separated Proceeding. The parties have agreed to engage in culturally appropriate mediation to resolve most, if not all, of the issues in this litigation. As the Aboriginal Guidelines state, "the experience of the Court is that many parties who are at first unwilling to enter into a dialogue discover they are later able to find common ground and a shared interest in

[55] Order of Madam Justice St-Louis dated May 28, 2019, Reimer Affidavit, Exhibit C.

reaching a resolution, leading to an acceptable resolution for all parties".[56] The mediation constitutes a significant step toward resolving this dispute in the spirit of reconciliation.[57] The best interests of the class require that duplicative filings of other proposed class actions and public infighting amongst counsel not disrupt the mediation.[58]

61. The extension of the protections built into the Preclusion Order to the Consolidated Proceeding and the Separated Proceeding will prevent overlapping and duplicative actions in the Federal Court and will therefore promote judicial economy.

62. It will be consistent with this Court's national jurisdiction over class actions of this nature. The impugned conduct in both the Consolidated Proceeding and the Separated Proceeding happened at a national level. The class members are dispersed throughout Canada. This Court is in a unique position to adjudicate their claims on a national level, a fact that supports the extension of the Preclusion Order to the Consolidated Proceeding and the Separated Proceeding. As the Court stated on a motion for a similar order:

> [T]he order requested furthers the effective exercise of the Federal Court's national class action jurisdiction. … The order requested recognizes the national dimensions of the claims, and facilitates their expeditious resolution by providing a common and convenient vehicle for class members who live in widely different parts of the country to enforce their legal rights.[59]

[56] Aboriginal Guidelines at 5.
[57] Thompson Affidavit at paras 10-11.
[58] *Heyder v Canada (Attorney General)*, 2018 FC 432 at para 9 [*Heyder*].
[59] *Heyder* at para 12.

63. The salutary effects of the Preclusion Order advance these goals and warrant the Preclusion Order's extension to the Consolidated Proceeding and the Separated Proceeding.

E. Jonavon Joseph Meawasige and Carolyn Buffalo Should be Appointed Litigation Guardians

64. The Rules permit litigation by a litigation guardian or representative. Rule 115 provides:

> **Appointment of representatives**
>
> 115 (1) The Court may appoint one or more persons to represent …
>
> (b) a person under a legal disability against or by whom a proceeding is brought.
>
> **Who may be appointed**
>
> (2) The Court may appoint as a representative under subsection (1) …
>
> (b) a person eligible to act as a representative in the jurisdiction in which the person to be represented is domiciled.

65. In other words, the Court can appoint a person as litigation guardian for a party under a legal disability if the proposed guardian meets the requirements to act as such in the province or territory where the disabled party is domiciled.

i. Jeremy Meawasige

66. Mr. Meawasige suffers from significant disabilities. He is unable to appreciate the litigation or instruct his counsel.[60] The Court discussed Mr. Meawasige's disabilities in a 2013 decision.[61] The Court also previously appointed Mr. Meawasige's mother as his litigation guardian in this proposed class action.[62] Since his mother has passed away, Mr. Meawasige needs a new litigation guardian.[63]

67. Mr. Meawasige is domiciled on the Pictou Landing First Nations Reserve in Nova Scotia.[64] Rule 36.07(5) of the *Nova Scotia Civil Procedure Rules* governs the appointment of a litigation guardian in Nova Scotia as follows:

> The litigation guardian's statement must be entitled "Litigation Guardian's Statement", be signed personally by the litigation guardian, and include all of the following:
>
> (a) the guardian's consent to be litigation guardian for the party;
>
> (b) a description of the litigation guardian's relationship to the party;
>
> (c) confirmation the litigation guardian has appointed counsel for the party;
>
> (d) a representation that the litigation guardian has no interest in the proceeding adverse to that of the party;
>
> (e) an acknowledgment that costs are normally awarded for or against a party rather than the party's litigation guardian, but that a litigation guardian may be liable for costs if the guardian abuses the court's processes.

[60] Affidavit of Jonavon Meawasige sworn September 2, 2020 [Meawasige Affidavit] at para 4.
[61] *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342.
[62] Order dated May 28, 2019, Meawasige Affidavit, Exhibit B.
[63] Meawasige Affidavit at para 5.
[64] Meawasige Affidavit at para 3.

68. The proposed litigation guardian, Jonavon Joseph Meawasige, meets these requirements. He has sworn an affidavit giving evidence of the following:

(a) He is seeking to be appointed litigation guardian for Mr. Meawasige;

(b) He describes his relationship to his brother, Mr. Meawasige;

(c) He confirms that he has appointed counsel for Mr. Meawasige;

(d) He represents that he has no interest in the proceeding adverse to that of Mr. Meawasige; and

(e) He acknowledges that he is aware of the costs regime under the Rules of the Federal Court.[65]

ii. Noah Buffalo-Jackson

69. Mr. Buffalo-Jackson was born in 2001, 10 weeks premature and weighing four pounds. He was diagnosed with Spastic Quadriparetic Cerebral Palsy Level 5 on the Gross Motor Function Classification System, which means that he has "an organic and chronic condition requiring long-term rehabilitive treatment".[66] His intellect is impaired, and he cannot make decisions on his own.[67] He is therefore unable to appreciate the litigation process or instruct his counsel.

[65] Meawasige Affidavit at para 11.
[66] Affidavit of Carolyn Buffalo affirmed October 8, 2020 [Buffalo Affidavit] at para 12.
[67] Buffalo Affidavit at para 13.

70. Mr. Buffalo-Jackson is domiciled in Alberta.[68] Rule 2.14 of the *Alberta Rules of Court*[69] governs the appointment of litigation guardians in that province:

> If an individual or estate who is required to have a litigation representative under rule 2.11 does not have one, an interested person
>
> (a) may file an affidavit in Form 1 containing the information described in subrule (2), and by doing so becomes the litigation representative for that individual or estate …
>
> (2) The affidavit must include
>
> (a) the interested person's agreement in writing to be the litigation representative,
>
> (b) the reason for the self-appointment,
>
> (c) the relationship between the litigation representative and the individual or estate the litigation representative will represent,
>
> (d) a statement that the litigation representative has no interest in the action adverse in interest to the party the litigation representative will represent,
>
> (e) if the litigation representative is an individual, a statement that the litigation representative is a resident of Alberta,
>
> (f) if the litigation representative is a corporation, the place of business or activity of the corporation in Alberta, and
>
> (g) an acknowledgment of potential liability for payment of a costs award attributable to or liable to be paid by the litigation representative.

[68] Buffalo Affidavit at para 6.
[69] Alta Reg 124/2010.

71. Carolyn Buffalo seeks to be appointed as Mr. Buffalo-Jackson's litigation guardian in this lawsuit. She meets the requirements under Alberta law. She has sworn an affidavit giving evidence of the following:

(a) She agrees in writing to be the litigation guardian, and seeks to be so appointed on this motion;

(b) She describes the reasons why Mr. Buffalo-Jackson needs a litigation guardian and why she is seeking to be his litigation guardian;

(c) She describes her relationship with her son, Mr. Buffalo-Jackson;

(d) She represents that she has no interest in this action adverse to Mr. Buffalo-Jackson;

(e) She states that she is a resident of Alberta; and

(f) She acknowledges that she is aware of the costs regime under the Rules of the Federal Court.[70]

F. Other Housekeeping Relief Sought Should be Granted

i. Addition of new plaintiffs

72. Jonavon Joseph Meawasige, Noah Buffalo-Jackson, Carolyn Buffalo, and Dick Eugene Jackson also known as Richard Jackson seek to be added as plaintiffs to the Consolidated Proceeding. The relief should be granted.

[70] Buffalo Affidavit at paras 54-57.

73. Rule 104(1)(b) provides that "At any time, the Court may … order that a person who ought to have been joined as a party ... be added as a party, but no person shall be added as a plaintiff or applicant without his or her consent, signified in writing or in such other manner as the Court may order".

74. The addition of the proposed representative plaintiffs to the Consolidated Proceeding does not prejudice any party. They have all sought to be added and have sworn affidavits in support of the relief sought on this motion and in support of certification.

ii. Amendment of pleadings

75. The relief sought on this motion requires amendment of pleadings in the form of the proposed claims in the Consolidated Proceeding and the Separated Proceeding.[71] The relief should be granted.

76. Rule 75 permits the amendment of any documents, including pleadings, by leave "on such terms as will protect the rights of all parties".

77. As was previously submitted, the proposed amendments are beneficial to a majority of the putative class members in the form of the Consolidated Proceeding, and protect the interests of the putative class members defined in the Separated Proceeding. The defendant has not served a statement of defence.[72] No prejudice will result to any party from these amendments.

[71] Schedules A and B to the Notice of Motion.
[72] Reimer Affidavit at para 5.

PART IV - STATEMENT OF THE ORDER SOUGHT

78. The plaintiffs respectfully seek an Order:

a) granting leave to the plaintiffs in Court File No. T-141-20 under the Preclusion Order to commence the proposed class proceeding in Court File No. T-141-20;

b) consolidating the actions in Court File No. T-402-19 and Court File No. T-141-20;

c) adding Jonavon Joseph Meawasige, Noah Buffalo-Jackson, Carolyn Buffalo, and Dick Eugene Jackson also known as Richard Jackson as plaintiffs to the Consolidated Proceeding;

d) appointing Jonavon Joseph Meawasige as representative and litigation guardian for the plaintiff Jeremy Meawasige;

e) appointing Carolyn Buffalo as representative and litigation guardian for the plaintiff Noah Buffalo-Jackson;

f) granting leave to serve and file the Consolidated Statement of Claim in the Consolidated Proceeding substantially in the form enclosed as Schedule "A" to the Notice of Motion herein;

g) amending the style of cause in the Consolidated Proceeding accordingly, as drafted in Schedule "A" to the Notice of Motion herein;

h) stating that the removal of the Jordan's Class members and corresponding Family Class members with claims dated between April 1, 1991 and December

11, 2007 in Court File No. T-402-19 and/or Court File No. T-141-20 from the Consolidated Proceeding is without prejudice to those Jordan's Class members' rights to commence a new action and to advance any arguments available to them notwithstanding this Order and notwithstanding the Consolidated Proceeding;

i) granting the AFN and Zacheus Joseph Trout leave under the Preclusion Order to commence a proposed class action as particularized in the draft claim substantially in the form enclosed as Schedule "B" to the Notice of Motion herein;

j) stating that this Order is without prejudice to the defendant's right to contest certification and/or defend against the action in Schedule "B" to the Notice of Motion herein as it would have been immediately prior to the issuance of this Order, subject to paragraph (h), above; and

k) extending the Preclusion Order *nunc pro tunc* and without any interruption from May 8, 2019 when the Preclusion Order took effect, precluding the commencement of another proposed class proceeding in this Court in respect of similar allegations without leave of the Court, to:

    i. the Consolidated Proceeding in Schedule "A" to the Notice of Motion herein from the date it is issued under this Order, with Fasken Martineau Dumoulin, Kugler Kandestin LLP, Miller Titerle + Co., Nahwegahbow Corbiere, and Sotos LLP as class counsel; and

ii. the Separated Proceeding in Schedule "B" to the Notice of Motion herein from the date it is issued under this Order, with Fasken Martineau Dumoulin, Kugler Kandestin LLP, Miller Titerle + Co., Nahwegahbow Corbiere, and Sotos LLP as class counsel.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of November, 2020.

SCHEDULE A

STATUTES OR REGULATIONS

1. *Federal Courts Act* (RSC, 1985, c F-7)

Relief against the Crown
17 (1) Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.

Cases
(2) Without restricting the generality of subsection (1), the Federal Court has concurrent original jurisdiction, except as otherwise provided, in all cases in which

(a) the land, goods or money of any person is in the possession of the Crown;

(b) the claim arises out of a contract entered into by or on behalf of the Crown;

(c) there is a claim against the Crown for injurious affection; or

(d) the claim is for damages under the *Crown Liability and Proceedings Act*.

Crown and subject: consent to jurisdiction
(3) The Federal Court has exclusive original jurisdiction to hear and determine the following matters:

(a) the amount to be paid if the Crown and any person have agreed in writing that the Crown or that person shall pay an amount to be determined by the Federal Court, the Federal Court — Trial Division or the Exchequer Court of Canada; and

(b) any question of law, fact or mixed law and fact that the Crown and any person have agreed in writing shall be determined by the Federal Court, the Federal Court — Trial Division or the Exchequer Court of Canada.

Conflicting claims against Crown
(4) The Federal Court has concurrent original jurisdiction to hear and determine proceedings to determine disputes in which the Crown is or may be under an obligation and in respect of which there are or may be conflicting claims.

Relief in favour of Crown or against officer
(5) The Federal Court has concurrent original jurisdiction

(a) in proceedings of a civil nature in which the Crown or the Attorney General of Canada claims relief; and

(b) in proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of the duties of that person as an officer, servant or agent of the Crown.

Federal Court has no jurisdiction
(6) If an Act of Parliament confers jurisdiction in respect of a matter on a court constituted or established by or under a law of a province, the Federal Court has no jurisdiction to entertain any proceeding in respect of the same matter unless the Act expressly confers that jurisdiction on that court.

2. *Federal Courts Rules*, SOR/98-106, rr 334.16 and 334.28

General principle
3 These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

75 (1) Subject to subsection (2) and rule 76, the Court may, on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties.

(2) No amendment shall be allowed under subsection (1) during or after a hearing unless

> (a) the purpose is to make the document accord with the issues at the hearing;
> (b) a new hearing is ordered; or
> (c) the other parties are given an opportunity for any preparation necessary to meet any new or amended allegations.

76 With leave of the Court, an amendment may be made

> (a) to correct the name of a party, if the Court is satisfied that the mistake sought to be corrected was not such as to cause a reasonable doubt as to the identity of the party, or
> (b) to alter the capacity in which a party is bringing a proceeding, if the party could have commenced the proceeding in its altered capacity at the date of commencement of the proceeding,

unless to do so would result in prejudice to a party that would not be compensable by costs or an adjournment.

Order for joinder or relief against joinder
104 (1) At any time, the Court may

(a) order that a person who is not a proper or necessary party shall cease to be a party; or
(b) order that a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined be added as a party, but no person shall be added as a plaintiff or applicant without his or her consent, signified in writing or in such other manner as the Court may order.

Directions
(2) An order made under subsection (1) shall contain directions as to amendment of the originating document and any other pleadings.

Consolidation of proceedings
105 The Court may order, in respect of two or more proceedings,
(a) that they be consolidated, heard together or heard one immediately after the other;
(b) that one proceeding be stayed until another proceeding is determined; or
(c) that one of the proceedings be asserted as a counterclaim or cross-appeal in another proceeding.

Separate determination of issues
107 (1) The Court may, at any time, order the trial of an issue or that issues in a proceeding be determined separately.

Court may stipulate procedure
(2) In an order under subsection (1), the Court may give directions regarding the procedures to be followed, including those applicable to examinations for discovery and the discovery of documents

Appointment of representatives
115 (1) The Court may appoint one or more persons to represent
(a) unborn or unascertained persons who may have a present, future, contingent or other interest in a proceeding; or
(b) a person under a legal disability against or by whom a proceeding is brought.

Who may be appointed
(2) The Court may appoint as a representative under subsection (1)
(a) a person who has already been appointed as such a representative under the laws of a province; or

(b) a person eligible to act as a representative in the jurisdiction in which the person to be represented is domiciled.

Order binding on represented person
(3) Unless the Court orders otherwise, a person for whom a representative is appointed under subsection (1) is bound by any order made in the proceeding.
Class proceedings

384.1 A proceeding commenced by a member of a class of persons on behalf of the members of that class shall be conducted as a specially managed proceeding.

Powers of case management judge or prothonotary
385 (1) Unless the Court directs otherwise, a case management judge or a prothonotary assigned under paragraph 383(c) shall deal with all matters that arise prior to the trial or hearing of a specially managed proceeding and may

(a) give any directions or make any orders that are necessary for the just, most expeditious and least expensive determination of the proceeding on its merits;

Powers of case management judge or prothonotary
385 (1) Unless the Court directs otherwise, a case management judge or a prothonotary assigned under paragraph 383(c) shall deal with all matters that arise prior to the trial or hearing of a specially managed proceeding and may

(a) give any directions or make any orders that are necessary for the just, most expeditious and least expensive determination of the proceeding on its merits;
(b) notwithstanding any period provided for in these Rules, fix the period for completion of subsequent steps in the proceeding;
(c) fix and conduct any dispute resolution or pre-trial conferences that he or she considers necessary; and
(d) subject to subsection 50(1), hear and determine all motions arising prior to the assignment of a hearing date.

Order for status review
(2) A case management judge or a prothonotary assigned under paragraph 383(c) may, at any time, order that a status review be held in accordance with this Part.

Order to cease special management
(3) A case management judge or a prothonotary assigned under paragraph 383(c) may order that a proceeding, other than a class proceeding, cease to be conducted as a specially managed proceeding, in which case the periods set out in these Rules for taking any subsequent steps apply.

Interpretation
387 A dispute resolution conference shall be conducted by a case management judge or prothonotary assigned under paragraph 383(c), who may

(a) conduct a mediation, to assist the parties by meeting with them together or separately to encourage and facilitate discussion between them in an attempt to reach a mutually acceptable resolution of the dispute;

(b) conduct an early neutral evaluation of a proceeding, to evaluate the relative strengths and weaknesses of the positions advanced by the parties and render a non-binding opinion as to the probable outcome of the proceeding; or

(c) conduct a mini-trial, presiding over presentation by counsel for the parties of their best case and rendering a non-binding opinion as to the probable outcome of the proceeding.

Report of partial settlement
389(2) Where a settlement of only part of a proceeding is reached at a dispute resolution conference, the case management judge shall make an order setting out the issues that have not been resolved and giving such directions as he or she considers necessary for their adjudication.

3. *Nova Scotia Civil Procedure Rules*, Royal Gaz Nov 19, 2008

36.07(5) Becoming a litigation guardian

The litigation guardian's statement must be entitled "Litigation Guardian's Statement", be signed personally by the litigation guardian, and include all of the following:

(a) the guardian's consent to be litigation guardian for the party;

(b) a description of the litigation guardian's relationship to the party;

(c) confirmation the litigation guardian has appointed counsel for the party;

(d) a representation that the litigation guardian has no interest in the proceeding adverse to that of the party;

(e) an acknowledgment that costs are normally awarded for or against a party rather than the party's litigation guardian, but that a litigation guardian may be liable for costs if the guardian abuses the court's processes.

4. *Alberta Rules of Court*, Alta Reg 124/2010

Self-appointed litigation representatives
2.14(1) If an individual or estate who is required to have a litigation representative under *rule 2.11* does not have one, an interested person

(a) may file an affidavit in Form 1 containing the information described in subrule (2), and by doing so becomes the litigation representative for that individual or estate, and

(b) where an interested person has, or proposes to, become the litigation representative under clause (a) for an estate, the interested person must serve notice of the appointment in Form 2 on the beneficiaries and heirs at law of the deceased.

(2) The affidavit must include

(a) the interested person's agreement in writing to be the litigation representative,

(b) the reason for the self-appointment,

(c) the relationship between the litigation representative and the individual or estate the litigation representative will represent,

(d) a statement that the litigation representative has no interest in the action adverse in interest to the party the litigation representative will represent,

(e) if the litigation representative is an individual, a statement that the litigation representative is a resident of Alberta,

(f) if the litigation representative is a corporation, the place of business or activity of the corporation in Alberta, and

(g) an acknowledgment of potential liability for payment of a costs award attributable to or liable to be paid by the litigation representative.

(3) If a person proposes to become a self-appointed litigation representative for the estate of a deceased person, the affidavit referred to in subrule (2) must, in addition to the matters set out in subrule (2), disclose any of the following matters that apply:

(a) whether the estate has a substantial interest in the action or proposed action;

(b) whether the litigation representative has or may have duties to perform in the administration of the estate of the deceased;

(c) whether an application has been or will be made for administration of the estate of the deceased;

(d) whether the litigation representative does or may represent interests adverse to any other party in the action or proposed action;

(e) repealed AR 143/2011 s2

(4) A person proposing to become a self-appointed litigation representative has no authority to make or defend a claim or, without the Court's permission, to make an application or take any proceeding in an action, until the affidavit referred to in subrule (1)(a) is filed.

SCHEDULE B

BOOK OF AUTHORITIES

1. *Canadian National Railway Co. v. McKercher LLP,* 2013 SCC 39
2. *Vaeth v North American Palladium Ltd*, 2016 ONSC 5015
3. *Persaud v Talon International Inc,* 2018 ONSC 5377
4. *McLean v Tallcree First Nation*, 2018 FC 962
5. *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2
6. *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39
7. *Apotex Inc. v. Bayer Inc.,* 2020 FCA 86
8. *Heyder v Canada (Attorney General)*, 2018 FC 432
9. *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342

Guidelines

10. Federal Court ~ Aboriginal Law Bar Liaison Committee, Practice Guidelines for Aboriginal Law Proceedings (April 2016)

Court File Nos. T-402-19 / T-141-20

FEDERAL COURT
PROPOSED CLASS PROCEEDING

B E T W E E N:

XAVIER MOUSHOOM and JEREMY MEAWASIGE (by his litigation guardian, Maurina Beadle)

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
PROPOSED CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, and MELISSA WALTERSON

Plaintiffs

and

HER MAJESTY THE QUEEN
AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Defendant

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April 9, 2021

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Court File Nos. T-402-19 / T-141-20

FEDERAL COURT
PROPOSED CLASS PROCEEDING

B E T W E E N:

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PART I - OVERVIEW

1. These submissions supplement the plaintiffs' Written Representations on the conflict issue in the plaintiffs' Motion Record for Consolidation and Other Relief dated November 2, 2020, at pages marked 265-269 (pages 268-272 of the PDF) (the "**First Submissions**").

2. The factual context of these submissions is the requested bifurcation of the case into two separate proceedings: the Consolidated Proceeding on the one hand which will proceed on behalf of, among others, the Jordan's Principle class members whose claims arose from December 12, 2007 onward, and the Separated Proceeding on the other hand which will proceed on behalf of the Jordan's Principle class members whose claims arose from April 1, 1991 to December 11, 2007. The Crown consents to certification and mediation of the Consolidated Proceeding, but contests the certification of and does not agree at this time to mediate the Separated Proceeding. The Court has asked counsel to address in these additional submissions whether these facts create an actual or potential conflict of interest such that bifurcation should be refused or other court intervention should be warranted. The answer is no.

3. These submissions will consider actual and potential scenarios arising from the facts of this case, and demonstrate why none of the scenarios presents a conflict of interest.

4. It should be noted by way of background that the Crown maintains that Jordan's Principle did not become actionable until Parliament passed a resolution formally recognizing it on December 12, 2007, and that the Jordan's Principle class members

whose claims arose before that time cannot succeed. Therefore, the Crown asserts, a claim on behalf of the 1991 to 2007 Jordan's Principle class should not be certified, and the Crown is not prepared to mediate those claims. The Crown wishes to advance its defence in court in respect of those claims.

5. While the plaintiffs disagree with the Crown on the legal issues, parties cannot be compelled to consent to certification or to mediate all or part of a claim against their will. There is no suggestion that the Crown is acting in bad faith in taking this position. It has been agreed that both sides will fully preserve their positions in respect of the 1991-2007 Jordan's Principle class and will have their day in court both at certification and, if necessary, at trial. No class member's rights in either the Consolidated or Separated Proceeding are being compromised in any way by what is being proposed. Moreover, it is submitted, the Crown's willingness to mediate a large portion of the case, while litigating another portion is consistent with best practices regarding aboriginal litigation. The alternative – holding up resolution until every disputed issue has been fully and finally litigated – is harmful to class members and inconsistent with the goal of reconciliation.

PART II - CONFLICTS OF INTEREST GENERALLY AND IN CLASS ACTIONS

6. Conflicts of interest for lawyers concern: (a) whether the immediate **legal interests of clients are directly adverse** in the matters on which the lawyer is acting;[1] (b) the **misuse of confidential information** to a client's disadvantage;[2] and (c)

[1] *Canadian National Railway Co. v. McKercher LLP,* 2013 SCC 39 at paras 32-34 [*McKercher*].
[2] *McKercher* at paras 23-24.

ineffective representation where the lawyer is **tempted to prefer other interests** over those of his client: the lawyer's own interests, those of a current client, of a former client, or of a third person.[3]

7. None of these concerns arise here.

8. The class members in the Separated Proceeding advance claims against the Crown that relate to the period between April 1, 1991 and December 11, 2007. The Jordan's Class members in the Consolidated Proceeding advance claims that date from December 12, 2007 to the present. Other than for this timing – or temporal – difference, the **interests of both classes are identical**. Where their interests are different, i.e. timing, **they are not in conflict**. If both cases were to proceed to trial and the court were to find, for example, that no claim under Jordan's Principle could be maintained for the pre-December 12, 2007 period, this would not affect the claims of the class members in the Consolidated Proceeding in any way.

9. There is **no potential for misuse of confidential information** to the detriment of either class. To the contrary, all factual and expert evidence and knowledge acquired by counsel in the prosecution of one action will benefit the other action. A significant economy is possible because counsel will act for both classes in what will be substantially similar factual cases.

10. There is **no potential for counsel to prefer the interests of one class over the other**. In both cases, counsel have the same motivation to seek the best result for both

[3] *McKercher* at paras 25-26.

classes whether at trial or at settlement. Moreover, unlike in most other cases, class counsel must seek approval of any settlement from the court, on notice to all class members.[4] This mechanism exists to ensure that class counsel have fulfilled their duties and to ensure that any settlement is fair and reasonable to the class.

11. The majority of cases dealing with conflicts of interest and class counsel relate to instances in which class counsel also represents an individual, typically the representative plaintiff, in a related individual action. In these instances, courts have found that a conflict of interest arises due to the nature of the lawyer-client relationship in the individual claim.[5] Counsel's duty to pursue the best possible outcome for the *representative plaintiff* in its individual retainer may put counsel in conflict with the duty to pursue what is in the best interests of *the class as a whole* in the class action retainer. However, these conflicting duties do not arise in this instance.

12. Class counsel are not attempting to advance any individual claims that would be covered by either of the proceedings. Rather, class counsel are advancing claims against the same defendant which, although similar in nature, are distinct in that the conduct occurred during separate time periods.

13. In Persaud, Perell J. noted:[6]

> In the context of class proceedings, there are three types of conflict of interest that require examination: (1) conflicts of interest arising from a lawyer's direct financial interest in the class proceedings, which are an inherent conflict allowed by the entrepreneurial model of the class

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[4] *Federal Court Rules*, SOR/98-106, in particular r. 334.29 (Settlement Approval) and r. 334.34 (Notice of Settlement).
[5] See, for example, *Vaeth v North American Palladium Ltd.*, 2016 ONSC 5015 and *Persaud v Talon International Inc,* 2018 ONSC 5377 [***Persaud***].
[6] *Persaud* at para 175.

> proceedings legislation; (2) conflicts arising from a divergence of interest between the representative plaintiff and class members; and (3) conflicts arising from the lawyer's divided loyalties arising outside of the class proceeding. In the immediate case, all three types of conflict of interest would be present should Levine, Sherkin, and Boussidan simultaneous act for the plaintiffs in the sixteen actions and for the Class Members.

14. None of the three types of conflicts of interest outlined by Perell J. are present in these proceedings. The interests of the class in one proceeding are not in conflict with the interests of the class in the other proceeding. The decision to proceed by way of separate proceedings with separate proposed class representatives in both will ensure that the interests of all class members are protected and fairly represented.

15. Even in circumstances where a class is composed of groups that may have claims that conflict with each other, a subclass and separate representation is not always required. In *Infineon*,[7] the class consisted of direct and indirect purchasers of microchips suing numerous manufacturers for allegedly fixing prices of microchips. The defendants opposed the appointment of the proposed representative plaintiffs on the grounds that, as indirect purchasers, they could not adequately represent the interests of the direct purchasers. The defendants argued that the indirect purchasers of microchips were in a direct conflict with the direct purchasers as both groups were claiming the same pot of money from the same defendants, and a dollar in the pocket of the indirect purchasers was a dollar that did not go into the pocket of the direct purchasers, and vice versa.[8] The

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[7] *Infineon Technologies AG v Option consommateurs*, 2013 SCC 59 [***Infineon***].
[8] *Infineon* at para 152.

plaintiffs sought to represent both groups by the same indirect purchaser representatives and the same counsel.

16. The Supreme Court of Canada found that the direct and indirect purchasers shared a common interest in establishing an aggregate loss.[9] Despite the fact that there was a real possibility that the direct and indirect purchaser groups would have conflicting interests in the litigation, the Court did not find any actual conflict, and found that the class would be fairly and adequately represented by the proposed representative plaintiffs and class counsel.

PART III - ANALOGY TO SUBCLASSES

17. What is proposed on these motions is equivalent to the creation of a subclass within the Consolidated Proceeding. Instead of creating a subclass for the 1991-2007 Jordan's Principle class members, the parties have decided to bifurcate the proceedings into two separate actions, with separate class representatives. Despite this procedural difference, the practical result is essentially the same.

18. The Federal Court Rules contemplate the creation of subclasses in r. 334.16(3):

> **Subclasses**
>
> **(3)** If the judge determines that a class includes a subclass whose members have claims that raise common questions of law or fact that are not shared by all of the class members so that the protection of the interests of the subclass members requires that they be separately represented, the judge shall not certify the proceeding as a class proceeding unless there is a representative plaintiff or applicant who
>
> > **(a)** would fairly and adequately represent the interests of the subclass;

[9] *Infineon* at para 151.

> **(b)** has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members as to how the proceeding is progressing;
>
> **(c)** does not have, on the common questions of law or fact for the subclass, an interest that is in conflict with the interests of other subclass members; and
>
> **(d)** provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

19. The existence of subclasses is a recognition by Parliament that there can be different groups within a class action, each with somewhat different interests and each potentially subject to different defences. Yet, each of the groups stands to benefit from a decision by the court on all or some of the proposed common issues. In some cases, the court must appoint a separate representative plaintiff who is able to advance the subclass's claims and who stands to benefit only if the subclass's claims succeed. However, that is only necessary where "the protection of the interests of the subclass members requires" it.

20. In order to ensure that the 1991-2007 Jordan's Principle class members' interests are fully and separately represented, class counsel propose a separate representative plaintiff for the Separated Proceeding whose claim will only succeed if the claims in the Separated Proceeding succeed. As outlined in the First Submissions, Mr. Trout, the proposed representative plaintiff for the Separated Proceeding, is motivated to vigorously advance the cause of the class members in the Separated Proceeding regardless of the outcome of the Consolidated Proceeding. Mr. Trout lost two of his children to serious illness and the essential service shortages that they suffered during

the proposed class period for the Separated Proceeding (*i.e.*, 1991-2007). The Separated Proceeding will allow Mr. Trout to advance the litigation in the best interests of his fellow class members. Mr. Trout will only receive compensation if the Separated Proceeding succeeds. Although the proper time to evaluation Mr. Trout's suitability as a class representative is at the certification hearing of the Separated Proceeding, there can be no doubt of his independence and desire to seek justice.

21. Thus, to summarize: the bifurcation of the Separated Proceeding from the Consolidated Proceeding is analogous to the creation of a subclass within the Consolidated Proceeding; the protections afforded to the interests of the members of the Separated Proceeding as provided in r. 334.16(3) are addressed through the appointment of a separate class representative, Mr. Trout, who is solely motivated to advance the interests of the subclass as his own case arises exclusively in the time period of 1991 to 2007.

22. Should this court determine that the Separated Proceeding should not be bifurcated from the Consolidated Proceeding but, rather, should proceed by way of subclass, counsel will propose a subclass within the Consolidated Proceeding and seek to add Mr. Trout as a proposed representative plaintiff of the subclass. However, it is submitted that to do this would serve no practical purpose and would have the same practical effect as the bifurcation that is being jointly proposed by the parties.

PART IV - NO RISK OF CONFLICT IN ANY OF THE LIKELY SCENARIOS

23. As stated above, the parties have agreed to try to resolve the Consolidated Proceeding through a mediated settlement, but Canada has not agreed to mediate the

claims of the class members in the Separated Proceeding. This does not create an actual or potential conflict. If anything, it prevents one.

24. The parties have agreed to terms that ensure the litigation of the Separated Proceeding proceeds promptly without any timing impact from the mediation of the Consolidated Proceeding. At this time, no settlement has been reached in the Consolidated Proceeding, although the mediation is ongoing. The continuation of the mediation does not delay the hearing of the contested certification motion for the Separated Proceeding. The plaintiffs have delivered their motion for certification of the Separated Proceeding and wish to schedule the hearing as soon as the court can accommodate.

25. If parties were to reach a settlement of the Consolidated Proceeding, including a settlement of the 2007 to present Jordan's Principle class members, the interests of the 1991-2007 Jordan's Principle class members would not be prejudiced.

26. Although not the case here, placing class members on a separate track (one on a litigation track and one on a mediation track) might arguably be prejudicial if, for example, one group's claims were settled against a corporation leaving the corporation financially weakened and unable to pay future claims. This circumstance does not arise here, however, as the defendant has the full faith and credit of a sovereign nation.

27. In order to highlight why proceeding in the manner proposed is beneficial to all class members, consider the scenario in which the Crown agreed to certify and mediate the claims of all of the Jordan's Principle class members from 1991 to the present. Since the Crown believes it owes no duty to compensate the 1991-to-2007 Jordan's Principle

class members, it might have offered compensation only to the 2007-onward Jordan's Principle class members on condition that the plaintiffs agree to release **all claims** on behalf of all Jordan's Principle class members. This would potentially create a conflict between the class members as the 1991-2007 Jordan's Principle class members would potentially be required to release their claims in exchange for no consideration in order that the 2007-onward Jordan's Principle class members be compensated. In such circumstances, class counsel could either accept the condition, reject the condition and attempt to negotiate payment for the 1991-2007 class, or end the mediation. Under that scenario, counsel would be forced to use its best judgment to represent the class and would be expected to justify any decision at the settlement approval hearing if a settlement was reached. Proceeding in the manner proposed avoids that potential adversity of interests.

28. If the present mediation does not result in a settlement of the Consolidated Proceeding, both proceedings will proceed on a litigation track, with the only difference being that the Separated Proceeding will have a contested certification hearing.

29. This is not a situation where class counsel has attempted to use one proceeding as a test run for another or allowed the defendant to pit one group against another. Rather, class counsel identified a procedural solution that will allow the actions to proceed in an efficient manner, without compromising the interests of either class.

30. Furthermore, it is not uncommon for a defendant to wish to resolve the claims of certain, but not all class members, or for one of multiple defendants to wish to resolve the claims of the class members while other defendants do not wish to seek resolution.

Class representatives and class counsel should be encouraged to resolve the claims of as many class members as possible, so long as they do so without prejudicing the claims of the other class members that are being contested.

31. Respectfully, it cannot be that a conflict or an appearance of a conflict arises any time a defendant wishes to resolve certain, but not all class members' claims, or one of multiple defendants wishes to seek resolution, while others do not.

32. It is further not in the interests of justice that the law should be set up in a manner so as to encourage a multiplicity of law firms to be retained. While counsel must of course ensure that they can advance their client's interests free of a conflict of interest, the test cannot be so rigid that the inevitable result is the need for and proliferation of lawyers. Such an approach would run counter to two pillars of class actions in Canada, being judicial economy and access to justice.

33. In matters involving First Nations in particular, the Federal Court's Practice Guidelines for Aboriginal Law Proceedings [10] specifically encourage partial settlements:[11]

> Although the Court will encourage parties to reach a settlement or narrow their issues in dispute through agreement, ultimately the parties must decide whether they want to pursue this avenue, understanding that there is also a cost to settlement discussions, which do not always lead to a settlement of the dispute. **It is recognized that if successful, settlement by agreement helps to restore the relationship and trust between the parties, a form of reconciliation.**

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[10] Federal Court's Practice Guidelines for Aboriginal Law Proceedings (April 2016), <https://www.fct-cf.gc.ca/content/assets/pdf/base/Aboriginal%20Law%20Practice%20Guidelines%20April-2016%20(En).pdf> [**Aboriginal Guidelines**].

[11] Aboriginal Guidelines at p 5 (emphasis added).

> It is important to keep in mind that there is often overlap between settlement and judicial adjudication: many disputes that begin as adversarial proceedings may shift over to dialogue and resolution by agreement, **even if only for some of the issues in dispute**…

34. This demonstrates that class representatives and class counsel *should* seek to resolve claims partially if, despite their best efforts, they are unable to resolve *all* claims.[12]

35. Bifurcating the proceedings as proposed is the optimal manner of proceeding under the circumstances. On the one hand, the class members in the Consolidated Proceeding are afforded the opportunity to resolve their claims through negotiation and mediation, and certification of their claims is not contested. On the other hand, class members of the Separated Proceeding benefit from the work and efforts of class counsel in relation to Jordan's Principle, to advance their claims to certification as expeditiously as possible.

36. For the reasons stated, no actual or potential conflict of interest arises from the relief requested.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of April, 2021.

[12] In addition to the Aboriginal Guidelines, The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples (2018) < https://www.justice.gc.ca/eng/csj-sjc/ijr-dja/dclip-dlcpa/litigation-litiges.pdf> also encourages parties to settle part or all of a claim where possible.

SCHEDULE A

STATUTES OR REGULATIONS

1. *Federal Courts Rules*, SOR/98-106, rr 334.16, 334.29 and 334.34

Certification

Conditions

334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if

(a) the pleadings disclose a reasonable cause of action;

(b) there is an identifiable class of two or more persons;

(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;

(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and

(e) there is a representative plaintiff or applicant who

(i) would fairly and adequately represent the interests of the class,

(ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,

(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

Matters to be considered

(2) All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether

(a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;

(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;

(c) the class proceeding would involve claims that are or have been the subject of any other proceeding;

(d) other means of resolving the claims are less practical or less efficient; and

(e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

Subclasses

(3) If the judge determines that a class includes a subclass whose members have claims that raise common questions of law or fact that are not shared by all of the class members so that the protection of the interests of the subclass members requires that they be separately represented, the judge shall not certify the proceeding as a class proceeding unless there is a representative plaintiff or applicant who

(a) would fairly and adequately represent the interests of the subclass;

(b) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members as to how the proceeding is progressing;

(c) does not have, on the common questions of law or fact for the subclass, an interest that is in conflict with the interests of other subclass members; and

(d) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

Approval

334.29 (1) A class proceeding may be settled only with the approval of a judge.

Binding effect

(2) On approval, a settlement binds every class or subclass member who has not opted out of or been excluded from the class proceeding.

Notice of settlement

334.34 Notice that an offer to settle has been made or that a settlement has been approved under rule 334.29 shall be given by the representative plaintiff or applicant to the class or subclass members in accordance with the directions of a judge in respect of the content of and means of giving the notice.

SCHEDULE B

BOOK OF AUTHORITIES

1. *Canadian National Railway Co. v. McKercher LLP,* 2013 SCC 39
2. *Vaeth v North American Palladium Ltd*, 2016 ONSC 5015
3. *Persaud v Talon International Inc,* 2018 ONSC 5377
4. *Infineon Technologies AG v Option consommateurs*, 2013 SCC 59

Guidelines

5. Federal Court ~ Aboriginal Law Bar Liaison Committee, Practice Guidelines for Aboriginal Law Proceedings (April 2016)
6. The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples (2018)

This is **Exhibit "F"** to the Affidavit of David Sterns, Affirmed remotely before me in the City of Toronto, in the Province of Ontario, on October 6, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration remotely

Commissioner for taking Affidavit
(or as may be)

Georgia Elizabeth Scott-McLaren, a Commissioner, etc.
Province of Ontario, for
Sotos LLP, Barristers and Solicitors
Expires February 20, 2024

Court File Nos.: T-402-19/T-141-20

FEDERAL COURT
PROPOSED CLASS PROCEEDINGS

BETWEEN:

XAVIER MOUSHOOM and JEREMY MEAWASIGE
(by his litigation guardian Maurina Beadle)

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

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HER MAJESTY THE QUEEN AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

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PART I – OVERVIEW

1. Amicus makes these representations in furtherance of the mandate conferred by the Order of this Court dated June 10, 2021 (the "Order Appointing Amicus"). That mandate is:

> … to assist the Court in safeguarding the interests of class members throughout these proceedings, including but not limited to their consolidation and bifurcation into the Consolidated Proceeding (on behalf of, among others, the Jordan's Principle class members whose claims arose from December 12, 2007 onward) and the Separated Proceeding (on behalf of the Jordan's Principle class members whose claims arose from April 1, 1991 to December 11, 2007), given that the same counsel act for the plaintiffs in both proceedings.[1]

2. Among other forms of relief, the plaintiffs move for Orders consolidating the Actions in Court File No. T-402-19 and Court File No. T-141-20 (hence, the Consolidated Proceeding) and for leave under the Preclusion Order for Zacheus Joseph Trout to commence a new class action, the Separated Proceeding, on behalf of claimants separated from the Consolidated Proceeding.

3. The parties have agreed to the expedited prosecution of the Consolidated Proceeding, which consists of the majority of class members.[2] The Crown has consented to certification of the class proceeding with respect to those class members and, in respect of this portion of the claim, has agreed to participate in a mediation facilitated by a retired member of the Federal Court who possesses subject-matter expertise.[3] In relation to the Separated Proceeding, which is comprised of a subset of class members,[4] the Crown is exercising its right to contest certification.[5]

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[1] Order of Mr. Justice Phelan and Madam Justice St-Louis dated June 10, 2021, para. 1.
[2] These include the Removed Child Class (April 1, 1991 to present), Family Members of the Removed Child Class (April 1, 1991 to present), Jordan's Class (December 12, 2007 to present) and Family members of Jordan's Class (December 12, 2007 to present).
[3] Written Submissions of the Moving Parties, November 2, 2020, para. 18.
[4] This subset is comprised of Jordan's Class (April 1, 1991 to December 11, 2007) and family members of Jordan's Class (April 1, 1991 to December 11, 2007).
[5] Written Submissions of the Moving Parties, November 2, 2020, para. 19.

4. The plaintiffs' counsel have made submissions and offered assurances to the Court as to the effectiveness of their representation of the Separated Proceeding class members, should the relief they seek be granted. Counsel take the position that:

a. "[T]he remainder of the class (i.e., those within the Separated Proceeding) have given up none of their rights";[6]

b. The separate prosecution of the claims in the Separated Proceeding will not prejudice the interests of class members in that action because

i. they have not given up their claims; instead, they retain all of their rights to seek certification and advance their claims, and the hearing of the certification motion will not be delayed due to mediation of the Consolidated Proceeding;[7]

ii. the proposed representative plaintiff in the Separated Proceeding, Mr. Trout is motivated to vigorously advance the cause of the class members in the Separated Proceeding regardless of the outcome in the Consolidated Proceeding;[8] and

iii. "Class counsel will vigorously advance their claims";[9]

c. "Proceeding in this bifurcated manner will advance the litigation for a large portion of the class without affecting or compromising the interests of those class

[6] Written Submissions of the Moving Parties, November 2, 2020, para. 21; April 9, 2021, para. 5.
[7] Written Submissions of the Moving Parties, November 2, 2020, para. 37.
[8] Written Submissions of the Moving Parties, November 2, 2020, para. 39; April 9, 2021, paras. 20-21. Counsel posited that while creation of a subclass would have no real purpose and would have the same practical effect as the bifurcation that is being jointly proposed by the parties, in that event they would seek to add Mr. Trout as a representative plaintiff of the subclass: Written Submissions of the Moving Parties, para. 22.
[9] Written Submissions of the Moving Parties, November 2, 2020, para. 21.

members whose claim does not fall within the Crown's consent to certification"; and[10]

d. "These class members benefit from the work done to date in preparation for contested certification in the Moushoom Action."[11]

5. Counsel submit that whether in the Separated Proceeding or in the Consolidated Proceeding, all class members advance the same rights of action against the Crown. Counsel further submit that the interests of class members in both proceedings are identical and not in conflict.[12] The fact that their claims arose at different times (April 1, 1991 to December 11, 2007 in the case of the Separated Proceeding; December 12, 2007 to the present in the case of the Consolidated Proceeding) is no basis for concluding that they are adverse in interest.[13] Moreover, they submit, bifurcation does not raise any spectre of adverse interests in the future.[14]

PART II – SHOULD BIFURCATION BE REFUSED / IS OTHER COURT INTERVENTION WARRRANTED?

6. As a general and guiding principle, the Supreme Court of Canada has accepted the proposition that "a litigant should not be deprived of his or her choice of counsel without good cause".[15] Thus, in general, the plaintiffs in the Consolidated Proceeding and Separated Proceeding should be entitled to proceed with their chosen counsel, unless a good reason exists to prevent it, such as a conflict of interest.

7. In *McKercher*, the Supreme Court identified three different types of conflicts of interest that may arise, particularly where a conflict is alleged to exist as a result of a lawyer's or firm's

[10] Written Submissions of the Moving Parties, November 2, 2020, para. 21.
[11] Written Submissions of the Moving Parties, November 2, 2020, paras. 21 and 38.
[12] Written Submissions of the Moving Parties, April 9, 2021, para. 8.
[13] Written Submissions of the Moving Parties, November 2, 2020, para. 42.
[14] Written Submissions of the Moving Parties, November 2, 2020, para. 43.
[15] *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, at 1243.

concurrent representation of two or more clients. *Firstly*, the "bright line rule" absolutely prohibits the simultaneous representation of two current clients where the "*immediate legal* interests" of the clients are "*directly* adverse".[16] *Secondly*, a lawyer cannot act where there is a risk that he or she will misuse confidential information obtained from a client.[17] *Finally*, even where the bright line rule does not apply and there is no risk of a misuse of confidential information, a conflict will still exist where "the concurrent representation of clients creates a substantial risk that the lawyer's representation of the client would be materially and adversely affected", such as where the lawyer's effective representation of the client would be compromised by the lawyer's own interests, or the interests of a current client, former client, or a third person.[18]

8. Amicus submits that none of these conflicts of interest would result from bifurcating the Consolidated Proceeding and the Separated Proceeding.

9. Firstly, the bright line rule is not applicable. In *McKercher*, the Court stressed that, for the bright line rule to apply, the *direct legal interests* of the clients must be adverse – such as where the clients are opposing parties in the same proceeding. It does not apply where any adversity is indirect, or merely based on strategic considerations, rather than legal ones.[19] Here, it is clear that the immediate legal interests of the plaintiffs in the two proceedings would not be directly adverse. Bifurcating the proceedings would not make the different classes opposing parties in the same proceeding.

10. The members of each class raise similar claims against the same defendant based on similar conduct arising in two separate time periods. There is no zero sum game here: the success

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[16] *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, at para. 32 [emphasis in original].
[17] *McKercher*, at paras. 23-24.
[18] *McKercher*, at paras. 26, 38.
[19] *McKercher*, at paras. 32-35.

of the plaintiffs in the Consolidated Proceeding does not necessarily result in any detriment to the plaintiffs in the Separated Proceeding, and vice versa.

11. Secondly, there does not appear to be any risk of the misuse of confidential information. Amicus does not see how counsel may obtain confidential information in one proceeding that could then be used to the disadvantage of the plaintiffs in the other proceeding. This situation is completely distinct from situations where a lawyer or firm acts against a former client in a related matter, where concerns regarding the misuse of confidential information are most acute.[20]

12. Finally, Amicus does not believe that there is a substantial risk that counsel's effective representation of one client would be materially and adversely affected by the bifurcation of the proceedings and counsel's concurrent representation in both actions. In the present circumstances, there does not appear to be a substantial risk that plaintiffs' counsel would prefer the interests of one set of class members over the other, or "soft peddle" their representation of one in order the benefit the other (or themselves).

13. This third category of conflicts identified in *McKercher* is the most prevalent one in the class actions context. The Ontario Superior Court has recognized the inherent conflicts of interest that arise from the "entrepreneurial model of the class proceedings legislation".[21] As a result, it is appropriate for the courts to be particularly wary of conflicts of interests in class proceedings. Indeed, it is ultimately the responsibility of the courts to defend against such conflicts and ensure that the interests of class members are not subordinated to the interests of class counsel, or their other clients.[22]

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[20] *McKercher*, at para. 24.
[21] *Singh v. RBC Insurance Agency Ltd.*, 2020 ONSC 5368, at para. 42; *Persaud v. Talon International Inc.*, 2018 ONSC 5377, at para. 175.
[22] *Singh*, at para. 42.

14. In a number of cases, the Ontario Superior Court has disallowed counsel from acting both as class counsel and as counsel in related individual actions against the same defendants – whether the plaintiff in the individual actions is also the representative plaintiff in the class action,[23] merely a putative class member,[24] or even a class member who has opted out of the class.[25] In these cases, the courts have highlighted concerns related to counsel's duty of commitment to zealously represent class members, given their duties and interests with respect to their clients in the individual actions.

15. For example, in *Singh*, counsel sought to act for the same client both as representative plaintiff in a class action and in a related individual action. Glustein J. noted that the client's interests regarding what claims to pursue in the class action could be impacted by the individual action, a settlement of the individual action would likely require a release of the defendant which would affect the class action, and there was a significant risk of conflicting instructions from the client.[26] In such circumstances, the law firm could not simultaneously fulfill its duty of zealous advocacy to the plaintiff in the individual action and the class members in the class action.

16. Similarly, in *Persaud*, Perell J. did not permit counsel to act as class counsel while also acting for sixteen putative class members in related individual actions. In that case, the court also identified the risk of conflicting instructions, as well as risks that the firm could be incentivized to seek the highest settlement in the class proceeding at the expense of the individual actions.[27]

17. In *Vaeth*, Perell J. similarly identified a conflict based on the concern that, if a fixed pool of settlement funds existed, settlement in one action could leave fewer funds available to resolve

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[23] *Singh*.
[24] *Persaud*, at para. 165.
[25] *Vaeth v North American Palladium Ltd.*, 2016 ONSC 5015.
[26] *Singh*, at paras. 85-86, 89, 93.
[27] *Persaud*, at paras. 175-181.

the other actions and counsel would be forced to advance the interests of one client at the expense of the other.[28]

18. These risks that courts have recognized do not arise from plaintiffs' counsel's representation in both the Consolidated Proceeding and the Separated Proceeding.

19. Crucially, unlike the other cases, this is not a situation of counsel acting in both a class proceeding and a related individual action. Both the Consolidated Proceeding and the Separated Proceeding are proposed class actions. Accordingly, there is little risk of counsel being incentivized to settle one action at the expense of the other in order to obtain higher remuneration for themselves.

20. Importantly, in *Singh*, *Persaud*, and *Vaeth*, there was overlap between the plaintiffs in the various actions, in the sense that all of the plaintiffs in the individual actions were also putative class members. This circumstance alone created potential and, in some situations, actual conflicts. In this case, the Consolidated Proceeding and the Separated Proceeding are legally distinct in the sense that the allegations relate to different time periods, creating different putative classes based on when the class members were allegedly wronged. This fact substantially reduces any risk that the interests of class members in one proceeding will come into direct conflict with the interests of the others, thereby requiring counsel to favour one class over the other in their advice.

21. Further, while the class members may seek to adopt different strategies with respect to the different proceedings, this will not result in conflicting instructions to counsel on how to proceed in each individual proceeding.

22. Finally, it is significant that the defendant in the proceedings is the Attorney General of Canada. As a result, unlike with private defendants, there is not a risk that settlement in one

[28] *Vaeth*, at paras. 67-73.

proceeding will directly reduce the amount of money in the other proceeding by implicating the solvency of the defendant or exhausting the defendant's insurance.

23. For these reasons, the concerns related to the duty of commitment that the Ontario Superior Court has identified in the class actions context are not applicable to this case. Amicus agrees with plaintiffs' counsel that this situation is more closely analogous to a scenario where counsel represents different sub-classes in the same proceeding, rather than representing plaintiffs in both a class action and related individual actions.

24. One potential source of conflict that might arise from bifurcation is a risk that counsel may be incentivised to prioritize and devote their attention to the Consolidated Proceeding – where certification is not being contested, mediation is already being contemplated, and therefore a settlement may appear more likely – at the expense of proceeding expeditiously in the Separated Proceeding. Such a scenario, in which the Separated Proceeding would be placed on the "back burner", would clearly not be in the best interests of the class members in the Separated Proceeding.

25. However, Amicus is satisfied that safeguards already exist to prevent this scenario. Plaintiff's counsel point out that the Separated Proceeding is not being stayed or delayed as a result of bifurcation and the Crown has already agreed to an expedited determination of the certification motion. They explain that class counsel have instructions to proceed with the certification motion, regardless of the mediation of the Consolidated Proceeding. They have offered assurances about the conduct of the Separated Proceeding (including that the proposed representative plaintiff in the Separated Proceeding, Mr. Trout is motivated to vigorously advance the cause of the class members in the Separated Proceeding regardless of the outcome in

the Consolidated Proceeding and that they, too, will do so) and it will be salutary that the Court has noted those assurances and will keep them in mind as the matter proceeds.

26. Moreover, Amicus submits that any residual concerns in this regard can be adequately addressed by the Court imposing a timetable for the certification motion in the Separated Proceeding that ensures that those class members are not being forced to wait as a result of bifurcation.

27. Accordingly, Amicus submits that a sufficient basis does not exist to refuse bifurcation due to plaintiffs' counsel's proposed representation in both the Consolidated Proceeding and the Separated Proceeding. The Court may consider it appropriate to impose a timetable on the certification motion in the Separated Proceeding to ensure that it is not unduly delayed as a result of bifurcation, to the detriment of the class members.

PART III – AMICUS' RECOMMENDED COURSE OF ACTION

28. The Order Appointing Amicus provides that Amicus' mandate continues after the Courts' determination of the issue as to whether bifurcation of the proceeding into the Consolidated Proceeding and the Separated Proceeding would place the plaintiffs' counsel in an actual or potential conflict of interest, such that bifurcation should be refused or other court intervention should be warranted. Amicus remains available to provide any assistance that the Court may require.[29]

29. Should the parties in the Consolidated Proceeding reach a settlement, the Courts may wish to seek representations from Amicus at the hearing of the settlement approval motion. The Ontario Court of Appeal has recognized the desirability of involving amicus curiae to assist the

[29] Order of Mr. Justice Phelan and Madam Justice St-Louis dated June 10, 2021, subpara. 1(b).

court in reviewing settlement agreements and determining related issues, as such motions generally proceed unopposed.[30]

30. In this case, if a settlement is reached in the Consolidated Proceeding, it may be appropriate to have Amicus make submissions on the approval of the settlement, in order to ensure that no aspect of the settlement would prejudice the interests of the class members in the Separated Proceeding, whether advertently or inadvertently.

31. In the meantime, in Amicus' respectful view, the Consolidated Proceeding and the Separated Proceeding should be permitted to proceed to their respective resolutions, bifurcated from each other.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of June, 2021.

[30] *Smith Estate v. National Money Mart Company*, 2011 ONCA 233, at paras. 15-26.

SCHEDULE A

AUTHORITIES

1. *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39
2. *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235
3. *Persaud v. Talon International Inc.*, 2018 ONSC 5377
4. *Singh v. RBC Insurance Agency Ltd.*, 2020 ONSC 5368
5. *Smith Estate v. National Money Mart Company*, 2011 ONCA 233
6. *Vaeth v North American Palladium Ltd.*, 2016 ONSC 5015

MOUSHOOM et al.
Plaintiffs
ASSEMBLY OF FIRST NATIONS et al.
Plaintiffs

-and-

THE ATTORNEY GENERAL OF CANADA.
Defendant
HER MAJESTY THE QUEEN
Defendant

Court File Nos.: T-402-19/T-141-20

FEDERAL COURT
PROPOSED CLASS PROCEEDINGS

WRITTEN REPRESENTATIONS OF AMICUS CURIAE

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This is **Exhibit "G"** to the Affidavit of David Sterns, Affirmed remotely before me in the City of Toronto, in the Province of Ontario, on October 6, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration remotely

Commissioner for taking Affidavit
(or as may be)

Georgia Elizabeth Scott-McLaren, a Commissioner, etc.
Province of Ontario, for
Sotos LLP, Barristers and Solicitors
Expires February 20, 2024

Tribunal File No. T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA AND ASSEMBLY OF FIRST NATIONS

Complainants

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

THE ATTORNEY GENERAL OF CANADA
(representing the Minister of Indian and Northern Affairs)

Respondent

-and-

CHIEFS OF ONTARIO AND
AMNESTY INTERNATIONAL CANADA

Interested parties

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Overview

1. The Complainants have not established a *prima facie* case that federal funding of child welfare on reserve is discriminatory.[1] Their purported comparison of federal to provincial/territorial funding does not demonstrate adverse differential treatment or denial of a service under section 5 of the *Canadian Human Rights Act* ("the Act").[2]

2. The complaint is primarily based on the allegation that the federal government does not fund child and family service providers for First Nation children living on reserve to the same level that service providers off reserve are funded by the provincial and Yukon governments[3] and that such differential funding constitutes discrimination.

3. This allegation was not borne out by the evidence. In fact, there was no evidence advanced by the Complainants regarding how the provincial or territorial funding models work, or what their respective child welfare budgets are as compared to the federal government. No provincial or territorial witnesses were called by the Complainants to substantiate their allegation that the federal government funds child welfare services on reserve in a discriminatory manner as compared to the rest of the country.

4. Instead, the Complainants' evidence focussed on establishing that an increase in federal funding and a change to existing funding models would facilitate the development of more First Nation Child and Family Agencies ("FNCFS Agencies") on reserve, more autonomy for those Agencies and the availability of a broader range of services. However, the evidence does not establish that First Nation children on reserve are receiving child welfare services at a discriminatory level as compared to children in the rest of the country. The evidence did not even establish that the proposed changes would lead to better outcomes for First Nation children

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1 The term "Complainants" encompasses the two Complainants, the First Nations Child and Family Caring Society and the Assembly of First Nations, as well as the Canadian Human Rights Commission and the two interested parties, the Chiefs of Ontario and Amnesty International.

2 Section 5, *Canadian Human Rights Act*, RSC. 1985, c. H-6

3 References to "territorial government" refers to the Yukon, which is the only territory encompassed in this complaint.

on reserve.

5. As an alternative argument, the Complainants allege that even if federal and provincial/territorial funding is reasonably comparable, it is still discriminatory because of the higher needs of First Nation children on reserve. Again, this was not borne out in the evidence, which suggests that while the needs of First Nation children on reserve are high, the need is equally high among First Nation children living off reserve. Accordingly, no *prima facie* case was established. In any event, the question of whether federal funding is sufficient to meet a perceived need is beyond the scope of an investigation into discrimination under section 5 of the *Canadian Human Rights Act*, whether it relies on fiduciary duty arguments, international law principles or Jordan's Principle. The claim of discrimination is unfounded and should be dismissed.

PART I – FACTS

A. Background on federal funding for child welfare on reserve

6. The provision of child welfare services falls within provincial jurisdiction.[4] Around the 1950's, concerns arose with respect to the safety of children on reserve, as the provinces were not necessarily providing the full range of child welfare services to on reserve First Nation communities in their jurisdictions.[5]

7. As a means of responding to these concerns, the Respondent, the Department of Aboriginal Affairs and Northern Development Canada ("AANDC")[6] became involved as a matter of social policy by engaging provinces in discussions about ensuring the provision of child welfare services on reserve in exchange for federal cost-sharing agreements.[7] The only province that entered into such an agreement

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4 *Testimony of Sheilagh Murphy*, Transcript vol 54, pg 28; Also see: *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45; *Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto*, 2010 SCC 46

5 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 28-9

6 The name of Aboriginal Affairs and Northern Development Canada has changed throughout the time period of this complaint and for ease of reference, will be referred to as the Respondent through these submissions.

7 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 28-9

was the province of Ontario, which led to the development of the *1965 Welfare Agreement*.[8] This agreement is still in force today and addresses the provision and funding of child welfare on reserve as well as other social programs.[9]

8. Given the lack of interest from the other provinces to entering in cost-sharing agreements, the Respondent received policy authority from Cabinet to enter into funding arrangements with First Nation communities in the remaining jurisdictions who were interested in becoming service providers in their own communities.[10]

9. As there was no consistency in the funding arrangements being reached between the Respondent and the various First Nations to develop FNCFS Agencies, the Respondent began to work on a national system. The goal was to create uniformity and predictability in funding across the country while increasing the capacity of the First Nations to deliver child welfare services in their communities in a culturally appropriate manner.[11] The result was Directive 20-1, which was introduced in the early 1990's.[12]

10. At the time Directive 20-1 was introduced, there were approximately 23 FNCFS Agencies across the country; there are now 104.[13]

B. Federal funding for the First Nations Child and Family Services Program

11. The Respondent receives an allocation for all of its programming on a yearly basis from Treasury Board.[14] The total amount is approximately 7 billion dollars.[15] The Respondent uses this money to fund the various programs that offer services on reserve.

12. Funding for child welfare services on-reserve is provided through the First Nations

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8 *1965 Welfare Agreement*, HR-11, tab 214
9 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 28-9
10 *Testimony of Sheilagh Murphy*, Transcript vol 54, pg 29
11 *Testimony of Sheilagh Murphy*, Transcript vol 54, pg 30
12 *Testimony of Sheilagh Murphy*, Transcript vol 54, pg 30
13 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 50-51
14 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 73
15 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 73

Child and Family Services Program ("the FNCFS Program").[16] The purpose of the FNCFS Program is to fund FNCFS Agencies and programs that deliver child welfare services to First Nation children and families on reserve.[17]

13. The FNCFS Program is within the Respondent's Social Policy and Programs Branch, which manages and funds five social programs offered on reserve.[18] In addition to the FNCFS Program, the other four social programs are Income Assistance, National Child Benefit Re-Investment, Assisted Living and Family Violence Prevention.[19]

14. Funding for the social programs is provided through yearly appropriations by Parliament through Grants and Contributions.[20] The five social programs receive funding on an annual basis in the vicinity of $1.6 billion dollars from the overall allocation to the Respondent: the Income Assistance Program receives $830 million, the FNCFS Program receives $627-$630 million, the Assisted Living Program receives $92 million, National Child Benefit Reinvestment receives $50-$55 million and the Family Violence Prevention Program receives 30.1 million.[21]

15. While the monies are appropriated annually, the funds are ongoing, which means the Respondent knows that the core amount of money they receive for these programs will remain the same each year.[22]

16. In order to receive an increase in yearly funding for a social program, there has to be a decision by the Minister to make a policy change justifying the need for an increase in funding. The role of the Social Policy and Programs Branch is to provide research and options to the Minister and senior government officials to

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16 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 51
17 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 53
18 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 51-2, *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 19-20
19 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 51-2
20 Testimony of Sheilagh Murphy, Transcript vol 54, pgs 19-20
21 *Testimony of Sheilagh Murphy*, Transcript, vol 54, pgs19-20; *How First Nation Child and Family Services works in each region*, R-13, tab 5; and *Deck entitled "Better Outcomes for First Nations Children: Aboriginal Affairs and Northern Development Canada's Role as a Funder in First Nations Child and Family Services"*, R-13, tab 18
22 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 20-22

inform these decisions.[23]

17. There is no authority for a government department or a program to unilaterally make a substantive policy change to a program that would impact the amount of funding or the way in which government monies are spent.[24]

18. Once the Minister has made a decision with respect to the institution of a policy change, approval must then be sought and granted from Cabinet.[25] If Cabinet approves the policy change, the Respondent must then prepare a Treasury Board submission to receive funding authority.[26] The Treasury Board submission must provide specific details regarding how the funding will be used and the justification for the funding.[27] The Treasury Board process also requires the development of "Terms and Conditions" to establish the authority under which public monies can be used and sets out strict parameters for how this money can be spent.[28]

19. With respect to the FNCFS Program, the Terms and Conditions specify that the funding must be used for expenses relating to child welfare and cannot fund expenses covered by another department or program in the federal family.[29] For example, medical and education expenses fall outside the authorities of the FNCFS Program, as they are funded through another federal program or department.[30]

20. The Respondent is responsible for ensuring the funds disbursed through the FNCFS Program are being used in accordance with their governing Terms and Conditions, which means that the funds must be used for child welfare expenses, such as social work, child protection and prevention services.[31] This is part of the Respondent's general stewardship role for the accountability of public funds, which requires it to

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23 *Testimony of Sheilagh Mu*rphy, Transcript vol 54, pgs 23-24
24 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 45-48, *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 82-84
25 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 23-24
26 *Testimony of Barbara D'Amico*, Transcript, vol 50, pgs 84-6, *Testimony of Sheilagh Murphy*, Transcript, vol 54, pgs 20-24 and 45-46
27 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 86
28 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 85-6
29 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 86-7, 89-90
30 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 59, 89, 97
31 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 56

ensure all funds provided are spent within the authority given by the Executive.[32]

C. The Respondent's role in child welfare on reserve

21. There are three partners involved in the delivery of child welfare services on reserve: the federal government, the provincial and Yukon governments and First Nations.[33] The role of the federal government, through the Respondent, is to fund the FNCFS Program.[34] To fulfil this role, it develops funding agreements with the FNCFS Agencies, and in some cases the provinces and Yukon, and builds costing models for the funding allocations.[35]

22. The Respondent is not involved with and does not control decisions on what programs or services are offered by the FNCFS Agencies for child welfare on reserve. The Respondent's role is to ensure that public funds are used for child welfare expenditures in accordance with the applicable funding authorities.[36]

23. In 2012/13, the Respondent provided 627 million in funding to the FNCFS Program.[37]

D. The Provincial/Yukon governments' role in child welfare on reserve

24. The provincial and Yukon governments have legislative and regulatory authority for child welfare across Canada.[38] In each province or territory, the Director of Child Welfare can delegate their authority under the legislation to an individual service delivery society, agency, or social worker.[39] The decision on whether a society, agency or social worker receives delegated authority rests with the province

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32 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 57
33 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 53-4
34 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 55-56
35 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 55-56
36 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 57, 59
37 *Deck entitled "Better Outcomes for First Nations Children: Aboriginal Affairs and Northern Development Canada's Role as a Funder in First Nations Child and Family Services"*, R-13, tab 18, p12
38 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 62
39 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 63

or territory.[40]

25. The provincial/territorial governments are also responsible for ensuring that the delegated authorities delivering child welfare services, both on and off reserve, are acting in accordance with the legislation and regulations.

E. The First Nations' role in child welfare on reserve

26. Child welfare services and programs on reserve are primarily delivered by the FNCFS Agencies.[41] In some cases, there is no FNCFS Agency and child welfare services are delivered by a tribal council, a band, the province or Yukon governments. While provincial or territorial requirements set operational standards and dictate what programs and services must be offered to a community, decisions with respect to what additional programs and services are offered rests with the FNCFS Agencies, in accordance with their delegated authority.[42]

27. In determining what services to provide and how to deliver them, the FNCFS Agency decides what is "culturally appropriate" for their community.[43] The definition of what is culturally appropriate depends on the specific culture of each First Nation community.[44] The Respondent has no role in determining what is culturally appropriate. This is left solely within the discretion of the FNCFS Agency or the First Nations leadership.[45]

28. In addition to making the determination on what additional programs and services to offer, the FNCFS Agencies are responsible for the day-to-day administration of the agency, which involves hiring staff and management, setting a budget and making decisions on agency expenditures.

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40 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 63
41 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 57-58
42 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 57-58
43 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 60-61
44 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 60-61
45 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 60-61

F. The FNCFS Program funding models

i. Directive 20-1

29. Directive 20-1 has two funding streams: maintenance and operations.[46] Maintenance is the basic reimbursement of the actual money spent by the FNCFS Agency on maintaining children in care out of the family home.[47] The categories of expenses included in maintenance are defined in the National Policy Manual.[48]

30. At the start of each year, there is a funding agreement that includes a maintenance budget based on the previous year's actual maintenance expenses.[49] Monthly or quarterly maintenance reports are provided that track the up to date expenditures to see whether they are in accordance with the expenses that were anticipated.[50]

31. The operations stream under Directive 20-1 is calculated through a formula that assigns fixed amounts for each organization, each member band and each child in the 0-18 population on-reserve, as well as other various fixed costs.[51] The final number from these calculations is how much the FNCFS Agency is funded for the operations stream. Operations is meant to cover the administrative and staffing expenses of running an agency, which includes expenses such as salaries and overhead. Under Directive 20-1, funding for prevention programs is also included in operations.

32. Directive 20-1 is currently in place in British Columbia, New Brunswick, Newfoundland and Labrador and the Yukon.[52]

ii. The Enhanced Prevention Focused Approach

33. In 2007, the Respondent sought and received authority to change its child welfare funding and develop a new funding model, the Enhanced Prevention Focused

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46 *Testimony of Barbara D'Amico*, Transcript vol 50, pg155
47 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 168, 172
48 *National Policy Manual*, HR-13, tab 272, *Testimony of Barbara D'Amico*, Transcript vol 51, pgs 3-7
49 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 168
50 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 68
51 *Testimony of Barbara D'Amico*, Transcript vol 51, pgs 14-17; *Directive 20-1*, R-13, tab 2
52 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 141; see also *How First Nation Child and Family Services works in each region*, R-13, tab 5

Approach ("the EPFA").[53] The EPFA added an additional funding stream specifically for prevention based services, while also providing a new calculation for the operations stream that takes into account provincial data on child welfare expenditures.[54] The development of the EPFA reflects the underlying shift in social work practice, placing a greater focus on prevention services, as opposed to protection services.[55]

34. The EPFA implementation process begins with tripartite discussions between the provinces, First Nation communities and the Respondent.[56] From the tripartite discussions, the Tripartite Accountability Framework is developed, which is a framework to support all parties in moving forward with the transition to the EPFA.[57] It outlines the goals and objectives, performance indicators, roles and responsibilities of the parties, and can be used by the FNCFS Agencies as a benchmark when developing their business plans.[58] Although it is not signed, the Respondent seeks and obtains the endorsement of the provinces and the participating First Nations through Band Council resolutions or letters of endorsement.[59]

35. Once the framework is in place, the costing discussions take place. Prior to the costing discussions, the FNCFS Program requests all child welfare costing variables from the province."[60] This approach is taken because the provinces do not always use a funding formula that the Respondent can replicate.[61] The costing variables include information such as salary scales, future collective bargaining that could affect salary scales, and staffing ratios.[62]

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53 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 144-5
54 *1000 Child Template*, R-13, tab 10
55 *How First Nation Child and Family Services works in each region*, R-13, tab 5; and *Deck entitled "Better Outcomes for First Nations Children: Aboriginal Affairs and Northern Development Canada's Role as a Funder in First Nations Child and Family Services"*, R-13, tab 18
56 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 146-152; see documents pertaining to tripartite meetings, regional round tables and technical working groups in R-13 and R-14, at tabs 25-37, 63-69, 72-86 and 91
57 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 147
58 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 146-7
59 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 146-8
60 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 150-1
61 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 150-1
62 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 150-1

36. The costing variables from the provinces are worked into the operations and prevention formulas in order to meet the policy objective of providing funding for "reasonably comparable services" to what is available in off reserve communities.[63]

Differences between the EPFA and Directive 20-1

37. The funding under the EPFA is different than the funding under Directive 20-1.[64] While Directive 20-1 was developed by the federal government, the EPFA is developed in a tripartite setting that results in a formula tailored to each jurisdiction.[65]

38. Another central distinction is that the EPFA has three funding streams: maintenance, operations and prevention.[66] Under Directive 20-1, funding for prevention services is included in the operations stream. Further, under the EPFA, the FNCFS Agencies can move money around between these three streams.[67] The only caveat is that the money must be spent on child welfare expenses.[68]

39. Maintenance under the EPFA is primarily the same, as it still reimburses FNCFS Agencies for the actual amount spent on maintenance expenditures.[69] Under the EPFA, the FNCFS Agency receives funding for maintenance based on the previous year's actual expenditures for maintenance and the FNCFS Agency works within the full EPFA envelope, which is adjusted yearly.[70]

40. Any reduction in maintenance expenses will result in a surplus.[71] The FNCFS Agency determines how they wish to use the money and provides the FNCFS Program with an unexpended funds plan.[72] The only restriction on the FNCFS Agency's use of surplus money is that it is to be used for child welfare services; it

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63 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 150-1
64 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 152
65 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 56
66 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 155
67 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 155
68 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 157
69 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 169
70 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 169, 176
71 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 164, 169
72 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 174

cannot be used for expenses covered by another federal program.[73]

41. However, if the maintenance expenses exceed the amount the FNCFS Agency is funded there will be a deficit.[74] When this occurs, the FNCFS Program works with the FNCFS Agency to see if there is another source of funds to use towards this deficit, such as a surplus in one of the other streams of the FNCFS Agency's budget.[75] If there is no surplus, the FNCFS Program will pay for the increased expenses.[76]

42. Although maintenance funding has essentially remained the same, the formula for calculating operations funding under the EPFA has changed from the formula used under Directive 20-1. In the EPFA formula, funding is determined through various "line items," which are specific operations expenditures, such as funding for protection workers or travel costs.[77] Each line item is assigned an amount. This amount may be static, such as the funding for an Executive Director, or variable, such as the funding for child protection workers, which takes into account the provincial salary grids, provincial ratios of protection workers to children and the First Nations 0-18 population.[78]

43. Under the EPFA, there is also a new stream of funding for prevention services. As with the funding for operations under the EPFA, the funding for prevention is calculated through line items, such as prevention workers, that are assigned funding amounts based on provincial salary grids and provincial ratios of social workers to children.[79]

44. The calculation of funding for the line items in operations and prevention under the EPFA comes directly from discussions with the province on how they fund child welfare services off reserve.[80] This provincial data is then incorporated into the

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73 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 17-7
74 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 169
75 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 179
76 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 180-1
77 *Testimony of Barbara D'Amico*, Transcript vol 51, pgs 18-20; *1000 Child Template*, R-13, tab 10
78 *Testimony of Barbara D'Amico*, Transcript vol 51, pgs 18-66; *1000 Child Template*, R-13, tab 10
79 *Testimony of Barbara D'Amico*, Transcript vol 51, pgs 66-8; *1000 Child Template*, R-13, tab 10
80 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 153-4 and v51, p18-20

formula in order to provide "reasonably comparable" funding.[81]

Implementation of the EPFA across Canada

45. The funding under the EPFA is structured as a five year roll out. At the start of the five years, a jurisdiction transitioning to the EPFA will receive a percentage of the anticipated total amount.[82] The amount increases each year until it reaches the full 100% of the EPFA increase and implementation.[83] At the end of the five years, the funding will continue at the same level; it is not cut off or stopped.[84]

46. Over the last six years, the Respondent has invested an additional $102.3 million into the FNCFS Program for EPFA.[85] This is in addition to the monies the FNCFS Agencies were already receiving under Directive 20-1.[86]

47. The EPFA is currently in place in Alberta, Manitoba, Saskatchewan, Quebec, Nova Scotia and Prince Edward Island.[87] The amounts currently received in each of these jurisdictions for child welfare as of 2012/13 are: Alberta – $129.8 million; Saskatchewan – $79.6 million; Quebec – $67.3 million; Nova Scotia – $15.9 million; and Prince Edward Island – $1.4million.[88]

48. In addition, the FNCFS Agency in Nova Scotia has received an additional $6

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81 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 153 and v51, p18-66

82 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 134

83 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 134

84 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 166-7

85 *Deck entitled "Better Outcomes for First Nations Children: Aboriginal Affairs and Northern Development Canada's Role as a Funder in First Nations Child and Family Services"*, R-13, tab 18; *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 102, 132-3, 140

86 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 136-7; see also *Profile of Funding Approved*, R-13, at tab 15; and *Deck entitled "Better Outcomes for First Nations Children: Aboriginal Affairs and Northern Development Canada's Role as a Funder in First Nations Child and Family Services"*, R-13, tab 18

87 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 102, 131-2; *How First Nation Child and Family Services works in each region*, R-13, tab 5

88 *Deck entitled "Better Outcomes for First Nations Children: Aboriginal Affairs and Northern Development Canada's Role as a Funder in First Nations Child and Family Services"*, R-13, tab 18, p12-13; *Reports- CFS Stats- Cheat Sheet*, R-13, tab 22. Also see: *How First Nation Child and Family Services works in each region*, R-13, tab 5 for a detailed explanation of the EPFA implementation in these jurisdictions

million in funding per year since 2011 in order to respond to a crisis situation.[89]

49. The remaining jurisdictions will transition to the EPFA. While waiting for this transition, some of the provinces that are still under Directive 20-1 have received additional funding in excess of what is provided under the Directive 20-1 formula.

Transitional funding in BC prior to the EPFA

50. In BC, the FNCFS Agencies are receiving funding beyond what is provided in Directive 20-1. This transitional funding is an interim measure until the EPFA is implemented in BC and results from the "shift to actuals" in funding maintenance.[90]

51. Prior to April 1, 2011, delegated FNCFS Agencies were reimbursed for their maintenance costs on a "per diem" basis.[91] The per diem was an average daily rate based on the number of care days. FNCFS Agencies were able to generate surpluses under the per diem system, as the per diem rates were greater than the actual costs of keeping a child in care.[92]

52. The Auditor General's Report of May 2008 criticized the Respondent for not complying with its Treasury Board authority to reimburse actual costs of children in care.[93] In response, the Respondent transitioned FNCFS Agencies in BC to a reimbursement of actual costs of maintenance, beginning in April 2012.[94]

53. As the per diem method of paying for maintenance generated funding in excess of the actual costs for maintaining a child in care, many FNCFS Agencies had generated surpluses, which were used to supplement their operating budgets and for prevention programs. As part of the "shift to actuals", the Respondent calculated the surplus amount the FNCFS Agencies received under the per diem method and

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89 *How First Nation Child and Family Services works in each region*, R-13, tab 5; *Testimony of Barbara D'Amico*, Transcript vol 51, pg 107

90 *Testimony of William McArthur*, Transcript vol 63, pgs 38-389; see also *Province as Service Provider*, R-13, tab 11; and *2014-2015 FNCFS Initial Budget*, R-14, tab 87

91 *Testimony of William McArthur*, Transcript vol 63, pgs 38-389

92 *Testimony of William McArthur*, Transcript vol 63, pgs 35-36

93 *Testimony of William McArthur*, Transcript vol 63, pgs 38-389

94 *Testimony of William McArthur*, Transcript vol 63, pgs 38-389

allocated transitional funding to the FNCFS Agencies based on this amount.[95] As a result, the FNCFS Agencies in BC did not experience a reduction in the amount they had been receiving under the per diem system. 80% of the eligible transition funding was released annually until the FNCFS Agency exhausted its surplus and became eligible for 100% of the transition funds.[96]

54. Currently, all of the FNCFS Agencies in BC receive the full amount of transitional funding.[97] This is in addition to the funding received under Directive 20-1.[98]

Prevention services funding in New Brunswick prior to the EPFA

55. In New Brunswick, the FNCFS Agencies receive additional funding beyond what is provided in Directive 20-1.[99] This funding is for the Head Start and In Home Care programs and is approximately 1.4 million and 1.1 million respectively.[100]

56. Head Start funding is to support families in their homes.[101] In Home Care funds situations where a child remains in the home, although there is an open case with the FNCFS Agency, and includes a variety of services such as social work and case management.[102]

57. Both Head Start and In Home Care are precursors to the implementation of the EPFA and this funding is effectively used for prevention services.[103] Decisions on how to use this funding are made by the FNCFS Agencies.[104]

iii. The Ontario *1965 Welfare Agreement*

58. In Ontario, child welfare for First Nations on reserve communities is cost shared between the federal and provincial governments under the *1965 Welfare Agreement*,

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95 *Testimony of William McArthur*, Transcript vol 63, pgs 38-389
96 *Testimony of William McArthur*, Transcript vol 63, pgs 38-389
97 *Testimony of William McArthur*, Transcript vol 63, pgs 38-389
98 *Deck entitled "Better Outcomes for First Nations Children: Aboriginal Affairs and Northern Development Canada's Role as a Funder in First Nations Child and Family Services"*, R-13, tab 18
99 *Testimony of Barbara D'Amico*, Transcript vol 51, pgs 169-175; *How First Nation Child and Family Services works in each region*, R-13, tab 5
100 *Testimony of Barbara D'Amico*, Transcript vol 51, pgs 169-175
101 *Testimony of Barbara D'Amico*, Transcript vol 51, pgs 169-175
102 *Testimony of Barbara D'Amico*, Transcript vol 51, pgs 169-175
103 *Testimony of Barbara D'Amico*, Transcript vol 51, pgs 169-175
104 *Testimony of Barbara D'Amico*, Transcript vol 51, pgs 169-175

rather than being calculated by a funding formula.

59. The terms of the Agreement essentially provide that the province of Ontario extends its welfare programs throughout the province and the federal government reimburses Ontario for a portion of the costs of specific programs identified in the Agreement. [105] The principle of the Agreement is that, as long as the service is available generally, on an equal basis on and off reserve in Ontario, it is cost shareable.[106] Child and family services are one of the social programs funded under this Agreement, which allows for reimbursement of provincial funding provided to child welfare agencies and organizations for prevention and protection services that are directly provided to First Nation children on reserve.[107]

60. The cost-sharing formula currently results in the provincial government billing roughly 92% of the cost of direct services back to the federal government.[108]

61. Prevention and Family Support Services, which were introduced by the Ontario government in the late 1970s, are cost shared up to approved contribution levels. As recently as 2005, the Respondent agreed to reimburse general increases to these prevention services.[109]

62. As the government of Ontario determines how child protection and prevention programs are funded, the federal government's role is essentially limited to ensuring that the agreed on funding is being provided and auditing the claimed expenses. There is no overall cap of expenditures under the 1965 Agreement.[110]

iv. Funding agreements with provinces to provide child welfare services

63. In Alberta and BC, the Respondent has agreements with the provincial governments to provide child welfare services directly to on reserve communities that are not

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105 *Testimony of Phil Digby*, Transcript vol 59, pg 15
106 *Testimony of Phil Digby*, Transcript vol 59, pg 77
107 *Testimony of Phil Digby*, Transcript vol 59, pgs 30-33
108 *Testimony of Phil Digby*, Transcript vol 59, pg 38; *Ontario Regional Aboriginal Affairs and Northern Development Regional Directive; Administrative Process Arrangement- Ministry of Community and Social Services for 2010-2011; Child Welfare Expenditure Summary- YTD Report 2011/12*, R-14, at tabs 58-60
109 *Testimony of Phil Digby*, Transcript vol 59, pgs 53-56
110 *Testimony of Phil Digby*, Transcript vol 59, pg 121

served by FNCFS Agencies. The Respondent reimburses the provinces for these costs.

Alberta Administrative Reform Agreement

64. In Alberta, provincial agencies provide child welfare services to six First Nation communities that are not affiliated with one of the 17 FNCFS Agencies,[111] pursuant to the "Arrangement for the Funding and Administration of Social Services ("Administrative Reform Agreement").[112] Alberta is reimbursed by the Respondent for these services.[113]

65. The Administrative Reform Agreement sets out the arrangements for funding and administration of various social services, including child welfare, applicable to First Nations on reserve.[114] Alberta sends a yearly billing report to the Respondent based on a formula has three components: program cost, direct administration, and indirect administration.[115] The formula does not, however, provide for 100% reimbursement.[116] The Respondent subjects the province's annual billings to compliance review and deducts ineligible items.[117]

66. The Respondent has approached Alberta to express its concerns with the Administrative Reform Agreement but Alberta has indicated it is not interested in reviewing the Agreement.[118]

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111 Prior to January 9 2014, there were 18 FNCFS Agencies and the province provided services to 6 First Nation communities not affiliated with one of the 18 FNCFS Agencies. After January 9, 2014, there were 17 FNCFS Agencies and the province provided services to 9 First Nation communities not affiliated with one of the 17 FNCFS Agencies

112 *Testimony of Carol Schimanke*, Transcript vol 61, pg 86 and vol 62, pgs 72-74; *How First Nation Child and Family Services works in each region*, R-13, tab 5; *Arrangement for the Funding and Administration of Social Services*, HR-13, tab 270

113 *Arrangement for the Funding and Administration of Social Services*, HR-13, tab 270

114 *Arrangement for the Funding and Administration of Social Services*, HR-13, tab 270, clause 7, Appendix II and Schedule A

115 *Alberta Children and Youth Services Administrative Reform Agreement, Child Welfare April 2008 to March 2009 Billing*, HR-12, tab 264; *Testimony of Carol Schimanke*, Transcript vol 62, pgs 2-3

116 *Testimony of Carol Schimanke*, Transcript vol 62, pgs 9-11

117 *Testimony of Carol Schimanke*, Transcript vol 62, pgs 46-47

118 *Testimony of Carol Schimanke*, Transcript vol 61, pgs188 and vol 62, pgs 46-47

BC Service Agreement

67. In British Columbia, there are 84 First Nation communities that receive their services from the provincial Ministry of Children and Family Development ("the MCFD"), as they are not affiliated with a delegated FNCFS Agency. [119]

68. In 1996, Canada and BC signed a Memorandum of Understanding ("MOU") to clarify their respective roles in funding child protection services.[120] BC was to administer the provincial child welfare legislation for the benefit of "Indian persons under the age of nineteen", while the Respondent was to reimburse the province for the cost of child protection services for any eligible child.[121]

69. The MOU was replaced by annual Service Agreements, starting in 2012.[122] Appendix A to the Service Agreement is a breakdown of costs billed by the MCFD to the Respondent for the services provided, although the MCFD does not provide any data to support its costing assertions.[123] Appendix B to the Service Agreement is a table, which sets out a costing exercise conducted by MCFD. Discussions have taken place between the province and the Respondent with respect to the nature and quality of the available source data to back up the MCFD's various cost assertions.[124]

G. The Respondent's funding of other social programs on reserve

70. The five social programs funded by the Respondent are all interconnected and aim to ensure the existence of a reasonably comparable social support system for First Nations living on reserve as compared to what is available off reserve.[125]

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119 *Testimony of William McArthur*, Transcript vol 63, pgs 10-11 and 15-16; *How First Nation Child and Family Services works in each region*, R-13, tab 5

120 *For the Funding of Child Protection Services for Indian Children, Between: British Columbia and Canada*, R-13, tab 8

121 *For the Funding of Child Protection Services for Indian Children, Between: British Columbia and Canada*, R-13, tab 8

122 *Service Agreement Between the Province of British Columbia and Canada*, HR-14, tab 399, clause 4.1; also see *Testimony of William McArthur*, Transcript vol 63, pgs 60-73

123 *Testimony of William McArthur*, Transcript vol 63, pgs 68-70

124 *Testimony of William McArthur*, Transcript vol 63, pgs 68-70

125 *Testimony of Sheilagh Murphy*, Transcript vol 54, pg 7

71. The Income Assistance Program provides for the basic needs of individuals who do not have income or employment, similar to what provinces would call social assistance or income assistance.[126] This program is delivered by First Nation communities to their members using provincial rates and eligibility from the jurisdiction in which they reside.[127]

72. The Assisted Living Program is available to low income individuals who require additional supports, including respite services and in-home care services.[128] This program funds the social elements for individuals in institutional care while the medical needs of these individuals would be funded through Health Canada.[129]

73. The National Child Benefit Reinvestment Program is a derivation of the Income Assistance Program and is also connected to the concept of providing financial support to low income families.[130] Instead of receiving an income assistance benefit for children, the Respondent moved to a tax system where all families in low income situations received benefits for their children through a "National Child Benefit Supplement."[131] As providers of income assistance, the Respondent and the provinces were supposed to take the savings realized by having families receiving those benefits, and reinvest these savings into programs that support low income families.[132]

74. Provinces have taken different approaches with the money and the Respondent follows what is done in any particular province.[133] Some jurisdictions use the money saved for reinvestment programs. This would result in First Nation communities applying for funding on a "project basis" – such as funding for a childcare program for parents who are working or attending school and who cannot afford daycare.[134]

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126 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 7-8
127 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 7-8
128 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 7-8
129 *Testimony of Sheilagh Murphy*, Transcript vol 54, p 8
130 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 8-10
131 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 8-10
132 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 8-10
133 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 8-10
134 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 8-10

75. Other examples of programs funded by the Respondent with this money are child nutrition programs to ensure First Nation children are receiving breakfast or lunch at school; support to parents program that aims to help parents improve their parenting skills; and transition to work programs that offer support to parents who are trying to integrate or reintegrate into the workforce by funding the purchase of tools that might be necessary for employment.[135]

76. First Nations can also use some of the money from this program to provide cultural programming for low income children with the aim of helping them understand their culture and develop a sense of place in their communities as they grow up.[136]

77. The Family Violence Prevention Program has two components. The first is funding for 41 emergency shelters on reserve for women, children and men who are seeking respite in emergency situations. These shelters serve approximately 300 reserve communities across the country. The remaining communities seek these services from provincial based shelters. The other component of the Family Violence Prevention Program is the funding of prevention projects. Approximately $7 million of the total funding for this program is available to communities or groups of communities to use for prevention type activities to sensitize communities and individuals to the impact of violence within communities.[137]

78. Together, the five social programs function like a "suite of tools that communities can use in an integrated fashion to help individuals and families improve and make sure they have the income that they need and the supports they need."[138]

79. Other programs funded by the Respondent also have a role to play in supporting the health and well being of families and children. Notably, education funding has a role to play in improving outcomes for First Nation children by encouraging and supporting healthy development, higher education and better employment outcomes.[139] There is also a connection between the Respondent's infrastructure programs including funding for housing and water projects, and efforts to achieve

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135 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 8-10
136 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 8-10
137 *Testimony of Sheilagh Murphy*, Transcript vol 54, pg 11
138 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 19, 220- 221
139 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 222-223

better outcomes for First Nation children on reserve.[140]

H. Federal programs that benefit First Nation children on reserve

80. Other federal government departments have a role in supporting better outcomes for First Nation children living on reserve. Canada Revenue Agency provides benefits aimed at improving the financial situation for First Nation children in low income families. Human Resources Employment and Social Development Canada also has training and employment programs for low income families, as well as some daycare supports to facilitate a parent's ability to get the training required to enter into the workforce.[141]

81. Health Canada funds a wide network of programs aimed at improving the overall health and well being of First Nation on reserve.[142] The funding is broken into two major programs for First Nations on reserve: the Primary Health Care Program and the Supplementary Health Benefits Program, which is commonly known as the Non-Insured Health Benefits Program ("NIHB").[143] Health Canada also funds a third smaller program called the Health Infrastructure Support Program that supports the delivery of the primary health care programs on reserve.[144]

82. Within the framework of the Primary Health Care Program there are a vast number of sub-programs including Health Promotion and Disease Prevention. This sub-program is focused on healthy children, mothers and families. It is divided into a number of programs that focus on healthy pregnancy, infancy, and childhood development.[145] The Aboriginal Head Start Program falls within this sub-group and provides funding for early childhood development centres on reserve.[146]

83. Other sub-programs in the Primary Health Care Program are the Oral Health

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140 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 222-223
141 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 224-225
142 *Testimony of Sheilagh Murphy*, Transcript vol 54, pg 223
143 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147; See also *First Nations and Inuit Health-Program Compendium*, R-14, tab 90 for a detailed discussion of the programs offered by Health Canada to First Nations living on reserve
144 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
145 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
146 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147

Program and the Mental Wellness Program. The Mental Wellness Program focuses on three areas: addiction, general mental health and suicide prevention and Indian Residential Schools Resolution Health Support Program.[147]

84. As part of the addiction program, there are community based addiction programs on all First Nation reserves.[148] Not only is there a community based addictions worker in every community, but Health Canada also funds a network of 44 addiction centres across the country, plus eight youth solvent abuse treatment centres.[149] Health Canada also funds a smaller program focused directly on fetal alcohol syndrome.[150]

85. The second area that the Mental Wellness Program focuses on is general mental health and suicide prevention, in part by providing funding to every First Nation community for the Brighter Futures Program and the Building Healthy Communities Program.[151] There is also a suicide prevention program that funds projects across Canada.[152] Health Canada has recently started introducing mental wellness teams in each of the regions across the country to assist First Nations in addressing and responding to mental health concerns in individual communities. [153]

86. The third area in the mental wellness sub-program is the Indian Residential Schools Resolution Health Support Program, which supports families as they are going through the Independent Assessment Process.[154] It includes funding for cultural and elder supports as well as psychological counselling.[155]

87. The Healthy Living sub-program is focused on the prevention of chronic diseases such as diabetes.[156] There is also the Public Health Protection sub-program which is focused on the prevention of communicable disease and delivery of immunizations; and the Environmental Public Health sub-program, which primarily involves

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147 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
148 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
149 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
150 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
151 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
152 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
153 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
154 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
155 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
156 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147

environmental health inspectors who monitor water quality and inspect facilities on reserve.[157]

88. Finally, there is the Primary Care sub-program, which has a clinical care component and a home and community care component.[158] The primary care is generally recognized as the first point of contact with the health services and is more of a treatment oriented type of service.[159] This program exists in remote communities where physician services may not be readily available.[160] There would be nursing stations staffed by specially trained nurses, and occasionally physicians, who would provide primary care to residents of the reserve.[161] There is also a home and community care component that provides care by nurses and trained personal care workers in the home. This is available in every First Nation community across the country and is managed directly by that community.[162]

89. The other major program funded by Health Canada is the NIHB program.[163] This program funds services and benefits for First Nations and Inuit across Canada regardless of whether they live on or off reserve and regardless of their ability to pay.[164] It covers costs related to prescription drugs; medical supplies and equipment, which would include items such as wheelchairs and other mobility devices; medical transportation to access health services that are not located on reserve; optometric services; dental services; and short-term mental health counseling.[165]

I. The impact of Jordan's Principle

90. In addition to the network of social programs and health care services available to First Nations living on reserve, the Respondent has implemented Jordan's Principle.

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157 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
158 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
159 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
160 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
161 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
162 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
163 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
164 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
165 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147

This is a "child-first" principle passed by the House of Commons as a non-binding resolution. It was developed in response to the case of Jordan River Anderson, a First Nation child of the Norway House First Nation born with severe disabilities and complex needs, who was hospitalized from the time of birth.[166] Jordan reached a point in his case where he could have been transferred to a medical foster home in Winnipeg but there was a dispute between the federal and provincial governments regarding which government was responsible for paying for the supports required in the medical foster home.[167] Before the dispute was resolved, Jordan passed away in hospital.[168]

91. In honour of Jordan, the House of Commons passed motion 296, which states "in the opinion of the House, the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nation children."[169]

92. Following the resolution of the House of Commons, the Respondent was given the lead in implementing the motion.[170] The Respondent partnered with Health Canada, as both departments are key players in the funding of programs for First Nation children on reserve and each have programs that could be implicated in a Jordan's Principle case.[171]

93. Based on Jordan River Anderson's case, criteria for what would be a Jordan's Principle case were formulated by both departments and approved by Cabinet.[172] They are: 1) the child must be First Nation living or ordinarily resident on reserve; 2) there is a federal/provincial jurisdictional dispute over the service to be provided that has an impact on the continuity of care; 3) the child was assessed by health and social service professionals and found to have multiple disabilities requiring services from multiple service providers and 4) the service in question must be a

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166 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 9-13
167 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 9-13
168 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 9-13
169 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 12-13 and 16-17; *Motion 296 on Jordan's Principle*, HR-3, tab 20
170 *Testimony of Corinne Baggley*, Transcript vol 57, pg 13
171 *Testimony of Corinne Baggley*, Transcript vol 57, pgs13, 24-8; *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs11-12
172 *Testimony of Corinne Baggley*, Transcript vol 57,pg 13

service that would be available to a child residing off reserve in the same location.[173]

94. Once these four criteria are met, the government that is first contacted ensures that financial support for the care of the First Nation child will continue while the governments work out a resolution to the jurisdictional dispute.[174]

95. The definition of Jordan's Principle cannot be expanded or altered without obtaining Cabinet approval and receiving new policy authority.[175]

96. With the input of the provinces, Jordan's Principle has been implemented across Canada, although the implementation varies in each jurisdiction.[176] British Columbia, New Brunswick, Saskatchewan and Manitoba have formal processes in place, while the remaining jurisdictions opted for an informal case-by-case approach.[177]

97. Jordan's Principle is not a program and does not have funding attached to it.[178] Rather it is a policy, or a process that sits on top of the existing programs that support First Nation children with disabilities.[179] The programs that may be involved, or implicated, in a Jordan's Principle case may be funded by the Respondent or Health Canada and can include, but are not limited to: Special Education, the FNCFS Program, Assisted Living, Income Assistance, Home and Community Care, and Non-Insured Health Benefits.[180]

98. The application of Jordan's Principle is not meant to change the authorities of the implicated programs but to ensure the First Nation child is able to access the services from these programs.[181] Although Jordan's Principle may involve a child in care, it does not apply solely to children in care, but rather to all First Nation

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173 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 13-14 and 17-20
174 *Testimony of Corinne Baggley*, Transcript vol 57, pg 15
175 *Testimony of Corinne Baggley*, Transcript vol 57, pg 29
176 *Testimony of Corinne Baggley*, Transcript vol 57, pg 37
177 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 37-8
178 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 29-30, 128; *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 11-12
179 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 29-30
180 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 29-31
181 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 31-2

children on reserve.[182]

i. The Jordan's Principle approach

99. Case conferencing is the first step when a potential Jordan's Principle case comes to the attention of a focal point.[183] Focal points are federal government employees, either program specialists or program advisors, who work in the regional offices and are familiar with the programs that may be implicated in a Jordan's Principle case.[184] They are the point of first contact and are the ones to initiate the case conferencing and ensure all affected parties are included.[185] There are focal points for Health Canada and the Respondent in every province and Yukon.[186]

100. The purpose of case conferencing is to bring all involved parties together in order to find a solution to the underlying issue.[187] Case conferencing involves the affected parties, which usually includes the federal government, the provincial government, the service providers, and the family or their representative.[188]

101. Case conferencing is not limited to cases that meet the criteria for Jordan's Principle.[189] All cases that potentially raise a jurisdictional dispute are looked at and case conferencing is conducted in order to try and resolve the underlying issues.[190] Through the application of this approach, solutions have been found for many cases, even though they do not meet the federal definition of Jordan's Principle.[191]

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182 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 32-33
183 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 23, 84
184 *Testimony of Corinne Baggley*, Transcript vol 57, pg 81; *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 11-12
185 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 81-2
186 *Testimony of Corinne Baggley*, Transcript vol 57, pg 82
187 *Testimony of Corinne Baggley*, Transcript vol 57, pg 85
188 *Testimony of Corinne Baggley*, vol 57, pgs 40-1; *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 11-12
189 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 23, 43
190 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 43-4
191 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 96-7; *JP Tracking Tool Preliminary Findings Chart*, R-14, tab 53

J. The Complaint

102. In 2007, the Complainants filed a complaint with the Canadian Human Rights Commission, alleging that the Respondent was providing inequitable levels of funding for child welfare on reserve, in violation of section 5 of the Act.[192]

103. In 2010, the Attorney General moved to dismiss the complaint on the basis that the substance of the complaint exceeded the scope of section 5 of the Act. The Tribunal dismissed the complaint on the basis that section 5 did not permit the comparison of the actions of two different service providers.[193] This decision was overturned on judicial review and this reversal was affirmed by the Federal Court of Appeal. The complaint was then referred back to the Tribunal for hearing.[194]

104. The hearing of the complaint commenced in February 2013 and proceeded over approximately 16 weeks and included testimony from 25 witnesses.

Part II – Issues

105. The issues for the Tribunal to determine are:

1. Comparison of federal and provincial funding does not prove a *prima facie* case of discrimination under section 5;
2. Even without a comparison, there is no proof of a *prima facie* case of discrimination under section 5; and
3. The remedies sought are inappropriate for this complaint.

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192 *Complaint Form*, HR-1, tab 1
193 *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75
194 *Canada (Attorney General) v. Canadian Human Rights Commission, supra*

Part III – Argument

Preliminary issue: This complaint is beyond the scope of section 5 of the Act

A. No cross-jurisdictional complaints under the Act

106. Comparison between federal and provincial/territorial funding systems is not a valid comparison under the Act.

107. While the issue of whether this type of comparison was appropriate was addressed by the Federal Court of Appeal in its decision on the Respondent's appeal of the jurisdictional motion, the Court left open the possibility of having the Tribunal determine the appropriateness of the comparison in the context of the full hearing.[195]

108. There is a lack of cases where the Act or any other provincial human rights legislation has been used to make comparisons across jurisdictions. This may reflect recognition by the Courts and administrative bodies that statutes enacted by a given order of government cannot exceed their jurisdictional limits. In fact, the purpose clause of the Act states that it is limited to matters "within the purview of matters coming within the legislative authority of Parliament."[196]

109. On occasion, Courts have been called on to assess claims under section 15 of the *Charter of Rights and Freedoms* ("the Charter") that involve cross-jurisdictional comparisons. Even though such claims are more conceivable since the Charter is not jurisdictionally limited, they have not been successful. In *R. v. S.*, the Supreme Court of Canada dealt with a provision of the *Criminal Code* which permitted provincial attorneys general to provide certain "alternative measures" for young offenders. Ontario had not done so. In determining that there was no section 15 violation, as distinctions based on province of residence likely do not engage a "personal characteristic" similar to

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[195] *Canada (Attorney General) v. Canadian Human Rights Commission, supra,* at para 21
[196] *Canadian Human Rights Act*, RSC. 1985, c. H-6, section 2

those enumerated in section 15, the Court stated:

> Obviously, the federal system of government itself demands that the values underlying s. 15(1) cannot be given unlimited scope. The division of powers not only permits differential treatment based upon province of residence, it mandates and encourages geographical distinction. There can be no question, then, that unequal treatment which stems solely from the exercise, by provincial legislators, of their legitimate jurisdictional powers cannot be the subject of a s. 15(1) challenge on the basis only that it creates distinctions based upon province of residence. [197]

110. The section 15(1) case law supports the view that anti-discrimination law in Canada is not intended to address differences arising from the legitimate exercise of authority between two different jurisdictions, whether as between two provinces or as between a province and the federal government.[198] If the Charter, a constitutional document, is not a mechanism for equalizing differences between jurisdictions, then the Act, a quasi-constitutional federal statute cannot serve this function.

111. Even without the legal constraints barring cross-jurisdictional comparisons, there are also practical issues that make such a comparison unworkable. In the context of the present case for instance, there are variations in both the structure and services offered between the provinces. Further, there is nothing to prevent a province from increasing or decreasing its funding for its child welfare programs from time to time. This type of approach would also encroach on the federal government's ability to direct policy and public spending in accordance with its own priorities and spending choices.

112. The purported cross-jurisdictional comparison must also fail since it depends on the assumption that the provincial funding of child welfare across the country adequately addresses the needs of its recipients in a non-discriminatory way. There is no evidentiary basis for this assumption and the required analysis is

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197 *R. v. S.*(S.) [1990] 2 SCR 254, at para. 21

198 *R. v. S.*(S.) [1990] 2 SCR 254, at para. 21; See also *Haig v. Canada* [1993] 2 S.C.R. 995; *Chippewas of Nawash v. Canada*, 2000 CanLII 16536 (FC); aff'd at 2002 FCA 485; *Penner v. Danbrook*, [1992] 4 W.W.R. 386 at 390-91; and *Kelman v. Stibor* (1998), 55 C.R.R. (2d) 165 at 171

outside the jurisdiction of the Tribunal. Accordingly, the cross-jurisdictional analysis cannot form the basis of a complaint under section 5 of the Act and the complaint must fail.

B. No comparison between different service providers under the Act

113. Even without the cross-jurisdictional roadblock faced by this complaint, it is fundamentally flawed on the basis that it seeks to compare two different service providers. As was the case with cross-jurisdictional comparisons, there is a dearth of jurisprudence under the Act or any other human rights legislation where complainants have sought to compare different service providers serving two different publics. [199]

114. That said, there is jurisprudence in the employment context where the Federal Court overturned a Tribunal decision purporting to compare the discipline imposed on a female employee of one employer with a male employee of a subcontractor of the employer. The employee of the subcontractor was found to not be an appropriate comparator, as actions with respect to his employment were not within the control of the employer.[200]

115. The assertion in the present case is that the Respondent's funding must mirror that of numerous separate entities (the provincial and Yukon governments) over which it has no control. The claim cannot succeed as the Act cannot be used as a vehicle to equalize differences in treatment as between different entities serving different publics.

116. Accordingly the complaint should be dismissed, as it fails to make a valid comparison necessary for a section 5 analysis.

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[199] The Respondent does not concede it is a service provider for the purposes of section 5, which is discussed in greater detail in the analysis of the substantive claim.

[200] *Warren Gibson Ltd. v. Canada (Human Rights Commission)*, 2004 FC 1439, at para 21-24

Issue 1 – Comparison of Federal and Provincial Funding Does Not Prove a *Prima Facie* Case under Section 5

117. If the complaint survives the preliminary arguments, it still fails on its merits as the Complainants have failed to establish a *prima facie* case of discrimination under section 5 of the Act.

A. The test for discrimination under section 5

118. Complainants in proceedings before human rights tribunals bear the onus of showing a *prima facie* case of discrimination on a balance of probabilities. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the Respondent.[201]

119. There is only one standard of proof in a civil case - that is proof on a balance of probabilities and there are no degrees of probability within that civil standard.[202] Failure to discharge this onus means the complaint has not been substantiated and will be dismissed.

120. If the Complainants succeed in demonstrating that a *prima facie* case exists, the onus then shifts to the Respondent to demonstrate either: 1) the alleged discrimination did not occur as alleged by providing a reasonable (non-pretextual) explanation; or 2) the conduct was somehow non-discriminatory or justified by one of the defences under the *Act*.[203] If the Respondent discharges this onus, the complaint will be dismissed as unsubstantiated. The Respondent is not required to justify what is not a *prima facie* case of discrimination.[204]

121. As this complaint is brought under section 5 of the Act, its specific requirements must be considered when determining whether a *prima facie* case has been established. The Federal Court of Appeal has also said that this test prevents

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201 *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536, at para 28("*O'Malley*").
202 *F.H. v. McDougall*, 2008 SCC 53
203 *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204, at para 22; *Beattie and Louie v. Indian and Northern Affairs Canada,* 2014 CHRT 7, at paras 65-66
204 *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal,* 2007 SCC 4, at para 54

consideration of the Respondent's explanation for the impugned conduct at the *prima facie* stage.[205] However, this does not preclude a determination of whether it is reasonable to infer the existence of the required link between any denial or adverse differentiation and a prohibited ground.[206]Nor does it preclude consideration of the complex socio- economic context that is engaged by this complaint.[207]

122. In assessing whether a *prima facie* test exists under section 5, the following must be established by the Complainants on the balance of probabilities:

    i. The Respondent was engaged in the provision of "services customarily available to the general public", within the meaning of section 5;

    ii. The Respondent either denied the service to the Complainants, or adversely differentiated against the Complainants in the provision of the services;

    iii. The denial of adverse differentiation was based on whole or in part on a prohibited ground of discrimination and/or had a disproportionate adverse impact on persons indentified by a prohibited ground of discrimination. [208]

123. In *Moore v BC (Education)*, the Supreme Court noted that in order to demonstrate *prima facie* discrimination, the complainants are required to show that they have a characteristic protected from discrimination under the human rights legislation; that they experienced an adverse impact as a result of the level of funding; and that the protected characteristic was a factor in the adverse impact they experienced.[209]

124. As a result, the Complainants in this case must show something more than that they possess one of the grounds protected under the Act and that there is a difference in how they have been treated. They must show that the protected ground has some nexus with the adverse impact they allege. They must also demonstrate that the adverse impact was experienced with respect to the service at issue.

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205 *Lincoln v. Bay Ferries Ltd., supra*, at paras 18 and 22
206 *Armstrong v. BC (Min. Of Health)*, 2010 BCCA 56, at para 29
207 *Canada (Attorney General) v. Johnstone et al.*, 2014 FCA 110, at para 84; *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593, at paras 89, 91
208 *Beattie and Louie v. Indian and Northern Affairs Canada, supra*, at para 54
209 *Moore v. BC (Education)*, 2012 SCC 61, at para 33

125. In other words, the Complainants must not only show that they have experienced adverse impacts resulting from the levels of funding provided , but also that the protected characteristic they possess was a factor. A nuanced inquiry is required in order to properly assess "whether a distinction based on an enumerated ground that creates a disadvantage actually engages the right to equal treatment under the [Act] in a substantive sense."[210]

126. The Supreme Court has said there is a difference between discrimination and a distinction. Not every distinction is discriminatory.[211] It is not enough to impugn another's conduct on the basis that what was done allegedly failed to fully ameliorate the needs of individuals in a protected group. Such membership alone does not, without more, guarantee access to a human rights remedy. It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact that triggers the possibility of a remedy. And it is the Complainants who bear this threshold burden.[212]

127. In this case, the evidence demonstrates that the federal government is funding child welfare services that are regulated and administered by provinces and Yukon because those same provinces and territory choose not to fund such services. Even if an adverse impact resulting from the apparent failure of those provinces and the Yukon to fund child welfare for First Nation children living on reserve could be linked to a protected characteristic, the same cannot be attributed to the federal government's decision to address that failure by stepping in to fill the perceived funding gap created by others.

128. The Complainants have not met the threshold onus of establishing the existence of a *prima facie* case of discrimination, namely, that they have been disadvantaged by the Respondent's conduct based on stereotypical or arbitrary assumptions about aboriginal persons.

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210 *Tranchemontagne, supra*, at para 91

211 *McGill University Health Centre (Montreal General Hospital), supra*, at paras. 48-49

212 *McGill University Health Centre (Montreal General Hospital), supra*, at paras 48-49; *Honda Canada Inc. v. Keays*, 2008 SCC 39, at para 67; *Moore, supra*, at paras 33 and 60

B. The Respondent was not providing a service under section 5

129. As the Respondent does not provide a "service" within the meaning of section 5 of the Act, the complaint does not raise a *prima facie* case.

130. First, funding provided to FNCFS Agencies is not something "customarily available to the general public" as required by section 5 of the *Act*.

131. In *Gould v. Yukon Order of Pioneers,* the Supreme Court established a two-part analysis to interpret section 8(a) of the *Yukon Human Rights Act*, which prohibits any person from discriminating "when offering or providing services, goods, or facilities to the public":[213]

> The first step in the analysis involves a determination of what constitutes the "service", based on the facts before the court. Having determined what the "service" is, the next step requires a determination of whether the service creates a public relationship between the service provider and the service user. Inherent in this determination is a decision as to what constitutes "the public" to which the service is being offered, recalling that public is to be defined in relational as opposed to quantitative terms. In ascertaining a "public relationship" arising from a service, criteria including, but not limited to, selectivity in the provision of the service, diversity in the public to whom the service is offered, involvement of non-members in the service, whether the service is of a commercial nature, the intimate nature of the service and the purpose of offering the service will all be relevant. I would emphasize that none of these criteria operate determinatively; for example, the mere fact that an organization is exclusive with respect to the offering or providing of its service does not necessarily immunize that service from the reach of anti-discrimination legislation. A public relationship is to be determined by examining the relevant factors in a contextual manner.[214]

132. The scope of section 5 was further defined in *(Attorney General) v. Watkin.*[215] In *Watkin*, the Federal Court of Appeal expressly rejected the idea that all government actions come within the ambit of section 5 of the Act.[216] Instead, the Tribunal must first determine, on the basis of the evidence presented, what constitutes the

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213 *Gould v. Yukon Order of Pioneers* [1996] 1 S.C.R. 571

214 *Gould v. Yukon Order of Pioneers, supra*, at para 68

215 *Watkin v. Canada (AG),* 2008 FCA 170; also see *Forward v. Canada (Citizenship and Immigration),* 2008 CHRT 5; *Dreaver v. Pankiw*, 2009 CHRT 8, upheld in 2010 FC 555; *Andrews v. Indian and Northern Affairs Canada*, 2013 CHRT 21

216 *Watkin v. Canada (AG), supra*

"service" and whether it was provided in a discriminatory manner.[217]

> [...] There is, therefore, a requisite public relationship between the service provider and the service receiver, to the extent that the public must be granted access to or admitted to or extended the service by the service provider. There is a transitive connotation from the language employed by the various provisions; it is not until the service, accommodation, facility, etc., passes from the service provider and has been held out to the public that it attracts the anti-discrimination prohibition. [...]

133. The "transitive connotation" from the language of the various human rights statutes examined in *Gould* is present in section 5 of the Act in the words "in the provision of services."[218]

134. The funding at issue is provided on a government to government or government to agency basis and follows a process of discussion and implementation. Individual First Nation children and their families are not invited or expected to participate in the creation of these funding arrangements. They are not parties to the resulting contract and would normally be excluded by the doctrine of privity from seeking legal redress for alleged breaches.

135. As a result, the funding itself is not being held out as a service to the public. Rather, the benefit that is being held out as a service and offered to the public are the provincially mandated child prevention and protection services that the agencies (and not the Respondent) directly provide to individual First Nation children and their families. The delivery of services reflects the requirements of the applicable provincial child welfare schemes and the particular cultural context of the communities that the FNCFS Agency serves.

136. Contrary to the arguments of the Complainants, the Respondent does not "control" the services and programs delivered by the FNCFS Agencies. Control over issues such as whether a FNCFS Agency receives delegated authority or is in compliance with the statutory and regulatory requirements for delivery of child welfare services, rests with the provinces. The decisions on which services and programs to provide and the way in which they will be provided, is within the control of the

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217 *Watkin v. Canada (AG), supra*
218 *Canadian Human Rights Act, supra*, at s. 5

FNCFS Agency, under the supervision of the province/Yukon.

137. The role of the Respondent is limited to providing funding for child welfare on reserve and being accountable for the spending of those funds. In fulfilling this duty, the Respondent has responsibility to ensure that the funding provided to the FNCFS Agencies is being used for child welfare expenses, as required by the Terms and Conditions of the FNCFS Program.

138. Even if the Tribunal was to find that the provision of federal funding constitutes a service under section 5 of the Act, then the recipients of that service, and the victims of the practice, are the agencies that receive funding. These funding recipients are not individuals but artificial entities incapable of having their human dignity infringed and it is questionable whether they can suffer, let alone bring a claim of discrimination.[219]

139. The Complainants cannot establish the threshold issue to the section 5 analysis that the Respondent is providing a "service" by funding FNCFS Agencies. Accordingly, the complaint should be dismissed.

C. There is no denial or adverse differentiation in the provision of a service

140. Even if the funding provided by the Respondent is found to be a service, the Complainants have failed to show a denial of the service or adverse differentiation in the provision of that service.

i. There is no denial of a service under section 5

141. There is no evidence to support an allegation that child and family services are denied to First Nation children on reserve. While the Complainants allege that First Nation children living on reserve are "precluded from accessing, or have limited access to, child and family services", no specific examples or references to evidence were given to support this assertion.[220] Disagreement with the sufficiency or quality

[219] *Canada (Attorney General) v. Hislop*, 2007 SCC 10, at para 72

[220] The sole reference to this argument is found in the *Closing Submissions of the Commission*, at para 419

of the services does not equate to a denial of service. This aspect of the claim should be dismissed as unfounded.

ii. There is no adverse differentiation under section 5

142. At the heart of this complaint is the allegation that the Respondent underfunds child welfare services on reserve compared to the funding provided by the provinces and Yukon to the off reserve population. The comparison between federal and provincial funding is one raised by the Complainants and is the cornerstone of the case they advanced.

143. Even assuming this is an appropriate and legitimate comparison to make; the allegation is not supported by the evidence before the Tribunal. In order to substantiate this allegation, the Complainants would have first had to demonstrate how much funding is provided by the Respondent and the provincial/Yukon governments for child welfare services. Only after the amount of funding for both is reliably established, could the Tribunal determine if there is even a difference and whether that difference amounts to adverse differentiation.

144. The Complainants failed to produce even one witness from a province or Yukon who was in a position to provide authoritative and reliable evidence as to how the provincial/Yukon governments fund child welfare services and how much funding is provided. Moreover, they provided no reliable documentary evidence addressing this issue.

145. The onus was on the Complainants to establish a *prima facie* case of adverse differentiation with respect to the funding of child welfare services on reserve and they failed to do so.

146. An adverse inference should be drawn against the Complainants. In civil cases, an unfavourable inference can be drawn, where, in the absence of an explanation, a party litigant fails to call a witness who would have knowledge of the facts and

would be willing to assist the party.[221] No such witness was called nor was any explanation for the failure to do so given.

147. No such adverse inference should be drawn against the Respondent. An adverse inference can only be drawn after a *prima facie* case has been established by the party bearing the burden of proof. The evidence lead by the Complainants has not established a *prima facie* case regarding levels of provincial funding.[222]

148. An example of the lack of evidence on how the provinces and Yukon fund was shown in the expert evidence of Dr. Trocmé, who testified that he had never researched how provinces fund their child welfare programs or done any research to compare the level and type of services offered federally as opposed to provincially.[223]

149. The Complainants' witnesses testified in large part about perceived differences between services and programs being offered by their individual FNCFS Agencies and those being offered in the surrounding off reserve communities. However, they provided little empirical evidence to substantiate their allegations, which were often anecdotal in nature.

150. As an example, Derald Dubois, the Executive Director for Touchwood Child and Family Services, asserted that the province of Saskatchewan funded programs, which were unavailable to the First Nations families in his community. However, on cross-examination, he admitted that the same type of programs, tailored to his community's cultural needs, were in fact, offered by Touchwood. [224]

151. Some of the Complainants' witnesses also testified about issues related to getting funding from the FNCFS Program for expenses such as mobility devices, mental health services and orthodontics[225] However, the evidence also revealed that funding for such medical expenses is available through programs offered by Health

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221 *Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, The Law of Evidence in Canada, 4th ed (Markham, Ont: LexisNexis, 2014*, pp. 386-387 at 6.450

222 *Dwyer v. Mark II Innovations Inc.*, 2006 CarswellOnt 1837, at para 4

223 *Testimony of Dr. Nico Trocmé*, Transcript vol 8, pgs 36-38

224 *Testimony of Derald Dubois*, vol 10, pgs 23-7 and 44-7

225 See for example, *Testimony of Raymond Shingoose*, Transcript vol 31, pgs 55-6 and 143-4; *Testimony of Darrin Keewatin*, Transcript vol 32, pgs 71-2 and 76-77; *Testimony of Cindy Blackstock*, vol 47, pgs 258-61

Canada.[226]

152. Moreover, the evidence revealed that expenses for children in care that are not covered by other federal programs are paid for by the FNCFS Program, even if they do not fall strictly within the FNCFS Program authorities.[227]

153. In any event, the experience of a few FNCFS Agencies does not inform the analysis of whether there is differential treatment. Some FNCFS Agencies are more successful than others for a wide range of reasons. Further, the difference between the level of services and programs offered might have little to do with funding and more to do with choices made by the FNCFS Agency about the type of services and programs they want to provide and other administrative issues affecting the overall budget.[228]

154. With respect to the perceived issues with the EPFA, some of the Complainant witnesses claimed that funds to cover deficits in the maintenance budget had to come from the operations or prevention streams of funding. However, the evidence from the Respondent demonstrated that increases in maintenance costs are covered by the FNCFS program.[229] Only if there is an overall surplus in the FNCFS Agency's budget at the end of a year will the FNCFS Agency be asked to use the surplus to off-set the increase in maintenance expenditures.[230]

155. Lastly, the allegation that funding under the EPFA is essentially the same as under Directive 20-1 is inaccurate. The Respondent's evidence demonstrated that operations funding under the EPFA and Directive 20-1 are calculated in a completely different manner with different funding formulas.[231]

156. Given the national context of this complaint, evidence from each jurisdiction was required to establish discrimination in funding levels. Without this evidence, there can be no reliable comparison of federal and provincial/Yukon government funding

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226 *First Nations and Inuit Health- Program Compendium*, R-14, tab 90; *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147

227 *Testimony of Barbara D'Amico*, vol 50, pgs 97-8, 122

228 See for example: *Mi'kmaw Family & Children's Services of Nova Scotia- Operational Review 2013*, R-13, tab 14

229 *Testimony of Barbara D'Amico*, Transcript, vol 50, pgs 164-181

230 *Testimony of Barbara D'Amico*, Transcript, vol 50, pgs 164-181

231 *Testimony of Barbara D'Amico*, vol 50, pg 18-66

and thus, no basis to conclude the existence of adverse differentiation.

iii. The BC and Alberta agreements are not evidence of underfunding

157. In BC, the Respondent is billed for provincial delivery of child and family services on reserve through a Service Agreement between the Respondent and the province of BC that replaced the former Memorandum of Understanding. This Service Agreement cannot be considered credible evidence of how the province funds the off reserve population, as there is a lack of evidentiary support for how these expenses are calculated.[232]

158. In Alberta, the Complainants argue particular programs and/or services are reimbursed by the Respondent to the province, while the FNCFS Agencies do not receive funding for the same services or programs. However, this ignores the evidence that the FNCFS Agencies are not funded for specific programs but can instead use the overall amount of funding to offer the programs they determine are relevant and culturally appropriate for their population. In addition, many of the programs and services referenced in the Alberta agreement were in relation to health programs, which would be available through Health Canada and other social programs funded by the Respondent.[233]

159. As noted, the provincial and federal governments do not fund in the exact same manner. Any suggested differences in how the Respondent funds FNCFS Agencies as compared to the provincial agencies are a reflection of this difference and do not demonstrate that less funding is provided to the FNCFS Agencies.

iv. Reasonable comparability is an administrative term, not a test for adverse differentiation

160. The Respondent's policy objective of "reasonable comparability" is to ensure

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232 *Testimony of William McArthur*, Transcript vol 63, pgs 68-70

233 *Testimony of Darrin Keewatin*, Transcript vol 32, pgs 164-187; *Testimony of Carol Schimanke*, Transcript vol 62, pgs 2-18; *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147; *First Nations and Inuit Health- Program Compendium*, R-14, tab 90

funding for child welfare services allows children on reserve to receive services in a comparable manner to services available off reserve, while recognizing the inherent differences in organizational structure between provinces and the federal government.[234] The goal of reasonable comparability ensures that First Nation communities maintain flexibility to design their own programs to the extent possible, for example in the area of prevention, while maintaining an overall comparable level of service to that offered in the provinces.[235]

161. The objective of "reasonable comparability" is not meant to require that mirror services are provided on and off reserve. The primary roadblock for such an exact comparison is the different organizational structures of the provincial and federal systems. While many of the provinces may provide a wide range of services to address the needs of children through one department, this is not possible at the federal level where several departments have a role to play in achieving better outcomes for First Nation children on reserve.[236] It does not mean, however, that First Nation children on reserve are not receiving these services. Rather it means they are receiving these services through a different organizational structure than those used by the provinces and Yukon.

162. An additional roadblock in measuring the comparability of federal funding to provincial funding is the role of First Nation communities, who receive the funding and make choices based on their priorities for how that money should be spent.[237] At the end of the day the goal remains to ensure comparable funding and to improve ways of measuring comparability with the provinces.[238]

v. The documentary evidence does not support a *prima facie* case

163. The Complainants rely on an assortment of internal government documents, which they assert are admissible for the truth of their contents, either as "public

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234 *Testimony of Sheilagh Murphy*, vol 54, pgs 73-4
235 *Testimony of Sheilagh Murphy*, vol 54 at pgs 73-4
236 *Testimony of Sheilagh Murphy*, vol 54, pgs 224-227
237 *Testimony of Sheilagh Murphy*, Transcript, vol 54, pg 227
238 *Testimony of Sheilagh Murphy*, Transcript, vol 54, pg 231-232

documents" or admissions against interest by the Respondents. This assertion overshoots the mark.

164. The information in these documents are not admissions. At best, they reflect personal views of employees of the department at particular points in time. While these documents have been admitted into evidence, the Tribunal should access their weight contextually with reference to the Respondent's *viva voce* evidence regarding their proper interpretation.

165. When weighing the evidence, the Tribunal must also consider the scope of the author's authority to prepare the document in question.[239]

166. Further, the Complainants' reliance on the statements and views expressed in the federal and provincial Auditors General Reports and the provincial Children's Advocates' reports should be given minimal, if any weight. The authors of the documents have not been called to substantiate the documents or provide the context for the statements or opinions. These reports are not probative of the facts in issue and do not help the Tribunal decide if a claim of discrimination is founded.

167. Certain other third party reports relied upon by the Complainants, such as the *Blue Hills* report and the *Wen:de* reports, suggest a discrepancy between the levels of federal and provincial funding provided for child welfare. However, the authors of the *Blue Hills* report were not called to testify and the report itself includes several caveats as to its limitations.[240] Accordingly, the underlying methodology and credibility of the conclusions drawn in this report cannot be assessed.

168. Although some of the contributors to the *Wen:de* reports were called as witnesses, none were able to give substantive detailed evidence about the level of provincial funding compared to federal funding. The first of these witnesses, Dr. Blackstock, was unable to address the nature and extent of any research into the comparison of federal and provincial funding that might have been undertaken. Instead, she advised that another one of the authors, Prof. Loxley would be able to address this

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239 *Daum v. Schroeder*, 1996 CarswellSask 440 (Q.B.), at para 18

240 *First Nations Child and Family Services National Policy Review Funding Issues: Final Report*, HR-6, tab 66

issue.[241] However, in his testimony, Prof Loxley indicated he could not and admitted a lack of personal knowledge and experience with respect to this issue.[242] Similarly, Dr. Trocmé, another one of the authors, testified that he had never researched or undertaken any analysis of the differences between federal and provincial/territorial funding levels or models.[243]

169. In light of the above, the Tribunal should give little, if any weight, to the findings of those reports regarding the levels of provincial and federal funding of child welfare. Similarly, little weight should be given to the evidence of the Complainants' witnesses who relied on the conclusions and findings of those reports.

170. The Complainants have failed to establish a *prima facie* case through either their *viva voce* or documentary evidence. Accordingly the complaint should be dismissed.

Issue 2 – Even without a comparison, there is no *prima facie* case under section 5

A. The alternative argument cannot succeed

171. The Complainants' alternative argument - that even without a comparison group, federal funding for child welfare on reserve is still discriminatory - cannot succeed. Policy decisions regarding the expenditure of public funds are within the exclusive purview of the Executive. The task of the Tribunal in determining whether a *prima facie* case has been established is to determine whether adverse differentiation has been taken place. It is not to make determinations regarding the sufficiency of federal policy making, planning or spending priorities.

172. The Complainants' alternative argument also disregards the important role of comparison in a complaint of discrimination. Comparison is an essential feature of the analysis under human rights legislation. Relying on *Andrews*, the Supreme Court in *Battlefords and District Co-operative Ltd. v. Gibbs* stated:

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241 *Testimony of Cindy Blackstock*, Transcript vol 5, pgs 98-108
242 *Testimony of John Loxely*, Transcript vol 28, pgs 21-27
243 *Testimony of Dr. Nico Trocmé*, Transcript vol 8, pgs 36-38

> A finding of discrimination based on the imposition of a burden or the withholding of a benefit must be rooted in a comparison of the treatment received by a person with the treatment received by other persons.[244]

173. The legislation also reflects this necessity when it states that the purpose of the Act is to give effect to "the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have."[245]

174. In *Boulter v. Nova Scotia Power Incorporated*, the Nova Scotia Court of Appeal disagreed with the assertion that that comparator analysis is relevant only to direct discrimination in a Charter claim and is replaced for adverse effect discrimination by a need to show only that there is a failure to ameliorate the claimants' situation. The Court stated:

> The comparator analysis applies generally to s. 15(1) claims for either direct or adverse effect discrimination. Otherwise s. 15(1) would afford simply a freestanding duty of affirmative action instead of what the *Charter* intends, a remedy for differential treatment (on protected grounds) that is discriminatory.[246]

175. In *Withler v. Canada*, the Supreme Court emphasized that "Comparison plays a role throughout the [section 15] analysis." The Court went on to note:

> The role of comparison at the first step is to establish a "distinction". Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).[247]

176. The Complainants are essentially claiming that child welfare on reserve could be more effective if it was designed and/or funded differently or more substantially. However, the task of this Tribunal is to determine whether there is adverse differential treatment based on an enumerated ground, not whether a service or program for example, could be "better".

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244 *Battlefords and District Co-operative Ltd. v. Gibbs* [1996] 3 SCR 566, at para 29
245 *Canadian Human Rights Act, supra*, s. 2
246 *Boulter v. Nova Scotia Power Incorporated*, 2009 NSCA 17, at paras 72-73; also see paras 52-83
247 *Withler v. Canada*, 2011 SCC 12, at paras 41, 61 and 62

177. Government is making a policy decision to provide funding at a macro-level and on a scale that covers not only a range of actual services and benefits but also the indirect administration costs of the FNCFS Agencies that are responsible for providing them. This decision reflects complex policy choices with regards to public spending. The provision of funding at such high policy level engages the balancing of competing interests and priorities. Such decisions are entitled to some considerable degree of deference and a margin of reasonableness.[248]

178. What started out as a complaint that the FNCFS Program provided inequitable funding in comparison to what provinces and territories provide to their child welfare agencies now includes a wide variety of allegations. The fact the Complainants now allege a range of generalized complaints demonstrates that their concerns are not really about alleged discrimination but with the general policy approach taken by the government – they have effectively launched the Tribunal on an inquiry of government policy, rather than an investigation into alleged discriminatory practices.[249]

B. There is no evidentiary support for the alternative argument

179. Aside from the legal issues confronting the Complainants, there is no evidentiary foundation to support their claim that the high number of First Nation children on reserve in care is a result of the Respondent's funding.

180. When asked if he could draw a conclusion as to whether the level of federal funding verses provincial funding was having an adverse impact for First Nation on reserve children, the Complainants' expert, Dr. Trocmé made it clear that one must be "very careful" in trying to compare funding on and off reserve. "It's not just an on/off Reserve distinction, it's also Reserve verses urban aboriginal distinction. You really are comparing apples and oranges."[250]

181. The evidence does not show a uniform number of children in care throughout the

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248 See: *Moore v. BC (Education), supra*; *Armstrong v. BC (Min. Of Health), supra*; and *Tranchemontagne, supra*

249 *Moore, supra*, at para 64

250 *Testimony of Dr. Nico Trocmé*, Transcript, vol 8, pg 51

jurisdictions that are federally funded. If the Respondent's funding was in fact the cause of the numbers of children in care, it would be reasonable to assume that they would be the same throughout. However, there is a fluctuation on the numbers, with large jurisdictions such as BC and Saskatchewan having the lowest child in care counts of 3.6% and 3.7% respectively.[251]

182. What the evidence does show is that First Nation children are equally over-represented in the child welfare system whether they live on or off reserve, thus whether they are funded federally or by the provincial/territorial governments.[252]

183. The evidence also suggests that the reasons for higher rates of First Nation children in care are multifaceted and linked to a number of socio-economic factors. These factors include: poverty, substance abuse, housing, health and other issues. Such issues are often beyond the scope of child welfare policies.

184. Ascribing the high rates of First Nation children in care to insufficient federal funding of a particular suite of programs and services is unwarranted and in any event, overly simplistic as it fails to take into account the complex policy responses to a range of complex socio-economic issues.

C. Fiduciary duty principles are not applicable to the complaint

185. The Complainants allege that fiduciary duty and the honour of the Crown are engaged by the historical context and argue that these principles support a finding of discrimination. This argument is unsound in law and principle. There is also an absence of evidence to establish a breach of fiduciary duty.

i. A specific fiduciary duty is not engaged by this complaint

186. This complaint does not engage a specific fiduciary duty. While it is established that there is a general fiduciary relationship between the federal Crown and the

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251 *Breakdown of numbers of children in care and associated costs*, R-13, tab 16
252 *Testimony of Dr. Nico Trocmé*, Transcript, vol 8, pgs 26, 38-39, 45, and 46

aboriginal peoples of Canada,[253] not every aspect of that relationship gives rise to a specific fiduciary duty and it is not a source of plenary Crown liability covering all aspects of that relationship.[254]

187. The common law test for a fiduciary duty is found in *Alberta v. Elder Advocates of Alberta Society* and requires that: (1) the fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise the power or discretion so as to affect the beneficiary's legal and practical interests; and (3) the beneficiary is particularly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[255]

188. Most recently, the Supreme Court held that there were two possible ways to establish that the Crown owes a fiduciary duty to aboriginal peoples in a particular situation.[256] The first way involves a Crown undertaking discretionary control over a specific or cognizable Aboriginal interest in a particular situation ("the *Wewaykum* test").[257] The interest must be a pre-existing, communal Aboriginal interest in the land that is integral to the nature of the distinctive community and their relationship to the land.[258]

189. The *Wewaykum* test arises from the application of the principle of the honour of the Crown,[259] in which fiduciary obligations flow from the Crown's historical responsibilities with respect to the *sui generis* Aboriginal interest in land.[260] As a result, where the Crown assumes discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a unique fiduciary duty, rooted in the Crown's exclusive, trust-like control over the lands.

190. No such interest is asserted or demonstrated in this complaint. The Complainants

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253 *Guerin v. The Queen*, [1984] 2 S.C.R. 335

254 *Lac Minerals Inc. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at p597; *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159; *Weywaykum Indian Band v. Canada*, 2002 SCC 79, at para 81

255 *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, at para 27

256 *Manitoba Métis Federation v. Canada (Attorney General)*, 2013 SCC 14

257 *Manitoba Métis Federation, supra*, at paras 49 and 51; *Haida Nations v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para 18; *Wewaykum, supra*, 2002 SCC 79, at paras 79-83

258 *Manitoba Métis Federation, supra*, at paras 53 and 59

259 *Haida Nation v. British Columbia (Minister of Forests), supra*, at para 18

260 *Wewaykum, supra,* at paras 78-79; *Guerin, supra,* at pp 382, 385, 387

have not presented any evidence to show how providing public monies to fund FNCFS Agencies delivering child welfare is connected in any way to or affects any land-based rights, or reflects a communal, pre-existing and distinctly Aboriginal interest as contemplated in the jurisprudence.

191. The second way to establish a fiduciary duty is by demonstrating that there is a Crown undertaking to act in the best interests of a beneficiary, that the beneficiary would be vulnerable to Crown control and that the beneficiary's legal or substantial practical interests stand to be adversely affected by the fiduciary's control or exercise of discretion ("the *Elder Advocates* test").[261]

192. The *Elder Advocates* test is based on the application of general principles of fiduciary law developed in the non Aboriginal context, in which persons who undertake to act in someone's best interests, to the exclusion of all other interests, may be found to owe specific fiduciary duties in appropriate situations governed by a sense of exclusive loyalty.[262]

193. In the *Elder Advocates* case, the Supreme Court stated that a general obligation to the public or to sectors of the public cannot establish an undertaking to act in the beneficiary's best interests, and it may be difficult to show that a defined person or class of persons is vulnerable to the fiduciary's exercise of power. These requirements are not satisfied by a situation where a public authority is granted a power that may have an impact on a person's well-being, property or security, or when entitlements are contingent on future government action. The Court also indicated that "the special characteristics of governmental responsibilities and functions mean that governments will owe fiduciary duties only in limited and special circumstances".[263]

194. In *Manitoba Métis Federation*, the Court noted that a Crown undertaking under the *Elder Advocates* test means that "the power retained by the Crown must be coupled

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261 *Alberta v. Elder Advocates of Alberta Society, supra*, at para 36; *Manitoba Métis Federation v. Canada (Attorney General), supra*, at para 50

262 *Elder Advocates Society, supra*, at paras 29-37; *Manitoba Métis Federation, supra*, at para 47

263 *Elder Advocates Society, supra*, at para 37

with an undertaking of loyalty to act in the beneficiaries' best interests".[264] This means that, in order to show a fiduciary duty, a beneficiary must provide evidence that the fiduciary intended to forsake all other interests in favour of those of the beneficiary.

195. The Complainants have not provided evidence to demonstrate that the Respondent undertook to act in the best interests of any alleged beneficiary (such as an individual aboriginal claimant, the FNCFS Agencies, or other recipients of funding for child welfare) to the exclusion of all other interests. Without such evidence, a finding of exclusive loyalty is not warranted.

196. The Complainants have failed to establish the existence of a fiduciary duty owed by the federal government with respect to the funding of child welfare services on reserve, let alone a breach of that duty.

ii. A breach of fiduciary duty is not applicable to an examination of alleged discrimination

197. Even if a breach of fiduciary duty was established, it does not inform the issue before the Tribunal, regarding whether discrimination has occurred.

198. The AFN acknowledges that a finding of discrimination does not depend on the existence of a fiduciary duty.[265] However, the AFN goes on to argue that a finding of a fiduciary duty is relevant to the determination of the complaint, as it creates a standard to ensure that the Crown protects the interests of First Nation children, treats Aboriginal people fairly, and does not profit at the expense of its beneficiaries.[266] These arguments fail to specifically address the issue of substantive discrimination and fail to demonstrate how a breach of the alleged fiduciary duty would support a finding of discrimination.

199. The Caring Society argues that the Crown-Aboriginal fiduciary relationship (or the related principle, the honour of the Crown) helps to explain and justify why courts should endorse a "liberal interpretation of laws affecting Aboriginal Peoples" that

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264 *Manitoba Métis Federation, supra*, at para 61
265 *Closing submissions of the AFN*, at para 448
266 *Closing submissions of the AFN*, at para 450

would support a finding of discrimination in this case[267] The underlying assumption of this argument is that the Crown's alleged fiduciary duty requires a liberal interpretation of the Act because the principle of the honour of the Crown requires a large and liberal interpretation of important documents, such as treaties and constitutional legislation. The Caring Society's arguments also assert that the liberal interpretation that should be given to the Act is the one proposed by them.

200. The arguments of the Caring Society misread the jurisprudence concerning the principle of "liberal interpretation" and conflate the related, but distinct, principles of fiduciary law and the honour of the Crown.

201. The Caring Society also argues that a breach of a fiduciary duty constitutes unlawful discrimination under the Act.[268] However, no support is given for how the Caring Society arrives at this conclusion. The argument appears to be that the Crown has a fiduciary relationship with Aboriginal people only because of their Aboriginal identity, and as a result, any Crown breach of this fiduciary duty towards an Aboriginal claimant must also be because of the claimant's Aboriginal identity.

202. This reasoning is not supported by case law. The Supreme Court has said that while the Crown in many instances does owe a fiduciary duty to aboriginal people, it is the nature of the relationship, not the specific category of actor involved, that gives rise to a fiduciary duty.[269] The source of a fiduciary duty does not come from a beneficiary's cultural or racial identity and a breach of fiduciary duty will always depend on the factual circumstances of each case, not on the claimant's identity.

203. Finally, the Caring Society conflates the principle of justification of an infringement of an existing aboriginal or treaty rights affirmed under s. 35 of *Constitution Act, 1982*, with the statutory defences under the Act.[270] Specifically, the Caring Society invokes the s. 35 justification principle to argue that any justification of discriminatory treatment should also account for the Crown's fiduciary relationship with Aboriginal peoples. For example, the Caring Society suggests that the

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267 *Closing submissions of the Caring Society*, at para 38
268 *Closing submissions of the Caring Society* at para 39
269 *Gladstone v. Canada (Attorney General)*, 2005 SCC 21, at para 23
270 *Closing submissions of the Caring Society*, at para 40

discrimination justification "test" under the Act does not equate with the concept of a "public interest", but should incorporate the standard of a "compelling and substantial" legislative objective, as stated in the jurisprudence regarding the infringement and justification of s. 35 rights, notably in the *Sparrow* decision.[271]

204. This line of argument confuses separate and discrete legal principles that are engaged by very different factual scenarios. The approach taken by the Caring Society borrows different concepts from one scenario and incorporates them in another without any reasoned and principled analysis showing how this is possible or desirable. Such intermingling of these concepts does not assist the Tribunal in determining whether a prima facie case of discrimination has been established.

205. The guarantee of Aboriginal and treaty rights in s. 35 of the *Constitution Act, 1982,* like the Charter, operates as a limit on federal and provincial legislative powers. The Charter forms Part I of the *Constitution Act, 1982*, and the guarantee of Aboriginal rights forms Part II. Parts I and II are sister provisions, both operating to limit governmental powers, whether federal or provincial. Part II Aboriginal rights, like Part I Charter rights, are held *against* government — they operate to *prohibit* certain types of regulation which governments could otherwise impose.[272]

206. These limits have nothing to do with whether or not the exercise of such power violates the provisions of the Act, or constitutes a defence under the statute.

207. The legal principles involving these claims of discriminatory and breach of fiduciary duty are distinct and should not be intermingled. Fiduciary law has evolved from the jurisdiction of the Courts of Chancery over trusts and confidences. The key consideration in fiduciary duty is whether one has the right to expect that the other will act in the former's interest to the exclusion of his own several interests.[273] In contrast, claims of discrimination are statutorily based and are not synonymous with actionable claims arising in equity or common law.

208. Human rights legislation is not enacted to determine claims that can, and should, be

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271 *Closing submissions of the Caring Society*, at para 41; *R v. Sparrow*, [1990] 1 SCR 1075
272 *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para 142
273 Michael Ng, *Fiduciary Duties*, 2013: Canada Law Book, at pp. 1-1- 1-9

brought before the courts for adjudication. Just as claims of discrimination are not actionable in common law courts, complaints asserting tortious conduct, breach of fiduciary duty and constitutional based claims do not fall within the ambit of the Tribunal to adjudicate. To expand the reach of the Tribunal in such a way would undermine the statutory regime which, for many victims of discrimination, is a more accessible and effective means by which to seek redress.[274]

D. International law principles do not establish a *prima facie* case

209. The Tribunal does not have the jurisdiction to assess alleged violations of international law, nor to provide remedies for any such alleged breaches. While international law can be helpful in interpreting concepts in the domestic context, it cannot change the scope of the Tribunal's jurisdiction.

210. The Complainants, however, are not relying on international law concepts to assist the Tribunal in interpreting relevant concepts within its purview but to advance the claim that the Respondent is in violation of its international obligations by virtue of its funding for child welfare on reserve. This is not the proper forum to advance such an argument and there is no jurisdiction within the governing statute for the Tribunal to make such a finding.

211. In any event, international human rights treaties that are binding on Canada may form the basis of an interpretive presumption of conformity between the treaty and ordinary legislation.[275] Thus, there is a presumption that the Act conforms to these international principles. The arguments of the Complainants go well beyond suggesting that the Act needs to be in conformity with international obligations. According to their arguments, any interpretation of the Act which finds that the complaint is unfounded, either through jurisdiction or lack of merit, violates this principle. This is not true.

212. With respect to the question of jurisdiction, while the legislative scheme is a major

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274 *Honda Canada Inc. v. Keays, supra*, at paras 65-66

275 *R. v. Hape*, 2007 SCC 26 at paras 53-54; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para 137; *Schreiber v. Canada (A.G.)*, [2002] 3 S.C.R. 269, at para 50; *Bouzari v. Islamic Republic of Iran* (2004), 71 O.R. (3d) 675 (C.A.), at para 64

element in the domestic fulfillment of international human rights obligations, the Complainants' arguments fail to recognize other available mechanisms. Complaints about government actions that do not fall within the scope of the Act can be brought under the Charter.[276] As a result, a determination that something does not fall within the ambit of the Act and the jurisdiction of the Tribunal does not constitute a violation of international law.

213. Amnesty International argues that under international law "it is not permissible to treat two groups inequitably" on the basis of their indigenous identity.[277] This argument does not assist the Complainants, as the Respondent in this case only funds one group.

214. Contrary to the claims of Amnesty International, it is not within the jurisdiction of the Tribunal to either find a breach of international obligations or order a remedy based on such an alleged breach.[278] To the contrary, the Tribunal's task is to determine whether or not there has been a breach of the Act and, if so, to order appropriate remedies as provided within the Act.

215. Accordingly, the general statements made about the requirements of international law advanced by the Complainants, even assuming they are accurate, which is not admitted but explicitly denied, do not assist the Tribunal in applying the Act to the facts of this complaint.

E. The federal response to Jordan's Principle is not applicable to this complaint

216. The federal response to Jordan's Principle does not demonstrate a *prima facie* case of discrimination. Not only is Jordan's Principle not a child welfare concept that has bearing on this complaint, an assessment of the validity of the federal response is beyond the scope of this complaint.

217. Jordan's Principle was passed as a non-binding resolution in the House of

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[276] *Matson v Canada (Indian and Northern Affairs)*, 2013 CHRT 13, at paras 152-154; *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, at para 66-71

[277] *Closing submissions of Amnesty International*

[278] *Closing submissions of Amnesty International*, at para 63

Commons that has led to the development of a process to deal with individual cases involving jurisdictional disputes. It is not a separate program and does not have separate funding. Rather, it is a policy that "sits on top of a program."[279]

218. Although it is meant to assist with the resolution of jurisdictional disputes that arise with respect to certain programs, Jordan's Principle is not equipped to address or amend the parameters of the implicated, existing program.[280]

219. Jordan's Principle would only be applicable in the child welfare context if there was a dispute between the federal and provincial government over who was responsible for paying for a service, and the child involved was a child in care.

220. In the *Pictou Landing* case, for example, the child welfare system was not at issue.[281] The First Nations child in that case was not in the care of a FNCFS Agency but was a child with severe disabilities living at home with his mother, who also required medical assistance.[282] The implicated programs were Health Canada's Home and Community Care Program and the Respondent's Assisted Living Program.[283] At issue was the amount of funding available through these programs.[284]

221. The Federal Court disagreed with the Respondent regarding what the appropriate normative standard of care was in Nova Scotia for medical care and respite services and thus how much funding should be available to this family through the federal programs.[285]

222. Since Jordan's Principle is not a child welfare concept and is not a part of the FNCFS Program, any consideration of its validity is beyond the scope of this complaint.

223. Even if Jordan's Principle was determined to be a relevant consideration to the

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279 *Testimony of Corinne Baggley*, Transcript vol 57, pg 30
280 *Testimony of Corinne Baggley*, Transcript, vol 57, pg 30
281 Although the Federal Court found Jordan's Principle was engaged, the Respondent did not concede this and argued it was not.
282 *Pictou Landing Band Council and Maurina Beadle v Attorney General of Canada*, 2013 FC 342, at paras 98-9 ("*Pictou Landing*")
283 *Pictou Landing*, *supra*, at paras 12-15
284 *Pictou Landing*, *supra*, at para 22
285 *Pictou Landing*, *supra*, at paras 96-98,105 and 111-7

Tribunal's analysis of the claim, there is no evidence to suggest that the Respondent's approach and implementation of Jordan's Principle resulted in discrimination against the Complainants. The fact the Complainants disagree with the Respondent's definition and implementation of Jordan's Principle does not mean it is invalid or discriminatory. Moreover, the evidence has shown that even when cases do not met the federal definition of Jordan's Principle, the Respondent still works with the parties to find a resolution to jurisdictional dispute.[286]

224. Jordan's Principle has also been implemented across the country. Although the Complainants take issue with the parameters of this implementation, it does not negate the fact the evidence clearly indicates Jordan's Principle has been implemented.[287]

The Complainants have failed to establish a *prima facie* case of discrimination

225. The Complainants failed to establish the existence of a *prima facie* case of discrimination. The evidence does not substantiate their allegation that federal funding for child welfare services on reserve is discriminatory compared to the funding provided by the provinces and Yukon government. In fact, there was no reliable evidence advanced to establish how and to what extent the provinces and Yukon fund their child welfare programs.

226. The Complainants also failed to prove their alternative argument that even without a comparator group, federal funding for child welfare is discriminatory because it fails to meet the higher needs of First Nation children. In fact the evidence established that no distinction can be drawn between the level of need experienced by First Nation children living on reserve as compared to those living off reserve, thus as between those funded federally and those funded provincially.

227. As the Complainants have not established a *prima facie* case of discrimination, the claim should be dismissed.

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286 *JP Tracking Tool Preliminary Findings Chart,* R-13, tab 53 and *Federal Focal Points Tracking Tool Reference Chart- Manitoba Region*, R-13, tab 54

287 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 36-83, *Pictou Landing*, *supra*, at paras 84, 113

Issue 3 – The remedies sought are not appropriate for this complaint

228. Even if a claim of discrimination was established, the remedies being sought by the Complainants are not appropriate and should not be granted. The Supreme Court has held that a remedy should focus on addressing the actual impacts felt by the individual service recipients.[288] This requirement has not been met, as such a link must be established by evidence and not by personal views and conjecture.

A. The Complainants cannot dictate policy and funding decisions

229. While the Tribunal may order amendments to policy and provide guidance on the shape of amendments, it cannot prescribe the specific policy that must be adopted. This is particularly appropriate in this case where the policy at issue is a complex scheme that takes into account competing priorities and must fit within broader governmental policy approaches.

230. Jurisprudence also supports a less prescriptive approach in relation to government policy or legislative schemes.[289] The Tribunal has noted that in crafting remedies, courts and tribunals should be "sensitive to their role as judicial and quasi-judicial arbiters respectively. In particular, they should not 'fashion remedies which usurp the role of other branches of governance."[290]

231. The Complainants request for an order directing the Respondent to revise the funding framework for the FNCFS Program in accordance with their explicit instructions, intrudes too far into the responsibilities of Parliament and the executive.

232. In particular, the Caring Society's proposed remedies go well beyond what is within the scope of the Tribunal to order. They ask that the Respondent be ordered to convene a National Advisory Committee ("NAC"), which would include representatives from the Commission, the AFN and the Caring Society. The NAC would be responsible to "identify discriminatory elements" in the FNCFS Program

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288 *Moore, supra,* at para 64
289 *McAllister-Windsor v. Canada* , [2001] C.H.R.D. No. 4, at para 75
290 *Hughes v. Election Canada,* 2010 CHRT 4, at para 69

and given wide berth to make recommendations on amendments to its funding structure.[291] The NAC would also be responsible for monitoring the Respondent's implementation of these recommendations.[292]

233. The Caring Society is not simply asking for the Tribunal to grant relief, it is asking for the Tribunal to allow the Complainants to determine what the appropriate relief is and monitor its implementation. The proposed remedy would intrude into the Executive branch of government's role to establish public policy and direct the spending of public funds in accordance with fiscal priorities. This remedy is simply beyond the power of Tribunal or any other court to order.

234. The Caring Society also asks for an order that the Complainants be included in the tripartite discussions to be held between the provinces, the Respondent and the First Nations. This request is also inappropriate. The Complainants have not established what role they would play in these discussions or how their presence would benefit the process, especially considering the involvement of the First Nations in these discussions. The Complainants are not involved in the delivery of child welfare services on reserve and are not the recipients of such services. There is no evidence to even conclude that the First Nation children on reserve, or the FNCFS Agencies who provide the services have consented to their involvement in the process. Nor have they established how the proposed remedy would address the alleged discrimination.

235. The Complainants' request to impose a requirement that the two Complainant organizations be "consulted" on the remedies is also without merit. Although section 53(2)(a) of the Act provides a role for the Commission to the extent of "consultation" on "the general purposes of the measures" it does not require the consultation of other parties. There is nothing in the legislative scheme to support a requirement that the two Complainant organizations be included in the consultation process. The legislative scheme also does not require that the Tribunal receive the

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[291] *Caring Society's Closing Submissions*, at para 494 and pgs 209-212
[292] *Caring Society's Closing Submissions*, pg 209

Commission's "approval" before establishing remedies[293]

B. Decisions on what is culturally appropriate are best left to the FNCFS Agencies

236. The Caring Society argues that the collaborative involvement of the Commission, Complainants and Caring Society's member agencies is required to re-design the FNCFS Program due to their expertise with what is culturally appropriate.[294] This suggestion ignores the evidence that the decision on what is culturally appropriate rests with the FNCFS Agencies and is best determined by these Agencies based on individual community needs and concerns. There is no basis for the participation of the Complainants in this process and no evidence that they are better placed to make determinations on what is culturally appropriate.

237. Moreover, there is no indication that the individual FNCFS Agencies across the country or their respective governments are seeking the participation of the Complainants in this process.

C. There is no evidentiary foundation for a monetary award

238. The evidence before the Tribunal is insufficient to award the requested statutory maximum under special compensation for each child removed from their home since 2006.

239. This request is fundamentally flawed as it depends on the unproven premise that all these children were removed from their homes because of the Respondent's funding practices. To accept such an assertion requires a finding that had there been adequate/equal funding, no child would have been removed from his or her home. This bare assertion is unsupported in the evidence and overlooks the complex nature of the factors that lead to a child being removed from their home. The Complainants themselves have acknowledged that removal from the home is a valid approach in some cases to ensure the well being of a child.

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293 *Johnstone, supra*, at paras 121-122

294 *Caring Society's Closing Submissions*, at para 491

240. The Complainants did not even call evidence to demonstrate that any children were improperly removed from their home. There is also no evidence from any recipients of child welfare services on-reserve with respect to a service or program they did not receive or the adverse outcomes that flowed from this. The absence of individual Complainants, and related individual evidence, makes it impossible for the Tribunal to assess compensation on an individualized basis.

241. Although representative claims are permitted and groups of individual claimants need not provide specific evidence of expenses or effects on each member of the group, this is not a representative claim in that the Complainants have not established that they have the authority to speak on behalf of and or represent the interests of the children who were taken into care during the applicable time period. Even if it were a representative claim, there must still be some evidence of the impacts the discriminatory practice had on individuals that can be extrapolated to the other members of the group on a principled and defensible basis.[295] This type of factual basis is lacking.

242. The Caring Society is also seeking compensation for the alleged reckless and wilful behavior of the Respondent in respect of its funding of child welfare services on reserve. This claim is also unsupported by the evidence. The Respondent's funding of child welfare services has not remained static. Instead, it has changed to adapt to the shifts in social work practice and the costs of providing these services. The key example of this is the re-design of the funding formula to add an additional funding stream for prevention services.

243. The funding for the FNCFS Program as a whole has more than doubled in the last 15 years, increasing from 238 million in 1998/99 to in 627 million in 2012/13.[296]

244. The Respondent also continually assesses the FNCFS Program to determine how it can be improved. However, proposed improvements and increased spending must be considered and implemented within the larger federal context taking into

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295 *Canadian Human Rights Commission v. Canada (Attorney General)*, 2010 FC 1135, at para 73

296 *Deck entitled "Better Outcomes for First Nations Children: Aboriginal Affairs and Northern Development Canada's Role as a Funder in First Nations Child and Family Services"*, R-13, tab 18, p3 and 12

consideration other social, political and fiscal issues facing the government as a whole.

245. In any event, the authority of the Complainants to receive and distribute funds on behalf of "victims" has not been established. As an advocacy organization, the Caring Society does not have a legal or direct relationship with the individuals on whose behalf they purport to request a remedy. The Complainants propose the money be put into a trust. However, if the Tribunal determined it was appropriate to recover this money for each child, then it should be delivered to them directly – not to the Complainants to decide how it is to be used.

246. The Caring Society also requests an award of five million dollars for the province of Ontario to implement prevention services. There is no evidence to support that such an award is warranted or that the amount requested is reasonable. In fact, the evidence demonstrates that prevention services have been implemented in Ontario since the 1970's and that AANDC reimburses prevention activities under the *1965 Welfare Agreement*.[297]

247. The Caring Society clearly disagrees with the Respondent's decisions regarding how to fund the FNCFS program and to what level and, in effect, with the Respondent's overall decision making regarding the spending of public funds. However, they have not demonstrated that the alleged underfunding of child welfare on reserve has been wilful or reckless.

D. Legal costs are not recoverable

248. The Tribunal does not have authority to award legal costs, pursuant to the Supreme Court's finding in *Mowat*.[298] However, this is essentially what the AFN is asking for in its request for "throw away" expenses relating to the documentary disclosure, including for counsel's appearance at the motion for production. These are clearly legal costs and as such, are beyond the power of the Tribunal to award.

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[297] *Testimony of Phil Digby*, Transcript vol 59, pgs 30, 50-9, 71-81

[298] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)* 2011 SCC53

E. Remedies must be applicable to the FNCFS Program

249. The Complainants request remedies that are beyond the scope of this complaint. In this respect, there are extensive remedies requested with respect to the implementation of Jordan's Principle. The Respondent's implementation of Jordan's Principle is not a relevant issue in this complaint, as it is not part of the funding for child welfare on reserve. An order respecting programs or policies other than child welfare is beyond the scope of the complaint and the remedial powers of the Tribunal.

250. The fact the remedy request is over-broad is evidenced by the request of the Caring Society for an order that Jordan's Principle be applicable to all First Nation children (whether or not in care) and that this apply to all areas of funding (not just child and family services).

251. An order providing a remedy respecting programs other than child welfare is beyond the scope of the complaint and the remedial powers of the Tribunal. Accordingly, the Complainants request for a remedy to provide funding for items such as capital costs must be denied as funding for capital costs falls outside of the FNCFS Program and provides further illustration of the fact that this complaint is not properly constituted under section 5 of the Act.

Part IV – Order Sought

252. The Respondent respectfully requests this complaint be dismissed as unfounded.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Halifax, Nova Scotia this 3rd day of October, 2014.

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Part V – List of Authorities

Legislation

Canadian Human Rights Act, RSC. 1985, c. H-6

Jurisprudence

Alberta v. Elder Advocates of Alberta Society 2011 SCC 24

Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37

Andrews v. Indian and Northern Affairs Canada, 2013 CHRT 21

Armstrong v. BC (Min. Of Health), 2010 BCCA 56

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F.H. v. McDougall, 2008 SCC 53

Forward v. Canada (Citizenship and Immigration), 2008 CHRT 5

Gladstone v. Canada (Attorney General), 2005 SCC 21

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Matson v Canada (Indian and Northern Affairs), 2013 CHRT 13

McAllister-Windsor v. Canada , [2001] C.H.R.D. No. 4

McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal, 2007 SCC 4

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Ordon Estate v. Grail, [1998] 3 S.C.R. 437

Penner v. Danbrook, [1992] 4 W.W.R. 386

Pictou Landing Band Council and Maurina Beadle v Attorney General of Canada, 2013 FC 342

Quebec (Attorney General) v. Canada (National Energy Board), [1994] 1 S.C.R. 159

R. v. Hape, 2007 SCC 26

R v. S.[1990] 2 SCR 254

R v. Sparrow, [1990] 1 SCR 1075

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Tsilhqot'in Nation v. British Columbia, 2014 SCC 44

*Warren Gibson Ltd. v. Canada (Human Rights Commission)*2004 FC 1439

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Secondary sources

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Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *The Law of Evidence in Canada*, 4th ed (Markham, Ont: LexisNexis, 2014)

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This is **Exhibit "H"** to the Affidavit of David Sterns, Affirmed remotely before me in the City of Toronto, in the Province of Ontario, on October 6, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration remotely

Commissioner for taking Affidavit
(or as may be)

Georgia Elizabeth Scott-McLaren, a Commissioner, etc.
Province of Ontario, for
Sotos LLP, Barristers and Solicitors
Expires February 20, 2024

Tribunal File No. T-1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA
and ASSEMBLY OF FIRST NATIONS

Complainants

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

ATTORNEY GENERAL OF CANADA
(representing the Minister of Indian and Northern Affairs)

Respondent

and

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA and
NISHNAWBE ASKI NATION

Interested Parties

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A. Overview

1. This complaint was brought by public interest organizations who claimed that the Government's funding for child and family services on reserve amounted to systemic and ongoing discrimination against First Nations children and families. The complaint was largely substantiated, and the Tribunal must now determine the appropriate remedies. Remedies must be responsive to the nature of the complaint made, and the discrimination found: that means addressing the systemic problems identified, and not awarding monetary compensation to individuals.

2. Awarding compensation to individuals in this claim would be inconsistent with the nature of the complaint, the evidence, and this Tribunal's past orders. In a complaint of this nature, responsive remedies are those that order the cessation of discriminatory practices, redress those practices, and prevent their repetition.

3. The *Canadian Human Rights Act*[1] does not permit the Tribunal to award compensation to the complainant organizations in their own capacities or in trust for victims. The complainants are public interest organizations and not victims of the discrimination; they do not satisfy the statutory requirements for compensation under the *Act.* A class action claim seeking damages for the same matters raised in this complaint, on behalf of a broader class of complainants and covering a broader period of time, has already been filed in Federal Court.

4. These submissions address the legal questions before the Tribunal relating to compensation including the Tribunal's two questions on compensation that require a response from the Attorney General of Canada:

> a) Is the AFN's expert panel proposal feasible and legal? Would it be more appropriate to form a committee of the parties to identify individual victims and to refer them to the Tribunal for compensation? Should that committee include the COO and NAN?

[1] R.S.C. 1985, c. H-6 ("the Act")

b) The Caring Society is requesting compensation via an independent trust comparable to the Indian Residential Schools settlement achieved via the settlement of a class action claim. The AFN is requesting that compensation be paid directly to victims and their families. Should the Tribunal take both approaches?

B. What is Systemic Discrimination?

5. Systemic discrimination occurs where an organization's policies, practices and culture create or perpetuate the unequal treatment of a person or people.[2] Complainants allege systemic discrimination when they claim that government practices, attitudes, policies, and procedures disproportionately limit a group's right to opportunities that are generally available.[3] Quebec's Human Rights Tribunal defines systemic discrimination as

> "the cumulative effects of disproportionate exclusion resulting from the combined impact of attitudes marked by often unconscious biases and stereotypes, and policies and practices generally adopted without taking into consideration the characteristics of the members of groups contemplated by the prohibition of discrimination.[4]

C. This is a Complaint of Systemic Discrimination

6. In its 2014 written submissions, the Caring Society acknowledged that this is a claim of systemic discrimination, with no individual victims as complainants and little evidence about the nature and extent of injuries suffered by individual complainants.[5] The Caring Society stated that it would be an "impossible task" to obtain such evidence.[6] The absence of complainant victims and the assertion that it would be "impossible" to obtain victims' evidence strongly indicate that this is not an appropriate claim in which to award compensation to individuals. The AFN appears to also acknowledge that this is a claim of

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[2] *Moore v. British Columbia (Education),* 2012 SCC 61, quoting *Action Travail* at p.1138.
[3] *Crockford v. BC (AG)*, 2006 BCCA 360 at para. 49.
[4] *Commission des droits de la personne et des droits de la jeunesse c. Gaz métropolitain inc.*, 2008 QCTDP 24 (CanLII) at para. 36.
[5] Caring Society Written Submissions dated August 29, 2014 at para. 513.
[6] *Ibid.*

systemic discrimination: it alleges that the discriminatory practice is a perpetuation of systemic discrimination and historic disadvantage.[7]

7. Complaints of systemic discrimination are distinct from complaints alleging discrimination against an individual and they require different remedies.[8] Complaints of systemic discrimination are not a form of class action permitting the aggregation of a large number of individual complaints. They are a distinct form of claim aimed at remedying structural social harms.[9]

8. The Canadian Human Rights Commission considers this to be a complaint of systemic discrimination. Then Acting-Commissioner, David Langtry, referred to it as such in his December 11, 2014 appearance before the Senate Committee on Human Rights. In discussing how the Commission allocates its resources, he specifically named this complaint as an example of a complaint of systemic discrimination that merited significant involvement on the part of the Commission.[10]

9. Evidence of the systemic nature of the complaint is found in the identity of the complainants, the language of the complaint, the Statement of Particulars, and the nature of the evidence provided to the Tribunal. The Tribunal's previous orders in this matter, discussed below, clearly indicate that the Tribunal also regards this claim as a complaint of systemic discrimination.

Identity of the Complainants

10. This complaint is advanced by two organizations, the Assembly of First Nations ("AFN") and the First Nations Child and Family Caring Society of Canada ("Caring Society"),[11] who sought systemic changes to remedy discriminatory practices. It is not a complaint by

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[7] AFN Written Submissions on Compensation dated April 4, 2019 at para. 6.
[8] *Crockford v. BC (AG)*, 2006 BCCA 360. at paras. 49, 57 and 94
[9] Melissa Hart, "Civil Rights and Systemic Wrongs", (2011) 32 Berkeley J Emp & Lab L 4555 at 455-56.
[10] Canada, Parliament, *Senate Standing Committee on Human Rights*, 31st Parliament, 2nd Sess. (Dec. 11 2014). Available at: https://sencanada.ca/en/Content/Sen/committee/412/ridr/51838-e.
[11] Complaint to the Canadian Human Rights Commission ("Complaint") at p. 1 (Summary).

individuals seeking compensation for the harm they suffered as a result of a discriminatory practice. The complainant organizations were not victims of the discrimination and they do not legally represent the victims.

Language of the Complaint

11. In their initial complaint to the Canadian Human Rights Commission, the complainants allege systemic discrimination. They stated that the government's funding formula for child and family services on reserve constituted "systemic and ongoing" discrimination against First Nations children and families on reserve because it provided them with inequitable levels of child welfare services, as compared to non-Aboriginal children, due to their race and ethnic origin.[12] They further alleged that the government's failure to adequately fund services has resulted in 30%-40% of children in care in Canada being Aboriginal, and they called for an investment of $109 million dollars in year one of multi-year funding to ensure a basic level of equitable child welfare service for the First Nations children on reserve,[13] stating that anything less would "perpetuate the inequity".[14]

12. The framing of the complaint is important. In the *Moore* case, discussed in further detail below, the Supreme Court of Canada determined that remedies must flow from the claim as framed by the complainants.[15]

Complainants' Statement of Particulars

13. In the complainants' joint statement of particulars, they also indicated that this is a claim of systemic discrimination. They alleged insufficient funding for "statutory child welfare and protection programs for registered Indian children and families normally resident on reserve"[16] and undertook to provide the Tribunal with the evidence needed to compare the services available to the general public with those available to "registered First Nation

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[12] Complaint at p. 3 (final para.).
[13] Complaint at p. 1 (end of para. 1).
[14] Complaint at p. 3 (2nd bullet).
[15] *Moore v. British Columbia (Education), supra.*, particularly at paras. 64, 68-70.
[16] Complainants' Joint Statement of Particulars ("Particulars") at para. 1.

children and families normally resident on reserve", to determine if there was differential treatment and discriminatory practices.[17]

14. Claims by individual victims provide details of the harms they suffered as a result of the discriminatory practice. Here, the public interest Complainants alleged that the government's policies and practices amounted to a denial of essential services to First Nations children and families on reserve writ large. They also suggested that this denial perpetuated prior inequalities by stating that on reserve families have greater child welfare and protection needs.[18]

Nature of the Evidence

15. If this were a claim alleging discrimination against an individual or individuals, there would be evidence of the harm they suffered as a result of the discrimination to demonstrate that the victims meet the statutory requirements for compensation. No such evidence exists in this case. With respect to child welfare practices, there is very little evidence in the record regarding the impact of the discriminatory funding practice on individuals, particularly regarding causation, that is, evidence of the link between the discriminatory practices and the harms suffered. The AFN acknowledges that awards for pain and suffering require an evidentiary basis outlining the effects of the discriminatory practice on the individual victims.[19]

16. Underfunding did not cause specific children to be removed from their homes; additional funding would not necessarily have enabled them to stay. Provincial and Territorial child-care systems, relied on as the properly funded comparator for on-reserve services in the complaint, regularly remove children from homes. In some cases, removing a child can be a valid approach to ensure the well-being of that child.

17. No case law supports the argument that compensation to individuals can be payable in claims of systemic discrimination without at least one representative individual complainant

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[17] Particulars at para. 5.
[18] Particulars at para. 12.
[19] AFN Written Submissions on Compensation dated April 4, 2019 at para. 10.

providing the evidence needed to properly asses their compensable damages. This Tribunal has only awarded compensation to individuals in claims of systemic discrimination where they were complainants and where there was evidence of the harm they had suffered.[20] In this claim, the Tribunal lacks the strong evidentiary record required to justify awarding individual remedies.[21] An adjudicator must be able to determine the extent and seriousness of the alleged harm in order to assess the appropriate compensation and the evidence required to do so has not been provided in this claim.[22]

18. Neither of the tools available to the Tribunal to address the deficiency in evidence are appropriate in the circumstances. The Tribunal is entitled to require better evidence from the parties,[23] and to extrapolate from the evidence of a group of representative complainants. [24] However, there are no representative individual plaintiffs in this complaint and no evidence regarding their experiences from which to extrapolate on a principled and defensible basis.[25] The Tribunal's ability to compel further evidence is also not helpful as the Caring Society has stated that it would be an impossible task to obtain such evidence,[26] and would be inconsistent with the fundamental nature of the complaint. Compensating victims in this claim when they are not complainants would also be contrary to the general objection to awarding compensation to non-complainants in human rights complaints, as recognized by the Federal Court. [27]

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[20] *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Gaz Métropolitain Inc.*, 2008 QCTDP 24 at para 536 and 537 and *Canada (Human Rights Commission) v Canada (Minister of Social Development)*, 2010 FC 1135.

[22] *Lebeau v Conseil du Trésor (Statistique Canada),* 2015 FC 133 at para. 31, *Jodhan v Canada (AG)*, 2012 FCA 161 at para 102 (in the context of evidence in support of systemic remedies). See also *Entrop. Et al. v. Imperial Oil Ltd., et al.,* 2000 CanLII 16800 (ON CA) at paras. 46 and 59.

[23] *Canada (Human Rights Commission) v Canada (Minister of* Social *Development)*, 2011 FCA 202 at para 32, *Canada (Human Rights Commission) v Canada (Minister of Social Development)*, 2010 FC 1135 at para 75, and *Keeper-Anderson v Canada (Human Rights Commission)*, 2008 CHRT 46.

[24] *Canada (Human Rights Commission) v Canada (Minister of Social Development),* 2011 FCA 202 at para 12.

[25] *Canada Human Rights Commission v. Canada (Attorney General),* 2010 FC 1135 at para. 73.

[26] Caring Society's Written Submissions dated August 29, 2014 at para. 513.

[27] *Canada (Secretary of State for External Affairs) v. Menghani,* [1994] 2 FC 102 at para. 62.

19. In *Canada (Sec. State for External Affairs) v. Menghani*, the Court concluded that the Tribunal could not award permanent residency to an individual who was not a complainant even though it determined that he would have received it if not for the discriminatory practice it identified. The Court's conclusion was based on two findings: first, that the remedy was barred by statute and second, that there is a general objection to award specific relief to non-complainants.[28] The Commission points to two additional decisions in which this Tribunal declined to award compensation in claims where it would have been impractical to have thousands of victims testify, acknowledging that it could not award compensation en masse.[29]

20. Having framed their complaint as one of systemic discrimination, the complainants are now only entitled to remedies that flow from the complaint as framed. This Tribunal made their findings based on that choice. Complainants are only entitled to obtain remedies that flow from their complaint. In *Moore v. British Columbia (Education),* the B.C. Human Rights Tribunal permitted the complainant to lead evidence regarding systemic issues in a complaint of discrimination against an individual, in that case an individual with dyslexia who claimed discrimination on the basis he was denied access to education.

21. The B.C. Tribunal relied on that evidence to award systemic remedies. However the Supreme Court of Canada concluded that the systemic remedies are too far removed from the "complaint *as framed by the Complainant*" [emphasis in original].[30] The Supreme Court upheld the individual remedies but set aside all of the systemic orders because the remedy must flow from the claim.[31]

22. While the situation is reversed in this case, the same principle applies. The complainants framed this complaint as one of systemic discrimination and are now bound by that choice. Remedies in this case must be systemic, particularly because there is insufficient evidence to determine appropriate compensation, if any, for individuals. The lack of evidence of harm

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[28] *Ibid.*
[29] CHRC Written Submissions dated April 3, 2019, at para. 59.
[30] *Moore v. British Columbia (Education),* 2012 SCC 61 generally, particularly at para. 68.
[31] *Ibid.* at paras. 64 and 68-70.

suffered by individuals, and the apparent impossibility of obtaining it, clearly indicates that this is not an appropriate claim in which to award individual compensation.

The Tribunal Recognizes this as a Claim of Systemic Discrimination

23. The Tribunal has consistently recognized that this is a complaint of systemic discrimination in its decisions in this matter. In 2016 CHRT 10, the Tribunal acknowledged the systemic nature of the complaint in discussing the remedies available to address systemic discrimination under s. 53(2)(a) of the *Act*.[32]

24. In 2017 CHRT 14, in discussing who bears the onus of showing that Canada has complied with orders for immediate relief, the Tribunal stated that the complainants proved that Canada discriminated against First Nations children and families "in a systemic way".[33]

25. In 2018 CHRT 4, the Tribunal discusses the "fundamental core of Canada's systemic discrimination"[34] and states that it must intervene where, as here, it finds that behaviours and patterns that led to systemic discrimination are still occurring.[35]

The Complaint is not a Class Action

26. The remedies claimed by the parties resemble the sort of remedies that may be awarded by a superior court of general jurisdiction rather than a Tribunal with a specific and limited statutory mandate. A class action claim addressing the subject matter of this complaint has been filed in the Federal Court. The *Moushoom* claim demands $3B in damages under the *Canadian Charter of Rights and Freedoms* and an additional $50M in punitive and exemplary damages for the Crown's alleged breach of its common law and fiduciary duties to the class and the alleged breach of the class's s.15(1) *Charter* equality rights.

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[32] 2016 CHRT 10 at para. 18.
[33] 2017 CHRT 14 at para. 23.
[34] 2018 CHRT 4 at para. 93.
[35] 2018 CHRT 4 at para. 165

27. The claim alleges that Canada knowingly underfunded child and family services for children living on reserve and in the Yukon and underfunded prevention services to those same children while funding care for First Nations children who are removed from their homes thus creating an incentive to remove children.[36] It also alleges that Canada has failed to comply with Jordan's Principle and seeks damages on behalf of the people who suffered and died as a result.[37]

28. The *Moushoom* claim is brought on behalf of two classes: the Jordan's Principle class consisting of minors who were denied a service or product or whose receipt of a service or product was delayed or disrupted due to lack of funding, lack of jurisdiction or as a result of a jurisdictional dispute and the On-Reserve Class consisting of individuals who were minors during the relevant period and who were taken into out-of-home care during the class period when they or at least one of their parents was ordinarily resident on Reserve.[38] These classes include the victims of the discrimination identified by the Tribunal.

29. This class action will determine whether the individuals harmed by the discrimination identified in this complaint are entitled to compensation and will do so with the benefit of the robust powers granted to courts hearing class actions. As the AFN notes, the *Moushoom* class action assumes that there will be no compensation paid in this claim.[39]

30. The *Act* does not permit complaints on behalf of classes of complainants, nor does it permit remedies to be awarded to those same classes. Section 40(1) of the *Act* permits individuals or groups of individuals to file a complaint with the Commission while s.40(2) of the *Act* specifically empowers the Commission to decline to consider complaints, such as this, that are filed without the consent of the actual victims.

31. These provisions are quite different from other Canadian human rights legislation. British Columbia's *Human Rights Code* permits non-class members to start complaints on behalf of

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[36] *Xavier Moushoom v. The AGC* CFN: T-402-19. Filed March 4, 2019.
[37] *Ibid.*
[38] *Ibid.* at para. 1 (O) and (P)
[39] AFN Written Submissions on Compensation dated April 4, 2019 at para. 34.

a group or class of individuals.[40] Similarly, *The Saskatchewan Human Rights Regulations, 2018* (and their predecessor regulations) permit class complaints where the individual complainants share a common interest in a cause or matter subject to the Chief Commissioner's review. Potential class members are permitted to request exclusions from the class.[41]

32. The lack of an equivalent provision in the *Act* indicates that Parliament chose not to permit class action-style complaints, and it certainly did not grant the Tribunal jurisdiction or provide the tools needed to deal with class complaints.

33. Given its lack of jurisdiction, the Tribunal should not rely on principles from class action jurisprudence. Québec's Tribunal des droits de la personne, whose statute is similar to the *Act*, addressed the relationship between class actions and human rights (in the civil law context) in *Commission des droits de la personne et des droits de la jeunesse c. Québec (Procureur général)*.[42] The case concerned a settlement agreement reached by Quebec, the Quebec Commission, and the teachers' union. The parties encouraged the Tribunal to rely on class actions principles and to approve the agreement despite opposition from a group of young teachers who felt the deal was disadvantageous to them. The Tribunal declined to do so, noting that a "class action is an extraordinary procedural vehicle that breaks with the principle that no one can argue on behalf of another. That recourse can be exercised only with the prior authorization of the court."[43]

34. The Tribunal rejected the suggestion that class actions principles could apply in the human rights context, noting that in class actions the judge serves an important role in protecting "absent members".[44] Without these procedural protections, the tribunal process should not be used to dispossess victims of their rights in the dispute.[45] The Tribunal also concluded that the procedural mechanism of class actions is legislative, and can only be exercised where

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[40] *Human Rights Code* RSBC 1996, c 210, s 21(4) at para. 21(4)(b).
[41] *The Saskatchewan Human Rights Regulations, 2018* S-24.2 Reg 1 at s. 4.
[42] 2007 QCTDP 26 (CanLII).
[43] *Ibid.* at para. 105.
[44] *Ibid.* at para. 109.
[45] *Ibid.* at para. 109.

statutory conditions are met and therefore cannot, be transplanted into Tribunal proceedings without legislative authority.[46]

35. While not binding on this Tribunal, the Quebec Tribunal's reasoning is compelling. Class action principles do not apply to human rights complaints and should not be injected into them without legislative authority. Where courts are empowered to consider class proceedings, they are equipped with the tools necessary to do so. For example, Rule 334 of the *Federal Court Rules,* which governs class proceedings in the Federal Court, empowers judges to review and certify class proceedings, dictates the form for a certification order, provides a process for opting out of the class and modifies other processes under the *Rules* to accommodate class proceedings. The Rule notably requires a class representative, a person who is qualified to act as plaintiff or applicant under the rules.[47]

36. In the absence of such a provision, the Canadian Human Rights Tribunal is not empowered to address class complaints or to treat complaints that purport to be on behalf of unidentified individual complainants like a class claim.

D. The Scope of the Tribunal's Remedial Jurisdiction

37. The Tribunal does not have jurisdiction to award individual compensation in complaints of systemic discrimination, particularly where, as here, there are no individual complainants. The terms of the *Act* and the jurisprudence of both this Tribunal and the Federal Courts clearly indicate that paying compensation to the complainant organizations or to non-complainant victims would exceed the Tribunal's jurisdiction. Compensation can only be paid where there is evidence of harm suffered by complainant individuals and should only be paid where it advances the goal of ending discriminatory practices and eliminating discrimination.

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[46] *Ibid.* at para. 112.
[47] *Federal Court Rules,* SOR/98-106, Rule 334.

There is no Legal Basis for Compensating the Complainants

38. The Tribunal was created by the *Act* and its significant powers to compensate victims of discrimination can only be exercised in accordance with the *Act.* The Tribunal's task is to adjudicate the claim before it.[48] Its inquiry must focus on the complaint and any remedies ordered must flow from the complaint.[49] The requirements of s. 53(2)(e) or 53(3) must be satisfied for the Tribunal to award compensation under the *Act.*

Pain and Suffering

39. Section 53(2)(e) of the *Act* grants the Tribunal jurisdiction to award up to $20,000 to "the victim" of discrimination for any pain and suffering they experienced as a result of the discriminatory practice.[50] However, the complainant organizations are not victims of the discrimination and did not experience pain and suffering as a result of it. The evidence presented to the Tribunal by the complainants did not speak to "either physical or mental manifestations of stress caused by the hurt feelings or loss of respect as a result of the alleged discriminatory practice."[51] Organizations cannot experience pain and suffering and there is, therefore, no need to "redress the effects of the discriminatory practices"[52] with regards to the complainants. Redressing the discrimination found was necessary in this case, but the Tribunal's previous orders accomplished this goal.

Willful and Reckless

40. For discrimination to be found to be willful and reckless, and therefore compensable under s. 53(3) of the *Act,* evidence is required of a measure of intent or of behaviour that is devoid of caution or without regard to the consequences of that behaviour.[53] Compensation for willful and reckless discrimination is justified where the Tribunal finds that a party has failed to comply with Tribunal orders in previous matters intended to prevent a repetition of similar events from recurring.[54]

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[48] *Moore v. British Columbia (Education),* 2012 SCC 61 (CanLII) at paras. 64.
[49] *Ibid.* at para. 69.
[50] Section 53(2)(e) of the Act.
[51] *Canada (AG) v. Hicks,* 2015 FC 599 at para. 48.
[52] *Closs v. Fulton Forwarders Incorporated and Stephen Fulton,* 2012 CHRT 30 at para. 84.
[53] *Canada (AG) v. Collins,* 2011 FC 1168 at para. 33.
[54] *Canada (AG) v. Johnstone* 2014 FCA 110 at para. 125.

41. As with compensation for pain and suffering, compensation for willful and reckless discrimination can only be paid to "victims" of discrimination.[55] The complainant organizations were not victims of willful and reckless discrimination. Furthermore, there is no evidence of a consistent failure to comply with Orders.

42. This claim raises novel issues. There were no Orders requiring the Government to address these issues before the Tribunal's first decision in this matter. The Tribunal's decisions in this matter since 2017 are based on the findings and reasoning of the initial decision and are intended to: "provide additional guidance to the parties". [56] They do not demonstrate that Canada has acted without caution or regard to the consequences of its behaviour.

43. Concerns about the adequacy of the Government's response to studies and reports in the past[57] do not provide a basis for awarding compensation under s. 53(3). Canada's funding for child welfare services has consistently changed to address shifts in social work practice and the increasing cost of providing family services. Examples of these changes include the redesign of the funding formula to add an additional funding stream for prevention services and Bill C-92 currently before the House of Commons.

This Tribunal Understands the Limitations of its Remedial Jurisdiction

44. In its decisions in this matter, the Tribunal has shown a nuanced understanding of both its powers and of the limitations of its remedial jurisdiction. The Tribunal should follow its own guidance in deciding the issue of compensation in this case.

45. In 2016 CHRT 2, the Tribunal concluded that its remedial discretion must be exercised reasonably and on a principled basis considering the link between the discriminatory practice

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[55] s. 53(3) of the Act.
[56] *First Nations Child & Family Caring society Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2017 CHRT 14 at para. 32.
[57] Caring Society Written Submissions on Compensation dated April 3, 2019 at paras. 14-18 and 29.

and the loss claimed, the particular circumstances of the case and the evidence presented. In reaching its conclusion, it stated that the goal of issuing an order is to eliminate discrimination and not to punish the government.[58]

46. In 2016 CHRT 10, the Tribunal noted that s. 53(2)(a) of the *Act* "has been described as being designed" to address systemic discrimination. Section 53(2)(a) permits the Tribunal to employ special programs, plans or arrangements under s. 16 of the *Act* or an accommodation plan pursuant to s. 17 to redress discrimination.[59]

47. In 2016 CHRT 16, in declining to order the Government to pay to transfer recordings of the Tribunal hearings into a publicly accessible format at the request of the Aboriginal Persons Television Network (the "APTN"), the Tribunal acknowledged the importance of the link between the discriminatory practice and the loss claimed. While the Tribunal was respectful of the APTN's mission and recognized the public interest in the recordings, the fact that APTN was neither a party nor a victim meant that the remedial request was not linked to the discrimination and was, therefore, denied.[60]

48. The Tribunal dealt with this complaint on the basis alleged.. Section 53(2)(a) contains the appropriate remedies for proven claims of systemic discrimination, and that the goal of a remedial order is to eliminate discrimination. Awarding compensation to individuals who were not parties to the complaint would not achieve that purpose.

Systemic Discrimination Requires Systemic Remedies

49. The Federal Court of Appeal has recognized that structural and systemic remedies are required in complaints of systemic discrimination. In *Re: C.N.R. and Canadian Human Rights Commission,* the Federal Court of Appeal concluded that compensation for individuals is not an appropriate remedy in complaints of systemic discrimination. The Court found that

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[58] *First Nations Child and Family Caring Society of Canada v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 at para. 468.
[59] *First Nations Child and Family Caring Society of Canada v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 10 at para. 18.
[60] *First Nations Child and Family Caring Society of Canada v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 16 at para. 145.

compensation is limited to victims which made it "impossible, or in any event inappropriate, to apply it in cases of group or systemic discrimination" where, as here "by the nature of things individual victims are not always readily identifiable".[61]

50. Remedies in claims of systemic discrimination should seek to prevent the same or similar discriminatory practices from occurring in the future in contrast with remedies for individual victims of discrimination which seek to return the victim to the position they would have been in without the discrimination.[62] As human rights lawyers Brodsky, Day and Kelly state in their article written in support of this complaint:

> [w]here the breach of a human rights obligation raises structural or systemic issues – such as longstanding policy practices that discriminate against indigenous women – the underlying violations must be addressed at the structural or systemic level."[63]

Any Compensation Must be Paid Directly to Victims of the Discrimination

51. There is no legal basis for the Caring Society's requests that compensation for willful and reckless discrimination be paid into a trust fund that will be used to access services including: language and cultural programs, family reunification programs, counselling, health and wellness programs, and education programs.[64] Compensation is only payable to victims under the term of the *Act* and paying compensation to an organization on behalf of individual victims could bar that individual from vindicating their own rights before the Tribunal and obtaining compensation. It may also prejudice their recovery in a class action claim as any damages awarded to the victims would be offset against the compensation already awarded to the organization by the Tribunal.

Compensation is Inappropriate in Claims Alleging Breaches of Jordan's Principle

52. There is no basis to award compensation under the *Act* to either the complainant organizations or non-complaint individuals for alleged breaches of Jordan's Principle. As the

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[61] *Re: C.N.R. and Canadian Human Rights Commission*, 1985 CanLII 3179 (FCA) at para. 10 (overturned on other grounds but this issue was not appealed).
[62] Gwen Brodsky, Shelagh Day & Frances Kelly, "The Authority of Human Rights Tribunals to Grant Systemic Remedies" (2017) 6:1 Can J Hum Rts 1 at p. 3-4.
[63] *Ibid.* at p.18.
[64] Caring Society Written Submissions dated August 29, 2014 at para. 541.

Commission has stated, the proper remedy for breaches of Jordan's Principle is reconsideration.[65]

53. This remedy has already been ordered by the Tribunal in this case. In 2017 the Tribunal instructed the Government to re-review all denied requests for services, pursuant to Jordan's Principle or otherwise, dating back to April 1, 2009 to ensure compliance with the principle.[66] The results of this re-review were reported by Mr. Sony Perron in his November 15 and December 15, 2017 affidavits. As communicated in his affidavits and those more recently of Dr. Valerie Gideon, Canada continues to evaluate and determine any previously denied requests since April 2007 when submitted.

54. As the Canadian Human Rights Commission notes in its submissions, where Canada has implemented policies that satisfactorily address the discrimination, no further orders are required.[67]

55. Finally, and as discussed above, there is no basis to find that the government discriminated willfully or recklessly in this claim. The Tribunal in the *Johnstone* decision, relied on by the Caring Society,[68] justified its award of compensation under s. 53(3) of the *Act* by pointing to disregard for a prior Tribunal decision that addressed the same points and the government's reliance arbitrary and unwritten policies, among other things, neither of which are the case here.

E. Responses to the Tribunal's Questions

56. The responses provided below to the Tribunal's questions on compensation flow from the principles and jurisprudence discussed above.

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[65] CHRC's Statement of Particulars at para. 27(b).
[66] 2017 CHRT 35 (CanLII) at para. D of "ORDER".
[67] CHRC Written Submissions on Compensation dated April 3, 2019 at para. 10.
[68] Caring Society Written Submissions on Compensation dated April 3, 2019 at para. 6.

Question 1

57. The Tribunal has asked whether the expert panel proposed by the AFN is feasible and legal or whether it would be more appropriate for the parties to form a committee (potentially including COO and NAN) to refer individual victims to the Tribunal for compensation.

58. Neither of these proposals is feasible or legal. The Tribunal cannot delegate its authority to order remedies to an expert panel and it would not be appropriate to ignore the nature of the complaint by awarding compensation to victims who are not complainants in a claim of systemic discrimination. There are no individual complainants in this claim and little evidence of the harm suffered by victims from which the Tribunal can extrapolate. It would also offend the general objection against awarding compensation to non-complainants in human rights matters.

Question 2

59. This is for the NAN to answer.

Question 3

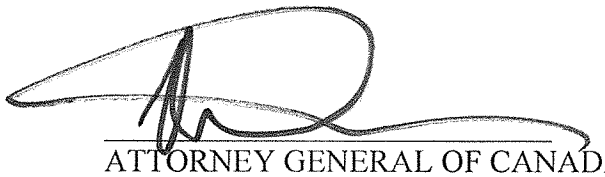
60. The Caring Society requests that compensation be paid in to an independent trust similar to the ones established under the Indian Residential Schools class action settlement and the AFN is requesting payment of compensation directly to victims and their families. You have asked why the Tribunal should not take both approaches to compensation proposed by the Caring Society and AFN.

61. The Tribunal should not, and is not permitted in law, to take either of the approaches proposed by the complainants. As the question notes, the Indian Residential Schools settlement is the result of agreement between the parties in settling a class action and the independent trust was not imposed by a Court or tribunal.

62. Compensation cannot be paid to victims or their families through this process because there are no victims or family-member complainants in this claim.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Ottawa, ON this 16th day of April, 2019.



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This is **Exhibit "I"** to the Affidavit of David Sterns, Affirmed remotely before me in the City of Toronto, in the Province of Ontario, on October 6, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration remotely

_____

Commissioner for taking Affidavit
(or as may be)

Georgia Elizabeth Scott-McLaren, a Commissioner, etc.
Province of Ontario, for
Sotos LLP, Barristers and Solicitors
Expires February 20, 2024

Court File Nos. T-402-19 / T-141-20 / T-1120-21

FEDERAL COURT
CLASS PROCEEDING

BETWEEN:

XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige), JONAVON JOSEPH MEAWASIGE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
CLASS PROCEEDING

BETWEEN:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON,
NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo, CAROLYN BUFFALO, and DICK EUGENE JACKSON also known as RICHARD JACKSON

Plaintiffs

and

HER MAJESTY THE QUEEN
AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
PROPOSED CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

SETTLEMENT AGREEMENT IN PRINCIPLE
(Compensation)

WHEREAS:

(a) On March 4, 2019, Xavier Moushoom commenced a proposed class action under Court File Number T-402-19 (the "**Moushoom Action**"), seeking compensation for discrimination dating back to April 1, 1991.

(b) On January 28, 2020, the Assembly of First Nations and other plaintiffs also filed a proposed class action under Court File Number T-141-20 (the "**AFN Action**") regarding similar allegations dating back to April 1, 1991.

(c) On July 7, 2021, the Honourable Justice St-Louis ordered that the Moushoom Action and the AFN Action be consolidated with certain modifications (the "**Consolidated Action**").

(d) The parties to the Consolidated Action engaged in mediation in accordance with the Federal Court Guidelines for Aboriginal Law Proceedings (dated April 2016) to resolve all or some of the outstanding issues in the Consolidated Action.

(e) The Assembly of First Nations and Zacheus Joseph Trout filed a proposed class action under Court File Number T-1120-21 (the "**Trout Action**") regarding the Crown's discriminatory provision of services and products between April 1, 1991 and December 11, 2007. The certification hearing for the Trout Action has been scheduled for September 2022.

(f) The Honourable Leonard Mandamin acted as mediator from November 1, 2020 to November 10, 2021.

(g) On September 29, 2021, in reasons indexed at 2021 FC 969, Justice Favel of the Federal Court of Canada upheld the Canadian Human Rights Tribunal decision made in Tribunal File: T1340/7008 (the "**CHRT Proceeding**") with respect to compensation.

(h) On November 26, 2021, the Federal Court granted certification of the Consolidated Action on consent of the parties.

(i) On or about November 1, 2021, the parties entered into negotiations outside of the Federal Court mediation process.

(j) The parties, by agreement, appointed The Honourable Murray Sinclair to act as chair of the negotiations.

(k) The parties worked collaboratively to determine the class sizes of the Consolidated Action and the Trout Action.

(l) The parties separately engaged experts ("**Experts**") to prepare a joint report on the estimated size of the Removed Child Class, as defined herein, on which the parties would rely for settlement discussions (the "**Joint Report**").

(m) The Experts relied on data provided by Indigenous Services Canada ("**ISC**") in preparing the Joint Report. ISC communicated to the experts and plaintiffs counsel that the data often came from third-party sources and was in some cases incomplete and inaccurate. The Joint Report referred to and took into account these factors.

(n) The Experts estimated that there were 106,200 Removed Child Class Members from 1991 to March 2019. The Experts advised that this class size must be adjusted to 115,000 to cover the period from March 2019 to March 2022 (the "**Estimated Removed Child Class Size**"). The Estimated Removed Child Class Size was determined based on the data received from ISC and modelling taking into account gaps in the data.

(o) Canada provided to the plaintiffs estimates of the Jordan's Principle Class Size, which were between 58,385 and 69,728 for the period from December 12, 2007 to November 2, 2017 (the "**Jordan's Principle Class Size Estimates**").

(p) Based on the Jordan's Principle Class Size Estimates, the plaintiffs estimated the size of the Trout Class, as defined below, to be 104,000.

(q) Based on the Parliamentary Budget Office Report, *Compensation For The Delay and Denial of Services to First Nations Children*, dated February 23, 2021, there are 1.5 primary caregivers per First Nations child.

NOW THEREFORE in consideration of the mutual agreements, covenants, and undertakings set out herein, the parties agree as follows:

DEFINITIONS

1. For purposes of this settlement, the following terms shall have the following meanings:

"**Removed Child Class**" means all First Nations* individuals who:

(i) were under the applicable provincial/territorial age of majority at any time during the Removed Child Class Period**; and

(ii) were taken into out-of-home care during the Removed Child Class Period while they, or at least one of their parents, were ordinarily resident on a Reserve*** or were living in the Yukon.

* First Nations means Indigenous peoples in Canada, including the Yukon and the Northwest Territories, who are neither Inuit nor Métis, and includes:

i. individuals who have Indian status pursuant to the *Indian Act*;
ii. individuals who are entitled to be registered under section 6 of the *Indian Act* at the time of certification; and
iii. individuals who met band membership requirements under sections 10-12 of the *Indian Act* by the time of certification, such as where their respective First Nation community assumed control of its own membership by establishing membership rules and the individuals were found to meet the requirements under those membership rules and were included on the Band List.

** **Removed Child Class Period** means the period between April 1, 1991 and March 31, 2022.

*** **Reserve** means a tract of land, as defined under the *Indian Act*, the legal title to which is vested in the Crown and has been set apart for the use and benefit of an Indian band.

"**Removed Child Family Class**" means all persons who are the brother, sister, mother, father, grandmother or grandfather of a member of the Removed Child Class.

"**Jordan's Principle Class**" means all First Nations individuals who were under the applicable provincial/territorial age of majority and who, during the period between December 12, 2007 and November 2, 2017, did not receive (whether by reason of a denial or a gap) an essential public service or product relating to a confirmed need, or whose receipt of said public service or product was delayed, on grounds, including but not limited to, lack of funding or lack of jurisdiction, or as a result of a jurisdictional dispute with another government or governmental department, contrary to their substantive equality rights and Jordan's Principle.

"**Jordan's Principle Family Class**" means all persons who are the brother, sister, mother, father, grandmother or grandfather of a member of the Jordan's Principle Class.

"**Trout Class**" means all First Nations individuals who were under the applicable provincial/territorial age of majority and who, during the period between April 1, 1991 and December 11, 2007, did not receive (whether by reason of a denial or a gap) an essential public service or product relating to a confirmed need, or whose receipt of said public service or product was delayed, on grounds, including but not limited to, lack of funding or lack of jurisdiction, or as a result of a jurisdictional dispute with another government or governmental department, contrary to their substantive equality rights.

"**Trout Family Class**" means all persons who are the brother, sister, mother, father, grandmother or grandfather of a member of the Trout Class.

The Removed Child Family Class, the Jordan's Principle Family Class and the Trout Family Class definitions are subject to limitations, restrictions and exclusions, as the plaintiffs may decide, in the comprehensive settlement agreement.

2. The parties acknowledge that the intent of this agreement is to ensure that Canada be released from the claims of all Class members in the Consolidated Action and the Trout Action, including all claimants envisaged by the compensation order in the CHRT Proceeding, who do not opt-out. The parties agree to reflect this requirement in negotiating the comprehensive settlement agreement.

SETTLEMENT AMOUNT

3. Canada will pay a total of $20,000,000,000 ($20 billion) (the "**Settlement Funds**") to settle the claims of the Removed Child Class, the Removed Child Family Class, the Jordan's Principle Class, the Jordan's Principle Family Class, the Trout Class, and the Trout Family

Class. Canada will pay the Settlement Funds into an interest-bearing trust account upon the expiry of the appeal period from the judgment approving the settlement, if applicable.

NON-REVERSION OF SETTLEMENT FUNDS

4. No amount or earned interest that remains after the distribution of the Settlement Funds shall revert to Canada. Such amounts will instead be further distributed in accordance with the distribution protocol designed and approved under paragraph 7, below (the "**Distribution Protocol**").

WARRANTIES AND REPRESENTATIONS ON SIZE OF THE SETTLED CLASS

5. The parties acknowledge that, in preparing the Joint Report, the Experts relied on data from ISC to determine the Estimated Removed Child Class Size. Both the plaintiffs and Canada were aware that parts of this data came from third parties, was incomplete and, in some cases, inaccurate. The parties, including Canada, took account of the nature of this data in entering into this settlement.

6. Canada warrants and represents that it provided to the Experts all of the data in Canada's possession relating to the Estimated Removed Child Class Size; however, Canada does not represent or warrant the accuracy of the data it provided nor the accuracy of the Joint Report of the Experts.

DISTRIBUTION

7. The design and implementation of the Distribution Protocol, as well as the breakdown of the Settlement Funds (the "**Breakdown**") shall be within the sole discretion of the plaintiffs to the

Consolidated Action and the Trout Action, subject to the approval of the Court. The plaintiffs will establish the Distribution Protocol and may seek input from the First Nation Child and Family Caring society, as well as from such other experts and First Nations stakeholders as the plaintiffs deem in the best interests of the class members. The Breakdown shall be determined by the Plaintiffs and class counsel, and agreed upon as part of the comprehensive settlement agreement.

8. Notwithstanding paragraph 7 above, Canada shall have standing to make submissions on the Distribution Protocol at the hearing on the motion to approve same before the Federal Court.

RELEASE

9. As consideration for the payment of the Settlement Funds and the other obligations set forth herein, Canada shall be fully and finally released and discharged from any and all compensation claims asserted in the CHRT Proceeding, the Consolidated Action and the Trout Action for damages of all kind, including, without limitation, compensatory damages, punitive damages and exemplary damages either at common law, equity or civil law, and damages for the violation of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, and the *Canadian Charter of Rights and Freedoms* by all members of the Removed Child Class, the Removed Child Family Class, the Jordan's Principle Class, the Jordan's Principle Family Class, the Trout Class, and the Trout Family Class who do not opt out of the class action within the Opt-out Period defined in paragraph 12, below.

CONSENT TO CERTIFICATION OF TROUT ACTION

10. Canada will consent to certification of the Trout Action upon the signing by the parties of this Agreement in Principle. The form and content of the certification order is to be agreed upon

within 14 days of the signing of this agreement. Any disagreement as to the form and content of the certification order is to be decided by the Federal Court.

CONSENT TO ORDER OF CANADIAN HUMAN RIGHTS TRIBUNAL

11. The Assembly of First Nations and Canada will jointly seek an order from the Canadian Human Rights Tribunal declaring that the Order for compensation has been fully satisfied. Class counsel, on behalf of some or all of the representative plaintiffs to the Consolidated Action and the Trout Action, will seek interested party status and/or standing to make representations before, and to answer questions posed by, the Canadian Human Rights Tribunal in respect of same. Canada consents to class counsel obtaining such standing, and the Assembly of First Nations may take whatever position it wishes in respect thereof. The parties will take all necessary steps to support the application, including filing such evidence and submissions as may be required.

OPT-OUT

12. The opt-out deadline will be six (6) months after distribution of the Notice of Certification and Settlement Approval Hearing or such other date as may be directed by the Court (the "**Opt-out Period**").

OWNERSHIP AND CONTROL OF HISTORICAL RECORDS

13. Provisions as to the ownership and control of documents will be agreed upon as part of the comprehensive settlement agreement to be entered into by the parties.

SOCIAL BENEFITS

14. Upon approval of the comprehensive settlement agreement by the Federal Court, Canada will write to all provincial and territorial Deputy Ministers responsible for child and family services, health, and education, as well as other relevant Deputy Ministers, to encourage them to collaborate in:

    (a) exempting class member claims payouts under this settlement agreement from taxation, the Children's Special Allowance, social assistance payments, post-majority care or other provincial/territorial benefits "claw backs"; and

    (b) ensuring that receipt of any compensation under this settlement shall in no way affect funding received through a Jordan's Principle request, whether pending or approved.

15. Canada shall not in any way consider receipt of compensation under this settlement as a factor in deciding any pending, approved or future requests pursuant to Jordan's Principle.

TAXABILITY

16. It is the intention of the parties that the Settlement Funds, including the interest earned on the Settlement Funds awaiting distribution, will be distributed to class members as compensation, as opposed to "income" subject to taxation. Furthermore, Canada will seek an opinion from the Canada Revenue Agency that compensation received by any class member from the Settlement Funds as well as any interest income on the Settlement Funds awaiting distribution, including any structured payment if applicable, is not "income" for income tax purposes, and

that such amounts are accordingly exempt from taxation. Such opinion will be provided prior to the finalization of the comprehensive settlement agreement.

SUPPORT TO CLASS MEMBERS AND ADDITIONAL COSTS OF THE COMPENSATION PROCESS

17. As part of the comprehensive settlement agreement, the parties will negotiate provisions as to the parameters of culturally sensitive health, information, and other supports to be provided to class members during the claims period, as well as funding for health care professionals to deliver support to class members who suffer or may suffer trauma for the duration of the claims process.

18. The parties agree that provisions as to the funding to the Assembly of First Nations for the provision of assistance to claimants in completing relevant compensation forms will be negotiated by the parties as part of the comprehensive settlement agreement to be entered into by them.

19. Without limitation to the foregoing, Canada will pay for mental health, and cultural and spiritual supports, navigators to promote communications and provide referrals to health services, AFN line liaisons, trustees to manage funds, records to support claimant eligibility from provinces, territories, and agencies, and professional services (taxonomy and actuarial services), and reasonable fees relating to a structured settlement (if applicable) to be agreed. For greater clarity, this agreement shall not be interpreted as an agreement by any party that structured settlements, financial literacy or like programs for adults are required or in order; these items will be the subject of discussion and agreement for the comprehensive settlement agreement.

20. No such amounts will be deducted from the Settlement Funds.

NOTICE AND OTHER ADMINISTRATION FEES

21. Canada will fund reasonable notice and other administration fees involved in carrying out this settlement agreement, including, but not limited to, information and notice to the class members about certification, this settlement and the claims process, as well as third-party administration costs. Details of this provision will be agreed upon as part of the comprehensive settlement agreement to be entered into by the parties.

22. No such amounts will be deducted from the Settlement Funds.

LEGAL FEES

23. Canada will pay reasonable legal fees to class counsel, over and above the Settlement Funds. A disagreement between the parties over legal fees shall not prevent the parties from signing the comprehensive settlement agreement. Canada and class counsel shall participate in mediation if they are unable to agree upon the legal fees, to be presided over by a mediator to be agreed upon by and between Canada and class counsel or, failing agreement, appointed by the Federal Court. In the event that Canada and class counsel are not able to agree upon legal fees during mediation, , fees will be subject to the approval of the Federal Court. Canada shall have standing to make submissions to the Court regarding such fees.

24. No such amounts will be deducted from the Settlement Funds.

PUBLIC APOLOGY

25. Canada will propose to the Office of the Prime Minister that the Prime Minister make a public apology for the discriminatory conduct underlying the class members' claims and the past and ongoing harm it has caused.

DISPUTES

26. The judge case-managing the Consolidated Action shall be seized of and have jurisdiction over any disputes arising as to the interpretation of this agreement in principle.

COMPREHENSIVE SETTLEMENT AGREEMENT

27. The parties shall draft a comprehensive settlement agreement by no later than March 31, 2022. The comprehensive settlement agreement will set out in full detail all aspects of the proposed settlement, including notice to class members, administration of the settlement, the Distribution Protocol, Breakdown of the Settlement Funds, investment of funds, the creation of a *cy près* fund for emergency relief, and all other matters relevant to this settlement.

28. This settlement is conditional upon the CHRT confirming the satisfaction of its Order for compensation and the Compensation Framework Order, as well as the approval by the Federal Court of a final comprehensive settlement agreement to be entered into by the parties.

29. Canada enters into this Agreement in Principle on the condition that an agreement in principle be reached on long-term reform. If this condition is not fulfilled or waived by Canada by March 31, 2022, then the plaintiffs are entitled to take the position that there is no longer agreement

as to the amount of the Settlement Funds, unless such deadline is extended by the parties in writing.

30. This settlement may be signed in counterpart and exchanged by electronic means.

31. The parties agree to draft the present agreement in principle in English. *Les parties conviennent de rédiger la présente entente de principe en anglais.*

Signed at TORONTO, this 29th day of DECEMBER 2021:

CANADA, as represented by the Attorney General of Canada
BY:

Attorney General of Canada
for the defendant

THE PLAINTIFFS, as represented by class counsel
BY:

Sotos LLP/Kugler Kandestin LLP/Miller Titerle + Co.
for the plaintiffs
Xavier Moushoom, Jeremy Meawasige (by his litigation guardian Jonavon Meawasige), Jonavon Joseph Meawasige, and Zacheus Joseph Trout

Nahwegahbow, Corbiere/Fasken LLP/Stuart Wuttke
for the plaintiffs
Assembly of First Nations, Ashley Dawn Bach, Karen Osachoff, Melissa Walterson, Noah Buffalo-Jackson By His Litigation Guardian, Carolyn Buffalo, Carolyn Buffalo, and Dick Eugene Jackson Also Known as Richard Jackson

Date signed December 31, 2021

This is **Exhibit "J"** to the Affidavit of David Sterns, Affirmed remotely before me in the City of Toronto, in the Province of Ontario, on October 6, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration remotely

_____

Commissioner for taking Affidavit
(or as may be)

Georgia Elizabeth Scott-McLaren, a Commissioner, etc.
Province of Ontario, for
Sotos LLP, Barristers and Solicitors
Expires February 20, 2024

Canadian Human Rights Tribunal
Tribunal canadien des droits de la personne

Ottawa, Canada K1A 1J4

October 24, 2022

By e-mail

(See Distribution List)

Dear Parties,

Re: First Nations Child and Family Caring Society et al. v. Attorney General of Canada
Tribunal File: T1340/7008

The Panel wishes to provide the parties with the following letter decision.

I. Introduction

The Panel congratulates the AFN and Canada for making important steps forward towards reconciliation and for their collaborative work on the Final Settlement Agreement on compensation for the class members in the class action (FSA). The FSA is outstanding in many ways, it promises prompt payment, it is a First Nations controlled distribution of funds, and it allows compensation in excess of what is permitted under the *CHRA* for many victims/survivors. The FSA aims to compensate a larger number of victims/survivors going back to 1991. The Panel wants to make clear that it does recognize First Nations inherent rights of self-government and the importance of First Nations making decisions that concern them. This should always be encouraged. The Panel believes this was the approach intended in the FSA which was First Nations-led.

As the Panel has done in the past, this letter is a summary decision. It is intended to convey the results of the Panel's deliberations to the parties immediately. The Panel's decision with its supporting analysis is lengthy and will take more time to complete. All the points identified in this letter will be fully explained in the forthcoming set of reasons, including providing the full reasoning and authorities to support the Panel's conclusions. Nevertheless, the Panel will work to release those reasons shortly. In the meantime, communicating the results of the Panel's analysis is intended to minimize the delay for all parties involved – the victims/survivors whose rights are being advanced in this complaint and those being represented in the class action process. The Panel recognizes the benefit of the parties continuing negotiations and hopes providing the Panel's determinations ahead of the full reasons will assist the parties.

II. Summary of the Context

In 2016, the Tribunal released *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 [*Merit Decision*] and found that this case is about children and how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities. The Tribunal found that Canada racially discriminated against First Nations children on reserve and in the Yukon in a systemic way not only by underfunding the First Nations Child and Family Services Program (FNCFS) but also in the manner that it designed, managed and controlled it. One of the worst harms found by the Tribunal was that the FNCFS Program failed to provide adequate prevention services and sufficient funding. This created incentives to remove First Nations from their homes, families and communities as a first resort rather than as a last resort. Another major harm to First Nations children was that zero cases were approved under Jordan's Principle given the narrow interpretation and restrictive eligibility criteria developed by Canada. The Tribunal found that beyond providing adequate funding, there is a need to refocus the policy of the program to respect human rights principles and sound social work practice in the best interest of children. The Tribunal established Canada's liability for systemic and racial discrimination and ordered Canada to cease the discriminatory practice, take measures to redress and prevent it from reoccurring, and reform the FNCFS Program and the 1965 Agreement in Ontario to reflect the findings in the *Merit Decision*. The Tribunal determined it would proceed in phases for immediate, mid-term and long-term program reform and financial compensation so as to allow immediate change followed by adjustments and finally, sustainable long-term relief. This process would allow the long-term relief to be informed by data collection, new studies and best practices as identified by First Nations experts, First Nations communities and First Nations Agencies considering their communities' specific needs, the National Advisory Committee on child and family services reform and the parties.

The Tribunal also ordered Canada to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's Principle. Jordan's Principle orders and the substantive equality goal were further detailed in subsequent rulings. In 2020 CHRT 20 the Tribunal stated that:

> Jordan's Principle is a human rights principle grounded in substantive equality. The criterion included in the Tribunal's definition in 2017 CHRT 14 of providing services "above normative standard" furthers substantive equality for First Nations children in focusing on their specific needs which includes accounting for intergenerational trauma and other important considerations resulting from the discrimination found in the *Merit Decision* and other disadvantages such as historical disadvantage they may face. The definition and orders account for First Nations' specific needs and unique circumstances. Jordan's Principle is meant to meet Canada's positive domestic and international obligations towards First Nations children under the *CHRA*, the *Charter*, the *Convention on the Rights of the Child* and the *UNDRIP* to name a few. Moreover, the Panel relying on the evidentiary record found that it is the most expeditious mechanism currently in place to start eliminating discrimination found in this case and experienced by First Nations children while the National Program is being reformed. Moreover, this especially given its substantive equality objective which also accounts for

> intersectionality aspects of the discrimination in all government services affecting First Nations children and families. Substantive equality is both a right and a remedy in this case: a right that is owed to First Nations children as a constant and a sustainable remedy to address the discrimination and prevent its reoccurrence. This falls well within the scope of this claim.

Consequently, the Tribunal determined all the above need to be adequately funded. This means in a meaningful and sustainable manner so as to eliminate the systemic discrimination and prevent it from reoccurring.

The Tribunal issued a series of rulings and orders to completely reform the Federal First Nations Child and Family Services Program Child. In 2019, the Tribunal ruled and found Canada's systemic and racial discrimination caused harms of the worst kind to First Nations children and families. The Tribunal ordered compensation to victims/survivors and, at the request of the complainants and interested parties, the Tribunal made binding orders against Canada to provide compensation to victims/survivors. The Tribunal then issued a series of compensation process decisions at the parties' requests and this process came to an end in late 2020 when Canada decided to judicially review the Tribunal's compensation decisions and halt the completion of the compensation process's last stages which would have allowed distribution of the compensation to victims/survivors.

The Tribunal announced in 2016 that it would deal with compensation later, hoping the parties would resolve this before the Tribunal ruled and made definitive orders. The Tribunal can clarify its existing compensation orders but it cannot completely change them in a way that removes entitlements to victims/survivors. The approach to challenge these key determinations is through judicial review.

The Tribunal encouraged the parties for years to resolve this.

The Panel was clear in 2016 CHRT 10 that it hoped that reconciliation could be advanced through the parties resolving remedial issues through negotiations rather than adjudication (para. 42). The Panel noted in 2016 CHRT 16 that some of the parties cautioned the Tribunal about the potential adverse impacts that remedial orders could have (para. 13). Accordingly, the Tribunal strongly encouraged the parties to negotiate remedies, including on the issue of compensation. The Tribunal offered to work with the parties in mediation-adjudication to help the parties craft remedies that would best satisfy their needs and most effectively provide redress to victims. Only Canada declined.

The issue left unresolved, the Tribunal was obligated to rule on compensation and the compensation process. In addressing compensation, the Tribunal was required to make challenging decisions addressing novel issues. Canada advanced multiple arguments opposing compensation. The Tribunal has made legal findings based on the evidence and linking the evidence to harms justifying orders under the *CHRA*. This exercise is made by the Panel who exercise a quasi-judicial role under quasi-constitutional legislation. The Tribunal, guided by all the parties in this case, including the AFN, made bold and complex decisions in the best interests of First Nations children and families. The Tribunal's decisions have been upheld by the Federal Court. Now that the Tribunal has issued those compensation decisions on quantum and categories of victims, they are no longer up for negotiation. They are a baseline. Negotiation involves compromise, which can sometimes result in two steps forward and one step back and this may be found acceptable by the

parties to the negotiation. However, negotiation cannot be used to take a step backwards from what the Tribunal has already ordered.

Once it found systemic discrimination, the Panel worked with rigor to carefully craft sound findings of fact and law that recognized fundamental rights for First Nations children and families in Canada and protect and vindicate those rights. The same Panel that made those liability findings against Canada is asked to let go of its approach to adopt a class action approach serving different legal purposes. The Panel was conscious that class actions were forthcoming and made sure they were not hindered by the Tribunal's compensation process. Now it is the Tribunal's decisions who are being hindered by the FSA applying an early-stage class action lens. Indeed, the parties did not finalize the compensation distribution process to allow for the distribution of funds for the compensation already ordered by this Tribunal in 2019. They pursued another approach instead that did not fully account for the *CHRA* regime and the Tribunal's orders.

In May 2022, the AFN and Canada advised the Tribunal that they needed a hearing in June to present the FSA. The Tribunal set aside all summer to deal with the matter expeditiously and to have sufficient time to properly consider over 3000 pages of documents but the AFN and Canada advised that class counsel were not yet ready to sign the FSA. The FSA was finally signed on July 4, 2022, and announced publicly but was only presented to the Tribunal on July 22, 2022. The motion to address the FSA was heard in September to afford fairness to all parties. The Panel agrees the victims/survivors have been waiting long enough and emphasizes that they could have been compensated at any time since the Tribunal's decision in 2016 and even more so after the compensation decision in 2019.

The Panel appreciates the parties' work to prepare for this hearing on a short-time frame and the submissions they provided both in writing before the hearing and at the hearing. There were a few issues on which the Panel had outstanding questions after the hearing. The Panel Chair requested that the parties address these outstanding questions. Once again, the Panel thanks the parties for responding to these questions promptly.

The Panel emphasizes that it acknowledges First Nations inherent rights to self-determination and self-governance. The Panel recognizes that the Canadian legal system views this motion as balancing individual and collective rights, while First Nations may frame the dialogue around responsibilities. The Tribunal emphasizes that First Nations rights holders are best placed to make decisions for their own citizens in or outside the courts. The Tribunal stresses the important fact that First Nations are free to make agreements concerning their citizens. The Tribunal understands the difficult choices made by the AFN and why the AFN has made them. First Nations had to work with $20 billion when they were asking much more for all cases.

III. The Tribunal is not functus to consider if the FSA fully satisfies the Tribunal's orders

The Panel remained seized of all its compensation orders to ensure effective implementation of its orders.

The Panel is not barred by the Federal Court decision to review the FSA in order to consider if the FSA fully satisfies the Tribunal's orders.

The Panel agrees with Canada and the AFN that the Federal Court in affirming the Tribunal's orders found the Tribunal had made reasonable decisions within the range of different reasonable outcomes.

The Panel agrees with Canada that this is not the first time the Tribunal has significantly amended an order, as demonstrated by the order in 2022 CHRT 8. Although consent is not a precondition to jurisdiction, both the Commission and the Caring Society agreed that the Tribunal had the authority to make that order. The 2022 CHRT 8 order made substantive changes to this Tribunal's previous orders. It ordered Canada to fund post-majority care at actual costs; fund additional research by the Institute of Fiscal Studies and Democracy; fund on an ongoing basis prevention measures at $2500, adjusted for inflation, per person for those persons on reserve and in the Yukon; and, finally, it set March 31, 2022, as the end date for compensation for removed children and their caregiving parents and grandparents.

The Panel finds that the 2022 CHRT 8 amendments clearly are in line with the retained jurisdiction to ensure discrimination is eliminated and does not reoccur.

The preceding example supports that the Tribunal had retained its jurisdiction to ensure effective implementation of its orders. The Tribunal expanded its orders and amended its orders to establish an end date for compensation based on the evidence provided that removals of children from their communities are being eliminated through sustainable and adequately funded community-led and developed programs.

Moreover, to determine if the Tribunal can amend its orders, one needs to look at the nature of the amendments sought and the evidence supporting the amendments.

The Panel finds the FSA is principled and carefully thought through and substantially satisfying the Tribunal's orders.

The real legal difficulties here are first that the FSA is not made on consent of all the parties to these proceedings and second arrives after, not before, the Tribunal made orders recognizing victims/survivors and therefore, the FSA proposes to remove rights from victims/survivors who have already been recognized in these proceedings. This situation could have been entirely different and more appropriate if the FSA had been presented to the Tribunal before the Tribunal had issued its orders or if the FSA included all victims/survivors covered by the Tribunal's orders. Now the Tribunal has made entitlement orders upheld by the Federal Court. The Tribunal's decision remains untouched at this time. It is open to the parties to come back before the Tribunal for the implementation phase.

The compensation process continues at this time and the Tribunal foresaw that the parties could appear before the Tribunal to seek clarifications and further orders on process and implementation. An example of seeking clarification is when the parties' different interpretation of the Tribunal's orders impact implementation of the orders. For example, in this joint motion, the parties disagree on who is part of the removed child category under the Tribunal's orders. This is an issue that the Tribunal, having retained jurisdiction on all its orders, can examine and clarify. However, his only came up as part of this joint motion.

Moreover, the parties could not contract out or ask the Tribunal to amend its evidence-based findings establishing systemic racial discrimination and related orders in the *Merit Decision* to a finding that there never was racial discrimination and therefore no, remedy is required. In the same

vein, if evidence-based findings are made that victims have suffered and should be compensated, the parties cannot contract out or ask the Tribunal to amend its previous evidence-based findings and related orders to a finding that certain victims entitled by this Tribunal have not suffered and should no longer receive compensation.

This is significantly different than asking the Tribunal to make a finding based on new evidence presented that demonstrates that some aspects of the discrimination found by this Tribunal has ceased in compliance with the injunction-like order made by this Panel to cease the discriminatory practice or that some amendment requests may enhance the Tribunal's previous orders to eliminate discrimination (2022 CHRT 8). The Tribunal's retention of jurisdiction is to ensure its orders are effectively implemented. This includes not narrowing its orders (see for example Jordan's Principle definition in 2017 CHRT 14) and eliminating the discrimination found in a complex nation-wide case involving First Nations from all regions. This is done through reporting, motions, clarification requests, etc. and findings are made on the evidence.

Moreover, the Tribunal's compensation decisions focused on what led to the removal of First Nations children and caused harm to children and families rather than the harms that happened after their removal given that this was not the evidence provided. Both should be compensated. The Tribunal made findings on the evidence it had at the time. The Tribunal foresaw that other harms could be compensated and much more than the *CHRA* cap through other recourses. This was explained in the compensation decision.

Upon consideration of the evidence, the FSA and all materials and submissions filed as part of this joint motion, the Panel accepts to make a declaration amounting to a finding (the Tribunal does not have authority to award declaratory relief: see *Merit Decision* at paras 472-473) with recommendations in the interest of reconciliation in Canada, expeditious distribution of compensation to victims/survivors and in recognizing the exceptional circumstances surrounding this FSA. The current circumstances are unique and distinguishable from the Panel's body of case law and the Tribunal's future cases.

IV. The Tribunal grants the motion in part

Summary of reasons

First, the AFN and Canada requested a finding that the FSA fully satisfies the Tribunal's *Compensation Decision* and related compensation orders. The AFN and Canada request that this finding is conditional on the Federal Court approving the FSA. Alternatively, the AFN and Canada request the Panel to amend its compensation orders to reflect the terms of the FSA or to find that in case of conflict between the FSA and the Tribunal's compensation decisions, the FSA will take precedence.

The Tribunal had difficulty making the decision given that the agreement occurred after the evidence-based findings and orders were made confirming compensation entitlement to categories of victims/survivors by this Tribunal. This important fact is determinative in considering the FSA. The Tribunal was open to adding people which is exactly what the FSA does and on this point the Tribunal is very pleased. However, the Tribunal never envisioned disentitling the victims who have already been recognized before the Tribunal through evidence-based findings in previous rulings. The difficulty would not have occurred but for the fixed amount of $20 billion that Canada offered, which forced First Nations to make difficult choices. Some of those choices are

understandable from a First Nations viewpoint recognizing Indigenous collective inherent rights but not for Canada under the human rights regime. While we understand that Canada respected that the negotiations were First Nations led, Canada is a signatory to the FSA and cannot contract out of its human rights obligations. It cannot collaterally attack the Tribunal's decisions. This would not have occurred if Canada had given sufficient funds to ensure it first compensates all the victims in front of the Tribunal who were the first to benefit from legal findings of a Tribunal based on tested evidence and legal analysis and compensation orders subsequently upheld by the Federal Court. Canada decided to negotiate a settlement of class actions that are at a very early stage and where an exercise such as the FSA is optimal. However, it sought to incorporate a Tribunal case at a very late stage, after findings on evidence have been made and orders on quantum and categories of victims were issued by the Tribunal. It also chose to impose a class action lens to a human rights process. This is feasible and should be encouraged if the Tribunal's reasons, orders on quantum and categories of victims are honored in the FSA. Denying entitlements once recognized in orders is an unfair and unjust outcome that the Tribunal cannot endorse given the *CHRA*'s objectives and mandate. The Tribunal's authority flows from its quasi-constitutional legislation and the Tribunal is, according to the Supreme Court, the " final refuge of the disadvantaged and the disenfranchised ".

On this point the Tribunal answers two specific questions as follows:

1. Are all the categories of victims in the Tribunal's orders covered by the FSA?

    a. No.

2. If the answer to question 1 is no, can the Tribunal find that the FSA fully satisfies the Tribunal's orders if categories of victims have been removed from the Tribunal's orders?

    a. No.

Specific derogations from the Tribunal's Compensation Orders

The parties addressed four potential derogations from the Tribunal's compensation orders in the FSA:

1) Entitlement for First Nations children removed and placed in non-ISC funded placements
2) Estates of deceased caregiving parents and grandparents are not entitled to compensation
3) Certain caregiving parents and grandparents will receive less compensation
4) Some Jordan's Principle victims/survivors may receive less compensation

The Tribunal will briefly address them in turn here:

1) Entitlement for children removed and placed in non-ISC funded placements

The FSA is adding another requirement in order to award compensation to First Nations children. The Tribunal decisions provide compensation for children removed from their homes, families and communities as a result of the FNCFS Program's discrimination. The FSA narrows it into removed children who were also placed in ISC funded care. In light of the evidence presented throughout this case, the Tribunal ordered the maximum compensation available under the *CHRA* for the great harms caused by the removal of First Nations children rather than the number of years in care or the other harms that occurred in care. The Tribunal explained that a removed child or caregiving

parent or grandparent had other recourses in addition to this maximum compensation that they could pursue to obtain higher amounts of compensation for the additional harms they suffered. The FSA and class actions focus on these additional harms and the Tribunal agrees this is an appropriate focus for the FSA and the class actions. However, the requirement of removal and placement in care in an ISC funded location cannot be considered a proper interpretation of the Tribunal's findings and orders. The Panel disagrees with the AFN and Canada's interpretation of the Tribunal's orders on this point. The Caring Society properly characterized the Tribunal's findings and orders in that regard.

Moreover, the AFN's interpretation of the children eligible for compensation because of their removal by child and family services was raised for the first time in this motion. The AFN may have some valid points about the challenges in identifying the children covered by the Tribunal's Compensation Orders. However, the manner in which these arguments were raised does not permit the Tribunal to assess the AFN's underlying arguments. While there was some limited evidence presented as part of this motion, the parties' arguments essentially focused on what the Tribunal had determined in previous motions. This was appropriate given the nature of this motion. The AFN's arguments about the ambiguity in which children are covered by the Tribunal's orders and the challenges in providing compensation to certain children are better addressed in a separate motion where the parties have sufficient notice to lead evidence on this point. The Tribunal is open to further clarifying and addressing implementation challenges for these victims. In fact, if there is ambiguity or outstanding challenges that will delay compensation, those issues should be resolved now so that the parties are able to implement the Compensation Framework promptly. However, the FSA's attempt to unilaterally remove these victims from the scope of the Tribunal's compensation through the class action proceeding is close to being a collateral attack on the Tribunal's decisions.

Further, in the *Merit Decision*, the Panel discussed the term in care:

> [117] Protection services are triggered when the safety or the well-being of a child is considered to be compromised. If the child cannot live safely in the family home while measures are taken with the family to remedy the situation, child welfare workers will make arrangements for temporary or permanent placement of the child in another home where he or she can be cared for. This is called placing the child "in care". The first choice for a caregiver in this situation would usually be a kin connection or a foster family. Kinship care includes children placed out-of-home in the care of the extended family, individuals emotionally connected to the child, or in a family of a similar religious or ethno-cultural background.
>
> [119] There are circumstances, however, when the risk to the child's safety or well-being is too great to be mitigated at home, and the child cannot safely remain in his or her family environment. In such circumstances, most provincial statutes require that a social worker first look at the extended family to see if there is an aunt, an uncle or a grandparent who can care for the child. It is only when there is no other solution that a child should be removed from his or her family and placed in foster care under a temporary custody order. Following the issuance of a temporary custody order, the social worker must appear in court to explain the placement and the plan of care for the child and support of the family. The temporary custody order can be renewed and eventually, when all efforts have failed, the child may be placed in permanent care.

2) Estates of caregiving parents and grandparents

Estates of deceased caregiving parents and grandparents in the FSA are not entitled to direct financial compensation unless the caregiver passes away after submitting an application for compensation. In contrast, the Tribunal's orders provide compensation to the estates of eligible caregivers regardless of when they passed.

3) Certain caregiving parents and grandparents will receive less compensation

The Tribunal's orders account for the compound effect on a caregiving parent or grandparent who has already experienced the pain and suffering of the removal of a child and now experiences the egregious harm of losing another one or more children as a result of the systemic racial discrimination. The FSA reduces the amount of compensation for those victims who were retraumatized and suffered greatly.

4) Some Jordan's Principle victims/survivors may receive less compensation

While the Tribunal understands the rationale for the FSA's phased approach on this aspect, the Tribunal is at a very different stage in the proceedings and has a different mandate. Further, the Tribunal is asked to accept the end of its jurisdiction on the compensation issue without having the full picture on this point as opposed to the Federal Court who will supervise the implementation of the FSA. The Tribunal's role is quite different then that of a class action process. Further, the Tribunal's role includes making findings on the evidence presented and, on this point, it is difficult to make proper findings which indicates that the request may be premature for this category.

While it is obvious that one of the reasons the AFN and Canada are proposing compromising the compensation ordered to victims in this case is the fixed amount of funds Canada provided to resolve this issue, the Tribunal is not suggesting that Canada should provide unlimited funding. The compensation orders require finite compensation to a finite class of victims/survivors. While the exact number of victims/survivors eligible for compensation is not known, it is not an unlimited number.

Opting-out provision

The Tribunal agrees with the Caring Society that under the FSA, victims will need to opt-out of the class action in short time frame. Further, the short time to make an opt out decision, particularly for child victims, is made more challenging because the FSA has incomplete definitions of terms and criteria that will directly affect compensation entitlements. This situation places some victims in an unfair position wherein they are being forced to make a decision to opt out without knowing what they can receive under the FSA versus their entitlement to human rights compensation pursuant to the Tribunal's orders. The unfairness deepens as the FSA seems to force victims to opt out of both avenues of compensation if they are dissatisfied with the class action deal struck at the Federal Court. Such an opt-out scheme would place victims who are receiving less than their CHRT entitlement of $40,000 in an untenable situation whereby they either accept reduced entitlements under the FSA or opt-out of the FSA to be left to litigate against Canada from scratch. Such a proposal deepens the infringement of dignity for victims and is therefore inconsistent with a human rights approach. This is concerning.

Moreover, the evidence in these proceedings has demonstrated many times that some First Nations often lack capacity by no fault of their own to respond rapidly to deadlines. For example, in 2020

CHRT 24, the Chiefs of Ontario objected to a firm, 13-month, deadline imposed by Canada to submit claims for retroactive reimbursement of Band Representative Services and a firm deadline for current-year claims for Band Representative Services. COO argued this period was too short. This Tribunal agreed with the COO. This is even more of an issue for individual victims given the incomplete information provided to the public by the AFN and Canada on the Tribunal's compensation orders.

Again, in accordance with the overarching goal of reconciliation, compensation that can be forthcoming to a majority of victims before the Tribunal and many more in a timely manner, in the spirit of UNDRIP and in recognition of First Nations right to self-government.

The Tribunal finds as follows:

The Tribunal is not functus to consider if the FSA fully satisfies the Tribunal's orders.

The Tribunal finds the FSA substantially satisfies the Tribunal's orders. The FSA can potentially fully satisfy the Tribunal's orders if it is amended to include all the categories of victims and the compensation amounts included in the Tribunal's orders and to include the possibility for them to opt-out of the FSA in a manner that is fully responsive and rectifies the areas of concerns mentioned above.

The Tribunal cannot declare or find the FSA fully satisfies the Tribunal's orders given that some victims/survivors who were recognized by and awarded compensation by this Tribunal have been removed or provided with reduced compensation. The Tribunal's orders were upheld by the Federal Court. The evidence currently before the Tribunal does not permit a finding that the FSA fully satisfies the Tribunal's orders. This difficulty is more than technical; it is a real legal one.

The Tribunal finds the FSA respects numerous and many important components of the Tribunal's compensation orders such as not retraumatizing victims, avoiding children testifying and with a culturally appropriate process. The Panel generally accepts the FSA and finds it more advantageous on many aspects and understands the principled choices made by First Nations. The Panel also sees great value in having one process supervised by the Federal Court for the compensation issue. The Panel would likely have approved a settlement along the lines of the FSA if it had been asked to do so prior to issuing its compensation entitlement decision or if all victims already recognized by the Tribunal's orders were included.

The Tribunal always contemplated adding more categories of compensable victims and offered to do so but the AFN turned this offer down in its submissions given that they had concerns that the compensation process with Canada would reach an impasse. The compensation orders were still judicially reviewed. The Tribunal never envisioned removing recognized categories of victims/survivors after it made its findings and orders based on evidence of harm. After the Tribunal makes an order entitling a category of victims to compensation, those orders have finality and the only options for removing the entitlement is through judicial review. While the Panel agrees it did not have the FSA before it at the time it made its orders, the Panel finds no legal basis justifying the denial of compensation to categories of victims recognized by this Tribunal. Moreover, the Tribunal would review the victims' eligibility for compensation if directed by the reviewing court.

The Panel stresses this context to emphasize that it urged the parties to negotiate an agreement on compensation to avoid making very specific orders that First Nations later argue against. This can

easily be avoided with deals in earlier stages of proceedings where no compensation has been ordered. The purpose of the Tribunal's retained jurisdiction on compensation was always to clarify, add and refine the orders. It was never to disentitle or remove victims. A careful reading of the Tribunal's decisions makes this clear.

The FSA is driven both by the class action cases and class action law. It does not apply a human rights lens and does not uphold Canada's human rights obligations under the Tribunal's orders. While the AFN in its submissions urges the Panel to consider a class action lens, the AFN has not persuaded the Panel why the Tribunal should apply this lens instead of an assessment based on existing human rights jurisprudence, especially as articulated in earlier decisions in this case. Even if the Panel were to use a class action lens, the AFN and Canada have not sufficiently explained how the factors that apply to a class action analysis would be applicable in the current context where many of the beneficiaries of the class action have an existing entitlement to compensation under valid Tribunal orders. While these orders are under judicial review, this is considerably different from the most typical class action context where none of the class action beneficiaries have any legal entitlement to compensation at the time of a settlement approval hearing. Further, the AFN does not sufficiently address how the class action framework applies when considering victims/survivors who would lose entitlement to compensation that they are currently owed by Canada.

Furthermore, the Panel believes that Justice Favel's comments on reconciliation cannot be interpreted to disentitle victims who were recognized by this Tribunal.

The Tribunal declares/finds

The FSA substantially satisfies the Tribunal's orders and, given that the Tribunal cannot order non-parties to negotiate or amend the FSA, recommends:

> Canada negotiates with the class action and Tribunal parties and allocates funds to cover all victims entitled to compensation under the Tribunal decisions. The amounts already ordered by the Tribunal should be the floor.
>
> For example, Canada can pay compensation funds of $20 billion or more if insufficient into a trust within 21 days following this letter-decision in order to generate interest until the time it is ready to roll out compensation in order to compensate human rights victims who were included in the Tribunal's orders but excluded under the FSA.
>
> If the Federal Court does not approve the FSA, the funds could revert to Canada.
>
> This may not be sufficient to cover the excluded categories. The parties to the FSA may need to consider other options.
>
> If all the victims identified and the compensation amounts in the Tribunal's orders are accounted for in the FSA and there is a possibility for them to opt-out of the FSA in a manner that rectifies the areas of concerns mentioned above, the Tribunal will be able to find the FSA fully satisfies the Tribunal's orders.

Alternatively:

Given the real potential for delaying compensation from additional litigation and judicial reviews that may arise from either side as a result of this joint motion, the Tribunal recommends removing the Tribunal approval from the FSA and make the necessary amendments to settle all three class actions and move forward at the Federal Court for approval and pay compensation in early 2023 to victims covered in the class actions. The parties to these proceedings can finalize their unfinished work in a timely manner and come back before the Tribunal to start distributing compensation to victims/survivors in the near future. Again, the Federal Court approved our compensation decisions and determined that they were reasonable, this is a compelling reason supporting our reasons in this decision. This alternative can be achieved regardless of Canada's judicial review at the Federal Court of Appeal.

Furthermore, the Tribunal notes the comments from the parties during the hearing that they are not yet in a position to distribute compensation under the Tribunal's orders and the Compensation Framework. The Tribunal reminds the parties that, absent a stay of the orders, the parties have an obligation to continue to address outstanding compensation issues so that they are in a position to set the earliest implementation date possible.

V. The request to amend the Tribunal's compensation orders to reflect the terms of the FSA is denied

The Tribunal cannot make the alternative order requested to amend its previous orders to conform to the FSA or to elevate the FSA over the Tribunal's orders in case of conflict. The Tribunal reaches this conclusion after considering the applicable case law, the *CHRA* and human rights regime, its previous findings and its previous orders.

Moreover, the FSA's legal framework is driven by the current class actions. Canada did not ensure that an appropriate human rights lens respecting its current human rights obligations and binding orders against it in this case was applied to allow it to agree to the FSA.

The Tribunal is fully aware that applying a human rights lens and its statutory powers to the issue does not provide statutory authority to change or amend the Tribunal's orders in removing rights to categories of victims so that the Tribunal's orders conform to the FSA. This is not permissible by law. The Tribunal is not a political body, it is an adjudicative body deriving its authority from statute and it cannot disturb the legal recourses under the *CHRA* regime to deny quasi-constitutional rights.

The Tribunal cannot overstate the importance of securing victims' rights across Canada. This requires the Tribunal to ensure that victims, who may include Indigenous Peoples and Nations, can pursue a human rights case under the *CHRA* through to a final resolution with fair recourse. Victims must be able to rely on the finality of findings of discrimination and compensation ordered by the Tribunal. Human rights are fundamental rights that are not intended to be bargaining chips that parties can negotiate away. Similar to how human rights legislation establishes minimum standards parties cannot contract out of, the Tribunal's compensation orders that generate binding compensation obligations on Canada. Canada cannot contract out of these obligations through an alternative proceeding.

The case is quite different with long-term reform where not all issues have been adjudicated by the Tribunal. The Tribunal supports First Nations-led solutions to eliminate discrimination if the

evidence advanced proves to eliminate the systemic discrimination found. The Panel reminds the parties that it is a Tribunal created by statute with a mandate to eliminate discrimination in Canada once findings are made, always based on evidence and not opinion. The Tribunal is still seized of the matter and will need to make findings before ending its jurisdiction to ensure discrimination is eliminated and does not reoccur.

The *CHRA* does not grant fleeting rights: once entitlements are recognized under the *CHRA*, they cannot be removed. Once a finding and a compensation order is made to vindicate rights, they may not be revoked absent an order from a reviewing court.

On this point, the Panel understands the AFN advances the FSA on behalf of First Nations Peoples expressing their decisions through an AFN executive decision rather than a Chiefs-in-Assembly resolution and the AFN submits the Panel should not get involved in the AFN's internal affairs. The Panel does not wish to meddle in the AFN's affairs.

However, a number of questions arose out of this joint motion. While these questions are not determinative of the outcome of this decision, the Panel has a number of areas of concern. The Panel also notes the evidence includes concerns raised by a number of First Nations concerning the FSA. However, there are some First Nations supporting it, as demonstrated by the COO resolutions supporting the FSA. There is also sufficient evidence demonstrating that when the AFN and Canada made public statements regarding the FSA, no meaningful steps were made to inform the public, the victims or their families who are entitled to compensation under the Tribunal's orders that they may lose entitlement to compensation under the FSA. In other words, what was communicated to the public was that the FSA only enhances the Tribunal orders when this is not true. Reconciliation also includes the whole truth. These comments do not apply to the AFN's meetings with First Nations to discuss the FSA as the Tribunal has little information on this point.

Again, this is not determinative on this motion but needs to be said and may be revisited in the issue on long-term reform.

In a previous hearing, counsel for the AFN explained that he viewed the AFN like the United Nations. The Panel liked the analogy of sovereign nations meeting to make decisions that concern them. The Panel understood that the Chiefs-in-Assembly resolutions adequately reflect this and ensure an effective process to express their consent after meaningful consultation. Chiefs-in-Assembly resolutions are referenced in previous decisions. This was given considerable weight by the Panel when accepting the AFN's past submissions given the representativity of First Nations through the resolutions made by Chiefs-in-Assembly. In all of the previous rulings made by the Panel, there never was a situation where the Tribunal received evidence of other First Nations disagreeing with the AFN's requested orders. Usually, the AFN provides Chiefs-in Assembly resolutions which bring assurances to the Panel that the rights holders agree with the order requests. This is an efficient way to proceed instead of hearing from each of the 634 First Nations in Canada which could paralyze the Tribunal's proceedings. Furthermore, the Tribunal's *Compensation Decision* (2019 CHRT 39), at paragraph 34 clearly mentions and relies on the Assembly of First Nations' resolution: Special Chiefs Assembly, Resolution No. 85/2018, December 4, 5 and 6, 2018 (Ottawa, ON) re Financial Compensation for Victims of Discrimination in the Child Welfare System. Moreover, the Tribunal's finding that pursuant to AFN resolution 85/201 the AFN is empowered to speak on behalf of First Nations children that have been discriminated against by Canada was upheld by the Federal Court (2021 FC 969, at para. 160).

A question remains as to why an important question such as compensation and the FSA was not addressed in a resolution from the Chiefs-in-Assembly. While the AFN indicates the Chiefs-in-Assembly were presented with the FSA, the FSA was already signed at the time that it was presented. The AFN states that the Chiefs-in-Assembly did not object to the FSA. However, little is said on the absence of a resolution from the Chiefs-in-Assembly. While the Panel agrees with the AFN that requiring all First Nations to agree may jeopardize any agreement, a resolution from the Chiefs-in-Assembly recognizes this reality and provides some assurances to the Panel on such important questions .In this case, the Panel does not have a resolution on the FSA from the AFN in the evidence and the Panel has resolutions voted on by some First Nations who have expressed concerns about the FSA to the AFN. Upon a full consideration of the issues since the recent interested party request ruling and, given that the Tribunal's approval of the FSA could result in ceasing the Tribunal's supervision of the financial compensation aspect of the case if the Tribunal later declares the FSA fully satisfies the Tribunal's orders, the opting-out process for First Nations at the Federal Court does not assist the Tribunal in making a determination in this motion.

The Panel also agrees with the Caring Society's submissions on the issue of free, prior and informed consent. The absence of a Chiefs-in-Assembly resolution in the evidence coupled with an insufficient period to opt-out of the FSA is a concern for this Tribunal.

Finally on this point, the Panel does not believe that this ruling should be interpreted to preclude Self-government or other agreements in the future. The real difficulty in this joint motion is the fact that entitlements orders were already made for victims/survivors by this Tribunal, the orders were upheld by the Federal Court and the compromises were made subsequently.

VI. Conclusion

The Panel does not believe it has a legal basis for granting the amendments requested by the AFN and Canada or for finding that the FSA fully satisfies the Tribunal's compensation orders. Granting the requested orders would disentitle certain victims/survivors from compensation under the Tribunal's orders. The Panel is nonetheless urged to accept this position because it would provide expedited compensation to the victims/survivors being compensated under the FSA. However, the Panel is not persuaded the expedited compensation would actually occur given the possibility of challenging the Tribunal's decision on this joint motion by way of judicial review and the possibility the FSA class action settlement is not approved in the Federal Court. Therefore, there is a risk of providing a false hope to those entitled to compensation under the FSA about the timeframe in which they would receive compensation.

This does not dispose of the Tribunal's retained jurisdiction to ensure systemic discrimination is eliminated. Canada cannot contract out the Tribunal's quasi-constitutional responsibility to eliminate the discrimination found and prevent similar discriminatory practices from arising. It has to occur after an evidence-based finding that satisfies the Tribunal that discrimination is eliminated and prevented from reoccurring or on consent of all, not just some, parties in the Tribunal proceedings and based on compelling evidence that discrimination will be eliminated. The Tribunal urges Canada in the spirit of reconciliation to remove the pressure on victims and First Nations and extend its December 30, 2022, deadline to the agreements to at least March 2023. The Tribunal has requested a minimum of 60 business days to consider long-term reform and will take the appropriate time needed to consider the matter.

The AFN in its oral arguments at the September 2022 hearing submitted that discrimination continues. This can be revisited in the long-term issue.

VII. Final remarks

The Panel honours the First Nations children victims/survivors who are really overcomers, First Nations across Turtle Island, and the First Nations parties in these proceedings who are the AFN, the Caring Society, the COO and the NAN. You are the true heroes.

The Panel also honors the Commission for never losing sight of not only First Nations victims in Canada but also all victims the human rights regime aims to protect.

The Panel honours the CAP, Amnesty International and the Innu Nation for their contributions on other aspects of these proceedings.

The Panel honours Canada for making an important step forward to negotiate in the spirit of reconciliation. However, this work is left unfinished.

The Tribunal's role includes all Peoples in Canada and must protect victims. The Tribunal signals to all victims in Canada that once your rights have been recognized and vindicated, they cannot be taken from you by respondents or the same Tribunal who has vindicated your rights unless ordered by higher Courts.

The Panel believes that the great work accomplished by the parties in these proceedings and the parties to the FSA can be kept alive and move forward if all victims/survivors are included or if the Tribunal’s full approval is no longer required.

Sophie Marchildon, Panel Chairperson
Edward P. Lustig, Tribunal Member

Ottawa, Ontario, October 24, 2022

Should you have any questions, please do not hesitate to contact the Registry Office by e-mail at registry.office@chrt-tcdp.gc.ca by telephone at 613-878-8802 or by fax at 613-995-3484.

Yours truly,

Judy Dubois Digitally signed by Judy Dubois
Location: Ottawa, Ontario
Date: 2022.10.24 13:53:39-04'00'

Judy Dubois
Registry Officer

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This is **Exhibit "K"** to the Affidavit of David Sterns, Affirmed remotely before me in the City of Toronto, in the Province of Ontario, on October 6, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration remotely

Commissioner for taking Affidavit
(or as may be)

Georgia Elizabeth Scott-McLaren, a Commissioner, etc.
Province of Ontario, for
Sotos LLP, Barristers and Solicitors
Expires February 20, 2024

First Nations Child and Family Services, Jordan's Principle, and Trout Class Settlement Agreement

(as revised on April 19, 2023)

Honouring First Nations Children, Youth, and Families

We honour all the children, youth, and families affected by Canada's discriminatory conduct in child and family services and Jordan's Principle. We acknowledge the emotional, mental, physical, spiritual, and yet to be known harms that this discrimination had on you and your loved ones. We stand with you and admire your courage and perseverance while recognizing that your struggle for justice often brings back difficult memories. We pay tribute to those who have passed on to the Spirit World before seeing their experiences recognized in this Agreement.

We are so grateful to Residential School Survivors, Sixties Scoop Survivors, the families of Murdered and Missing Women and Girls and 2SLGBTQQIA persons, First Nations leadership, and the many allies, particularly the children and youth who called for the full implementation of Jordan's Principle, substantively equal child welfare supports and fair compensation for those who were harmed. We thank you for continuing to stand with First Nations children, youth, and families to ensure the egregious discrimination stops and does not recur.

We honour and give thanks to Jordan River Anderson, founder of Jordan's Principle, and his family along with the representative plaintiffs, including Ashley Dawn Bach, Karen Osachoff, Melissa Walterson, Noah Buffalo-Jackson, Carolyn Buffalo, Richard Jackson, Xavier Moushoom, Jeremy Meawasige, Jonavon Meawasige, the late Maurina Beadle, and Zacheus Trout and his two late children, Sanaye and Jacob. We also recognize Youth in and from care, Residential School and Sixties Scoop Survivors who shared their truths to ensure funding for culturally competent and trauma informed supports are available to all affected by this Agreement.

To all the First Nations children, youth and families reading this: remember that you belong. You are children of Chiefs, leaders, matriarchs, and knowledge keepers, and you have the right to your culture, language, and land.

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Schedule H: Opt-Out Form

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Schedule J: Summary Chart of Essential Service, Jordan's Principle, and Trout Approach

SETTLEMENT AGREEMENT

THIS AGREEMENT is dated effective as of April 19, 2023 ("**Effective Date**").

BETWEEN:

XAVIER MOUSHOOM, JEREMY MEAWASIGE by his Litigation Guardian, Jonavon Joseph Meawasige, and JONAVON JOSEPH MEAWASIGE

(together, the "**Moushoom Plaintiffs**")

AND:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo, CAROLYN BUFFALO, and DICK EUGENE JACKSON also known as RICHARD JACKSON

(together, the "**AFN Plaintiffs**")

AND:

ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT

(together, the "**Trout Plaintiffs**")

AND:

HIS MAJESTY THE KING IN RIGHT OF CANADA

("**Canada**")

(collectively, "**Parties**")

WHEREAS:

A. On March 4, 2019, the Moushoom Plaintiffs commenced a proposed class action in the Federal Court under Court File Number T-402-19 (the "**Moushoom Action**"), seeking compensation for discrimination dating back to April 1, 1991.

B. On January 28, 2020, the AFN Plaintiffs also filed a proposed class action in the Federal Court under Court File Number T-141-20 (the "**AFN Action**") regarding similar allegations dating back to April 1, 1991.

C. On July 7, 2021, the Honourable Justice St-Louis ordered that the Moushoom Action and the AFN Action be consolidated with certain modifications (the "**Consolidated Action**").

D. The parties to the Consolidated Action engaged in mediation in accordance with the Federal Court Practice Guidelines for Aboriginal Law Proceedings (dated April 2016) to resolve all or some of the outstanding issues in the Consolidated Action. The Honourable Leonard Mandamin acted as mediator from November 1, 2020 to November 10, 2021.

E. On July 16, 2021, the Trout Plaintiffs filed a proposed class action in the Federal Court under Court File Number T-1120-21 (the "**Trout Action**") regarding the Crown's discriminatory provision of essential services and products between April 1, 1991 and December 11, 2007.

F. On September 29, 2021, in reasons indexed at 2021 FC 969, Justice Favel of the Federal Court of Canada upheld the Canadian Human Rights Tribunal (the "**Tribunal**") decision made in Tribunal File: T1340/7008 (the "**CHRT Proceeding**") and indexed at 2019 CHRT 39, 2020 CHRT 15, and 2021 CHRT 7 (collectively , the "**Compensation Orders**") in which the Tribunal awarded compensation to Children and their caregiving parents or caregiving grandparents impacted by Canada's systemic discrimination in the underfunding of child and family services on reserve and in the Yukon, and its narrow interpretation of Jordan's Principle. Canada appealed to the Federal Court of Appeal from Justice Favel's decision.

G. On or about November 1, 2021, the Parties entered into negotiations outside of the Federal Court mediation process.

H. The Parties, by agreement, appointed the Honourable Murray Sinclair to act as chair of the negotiations.

I. The Parties worked collaboratively to determine the class sizes of the Consolidated Action and the Trout Action.

J. The Parties separately engaged experts ("**Experts**") to prepare a joint report on the estimated size of the Removed Child Class, as defined herein, on which the Parties would rely for settlement discussions (the "**Joint Report**").

K. The Experts relied on data provided by Indigenous Services Canada ("**ISC**") in preparing the Joint Report. ISC communicated to the Experts and Class Counsel that the data often came from third-party sources and was in some cases incomplete and inaccurate. The Joint Report referred to and took into account these factors.

L. The Experts estimated that there were 106,200 Removed Child Class Members from 1991 to March 2019. The Experts advised that this class size must be adjusted to 115,000 to cover the period from March 2019 to March 2022 (the "**Estimated Removed Child Class Size**"). The Estimated Removed Child Class Size was determined based on the data received from ISC and modelling and took into account gaps in the data.

M. Canada provided to the Plaintiffs estimates of the Jordan's Principle Class Size, which were between 58,385 and 69,728 for the period from December 12, 2007 to November 2, 2017 (the "**Jordan's Principle Class Size Estimates**"). The Parties understand that the Jordan's Principle Class Size Estimates were based on a single 2019-2020 quarter and that extrapolating from that quarter therefore has limitations.

N. Based on the Jordan's Principle Class Size Estimates, the Plaintiffs estimated the size of the Trout Class, as defined below, to be approximately 104,000.

O. Based on the Parliamentary Budget Officer Report, *Compensation for the Delay and Denial of Services to First Nations Children*, dated February 23, 2021, there are an estimated 1.5 primary caregivers per First Nations Child.

P. On November 26, 2021, the Federal Court granted certification of the Consolidated Action on consent of the parties.

Q. On February 11, 2022, the Federal Court granted certification of the Trout Action on consent of the parties.

R. The Moushoom Plaintiffs, the AFN Plaintiffs, and the Trout Plaintiffs (collectively, the "**Representative Plaintiffs**") and Canada concluded an agreement in principle ("**AIP**") on December 31, 2021, which set out the principal terms of their agreement to settle the Consolidated Action and the Trout Action (collectively, the "**Actions**").

S. On March 24, 2022 (in 2022 CHRT 8), the Tribunal established March 31, 2022, as the end date for compensation to individuals included in the Removed Child Class and the Removed Child Family Class.

T. The Parties engaged in several months of intensive negotiations and drafted a final settlement agreement dated June 30, 2022 ("**Previous FSA**").

U. Pursuant to the Previous FSA, the Parties sought approval from the Court of Short-Form and Long-Form Notices of Certification and Settlement Approval Hearing, as well as the Opt-out Form. The Plaintiffs' motion was heard on June 22, 2022. On June 24, 2022, the Court granted the motion and approved the documents. The Court also heard submissions on the appropriate Opt-Out Deadline and determined that the Opt-Out Deadline would be six months from the date on which the notices are published.

V. Pursuant to the Previous FSA, the Parties sought approval from the Court of their notice plan for the distribution of Notices of Certification and Settlement Approval Hearing. The Parties published the approved Short-Form and Long-Form Notices of Certification and Settlement Approval Hearing accordingly as of August 19, 2022. On February 10, 2023, the Parties sought on consent a six-month extension of the Opt-Out Deadline to August

23, 2023, bringing the total time to Opt-Out to approximately one year, which extension the Court granted by an order dated February 23, 2023 attached hereto as Schedule A.

W. The Previous FSA was, amongst other things, conditional on the Tribunal confirming the satisfaction of the Compensation Orders.

X. The Plaintiffs brought and briefed the settlement approval motion to the Court. Canada and the Assembly of First Nations ("**AFN**") also brought a joint motion on July 22, 2022 to the Tribunal for an order confirming the satisfaction of the Compensation Orders. The First Nations Child and Family Caring Society of Canada ("**Caring Society**") and the Canadian Human Rights Commission opposed the joint motion. The motion was heard on September 14-15, 2022.

Y. On October 24, 2022, the Tribunal issued a letter decision dismissing the joint motion. On December 20, 2022, the Tribunal issued its full reasons in 2022 CHRT 41 ("**Joint Motion Decision**") for denying the joint motion. The Tribunal found that the Previous FSA substantially satisfied the Compensation Orders, but stated and clarified that with respect to the individuals covered by the Compensation Orders: (a) certain removed children not in a placement that was funded by Canada should be eligible for compensation; (b) estates of deceased Caregiving Parents or Caregiving Grandparents should be eligible for compensation; (c) the Caregiving Parents or Caregiving Grandparents of certain Removed Child Class Members who had more than one child removed from them should receive multiplications of $40,000 based on the number of removed children; and (d) Jordan's Principle children eligible under the Compensation Orders should receive $40,000. This Agreement intends to address the Joint Motion Decision.

Z. The Parties and the Caring Society thereafter explored ways of addressing the Joint Motion Decision, such that the Tribunal can find the Agreement fully satisfies the Tribunal's orders. The Parties and the Caring Society have now agreed to this updated Agreement, which addresses the issues raised in the Joint Motion Decision and is intended to be a full and final settlement of the Consolidated Action, Trout Action, and the Compensation Orders.

AA. In entering into this Agreement, the Parties:

i) Intend a fair, comprehensive and lasting settlement of all claims raised or capable of being raised in the Consolidated Action, the Trout action and the CHRT Proceeding including that:

(a) Canada knowingly underfunded child and family services for First Nations Children living on Reserve and in the Yukon;

(b) Canada failed to comply with Jordan's Principle, a human rights principle designed to safeguard First Nations Children's existing substantive equality

rights guaranteed in the *Canadian Charter of Rights and Freedoms* ("***Charter***"); and

(c) Canada failed to provide First Nations Children with essential services available to non-First Nations Children or which would have been required to ensure substantive equality under the *Charter*;

ii) Intend that the Claims Process be administered in an expeditious, cost-effective, user-friendly, culturally sensitive, and trauma-informed manner;

iii) Desire to:

(a) safeguard the best interests of the Class Members who are minors and Persons under Disability;

(b) minimize the administrative burden on Class Members; and

(c) ensure culturally informed and trauma-informed mental health and cultural support services, as well as navigational assistance are available to Class Members.

BB. This settlement agreement is designed such that some Class Members, or subsets of Class Members, receive direct compensation, while some others may be eligible to indirectly benefit from the Agreement without receiving direct compensation.

NOW THEREFORE in consideration of the mutual agreements, covenants, and undertakings set out herein, the Parties agree as follows:

ARTICLE 1 – INTERPRETATION

1.01 Definitions

In this Agreement, the following definitions apply:

"**Abuse**" means sexual abuse (including sexual assault, sexual harassment, sexual exploitation, sex trafficking and child pornography) or serious physical abuse causing bodily injury, but does not include neglect or emotional maltreatment.

"**Actions**" has the meaning set out in the Recitals.

"**Actuary**" means the actuary or firm of actuaries appointed by the Court on the recommendation of the Settlement Implementation Committee who is, or in the case of a

firm of actuaries, at least one of the principals of which is, a Fellow of the Canadian Institute of Actuaries.

"**Administrator**'' means Deloitte LLP, appointed by the Court by order dated August 11, 2022 attached hereto as Schedule B, and any successor(s) for Deloitte LLP appointed from time to time pursuant to this Agreement.

"**AFN Supports**" has the meaning set out in Article 9.

"**Age of Majority**" means the age at which a Class Member is legally considered an adult under the provincial or territorial law of the province or territory where the Class Member resides, attached hereto as Schedule C.

"**Agreement**" means this settlement agreement, including the Schedules attached hereto.

"**Approved Essential Service Class Member**" means a Class Member whose Claim has been approved by the Administrator, or on appeal by the Third-Party Assessor, pursuant to the criteria set in this Agreement.

"**Approved Jordan's Principle Class Member**" means a Jordan's Principle Class Member whose Claim has been approved by the Administrator, or on appeal by the Third-Party Assessor, pursuant to the criteria set in this Agreement.

"**Approved Jordan's Principle Family Class Member**" means a Jordan's Principle Family Class Member whose Claim has been approved by the Administrator, or on appeal by the Third-Party Assessor, pursuant to the criteria set in this Agreement.

"**Approved Kith Child Class Member**" means a Kith Child Class Member whose Claim has been approved by the Administrator, or on appeal by the Third-Party Assessor, pursuant to Article 7.

"**Approved Kith Family Class Member**" means a Kith Family Class Member whose Claim has been approved by the Administrator, or on appeal by the Third-Party Assessor, pursuant to Article 7.

"**Approved Removed Child Class Member**" means a Removed Child Class Member whose Claim has been approved by the Administrator, or on appeal by the Third-Party Assessor, pursuant to Article 6.

"**Approved Removed Child Family Class Member**" means the Caregiving Parent or Caregiving Grandparent of a Removed Child Class member, whose Claim has been approved by the Administrator, or on appeal by the Third-Party Assessor, pursuant to Article 6.

"**Approved Trout Child Class Member**" means a Trout Child Class Member whose Claim has been approved by the Administrator, or on appeal by the Third-Party Assessor, pursuant to the criteria set in this Agreement.

"**Approved Trout Family Class Member**" means a Trout Family Class Member whose Claim has been approved by the Administrator, or on appeal by the Third-Party Assessor, pursuant to the criteria set in this Agreement.

"Assessment Home" means a home designed for an initial short-term placement where the needs of a Child are being assessed in order to match them to a longer term placement.

"**Auditors**" means the auditors appointed by the Court and their successors appointed from time to time pursuant to the provisions of Article 16.

"**Band**" has the meaning set out in the *Indian Act*.

"**Band List**" has the meaning set out in sections 10-12 of the *Indian Act*.

"**Banking Facilities**" means an investment account or instrument at any single or syndicate of Schedule I Chartered Canadian Banks and their related treasury and custody entities, as approved by the Court.

"**Base Compensation**" means the amount of compensation (excluding any applicable Enhancement Payment and interest payment) approved by the Court as set out in this Agreement as part of the Claims Process, to be paid to an Approved Removed Child Class Member, an Approved Jordan's Principle Class Member, an Approved Trout Child Class Member, an Approved Kith Child Class Member, an Approved Removed Child Family Class Member, an Approved Trout Family Class Member, an Approved Jordan's Principle Family Class Member, or an Approved Kith Family Class Member. Such Base Compensation may be different for different Classes and may be made in more than one installment as the implementation of the Claims Process may require.

"**Budget**" means each of the budgets set out in Articles 6 and 7.

"**Business Day**'' means a day other than a Saturday or a Sunday or a day observed as a holiday under the laws of the province or territory in which the person who needs to take action pursuant to this Agreement is ordinarily resident or a holiday under the federal laws of Canada applicable in the said province or territory.

"**Canada**" has the meaning set out in the preamble.

"**Caregiving Grandparent**" and "**Caregiving Grandparents**" means a biological or adoptive caregiving grandmother or caregiving grandfather of the affected Child who lived with and assumed and exercised parental responsibilities over a Removed Child Class

Member at the time of the removal of the Child, or over a Kith Child Class Member at the time of the involvement of the Child Welfare Authority and the Child's Kith Placement, or over a Jordan's Principle Class Member or Trout Child Class Member at the time of the Delay, Denial or Service Gap with respect to the Child's Confirmed Need for an Essential Service. An adoption in this context means a verifiable provincial, territorial or custom adoption. Relationships of a foster parent or Stepparent to a Child are excluded from giving rise to a Caregiving Grandparent relationship under this Agreement.

"**Caregiving Parent**" and "**Caregiving Parents**" means the caregiving mother or caregiving father of the affected Child, living with, and assuming and exercising parental responsibilities over a Removed Child Class Member at the time of the removal of the Child, or over a Kith Child Class Member at the time of the involvement of the Child Welfare Authority and the Child's Kith Placement, or over a Jordan's Principle Class Member or Trout Child Class Member at the time of the Delay, Denial or Service Gap with respect to the Child's Confirmed Need for an Essential Service. Caregiving Parent includes the biological parents, adoptive parents or Stepparents for each applicable Class, except as where expressly provided for otherwise in this Agreement. A foster parent is excluded as a Caregiving Parent under this Agreement. An adoption in this context means a verifiable provincial, territorial or custom adoption.

"**Certification Orders**" mean collectively the order of the Court dated November 26, 2021, certifying the Consolidated Action as a class proceeding and the order of the Court dated February 11, 2022, certifying the Trout Action as a class proceeding, copies of which are attached hereto as Schedules D and E.

"Child" or **"Children"** means an individual under the Age of Majority of the individual's place of residence as set out in Schedule C, Provincial and Territorial Ages of Majority:

(a) at the time of removal, for the purposes of the Removed Child Class;

(b) at the time of the involvement of the Child Welfare Authority and the Kith Placement, for the purposes of Kith Child Class; and

(c) at the time of the Delay, Denial or Service Gap with respect to the individual's Confirmed Need for an Essential Service, for the purposes of the Essential Service Class, the Jordan's Principle Class, and the Trout Child Class.

"**Child Welfare Authority"** for the purposes of the Kith Child Class means an administrative body that is mandated to prevent and respond to Child maltreatment pursuant to provincial/territorial child welfare legislation and *An Act Respecting First Nations, Inuit and Métis Children, Youth and Families*, S.C. 2019, c. 24.

"**Child Welfare Information**" for the purposes of the Kith Child Class includes documents, records, case notes, statistics, reports, third party records and any other form

of information produced and/or collected by a Child Welfare Authority in relation to services and supports provided to First Nations Children, youth, and families pursuant to provincial or territorial child and family services legislation.

"**Child Welfare Records Technician**" means one or more individuals with sufficient expertise in child welfare and administrative information retained by the Administrator on advice of the Settlement Implementation Committee for the purposes of the verification of a Claim under this Agreement through provincial authorities, agencies or other Child Welfare Authorities, including in matters such as the verification of the Claims made by Kith Child Class Members or Kith Family Class Members. Child Welfare Records Technicians may be existing employees of a Child Welfare Authority as well as independent technicians retained pursuant to this Agreement.

"**CHRT Interest Accrual Period**" means:

(a) with respect to Approved Removed Child Class Members who were placed off-Reserve with non-Family as of and after January 1, 2006 and their corresponding Approved Removed Child Family Class Members: as of the last day of the calendar quarter of the removal until the Implementation Date;

(b) with respect to Approved Kith Child Class Members and Approved Kith Family Class Members as of and after January 1, 2006: as of the last day of the calendar quarter of the placement with a Kith Caregiver until the Implementation Date; and

(c) with respect to Approved Jordan's Principle Class Members and Approved Jordan's Principle Family Class Members: as of the last day of the calendar quarter of the Service Gap, Delay or Denial until the Implementation Date.

"**Claim**" means a claim for compensation made by or on behalf of a Class Member.

"**Claimant**" means a person who makes a Claim by completing and submitting a Claims Form to the Administrator, or on whose behalf a Claim is made by such Class Member's Estate Executor, estate Claimant or Personal Representative.

"**Claims Deadline**" means the date that is:

(a) three (3) years after the Claims Process Approval Date applicable to each class: for Class Members who have reached the Age of Majority or died before the Claims Process Approval Date applicable to those Class Members;
(b) three (3) years after the date on which a Class Member reaches the Age of Majority: for Class Members who have not reached the Age of Majority by the time of the Claims Process Approval Date applicable to their class; or
(c) three (3) years after the date of death: for Class Members who were under the Age of Majority and alive by the time of the Claims Process Approval Date

applicable to their class and who died or die prior to reaching the Age of Majority; or

(d) an extension of the deadlines in (a)-(c) above by 12 months: for Class Members individually approved on request by the Administrator on the grounds that the Claimant faced extenuating personal circumstances and was unable to submit a Claim as a result of physical or psychological illness or challenges, including homelessness, incarceration or addiction, or due to unforeseen community circumstances such as epidemics, community internet connectivity, pandemics, natural disasters, community-based emergencies or service disruptions at a national, regional or community level.

"**Claims Form**" means a written declaration in respect of a Claim by a Class Member with Supporting Documentation or such other form as may be recommended by the Administrator and agreed to by the Settlement Implementation Committee.

"**Claims Process**" means the process, including a distribution protocol, to be further designed and detailed in accordance with this Agreement for the distribution of compensation under this Agreement to eligible Class Members. The Claims Process also includes the Incarcerated Class Members Process and such other processes as may be recommended by the Administrator and experts, agreed to by the Plaintiffs and approved by the Court, for the submission of Claims, determination of eligibility, assessment, verification, determination of possible enhancement, payment of compensation to Class Members, and the role of the Third-Party Assessor. The distribution protocol within the Claims Process may be created and submitted to the Court for approval in one package or in several parts relating to different classes as and when each of such parts becomes ready following the Implementation Date.

"**Claims Process Approval Date**" with respect to each class means the date on which the distribution protocol in the Claims Process for that class has been approved by the Court.

"**Class**" means Jordan's Principle Class, Jordan's Principle Family Class, Removed Child Class, Removed Child Family Class, Trout Child Class, Trout Family Class, Kith Child Class, Kith Family Class, and Essential Service Class, collectively. Reference to a "class" or "classes" with a lower case "c" is to any of the Jordan's Principle Class, Jordan's Principle Family Class, Removed Child Class, Removed Child Family Class, Trout Child Class, Trout Family Class, Kith Child Class, Kith Family Class, or Essential Service Class, as may apply within the context of such reference.

"**Class Counsel**" means Sotos LLP, Kugler Kandestin LLP, Miller Titerle + Company, Nahwegahbow Corbiere, and Fasken LLP, collectively.

"**Class Member**" and "**Class Members**" means any one or more individual members of the Class.

"**Confirmed Need**" means the need of a member of the Jordan's Principle Class, Trout Child Class or Essential Service Class as confirmed by Supporting Documentation as defined for Essential Service Class, Jordan's Principle Class, and Trout Child Class.

"**Court**" means the Federal Court of Canada.

"**Cy-près Fund**" has the meaning set out in Article 8.

"**Delay**" means unreasonable delay and it is presumed that delay is unreasonable where a member of the Essential Service Class, Jordan's Principle Class, or Trout Child Class requested an Essential Service from Canada but they did not receive a determination on their request within 12 hours for an urgent case, or 48 hours for other cases, provided that contextual factors, as specified in the Claims Process, do not suggest otherwise.

"**Denial**" means where a member of the Essential Service Class, Jordan's Principle Class, or Trout Child Class requested an Essential Service from Canada and that request was either denied or the member of the Essential Service Class, Jordan's Principle Class, or Trout Child Class did not receive a response as to acceptance or denial.

"**Eligible Deceased Class Member**" means:

(a) a deceased Caregiving Parent or Caregiving Grandparent eligible to receive compensation as a Removed Child Family Class Member (of a Child placed off-Reserve with non-Family as of and after January 1, 2006), a Kith Family Class Member, or a Jordan's Principle Family Class Member;

(b) a deceased adult eligible to receive compensation as a Removed Child Class Member, a Kith Class Member, a Jordan's Principle Class Member, an Essential Services Class Member, or a Trout Class Member; and

(c) a deceased adult Claimant who submitted a Claim prior to death.

"**Eligibility Decision**" has the meaning set out in Article 5.02.

"**Enhancement Factor**" means any objective criterion agreed to by the Plaintiffs and approved by the Court that may be used by the Administrator to enhance the Base Compensation of some members of the Removed Child Class, Jordan's Principle Class or Trout Child Class.

"**Enhancement Payment**" means an amount, based on Enhancement Factors, that may be payable to an Approved Removed Child Class Member, an Approved Jordan's Principle Class Member, or an Approved Trout Child Class Member, in addition to a Base Payment. In determining eligibility for and the quantum of an Enhancement Payment, the

Settlement Implementation Committee may provide guidelines that take into account the amount of interest payment that an Approved Removed Child Class Member or an Approved Jordan's Principle Class Member has received on their Base Compensation, with a view to considering equity or parity amongst Class Members who may receive an interest payment and those Class Members who may not receive an interest payment under this Agreement.

"**Essential Service**" means a service, product or support that was required due to the Child's particular condition or circumstance, the failure to provide which would have resulted in material impact on the Child, as assessed in accordance with Schedule F, Framework of Essential Services.

"**Essential Service Class**" means a First Nations individual who did not receive from Canada (whether by reason of a Denial or a Service Gap) an Essential Service relating to a Confirmed Need, or whose receipt of said Essential Service relating to a Confirmed Need was delayed by Canada, on grounds, including but not limited to, lack of funding or lack of jurisdiction, as a result of a jurisdictional dispute with another government or federal governmental department(s) during the period between December 12, 2007 and November 2, 2017 (the "**Essential Service Class Period**"), while they were under the Age of Majority.

"**Estate Administrator**" includes an executor or administrator appointed or designated under federal, provincial or territorial legislation, as applicable under the circumstances.

"**Estate Executor**" means the executor, administrator, trustee or liquidator of an Eligible Deceased Class Member's estate.

"**Family**" includes a parent, stepparent, grandparent, adult sibling, aunt, uncle or adult first cousin of the Child.

"**First Nations**" in reference to individuals means:

(a) with respect to all Class Members: individuals who are registered pursuant to the *Indian Act*;

(b) with respect to all Class Members: individuals who were entitled to be registered under sections 6(1) or 6(2) of the *Indian Act*, as it read as of February 11, 2022 (the latter date of the Certification Orders);

(c) additionally with respect to the Removed Child Class only: individuals who met Band membership requirements under sections 10-12 of the *Indian Act* by February 11, 2022 (the latter date of the Certification Orders) such as where their respective First Nation community assumed control of its own membership by establishing membership rules and the individuals were found to meet the

requirements under those membership rules and were included on the Band List prior to February 11, 2022;

(d) additionally with respect to the Jordan's Principle Class only: individuals who met Band membership requirements under sections 10-12 of the *Indian Act* pursuant to paragraph (c), above, AND who suffered a Delay, Denial, or Service Gap between January 26, 2016 and November 2, 2017;

(e) additionally with respect to the Jordan's Principle Class only: individuals who were recognized as citizens or members of their respective First Nation prior to February 11, 2022 (the latter date of the Certification Orders) as confirmed by First Nations Council Confirmation, whether under final agreement, self-government agreement, treaties or First Nations' customs, traditions and laws, AND who suffered a Delay, Denial, or Service Gap between January 26, 2016 and November 2, 2017.

"**First Nations Council Confirmation**" means a written confirmation, the form and contents of which will be agreed upon amongst the Plaintiffs subject to the Court's approval, from a First Nation designed for the purposes of the Claims Process to the effect that an individual is recognized as a citizen or member of their respective First Nation whether under treaty, agreement or First Nations' customs, traditions or laws.

"**Framework of Essential Services**" is the approach to Essential Services and Confirmed Need, enclosed as Schedule F, Framework of Essential Services, developed with the assistance of experts, and agreed to by the Plaintiffs for the purposes of the Claims Process. The Framework of Essential Services is subject to further piloting by qualified experts and necessary re-adjustments agreed to by the Plaintiffs, or the Settlement Implementation Committee after the Approval of this Agreement.

"**Group Home**" means a staff-operated home funded by ISC where several Children are living together. Some Group Homes are parent-operated, where a couple with professional youth care training operate a Group Home together.

"**Implementation Date**" of this Agreement means the later of:

(a) the day following the last day on which a Class Member may appeal or seek leave to appeal the Settlement Approval Order; or

(b) the date on which the last of any appeals of the Settlement Approval Order are finally determined.

"**Incarcerated Class Members Process**" means the process for communicating the Claims Process specifically to Class Members incarcerated in federal penitentiaries, provincial prisons, and other penal and correctional institutions or institutions where

individuals are held involuntarily due to matters such as a lack of criminal responsibility due to a mental disorder.

"***Income Tax Act***" means the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp), as amended.

"***Indian Act***" means the *Indian Act*, R.S.C. 1985, c. I-5, as it read as of February 11, 2022 (the latter date of the Certification Orders).

"**Investment Committee**" means an advisory body constituted in accordance with this Agreement and Schedule G, Investment Committee Guiding Principles.

"**ISC**" has the meaning in the Recitals and includes any predecessor or successor department.

"**Jordan's Principle**" is a child-first human rights principle grounded in substantive equality that protects and promotes the substantive equality rights of all First Nations Children whether resident on- or off-Reserve, including in the Northwest Territories and Yukon. Jordan's Principle is named in honour of Jordan River Anderson of Norway House Cree Nation and his family.

"**Jordan's Principle Class**" or "**Jordan's Principle Class Member**" means an Essential Service Class Member who experienced the highest level of impact (including pain, suffering or harm of the worst kind) associated with the Delay, Denial, or Service Gap of an Essential Service that was the subject of a Confirmed Need. The Parties intend that the way that the highest level of impact is defined, and the associated threshold set for membership in the Jordan's Principle Class, fully overlap with the First Nations children entitled to compensation under the Compensation Orders.

"**Jordan's Principle Family Class**" means all persons who are the brother, sister, mother, father, grandmother or grandfather of a member of the Jordan's Principle Class at the time of Delay, Denial or Service Gap. Amongst the Jordan's Principle Family Class, only the Caregiving Parents or Caregiving Grandparents may receive direct compensation if otherwise eligible under this Agreement.

"Jordan's Principle Post-Majority Beneficiaries" means the beneficiaries eligible for benefits from the Jordan's Principle Post-Majority Fund.

"**Jordan's Principle Post-Majority Fund**" means $90,000,000 set aside from the Settlement Funds for the benefit of high-needs Approved Jordan's Principle Class Members necessary to ensure their personal dignity and well-being.

"**Kith Caregiver**" means an adult who is not a member of the Child's Family, does not live on-Reserve, and who cared for a Kith Child Class Member without receiving any funding in relation to the Child's Kith Placement.

"**Kith Child Class**" or "**Kith Child Class Member**" means a First Nations Child placed with a Kith Caregiver in a Kith Placement during the Removed Child Class Period and who meets the conditions specified herein and in Article 7.

"**Kith Family Class**" or "**Kith Family Class Member**" includes only the Caregiving Parents or, in the absence of Caregiving Parents, the Caregiving Grandparents of an Approved Kith Child Class Member who was placed in a Kith Placement between January 1, 2006 and March 31, 2022 pursuant to the conditions specified herein and in Article 7.

"**Kith Placement**" means where a First Nations Child resides with a Kith Caregiver outside of the Child's Family and off-Reserve, and a Child Welfare Authority was involved in the Child's placement.

"**Kith Placement Agreement**" means an agreement between a Caregiving Parent or Caregiving Grandparent of a Kith Child Class Member and a Child Welfare Authority relating to a Kith Placement of that Kith Child Class Member.

"**Non-kin Foster Home**" means any family-based care funded by ISC.

"**Non-paid Kin or Community Home**" means an informal placement, other than a Kith Placement, that has been arranged within the family support network, and the Child Welfare Authority does not have temporary custody and the placement is not funded by ISC.

"**Northern or Remote Community**" means a community as agreed upon by the Plaintiffs and set out in the Claim Process.

"**Notice Plan**" means the notice plan to be approved by the Court for dissemination of notices to Class Members.

"**Ongoing Fees**" has the meaning set out in Article 17.03.

"**Opt-Out**" means: (a) the delivery by a Class Member to the Administrator of the Opt-Out Form with the intention of being removed from the Actions before the Opt-Out Deadline; or (b) after the Opt-Out Deadline, a Class Member obtaining leave of the Court to opt out of the Actions in accordance with this Agreement.

"**Opt-Out Deadline**" means August 23, 2023 or such other date as the Court may determine, after which Class Members may no longer Opt-Out of the Actions, except with leave of the Court.

"**Opt-Out Form**" means the opt-out form as approved by the Court and enclosed hereto as Schedule H, Opt-Out Form.

"**Ordinarily Resident on Reserve**" means:

(a) a First Nations individual who lives in a permanent dwelling located on a First Nations Reserve at least 50% of the time and who does not maintain a primary residence elsewhere;

(b) a First Nations individual who is living off-Reserve while registered full-time in a post-secondary education or training program who is receiving federal, Band or Aboriginal organization education/training funding support and who:

a. would otherwise reside on-Reserve;

b. maintains a residence on-Reserve;

c. is a member of a family that maintains a residence on-Reserve; or

d. returns to live on-Reserve with parents, guardians, caregivers or maintainers when not attending school or working at a temporary job.

(c) a First Nations individual who is temporarily residing off-Reserve for the purpose of obtaining care that is not available on-Reserve and who, but for the care, would otherwise reside on-Reserve;

(d) a First Nations individual who is temporarily residing off-Reserve for the primary purpose of accessing social services because there is no reasonably comparable service available on-Reserve and who, but for receiving said services, would otherwise reside on-Reserve;

(e) a First Nations individual who at the time of removal or placement with a Kith Caregiver met the definition of ordinarily resident on reserve for the purpose of receiving child welfare and family services funding pursuant to a funding agreement between Canada and the province or territory in which the individual resided (including Ordinarily Resident on Reserve individuals funded through the cost-shared model under the Canada-Ontario 1965 Indian Welfare Agreement);

(f) for the purposes of Class Members in the Yukon, “on-Reserve” in this Agreement is inclusive of areas within the “Community Boundary” as defined in the *Umbrella Final Agreement Between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon* as of February 11, 2022 (the latter date of the Certification Orders), and “off-Reserve” in this Agreement is correspondingly inclusive of areas outside the “Community Boundary” as of February 11, 2022 (the latter date of the Certification Orders).

“**Out-of-home Placement**” means a distinct location where a Removed Child Class Member has been placed pursuant to a removal, such as an Assessment Home, Non-kin Foster Home, Paid Kinship Home, Group Home, a Residential Treatment Facility, or other

similar placement funded by ISC, except for the members of the Kith Child Class pursuant to Article 7.

"**Paid Kinship Home**" means a formal placement that has been arranged within the family support network and paid for by ISC, where the Child Welfare Authority has temporary or full custody.

"**Parties**" means the Plaintiffs and Canada;

"**Person Under Disability**" means:

(a) a person under the Age of Majority under the legislation of their province or territory of residence; or

(b) an individual who is unable to manage or make reasonable judgments or decisions in respect of their affairs by reason of mental incapacity including those for whom a Personal Representative has been appointed, or designated by operation of the law, pursuant to the applicable provincial, territorial or federal legislation.

"**Personal Representative**" means the person appointed, or designated by operation of the law, pursuant to the applicable provincial, territorial or federal legislation to manage or make reasonable judgments or decisions in respect of the affairs of a Person Under Disability who is an eligible Claimant and includes an administrator for property.

"**Plaintiffs**" means collectively the Moushoom Plaintiffs, the AFN Plaintiffs and the Trout Plaintiffs.

"**Professional**" means a professional with expertise relevant to a Child's Confirmed Need(s), for example: a medical professional or other registered professionals available to a Class Member in their place of residence and community (particularly in a Northern or Remote Community where there may not have been, or be, access to specialists, but there may have been access to community health nurses, social support workers, and mental health workers), or an Elder or Knowledge Keeper who is recognized by the Child's specific First Nations community.

"**Recitals**" means the recitals to this Agreement.

"**Removed Child Class**" or "**Removed Child Class Member**" means First Nations individuals who, at any time during the period between April 1, 1991 and March 31, 2022 (the "**Removed Child Class Period**"), while they were under the Age of Majority, were removed from their home by child welfare authorities or voluntarily placed into care, and whose placement was funded by ISC, such as an Assessment Home, a Non-kin Foster Home, a Paid Kinship Home, a Group Home, or a Residential Treatment Facility or another ISC-funded placement while they, or at least one of their Caregiving Parents or Caregiving Grandparents, were Ordinarily Resident on Reserve or were living in the

Yukon, but excluding children who lived in a Non-paid Kin or Community Home through an arrangement made with their caregivers and excluding individuals living in the Northwest Territories at the time of removal.

"**Removed Child Family Class**" means all persons who are the brother, sister, mother, father, grandmother or grandfather of a member of the Removed Child Class at the time of removal.

"**Reserve**" means a tract of land, as defined under the *Indian Act*, the legal title to which is vested in the Crown and has been set apart for the use and benefit of a Band.

"**Residential Treatment Facility**" means a treatment program for several Children living in the treatment facility with 24-hours-a-day trained staff, including locked or secure and unlocked residences, funded by ISC.

"**Service Gap**" means an Essential Service that is subject to a Confirmed Need, as determined in accordance with Schedule F, Framework of Essential Services, but was not available to an Essential Service, Jordan's Principle or Trout Class Member.

"**Settlement Approval Hearing**" means a hearing of the Court to determine a motion to approve this Agreement.

"**Settlement Approval Order**" means the draft order submitted to the Court regarding the approval of this Agreement, the form and content of which will be agreed upon amongst the Parties, if and as approved by the Court.

"**Settlement Funds**" means a total of $23,343,940,000 ($23.34394 billion), which Canada will pay to settle the claims of the Class in accordance with this Agreement.

"**Settlement Implementation Committee**" or "**Settlement Implementation Committee and its Members**" means a committee established pursuant to Article 12.

"**Settlement Implementation Report**" has the meaning set out in Article 12.03(1)(m).

"**Spell in Care**" applies to the Removed Child Class and means a continuous period in care, which starts when a Child is taken into out-of-home care and ends when the Child is discharged from care, by returning home, moving into another arrangement in a Non-paid Kin or Community Home, being adopted, or living independently at the Age of Majority. ISC data considers a Spell in Care by the start and end dates of each continuous period of Out-of-home Placement.

"**Stepparent**" means a person, other than an adoptive parent, who is First Nations and a spouse of the biological Caregiving Parent of a Removed Child Class Member, Jordan's Principle Class Member, or Trout Child Class Member, and lived with that Child's biological Caregiving Parent and contributed to the support of the Child, for at least three

(3) years, prior to the removal of the Child, or the occurrence of the Delay, Denial or the Service Gap.

"**Supporting Documentation**" means:

(a) for the Removed Child Class: such documentation required to be submitted by a Removed Child Class Member in accordance with this Agreement to substantiate eligibility and compensation under the applicable Claims Form;

(b) for the Essential Service Class, Jordan's Principle Class, and Trout Child Class: such documentation required to be submitted by a member of the Essential Service Class, Jordan's Principle Class, and Trout Child Class in accordance with this Agreement to substantiate eligibility and compensation under the applicable Claims Form;

(c) for the Removed Child Family Class: such documentation required to be submitted by a member of the Removed Child Family Class in accordance with this Agreement to substantiate eligibility and compensation under the applicable Claims Form;

(d) for the Jordan's Principle Family Class: such documentation required to be submitted by a member of the Jordan's Principle Family Class in accordance with this Agreement to substantiate eligibility and compensation under the applicable Claims Form;

(e) for the Trout Family Class: such documentation required to be submitted by a member of the Trout Family Class in accordance with this Agreement to substantiate eligibility and compensation under the applicable Claims Form;

(f) for the Kith Child Class: such documentation required to be submitted by a member of the Kith Child Class in accordance with this Agreement to substantiate eligibility and compensation under the applicable Claims Form;

(g) for the Kith Family Class: such documentation required to be submitted by a member of the Kith Family Class in accordance with this Agreement to substantiate eligibility and compensation under the applicable Claims Form; and

(h) for Eligible Deceased Class Members: the documentation to be required to be submitted in accordance with this Agreement to substantiate eligibility and compensation under the applicable Claims Form.

"**Time in Care**" means the total amount of time that a Removed Child Class Member spent in care regardless of the number of Spells in Care.

"**Third-Party Assessor**" means the person or persons appointed by the Court to carry out the duties of the Third-Party Assessor as stated in this Agreement, to be particularized in the Claims Process, and their successors appointed from time to time, as approved by the Court.

"**Trout Child Class**" or "**Trout Child Class Member**" means First Nations individuals who, during the period between April 1, 1991 and December 11, 2007 (the "**Trout Child Class Period**"), while they were under the Age of Majority, did not receive from Canada (whether by reason of a Denial or a Service Gap) an Essential Service relating to a Confirmed Need, or whose receipt of said Essential Service was delayed by Canada, on grounds, including lack of funding or lack of jurisdiction, or as a result of a Service Gap or jurisdictional dispute with another government or governmental department.

"**Trout Family Class**" means all persons who are the brother, sister, mother, father, grandmother or grandfather of a member of the Trout Child Class at the time of Delay, Denial or Service Gap. Amongst the Trout Family Class, only the Caregiving Parents or Caregiving Grandparents may receive direct compensation if otherwise eligible under this Agreement.

"**Trust**" means the trust established pursuant to Article 15.

"**Trust Fund**" has the meaning set out in Article 4.

"**Trustee**" means the trustee appointed by the Court pursuant to Article 15 for the purposes of this Agreement. The Trustee may be constituted by deed of trust, a society, or non-profit corporation as directed by the Plaintiffs.

1.02 Headings

The division of this Agreement into paragraphs and the use of headings are for convenience of reference only and do not affect the construction or interpretation of this Agreement.

1.03 Extended Meanings

In this Agreement, words importing the singular number include the plural and vice versa, and words importing any gender or no gender include all genders. The term "including" means "including without limiting the generality of the foregoing". Any reference to a government ministry, department or position will include any predecessor or successor government ministry, department or position.

1.04 Interpretation

The Parties acknowledge that they have reviewed and participated in settling the terms of this Agreement and they agree that there will be no presumptive rule of construction to

the effect that any ambiguity in this Agreement is to be resolved in favour of any particular Party.

1.05 Statutory References

In this Agreement, unless something in the subject matter or context is inconsistent therewith or unless otherwise herein provided, a reference to any statute is to that statute as enacted on the date of such reference and not as the statute may from time to time be amended, re-enacted, or replaced, and the same applies to any regulations made thereunder.

1.06 Business Day

Where the time on or by which any action required to be taken hereunder expires or falls on a day that is not a Business Day, such action may be done on the next succeeding day that is a Business Day.

1.07 Currency

All references to currency herein are to lawful money of Canada.

1.08 Compensation Inclusive

The amounts payable to Class Members under this Agreement are inclusive of any prejudgment or post-judgment interest, except as otherwise specified in Article 6.15, Article 6.16, or under Article 7.

1.09 Schedules

The following Schedules to this Agreement are incorporated into and form part of this Agreement:

Schedule A: Order dated February 23, 2023 on Opt-Out Deadline

Schedule B: Order dated August 11, 2022 on Appointment of Administrator

Schedule C: Provincial and Territorial Ages of Majority

Schedule D: Certification Order dated November 26, 2021 in Court File Nos. T-402-19 and T-141-20 (2021 FC 1225)

Schedule E: Certification Order dated February 11, 2022 in Court File No. T-1120-21 (2022 FC 149)

Schedule F: Framework of Essential Services

Schedule G: Investment Committee Guiding Principles

Schedule H: Opt-Out Form

Schedule I: Framework for Supports for Claimants in Compensation Process

Schedule J: Summary Chart of Essential Service, Jordan's Principle, and Trout Approach

1.10 Binding Agreement

This Agreement is binding upon the Parties, and for Canada and Class Members, upon their estates, heirs, Estate Executors, estate Claimants, and Personal Representatives.

1.11 Applicable Law

This Agreement will be governed by the laws of Canada, together with the laws of the province or territory where the Class Member is ordinarily resident, as applicable, save where otherwise specified in this Agreement.

1.12 Counterparts

This Agreement may be executed electronically and in any number of counterparts, each of which will be deemed to be an original and all of which taken together will be deemed to constitute one and the same Agreement.

1.13 Official Languages

As soon as practicable after the execution of this Agreement Class Counsel will arrange for the preparation of an authoritative French version. The French version will be of equal weight and force at law.

1.14 Ongoing Supervisory Role of the Court

Notwithstanding any other provision of this Agreement, the Court will maintain exclusive jurisdiction to supervise the implementation of this Agreement in accordance with its terms, including the adoption of protocols and statements of procedure, and the Parties attorn to the jurisdiction of the Court for that purpose. The Court may give any directions or make any orders that are necessary for the purposes of this Article.

ARTICLE 2 - EFFECTIVE DATE OF AGREEMENT

2.01 Date when Binding and Effective

On the Implementation Date, this Agreement will become binding in accordance with Article 11 on all Class Members who have not Opted-Out by the Opt-Out Deadline.

2.02 Effective Upon Approval

None of the provisions of this Agreement will become effective unless and until the Court approves this Agreement.

2.03 Legal Fees Severable

Class Counsel's fees for prosecuting the Actions have been or will be negotiated separately from this Agreement and remain subject to approval by the Court. The Court's decision on Class Counsel's fees will have no effect on the implementation of this Agreement. If the Court refuses to approve the fees of Class Counsel, the remainder of the provisions of this Agreement will remain in full force and effect and in no way will be affected, impaired or invalidated.

ARTICLE 3 – ADMINISTRATION

3.01 Designation of Administrator

The Administrator administers the Claims Process with such powers, rights, duties and responsibilities as are set out in this Article and such other powers, rights, duties and responsibilities as are determined by the Settlement Implementation Committee and approved by the Court. Following the establishment of the Settlement Implementation Committee and on the recommendation of the Settlement Implementation Committee, the Court may replace the Administrator at any time.

3.02 Duties of the Administrator

1) The Administrator's duties and responsibilities include the following:

   (a) in consultation with the Settlement Implementation Committee, developing, installing, and implementing systems, forms, information, guidelines and procedures for processing Claims and appeals of the decisions of the Administrator to the Third-Party Assessor in accordance with this Agreement and the Claims Process;

   (b) in consultation with the Settlement Implementation Committee, developing, installing, and implementing systems and procedures for making payments of compensation in accordance with this Agreement and the Claims Process;

   (c) receiving funds from the Trust and the Trustee to make payments to Class Members in accordance with this Agreement and the Claims Process;

   (d) ensuring adequate staffing for the performance of its duties under this Agreement, and training and instructing personnel;

(e) ensuring, in consultation with the Settlement Implementation Committee, First Nations participation and the reflection of First Nations perspectives, appropriate cultural knowledge, use of proper experts, and a trauma-informed and child- and youth-focused approach to the Class;

(f) keeping or causing to be kept accurate accounts of its activities and its administration and preparing annual audited financial statements, as well as reports, and records as are required by the Settlement Implementation Committee, the Auditors and the Court;

(g) reporting to the Settlement Implementation Committee on a monthly basis respecting:

i) Claims received and Claims determined including associated timelines for determination;

ii) Claims deemed ineligible and the reason(s) for that determination; and

iii) appeals from the Administrator's decisions and the outcomes of those appeals.

(h) identifying and reporting to the Settlement Implementation Committee systemic issues, including suspected or potential irregular or fraudulent Claims, in the implementation of the Agreement and the Claims Process as such issues arise and in any event no later than on a quarterly basis, and working with the Settlement Implementation Committee and any experts as may be required to find a resolution to such systemic issues—a systemic issue being an issue that affects more than one Class Member;

(i) responding to inquiries from Claimants respecting Claims and Claims Forms;

(j) providing navigational supports to Class Members in the Claims Process as outlined out in Schedule I, Framework for Supports for Claimants in Compensation Process, including: (i) assistance with the filling out and submission of Claims Forms; (ii) assistance with obtaining Supporting Documentation; (iii) assistance with appeals to the Third-Party Assessor pursuant to this Agreement; (iv) reviewing Claims Forms, Supporting Documentation, and First Nations Council Confirmations; and (v) determining a Claimant's eligibility for compensation in the Class;

(k) maintaining a database with all information necessary to permit the Settlement Implementation Committee and the Actuary to assess the financial sufficiency of the Trust Fund;

(l) in appropriate circumstances, requiring further Supporting Documentation in

relation to a claimed Confirmed Need from a different Professional. In case of doubt, the Administrator will consult with the Settlement Implementation Committee for direction;

(m) communicating with Claimants in either English or French, as the Claimant elects, and if a Claimant expresses the desire to communicate in a language other than English or French, making best efforts to accommodate such Claimant;

(n) verifying Claims in accordance with this Agreement;

(o) reporting annually to the Court on the Administrator's above tasks;

(p) determining requests for the extension of the Claims Deadline by individual Class Members facing extenuating personal circumstances, such as where a Claimant was unable as a result of physical or psychological illness or challenges, including homelessness, incarceration or addiction, or due to unforeseen circumstances such as epidemics, community internet connectivity, pandemics, natural disasters, community-based emergencies or service disruptions at a national, regional, or community level, to submit a Claim before the Claims Deadline, subject to further direction on such circumstances from the Settlement Implementation Committee; and

(q) such other duties and responsibilities as the Court or the Settlement Implementation Committee may from time to time direct.

2) In carrying out its duties and responsibilities outlined in this Agreement, the Administrator will:

(a) act in accordance with the principles governing the administration of Claims set out in this Article, in particular that the Claims Process intends to be cost-effective, user-friendly, culturally sensitive, trauma-informed, and non-traumatizing to Class Members;

(b) ensure quality assurance processes are documented and transparent;

(c) comply with the service standards established by the Plaintiffs; and

(d) perform other duties and responsibilities as the Court or the Settlement Implementation Committee may from time to time direct.

3) Except as otherwise provided in this Agreement and the Claims Process, the Administrator will request on a monthly basis such funds from the Trustee as may be necessary to pay approved Claims. The Trustee will provide such funds to the

Administrator, and the Administrator will pay such funds to the Class Members in accordance with this Agreement and the Claims Process.

3.03 Appointment of the Third-Party Assessor

On the recommendation of the Parties until the approval of this Agreement, and of the Settlement Implementation Committee thereafter, the Court will appoint as necessary from time to time one or more Third-Party Assessors composed of experts, including First Nations experts, with demonstrated knowledge of, and experience in, First Nations child and family services and Jordan's Principle. On the recommendation of the Settlement Implementation Committee, the Court may replace a Third-Party Assessor at any time. The Third-Party Assessor will perform the duties of the Third-Party Assessor set out in this Agreement and the Claims Process.

3.04 Responsibility for Costs

1) Canada will pay:

   (a) the reasonable costs of giving notice in accordance with the Notice Plan to be developed by the Parties, including Canada and the Settlement Implementation Committee, as approved and ordered by the Court;

   (b) the reasonable costs and disbursements of the Administrator, the Third-Party Assessor, the Trustee, the Auditors, the Actuary, Child Welfare Records Technicians, and any experts, advisors or consultants retained by the Settlement Implementation Committee for the purpose of implementing this Agreement;

   (c) the costs of the administration of the Trust;

   (d) legal fees pursuant to Article 17;

   (e) the costs of the supports for Class Members throughout the Claims Process as outlined in Schedule I, Framework for Supports for Claimants in Compensation Process; and

   (f) the costs of the Dispute Resolution Process in accordance with Article 18.

2) The Settlement Implementation Committee will provide a forecast of the costs and disbursements of the administration of this Agreement to Canada on an annual basis, on or before December 1 of each year regarding the year ahead, which forecast may be revised due to unforeseen circumstances. In such case, the Settlement Implementation Committee will advise Canada in writing. Canada may dispute the reasonableness of the forecast or any revision of it.

3) None of the costs payable by Canada pursuant to this Article will be deducted from the Settlement Funds.

ARTICLE 4 - TRUST FUND

4.01 Establishment of the Trust Fund

1) As soon as practicable after the appointment and settlement of the Trust in accordance with Article 15, the Trustee will establish investment trust account(s) at Banking Facilities for the purposes of receiving and investing the Settlement Funds and paying compensation to eligible Class Members.

2) The Trustee will collaborate with Canada to establish a transfer and drawdown schedule for payments to enable the orderly payment of the Settlement Funds. Canada will have no input or role in the selection of the Banking Facilities or the Trustee's selection of deposit or financial instruments.

3) On or after thirty (30) Business Days following the Implementation Date, and in accordance with Article 1.01, the Trustee on the recommendation of the Investment Committee may direct Canada to make payments to the Trust up to the total of the Settlement Funds.

4) By no later than 120 days following the Implementation Date, Canada will make payments to the Trust of Settlement Funds in the total amount of $23,343,940,000 ($23.34394 billion).

4.02 Distribution of the Trust Fund

The Trustee will periodically, on request based on estimated approved Claims, pay the Administrator from the trust account(s) under Article 4.01 for the purpose of distributing the Trust Fund for the benefit of the Class Members in accordance with this Agreement, including by paying compensation in accordance with Articles 6 and 7 through the Claims Process.

ARTICLE 5 - CLAIMS PROCESS

5.01 Principles Governing Claims Administration

1) The design and implementation of the distribution protocol within the Claims Process will be within the sole discretion of the Plaintiffs, subject to the approval of the Court. The Plaintiffs will establish the Claims Process and may seek input from the Caring Society, as well as from experts and First Nations stakeholders as the Plaintiffs deem in the best interests of the Class Members. The Plaintiffs will finalize the distribution protocol within the Claims Process in accordance with this Agreement, and will submit same for approval of the Court.

2) Notwithstanding Article 5.01(1), Canada will have standing to make submissions on the Claims Process at the hearing on the motion to approve same before the Court.

3) The Claims Process is intended to be expeditious, cost-effective, user-friendly, culturally sensitive, trauma-informed, and non-traumatizing, with any necessary accommodations for persons with disabilities or vulnerabilities. The Administrator will identify and implement service standards for the Claims Process no later than 180 days after the Claims Process Approval Date for any given class.

4) The Administrator and the Third-Party Assessor will, in the absence of reasonable grounds to the contrary, presume that a Claimant is acting honestly and in good faith with respect to any Claim.

5) In considering a Claims Form, Supporting Documentation, or a First Nations Council Confirmation, the Administrator and the Third-Party Assessor will draw all reasonable inferences that can be drawn in favour of the Claimant.

6) The Administrator will make reasonable efforts to obtain verification of each Claim within six (6) months of the receipt of the completed Claim, with all required elements. If the Administrator identifies systemic issues with its ability to verify some or all Claims in accordance with the Claims Process within six (6) months, the Administrator will refer the matter to the Settlement Implementation Committee to determine whether a different service standard should be applied to any of the classes.

7) In designing the Claims Process, the Administrator and the Plaintiffs will develop standards relating to the processing of Claims in compliance with this Agreement, insofar as this Agreement recognizes that Class Members' circumstances may require flexibility in the type of documentation necessary to support the Claims Forms due to challenges such as the Child's age or developmental status at the time of the events, the disappearance of records over time, the retirement or death of Professionals involved in a Child's case, and systemic barriers to accessing Professionals. In recognition of same, for example, Article 6.08(5) allows for Supporting Documentation that is contemporaneous or current where appropriate.

8) The Claims Process regarding the determination of Claims from members of the Kith Child Class will establish criteria and standards specific to the processing of such Claims, which take into account the Parties' intention and acknowledgement that specific standards, Supporting Documentation, eligibility, and Claims verification apply to the Kith Child Class as compared to the Removed Child Class to ensure the integrity of the Claims Process while also respecting the general principles set out in Article 5.01(7) and Article 7.01.

9) The Claims Process regarding the determination of Claims from members of the Essential Service Class, the Jordan's Principle Class, and the Trout Child Class will include a review for the purpose of making a recommendation on eligibility and compensation to the Administrator by an individual with specific culturally appropriate health and social training on Jordan's Principle, Essential Services, Confirmed Needs, Professionals, and Supporting Documentation. The Eligibility Decision will be made by the Administrator having received a recommendation under this Article.

10) In order to distribute payment to Claimants as soon as reasonably possible following the Implementation Date, the distribution protocol in the Claims Process for each class may be designed, piloted where required, and submitted for approval to the Court before the distribution protocol for other classes is finalized and approved. For example, if the distribution protocol within the Claims Process for the Removed Child Class is finalized and approved by the Court, compensation may be distributed to the Removed Child Class in accordance with this Agreement in advance of the finalization and approval of the distribution protocol for other classes.

5.02 Eligibility Decisions and Enhanced Compensation Decisions

1) The Administrator will make the decision on eligibility and compensation with respect to all classes ("**Eligibility Decision**").

2) The Administrator will review each Claims Form, Supporting Documentation, First Nations Council Confirmation, recommendation under Article 5.01(9), and such other information as the Administrator considers relevant to determine whether each Claimant is eligible for compensation.

3) A First Nations Council Confirmation is required for Claimants under the Jordan's Principle Class who solely meet the definition of "First Nations" as defined in Article 1.01 based on having been recognized as a member or citizen by their respective First Nations under agreement, treaties or First Nations' customs, traditions and laws on or before February 11, 2022 (the latter date of the Certification Orders).

4) Within six months of the receipt of a completed Claim with all required elements, including verification of the Claim by the Administrator, the Administrator will provide written reasons (including instructions on the appeal process) to a Claimant in any case of:

    (a) an Eligibility Decision;

    (b) a decision that a member of the Removed Child Family Class or the Kith Family Class is not entitled to receive compensation due to Abuse under Article 6.04(4) or Article 7.03(2);

(c) a decision that a Claimant is not entitled to an Enhancement Payment available to that Class; or

(d) a decision to refuse to extend the Claims Deadline with respect to a Class Member.

5) Only a Claimant approved by an Eligibility Decision may be entitled to payment pursuant to Article 6 or Article 7.

6) A Claimant will have 60 days to commence an appeal to the Third-Party Assessor in accordance with the Claims Process upon receipt of:

(a) an Eligibility Decision that a Claimant is not a Class Member;

(b) a decision that a Claimant is not entitled to an Enhancement Payment as defined in the Claims Process;

(c) a refusal to extend the Claims Deadline with respect to an individual Class Member; or

(d) a dispute amongst Removed Child Family Class Members under Article 6.05 or amongst Kith Family Class Members under Article 7.03.

7) The Third-Party Assessor's decision on an appeal pursuant to Article 5.02(6) will be final and not subject to judicial review, further appeal or any other remedy by legal action.

8) The Third-Party Assessor will comply with the procedure and timeline standards established in the Claims Process for an appeal from a decision of the Administrator.

9) There will be no right of appeal by a Class Member who belongs to a category, such as brothers and sisters, that is not entitled to receive direct payment under this Agreement.

ARTICLE 6 - COMPENSATION

6.01 General Principles Governing Compensation

1) The Plaintiffs will design a Claims Process with the goal of minimising the risk of causing trauma to Class Members.

2) No member of the Removed Child Class, Jordan's Principle Class, or Trout Child Class will be required to submit to an interview, examination or other form of *viva voce* evidence taking.

3) The Plaintiffs will agree to require fair and culturally appropriate Supporting Documentation in accordance with this Agreement tailored to each different class for the purposes of the Claims Process.

4) A Class Member may claim compensation starting two (2) years before they reach the Age of Majority, provided that no compensation is paid to that Class Member until after the Age of Majority. A Class Member may only receive compensation under the terms of this Agreement after the Age of Majority, except in the case of an Exceptional Early Payment in accordance with Article 6.10. The Claims Process will include a means by which a Child may register with the Administrator at any time in order to receive updates on the implementation of this Agreement.

5) Enhancement Factors have been selected as appropriate proxies for harm, based on expert opinion, and are designed to enable proportionate compensation to the Removed Child Class, the Jordan's Principle Class, and the Trout Child Class.

6) Compensation under this Agreement will take the form of either direct payment to eligible Class Members, or eligible estates of deceased Class Members, who have claimed through the Claims Process and been approved by the Administrator or indirect benefit to the Class through the Cy-près Fund.

7) A Class Member who qualifies for compensation as a member of more than one class under this Agreement will receive the higher amount for which the Class Member qualifies amongst the applicable classes, and compensation under the classes will not be combined.

8) The Kith Child Class and the Kith Family Class will be the subject of a separately designed compensation and verification process in the Claims Process in accordance with Article 7.

6.02 Governing Principles on Removed Children

1) This Agreement seeks to adopt a trauma-informed and culturally sensitive approach to compensating the Removed Child Class and the Caregiving Parents or Caregiving Grandparents of the Removed Child Class.

2) To the extent possible and based on objective criteria, the Agreement seeks to bring proportionality to the compensation process such that members of the Removed Child Class who suffered the most harm may receive higher compensation in the Claims Process.

3) For the Removed Child Class, eligibility for compensation and Enhancement Factors will be based on objective criteria and data primarily from ISC and Supporting Documentation as the case may be.

6.03 Removed Child Class Compensation

1) Base Compensation payable to an Approved Removed Child Class Member will not be multiplied by the number of Spells in Care.

2) An Approved Removed Child Class Member will be entitled to receive Base Compensation of $40,000.

3) An Approved Removed Child Class Member may be entitled to an Enhancement Payment based on the following Enhancement Factors ("**Removed Child Enhancement Factors**"):

    (a) the age at which the Removed Child Class Member was removed for the first time;

    (b) the Time in Care;

    (c) the age of a Removed Child Class Member at the time they exited the child welfare system;

    (d) whether a Removed Child Class Member was removed to receive an Essential Service relating to a Confirmed Need;

    (e) whether the Removed Child Class Member was removed from a Northern or Remote Community; and

    (f) the number of Spells in Care for a Removed Child Class Member and/or, if possible, the number of Out-of-home Placements applicable to a Removed Child Class Member who spent more than one (1) year in care.

4) The Plaintiffs will design a system of weighting the Removed Child Enhancement Factors for the Removed Child Class based on the input of experts that will reflect the relative importance of each Enhancement Factor as a proxy for harm.

5) The Plaintiffs have determined a Budget of $7.25 billion for the Removed Child Class, subject to Articles 6.11, 6.12, and 6.13.

6.04 Caregiving Parents or Caregiving Grandparents of Removed Child Class

1) Amongst the Removed Child Family Class, only the Caregiving Parents or Caregiving Grandparents may receive direct compensation if otherwise eligible under this Agreement. Brothers and sisters are not entitled to direct compensation but may benefit indirectly from this Agreement through the Cy-près Fund.

2) A foster parent is not entitled to compensation under this Agreement and is not entitled or permitted to claim compensation on behalf of a Child under this Agreement.

3) The Base Compensation of an Approved Removed Child Family Class Member will not be multiplied based on the number of removals or Spells in Care for a Child.

4) A Caregiving Parent or Caregiving Grandparent who has committed Abuse that has resulted in the Removed Child Class Member's removal is not eligible for compensation in relation to that Child. However, a Caregiving Parent or Caregiving Grandparent is not

barred from receiving compensation as a member of the Removed Child Class, the Kith Child Class, the Essential Service Class, the Trout Child Class or the Jordan's Principle Class if the Caregiving Parent or Caregiving Grandparent is otherwise eligible for compensation as a Child member of one of those classes under this Agreement.

5) A maximum compensation amount of two Base Compensation payments per Child among Caregiving Parents or Caregiving Grandparents of a Child, regardless of number of Spells in Care or removals, may be distributed under this Agreement.

6) Where the Child was removed more than once from a Caregiving Parent or a Caregiving Grandparent, the Caregiving Parent or the Caregiving Grandparent from whom the Child was first removed will be eligible to receive compensation.

7) The first time that a Child is removed from either a Caregiving Parent or Caregiving Grandparent will determine who receives compensation: whoever the Child was removed from earlier will take eligibility priority to receive a Base Compensation. For example, if the Child was removed from two Caregiving Grandparents in 2008 and later removed from a Caregiving Parent in 2010, the two Caregiving Grandparents receive two Base Compensation payments and no other person receives compensation.

8) Where the Class Member's eligibility cannot be determined in accordance with Article 6.04(6) or Article 6.04(7), or where the Child was first removed from more than two Caregiving Parents or Caregiving Grandparents, eligibility will be determined according to the following priority list:

    (a) Category A: Caregiving Parents who are not Stepparents; then

    (b) Category B: Caregiving Grandparent(s); then

    (c) Category C: Stepparents.

9) The Parties have budgeted the Base Compensation for an Approved Removed Child Family Class Member to be $40,000.

10) The final quantum of Base Compensation to be paid to each Approved Removed Child Family Class Member will be determined by the Settlement Implementation Committee in consultation with the Actuary, having regard to the number of Approved Removed Child Family Class Members and the Budget for the Removed Child Family Class under this Article, and the requirement to pay Base Compensation of $40,000 to Caregiving Parents and Caregiving Grandparents of Children in care as of or removed between January 1, 2006 and March 31, 2022 and placed off-Reserve with non-Family, subject to Court approval.

11) Payments to Approved Removed Child Family Class Members who may be entitled to receive compensation under this Article before the expiration of the Claims Deadline may

be made in installments in order to ensure sufficient funds exist to pay like amounts to like Claimants regardless of when they submitted their Claim.

12) The Plaintiffs have determined a Budget of $5.75 billion for the Removed Child Family Class.

6.05 Sequencing and Priorities in Compensation for Removed Child Family Class Members

1) The Administrator will not pay any Claims by a Caregiving Parent (Category A), Caregiving Grandparent (Category B) or Stepparent (Category C) until the expiration of the Claims Deadline, in order to determine:

   (a) From whom the Child was removed first;

   (b) Whether one, two, or no Caregiving Parent(s) (who are not Stepparents), or Caregiving Grandparent(s), who cared for the Child at the time of the first removal (Category A) are approved with respect to the same Child;

   (c) whether more than two other Caregiving Grandparents (Category B) or Stepparents (Category C) have submitted a Claim with respect to the same Child; and

   (d) the amount of compensation, if any, payable to each such Claimant in accordance with this Article.

2) Notwithstanding Article 6.05(1), the Claims Process may include provisions for exceptional circumstances to the following effect: The Administrator may approve a Claim by a putative Category A, Category B, or Category C Claimant before the expiration of the Claims Deadline in accordance with the timelines specified in Article 5.02(4), and if they are determined to be Approved Removed Child Family Class Members, the Administrator may pay their compensation in accordance with the timelines specified in Article 6.14, subject to all other applicable limitations under this Agreement only if the Claimant has submitted Claims Forms and Supporting Documentation substantiating that all other biological parent(s), adoptive parent(s), stepparent(s), biological and adoptive grandparent(s), if applicable, of the Child have expressly renounced their entitlement to make a Claim under this Agreement or if the Child was the subject of a single removal at birth and the Child was a ward of the state as a result of that removal until the Age of Majority.

3) In the event of Claims by more than two putative Caregiving Parents (Category A), the Administrator may require further information and proof from those Claimants, but without the direct involvement of the affected Child, to substantiate who, if any, amongst such

Claimants meet the definition of a Caregiving Parent entitled to compensation under this Agreement.

4) Where only one Caregiving Parent (Category A), who cared for the child at the time of the first removal has submitted a Claim that has been approved with respect to the Child, only one Caregiving Grandparent (Category B) who was living in the same household as the Caregiving Parent may be deemed to be eligible to receive the remaining Base Compensation payment under this Agreement, regarding that Child, and no other parent, grandparent, or stepparent of that Child will receive a Base Compensation under this Agreement. If such Caregiving Grandparent (Category B) is also eligible for compensation with respect to one or more other removed Children between January 1, 2006 and March 31, 2022 who were placed off-Reserve with non-Family, they will be entitled to a maximum of $80,000 in compensation under this Agreement with respect to multiplications of the Base Compensation under Article 6.06.

5) In the event of Claims by multiple putative Caregiving Grandparents (Category B) beyond the available number of Base Compensation payment(s) with respect to the same Child, the Administrator may require further information and proof from those Claimants, but without the direct involvement of the affected Child, to substantiate who, if any, amongst such Claimants meet the definition of a Caregiving Grandparent entitled to compensation under this Agreement.

6) If only one Base Compensation remains with respect to a Child, and two Stepparents (Category C) have been approved by the Administrator, or on appeal to the Third-party Assessor, such Stepparents will share pro rata that one Base Compensation.

7) Any dispute amongst Caregiving Parents, Caregiving Grandparents or Stepparents will be subject to a summary adjudicative determination by the Third-Party Assessor in accordance with the Claims Process.

6.06 Multiplication of Base Compensation for Certain Removed Child Family Class Members

1) An Approved Removed Child Family Class Member who is a Caregiving Parent or a Caregiving Grandparent will receive multiple Base Compensation payments if and where more than one Child of the Caregiving Parent or the Caregiving Grandparent, as the case may be, has been removed from their Family, and placed off-Reserve with non-Family at any time during the Removed Child Class Period.

2) The multiplication of the Base Compensation will correspond to the number of such Children who were removed from the Caregiving Parent or the Caregiving Grandparent and placed off-Reserve with non-Family. For greater certainty, a Child who was placed on-Reserve does not entitle a Caregiving Parent or a Caregiving Grandparent to a

multiplication of the Base Compensation. For example, two Caregiving Parents who had two of their Children removed from their care and placed off-Reserve with non-Family will each be entitled to $80,000 in compensation if otherwise eligible for compensation under this Agreement.

3) No other Removed Child Family Class Member may receive a multiplication of the Base Compensation regardless of the number of Children removed from such Removed Child Family Class Member and regardless of whether a Child was placed on-Reserve or off-Reserve.

4) Notwithstanding Article 6.06(1) and Article 6.06(2), an Approved Removed Child Family Class Member will be entitled to a maximum of two (2) Base Compensation payments, up to a maximum of $80,000 of compensation regardless of the number of Children removed in the following cases:

   (a) the Approved Removed Child Family Class Member had two or more Children removed and placed off-Reserve with non-Family between April 1, 1991 and December 31, 2005 (excluding those who remained in care as of January 1, 2006);

   (b) all Approved Removed Child Family Class Members who are Stepparents who had two or more Children removed and placed off-Reserve with non-Family during the Removed Child Class Period; or

   (c) all Approved Removed Child Family Class Members who are Category B Caregiving Grandparents during the Removed Child Class Period in cases where one Category A Caregiving Parent has been approved for compensation under this Agreement with respect to the affected Child.

5) The Settlement Implementation Committee may, on advice from the Actuary, reassess eligibility for multiplications of Base Compensation under this Article for Caregiving Parents or Caregiving Grandparents who are the subject of Article 6.06(4), including the potential reduction of two Base Compensation payments or, conversely, removal of the cap of two (2) Base Compensation payments set out in Article 6.06(4).

6) The Plaintiffs have determined a Budget of $997 million for the multiplication of Base Compensation paid pursuant to this article.

6.07 Governing Principles Regarding Essential Service, Jordan's Principle, and Trout Classes

1) To the extent possible, this Agreement applies the same methodology to the Essential Service Class, Jordan's Principle Class, and Trout Child Class.

2) This Agreement intends to:

(a) be trauma-informed regarding the Jordan's Principle Class, Essential Service Class, and the Trout Child Class;

(b) avoid subjective assessments of harm, individual trials, or other cumbersome methods of making Eligibility Decisions with respect to these classes; and

(c) use objective criteria to assess Class Members' needs and circumstances as a proxy for the impact experienced by such Class Members in a discriminatory system.

3) The Base Compensation of an Approved Jordan's Principle Class Member or an Approved Trout Child Class Member will not be multiplied based on the number of Essential Services that were the subject of the Child's Confirmed Need.

6.08 Essential Service Class, Jordan's Principle Class, and Trout Child Class

1) The Plaintiffs will design the portion of the Claims Process with respect to members of the Essential Service Class, Jordan's Principle Class, and the Trout Child Class in accordance with this Article. A summary of the approach in this Article as an interpretive aid is attached as Schedule J, Summary Chart of Essential Service, Jordan's Principle, and Trout Approach. In the case of a conflict, the Articles in this Agreement will govern.

2) Eligibility for compensation for members of the Essential Service Class, Jordan's Principle Class, and the Trout Child Class will be determined based on those Class Members' Confirmed Need for an Essential Service if:

(a) a Class Member's Confirmed Need was not met because of a Denial of a requested Essential Service;

(b) a Class Member experienced a Delay in the receipt of a requested Essential Service for which they had a Confirmed Need; or

(c) a Class Member's Confirmed Need was not met because of a Service Gap even if the Essential Service was not requested.

3) The Framework of Essential Services, based on advice from experts, establishes a method to assess:

(a) whether the Child had a Confirmed Need for an Essential Service;

(b) whether an Essential Service was subject to a Delay, Denial or Service Gap; and

(c) the impact of the Delay, Denial or Service Gap, as assessed by objective criteria (including related to the pain, suffering or harm) associated with the Delay, Denial or Service Gap.

4) A Claimant will be considered to have established a Confirmed Need if the Claimant has provided Supporting Documentation and has been approved by the Administrator.

5) Supporting Documentation will include verification of a recommendation by a Professional consistent with the following principles, where applicable:

    (a) Permissible proof includes contemporaneous and/or current proof of assessment, referral or recommendation to account for the difficulties in retaining and obtaining historic records during the Trout Child Class Period and Essential Service Class Period.

    (b) Permissible proof includes proof of assessment, referral or recommendation from a Professional within that Professional's expertise as may be available to the Class Member in their place of residence, including those in a Northern and Remote Community.

    (c) In order to establish a Confirmed Need, the Professional must specify in all cases the Essential Service that the Claimant needed, and the reason for the need, and when the need can reasonably be expected to have existed.

    (d) A Claimant may establish that they requested an Essential Service from Canada during the Trout Child Class Period or Essential Service Class Period by way of a statutory declaration. Proof of a request for an Essential Service is the only instance where a statutory declaration may be adduced as Supporting Documentation for the purposes of the Trout Child Class, Essential Service Class, Jordan's Principle Class, Jordan's Principle Family Class, and the Trout Family Class.

6) If the Administrator, or the Third-Party Assessor on appeal, determines that a Class Member has provided Supporting Documentation establishing a Confirmed Need for an Essential Service, the Administrator, or the Third-Party Assessor on appeal, will determine whether the Claimant faced a Denial, Delay or a Service Gap.

7) Where a Class Member has provided Supporting Documentation establishing a Confirmed Need for an Essential Service and where the Administrator has determined that the Class Member experienced a Denial, Delay or a Service Gap, that Class Member will be:

    (a) an Approved Essential Service Class Member or an Approved Jordan's Principle Class Member, depending on the criteria specified in this Agreement, if the Claimant's Confirmed Need occurred within the Essential Service Class Period;

    (b) an Approved Trout Child Class Member if the Claimant's Confirmed Need occurred within the Trout Child Class Period.

8) The Plaintiffs have determined a total Budget of $3.0 billion dollars for the Essential Service Class (inclusive of the Jordan's Principle Class) and collectively, subject to Articles 6.11, 6.12, and 6.13 ("**Essential Service Budget**").

9) The Plaintiffs have determined a Budget of $2.0 billion dollars for the Trout Child Class, subject to Articles 6.11, 6.12, and 6.13 ("**Trout Child Budget**").

10) A Claimant may be determined to be a Jordan's Principle Class Member if they have established a Confirmed Need for an Essential Service and have been determined to have experienced the highest level of impact (including pain, suffering or harm of the worst kind) in relation to a Delay, Denial or Service Gap, and including impact in relation to conditions and circumstances such as an illness, disability or impairment, based on objective criteria and expert advice pursuant to the method specified in Schedule F, Framework of Essential Services. In this regard:

    (a) Such impact (including pain, suffering or harm) is to be assessed through culturally sensitive Claims Forms and instruments such as a questionnaire designed in consultation with experts. Subject to the Court's approval, the selection of which Claimants qualify under this category will be based on objective factors (which may include the severity of pain, suffering or harm) and the number of Claimants.

    (b) The threshold of impact for qualification as a member of the Jordan's Principle Class is subject to the results of piloting of the method developed in accordance with Schedule F, Framework of Essential Services.

11) An Approved Jordan's Principle Class Member will be entitled to receive Base Compensation of $40,000.

12) An Approved Essential Service Class Member other than a Jordan's Principle Class Member will receive up to but not more than $40,000 in compensation based on a pro rata share of the Essential Service Budget after deducting the total estimated amount of compensation to be paid to all Approved Jordan's Principle Class Members.

13) An Approved Trout Child Class Member will receive a minimum of $20,000 in compensation if they have established a Confirmed Need for an Essential Service and have been determined to have experienced the highest level of impact (including pain, suffering or harm of the worst kind) in relation to a Delay, Denial or Service Gap, including impact in relation to conditions and circumstances such as an illness, disability or impairment, based on objective criteria and expert advice pursuant to the method specified in Schedule F, Framework of Essential Services. In this regard:

    (a) Such impact (including pain, suffering or harm) is to be assessed through culturally sensitive Claims Forms and instruments such as a designed in consultation with experts. Subject to the Court's approval, the selection of which Claimants qualify

under this category will be based on objective factors (which may include the severity of pain, suffering or harm) and the number of Claimants.

(b) The threshold of impact for qualification as a member of the Trout Child Class is subject to the results of piloting of the method developed in accordance with Schedule F, Framework of Essential Services.

14) An Approved Trout Child Class Member who has not established a Claim under Article 6.08(13) will receive up to but not more than $20,000 in compensation having regard to the Trout Child Class Budget, based on a pro rata share of the Trout Child Budget after deducting the total amount of compensation to be paid to Approved Trout Child Class Members who have established a claim under Article 6.08(13).

15) In the event of a Trust Fund Surplus pursuant to Article 6.11 based on advice from the Actuary after approved Claims under Article 6.08(10) and Article 6.08(13) are paid or projected to be paid, Approved Jordan's Principle Class Members, and Approved Trout Child Class Members who have established a claim under Article 6.08(13) may be entitled to an Enhancement Payment.

6.09 Caregiving Parents or Caregiving Grandparents of Jordan's Principle Class and Trout Child Class

1) Only the Caregiving Parents or the Caregiving Grandparents of Approved Jordan's Principle Class Members may be entitled to compensation if it is determined by the Administrator, or on appeal by the Third-Party Assessor, that such Caregiving Parents or Caregiving Grandparents themselves experienced the highest level of impact (including pain, suffering or harm of the worst kind).

2) Such Approved Jordan's Principle Family Class Members will be entitled to receive Base Compensation of $40,000.

3) Only the Caregiving Parents or Caregiving Grandparents of the Approved Trout Child Class Members who have established a Claim under Article 6.08(13) may be entitled to compensation if it is determined by the Administrator, or on appeal by the Third-Party Assessor, that such Caregiving Parents or Caregiving Grandparents themselves experienced the highest level of impact (including pain, suffering or harm of the worst kind). The Base Compensation of Approved Trout Family Class Members will be determined by the Settlement Implementation Committee with the assistance of the Actuary regarding the forecasted number of Claimants, based on objective factors (which may include the severity of pain, suffering or harm) and the number of Claimants.

4) The impact experienced by such Caregiving Parents or Caregiving Grandparents will be assessed through objective criteria and expert advice pursuant to a method to be developed and specified in parallel with Schedule F, Framework of Essential Services

regarding Children. Such impact (including pain, suffering or harm) may be assessed through culturally sensitive Claims Forms designed in consultation with experts. Subject to the Court's approval, the selection of which Claimants qualify under this category will be based on objective factors (which may include the severity of pain, suffering or harm) and the number of Claimants.

5) The selection of the objective factors and the threshold for qualification under this Article is subject to the results of piloting of the method of assessment developed in accordance with this Article.

6) The Base Compensation of an Approved Jordan's Principle Family Class Member or an Approved Trout Family Child Class Member will not be multiplied based on the number of Essential Services that were the subject of the Confirmed Need of the Approved Jordan's Principle Class Member or the Approved Trout Child Class Member whose Claim grounds the Caregiving Parent or Caregiving Grandparent's eligibility to seek compensation under this Article.

7) All other Jordan's Principle Family Class Members and Trout Family Class Members will not receive direct compensation under this Agreement, but are intended to benefit indirectly from the Cy-près Fund.

8) The Budget for the Jordan's Principle Family Class and the Trout Family Class collectively is the fixed amount of $2.0 billion dollars ("**Jordan's Principle and Trout Family Budget**"). There will be no reallocation to these classes of any surpluses or revenues.

6.10 Exceptional Early Payment of Compensation Funds

1) Notwithstanding Article 6.01(4), the Administrator may exceptionally approve the payment of compensation to a Claimant who has not reached the Age of Majority in accordance with this Article.

2) An individual under the Age of Majority may be eligible to receive an amount of compensation to fund or reimburse the cost of a life-changing or end-of-life wish experience or needs (the "**Exceptional Early Payment**"), if they provide Supporting Documentation establishing that:

   (a) they meet the requirements, other than age, to be an Approved Removed Child Class Member or an Approved Jordan's Principle Class Member; and

   (b) they are suffering from a terminal or severe degenerative life-threatening condition that has placed their life in jeopardy.

3) An individual who establishes eligibility for an Exceptional Early Payment in accordance with this Article must provide reasonable proof of a chosen life-changing or end-of-life wish experience and the approximate cost of that experience.

4) The Administrator will assess a Claimant's eligibility for an Exceptional Early Payment to fund or reimburse the cost in an amount up to, but no more than $40,000.

5) The Administrator will determine the Claim for an Exceptional Early Payment in the best interests of the Child and on an expedited basis commensurate with the Child's circumstances. The Administrator will require such documentation in good faith as is required to assess:

   (a) the Claimant's eligibility;

   (b) the Claimant's terminal or severe degenerative life-threatening condition;

   (c) the validity of the Claimant's life-changing or end-of-life experience request;

   (d) the age and circumstances of the Child and whether the Child needs any protection; and

   (e) the approximate cost of the life-changing or end-of-life wish experience.

6) Where a Class Member has received an Exceptional Early Payment and later submits a Claim for compensation, the amounts paid as Exceptional Early Payment will be deducted from that Claimant's total entitlement, if any, to compensation under this Agreement.

6.11 Priorities in Distribution of Surplus

1) On the advice of the Actuary or a similar advisor, the Settlement Implementation Committee may determine at any time or from time to time that there are unallocated or surplus funds on the Settlement Funds in the Trust Fund (a "**Trust Fund Surplus**").

2) The Settlement Implementation Committee may propose that a Trust Fund Surplus be designated and that there be a distribution of any Trust Fund Surplus for the benefit of the Class Members in accordance with this Article and the Claims Process, subject to the approval of the Court.

3) The Settlement Implementation Committee, having proposed that a surplus be designated and that there be a distribution of such Trust Fund Surplus, will bring motions before the Court for approval of the designation of a surplus and the proposed distribution of any Trust Fund Surplus. The designation and any allocation of a Trust Fund Surplus will be effective on the later of:

   (a) the day following the last day on which an appeal or a motion seeking leave to appeal of either of the approval orders in respect of such designation and allocation may be brought under the *Federal Courts Rules*, SOR /98-106; and

   (b) the date on which the last of any appeals of either of the approval orders in respect of such designation and allocation is finally determined.

4) In no event will any amount from the Trust Fund, including any Trust Fund Surplus, revert to Canada, and Canada will not be an eligible recipient of any Trust Fund Surplus.

5) In allocating the Trust Fund Surplus, the Settlement Implementation Committee will have due regard to the order of priorities set out below:

    i) Approved Removed Child Class Members;

    ii) Approved Jordan's Principle Class Members;

    iii) Approved Trout Child Class Members;

    iv) Approved Essential Service Class Members;

    v) Approved Removed Child Family Class Members.

6.12 Reallocation of Budgets

1) The Settlement Implementation Committee will adopt the Budgets with respect to compensation allocated to different classes in accordance with the amounts listed in Article 6 and Article 7.

2) The Settlement Implementation Committee will arrange for an actuarial review of the Trust Fund to be conducted at least once every three (3) years and more frequently if the Settlement Implementation Committee considers it appropriate. The actuarial review will be conducted by the Actuary in accordance with accepted actuarial practice in Canada. The actuarial review will determine:

    (a) the value of the assets available to meet all outstanding and future expected Claims;

    (b) the present value of all outstanding and future expected Claims using where necessary such reasonable assumptions as determined by the Actuary to be appropriate;

    (c) an actuarial buffer to provide a reasonable margin of protection due to adverse deviations from the assumptions utilized; and

    (d) the actuarial surplus and/or the actuarial deficit of funds in a Budget.

3) If based on the Actuary's advice the total compensation to be paid to the number of approved Class Members within a class is, or is expected to be, below the Budget, the Settlement Implementation Committee may transfer some amount from that Budget to another Budget.

4) If more than one (1) Budget has a higher than estimated total compensation to be paid to the number of approved Class Members, the Settlement Implementation Committee may

make such transfer of funds in accordance with the following order of priorities, subject to Court approval:

i) Approved Removed Child Class Members;

ii) Approved Jordan's Principle Class Members;

iii) Approved Trout Child Class Members;

iv) Approved Essential Service Class Members;

v) Approved Removed Child Family Class Members.

6.13 Income on Trust Fund

Subject to Article 6.15 and Article 6.16, the Settlement Implementation Committee may allocate income earned by the Trust Fund to any class, in its discretion, in accordance with the following order of priorities, favouring those classes where higher than estimated total compensation to be paid to the approved Class Members exists:

i) Approved Removed Child Class Members;

ii) Approved Jordan's Principle Class Members;

iii) Approved Trout Child Class Members;

iv) Approved Essential Service Class Members;

v) Approved Removed Child Family Class Members.

6.14 Option to Invest Compensation Funds

The Administrator will provide payment to Class Members who have been approved for compensation within nine (9) months of the approval of the Class Member's Claim, but in all cases, only after taking the following steps:

(a) At least six (6) months prior to issuing payment, the Administrator will contact the Approved Class Member to ask whether the Class Member wishes to direct a portion or all of the amount to which the Class Member is entitled to an investment vehicle.

(b) The form of notice to the Class Member will be determined by the Settlement Implementation Committee.

(c) If the Class Member indicates their desire that a certain amount be invested, the funds will be held or directed to an account or investment instrument to which the trustee is directed to send the payment by the Claimant.

(d) Once the Class Member's investment account is established, the fees, costs and taxes payable on the investment capital or returns will be borne by the Class Member's individual investment, as applicable.

6.15 Interest Payments to Certain Child Class Members

1) To facilitate the adjustment of compensation for the time value of money, the Settlement Implementation Committee, upon the advice of the Investment Committee and the Actuary will create an interest reserve fund, intended to ensure payment of 1.75 per cent annualized simple interest upon the Base Compensation amount payable in respect of the CHRT Interest Accrual Period ("**Interest Reserve Fund**").

2) The following Class Members are entitled to receive interest pursuant to this Article:

   (a) Approved Removed Child Class Members who were placed off-Reserve with non-Family during the CHRT Interest Accrual Period;

   (b) Approved Kith Child Class Members; and

   (c) Approved Jordan's Principle Class Members.

3) The entitlement of an Approved Removed Child Class Member, an Approved Kith Child Class Member, or an Approved Jordan's Principle Class Member to receive interest from the Interest Reserve Fund will commence on the 1st day of the yearly quarter following their removal or following the date on which the Child faced a Delay, Denial or Service Gap with respect to an Essential Service that was the subject of a Confirmed Need for the Child and runs for the balance of the CHRT Interest Accrual Period.

4) The Interest Reserve Fund will have an initial Budget of $1 billion.

5) The Actuary will calculate expected returns on the Settlement Funds from time to time and will recommend to the Settlement Implementation Committee additions to or transfers from the Interest Reserve Fund.

6.16 Income generated above the Interest Reserve Fund

1) The Settlement Implementation Committee may allocate any income earned on the Settlement Funds above the amount guaranteed by the Interest Reserve Fund, upon the advice of the Investment Committee and the Actuary, in accordance with Article 6.13 and Article 6.16.

2) The allocation of income generated above the Interest Reserve Fund will be distributed in accordance with the following priorities:

   (a) The endowment of the sum of $50 million to the Cy-près Fund pursuant to Article 8.02(1); then

(b) Approved Removed Child Family Class Members of Children placed off-Reserve with non-Family, Approved Kith Family Class Members, and Approved Jordan's Principle Family Class Members during the CHRT Interest Accrual Period, up to 1.75 per cent simple annualized interest from the date of the accrual of interest during the CHRT Interest Accrual Period; then

(c) Approved Removed Child Class Members other than those listed in Article 6.15(2)(a); then

(d) Approved Jordan's Principle Class Members; then

(e) Approved Trout Child Class Members; then

(f) Approved Essential Service Class Members; then

(g) Other Approved Removed Child Family Class Members; then

(h) Approved Trout Family Class Members.

3) For clarity, the discretion granted to the Settlement Implementation Committee in this Article is in addition to, and does not derogate from, the discretion afforded to the Settlement Implementation Committee under Article 6.13.

6.17 Adjustment for Time Value of Compensation Money

The compensation payable to an Approved Removed Child Class Member or an Approved Jordan's Principle Class Member who has not reached the Age of Majority by delivery of the notice of approval of settlement may be adjusted having regard to the period of time that passes before the Class Member reaches the Age of Majority. The Settlement Implementation Committee, upon the advice of the Investment Committee and the Actuary, will determine a consistent method for calculating the adjustment subject to the Court's approval.

ARTICLE 7 – KITH CHILD CLASS AND KITH FAMILY CLASS

7.01 Governing Principles

1) The Plaintiffs will design a Claims Process with the goal of minimising the risk of causing trauma to Class Members.

2) No member of the Kith Child Class will be required to submit to an interview, examination or other form of *viva voce* evidence taking.

3) The Plaintiffs will agree to require fair and culturally appropriate Supporting Documentation in accordance with this Agreement tailored to the specific circumstances of the Kith Child Class and Kith Family Class for the purposes of the Claims Process.

4) A Kith Child Class Member may claim compensation starting two years before they reach the Age of Majority, provided that no compensation is paid to that Class Member until after the Age of Majority.

5) Compensation under this Agreement will take the form of either direct payment to eligible Class Members, or eligible estates of deceased Class Members, who have claimed through the Claims Process and been approved by the Administrator or indirect benefit to the Class through the Cy-près Fund.

6) A Class Member who qualifies for compensation as a member of more than one class under this Agreement will receive the higher amount for which the Class Member qualifies amongst the applicable classes, and compensation under the classes will not be combined.

7) The Kith Child Class and the Kith Family Class will be the subject of a separately designed compensation and verification process in the Claims Process in accordance with Article 7.

8) The following principles will apply to the development of the Claims Process relating to the Kith Child Class:

    (a) The records related to the Kith Child Class, Kith Placements, Kith Caregivers, and Kith Agreements differ as between Child Welfare Authorities, provinces and regions, and such records are of a nature that necessitates unique evidentiary requirements in order to verify Claims and safeguard the integrity of the Claims Process. As such, the payment of compensation to the Kith Child Class will take place under a stream within the Claims Process that is independent of the other classes, in particular the Removed Child Class, to be developed pursuant to this Article.

    (b) The Parties and the Administrator will develop the Claims Process dedicated to the Kith Child Class with the participation of the Caring Society, and they will collectively take into account the views of and guidance from youth in care and youth formerly in care, as well as Child Welfare Authorities, to the extent that such views are applicable and in the best interests of the Class.

    (c) If required with respect to a Claim, verification should take place through the examination of personal records relating to the specific Child within the Child Welfare Information through the engagement of Child Welfare Authorities and/or Child Welfare Records Technicians.

(d) To the extent that some Claimants may be Children or individuals with varying accessibility needs at the time of submitting their Claims pursuant to this Article, the wellbeing and best interests of the Child will be a paramount consideration in the design of the Claims Process relating to such Kith Child Class Members.

7.02 Compensation to Kith Child Class

1) An Approved Kith Child Class Member will be entitled to receive Base Compensation of $40,000.

2) No Enhancement Payment applies to the Kith Child Class.

3) The Administrator will approve a Claimant as a Kith Child Class Member only if the Claimant has substantiated, or the Administrator has been able to otherwise verify, all of the following elements:

   (a) the First Nations Child was Ordinarily Resident on Reserve immediately before the Kith Placement;

   (b) the Child was placed with a Kith Caregiver during the Removed Child Class Period;

   (c) the Kith Caregiver lived off-Reserve, meaning the Kith Placement was off-Reserve; and

   (d) the Kith Placement occurred during a Child Welfare Authority involvement.

4) The Supporting Documentation for the Kith Child Class may incorporate the following examples, but only if such Supporting Documentation establishes all the required elements in Article 7.02(3):

   (a) a Kith Placement Agreement, establishing the required elements in Article 7.02(3), and other Supporting Documentation as may be required in the Claims Process;

   (b) statutory declarations from the Child Welfare Authority involved in the Claimant's Kith Placement, establishing the required elements in Article 7.02(3), and other Supporting Documentation as may be required in the Claims Process; or

   (c) other child-specific evidence establishing the required elements in Article 7.02(3), such as the individual to whom child-specific tax benefits were paid during the period in question, school records, passport application information, contact information from a doctor's file, records related to treaty payments, which options will be further defined and developed as part of the Claims Process.

5) The Budget for compensation to the Kith Child Class, inclusive of any adjustments to individual compensation to account for the time value of compensation to Approved Kith Child Class Members who have not reached the Age of Majority by delivery of the notice of approval of this Agreement, is the fixed amount of $600 million in compensation under this Agreement. There will be no reallocation to this class of any surpluses or revenues.

7.03 Kith Family Class

1) The Caregiving Parent(s) or, in the absence of Caregiving Parents, the Caregiving Grandparent(s) of an Approved Kith Child Class Member who was in a Kith Placement as of January 1, 2006 or between January 1, 2006 and March 31, 2022 may receive compensation under this Agreement.

2) A Kith Family Class Member who has Abused an eligible Child is not eligible for compensation in relation to that Child.

3) The Parties have budgeted the Base Compensation for an Approved Kith Family Class Member to be $40,000.

4) No Enhancement Payment applies to the Kith Family Class.

5) The Base Compensation of a Kith Family Class Member will not be multiplied based on the number of Kith Placements for a Child.

6) For the purposes of this Article and the Kith Family Class, a Stepparent is not considered a Caregiving Parent or a Caregiving Grandparent and is accordingly not eligible for compensation under this Article.

7) A maximum compensation amount of two Base Compensation payments per Child among Caregiving Parents or Caregiving Grandparents of a Child, regardless of number of Kith Placements, may be distributed under this Agreement, if otherwise eligible.

8) Where there was more than one Kith Placement regarding a Child, the Caregiving Parent or the Caregiving Grandparent in the earlier Kith Placement will take priority in receiving compensation. If the temporal order of such Kith Placements cannot be determined or is not determinative, the following priorities apply:

    (a) Category A: Caregiving Parents; then

    (b) Category B: Caregiving Grandparents.

9) The Administrator may only approve a Caregiving Parent or Caregiving Grandparent in relation to an already Approved Kith Child Class Member.

10) In the event of multiple Claims by more than two putative Caregiving Parents or Caregiving Grandparents, the Administrator may require further information and proof

from those Claimants, but without the direct involvement of the affected Child, to substantiate who, if any, amongst such Claimants met the definition of a Caregiving Parent or Caregiving Grandparent under this Agreement.

11) The final quantum of Base Compensation to be paid to each Approved Kith Family Class Member will be determined by the Settlement Implementation Committee in consultation with the Actuary, having regard to the number of Approved Kith Family Class Members and the Budget for the Kith Family Class under this Article, subject to Court approval.

12) Payments to Approved Kith Family Class Members who may be entitled to receive compensation under this Article before the expiration of the Claims Deadline may be made in installments in order to ensure sufficient funds exist to pay like amounts to like Claimants regardless of when they submitted their Claim.

7.04 Multiplication of Base Compensation for Certain Kith Family Class Members

1) An Approved Kith Family Class Member may receive multiple Base Compensation payments if and where the following conditions are met:

   (a) more than one Child of the Caregiving Parent or the Caregiving Grandparent, as the case may be, has been approved by the Administrator, or the Third-Party Assessor on appeal, as Approved Kith Child Class Members in a Kith Placement between January 1, 2006 and March 31, 2022;

   (b) the multiplication of the Base Compensation will correspond to the number of such Approved Kith Child Class Members who have been approved for compensation; and

   (c) the Approved Kith Family Class Member has established that they are a Caregiving Parent or Caregiving Grandparent to each of the such Approved Kith Child Class Member through Supporting Documentation.

2) The Budget for the Kith Family Class is the fixed amount of $702 million in compensation under this Agreement. There will be no reallocation to this class of any surpluses or revenues.

ARTICLE 8 – CY-PRÈS FUND

8.01 Governing Principles

1) The Plaintiffs will design a Cy-près Fund with the assistance of experts, subject to the Court's approval.

2) The Cy-près Fund's purposes are to benefit:

a) Class Members who do not receive direct payment under this Agreement; and

b) Approved Jordan's Principle Class Members who require post-majority services.

3) The Cy-près Fund will be First Nations led.

4) There will be an annual report of the operation, including distribution, of the Cy-près Fund, which will be made publicly available. A copy of the annual report will also be provided to the Settlement Implementation Committee.

8.02 Support to Benefit Class Members Who Do Not Receive Direct Compensation

1) Within one year after the Court's approval of the Cy-près Fund pursuant to Article 8.01(1) (the "**General Fund**"), the Trustee will endow the trust entity administering the General Fund with $50,000,000 from the Trust Fund, to be paid from the income generated on the Settlement Funds pursuant to Article 6.16(2)(a).

2) The objective of the General Fund is to provide culturally sensitive and trauma-informed supports to the Class, including the following:

(a) Establish a fund, foundation or other similar vehicle whose leadership may include First Nations youth and children in care, formerly in care, their allies and those who experienced a Delay, Denial or Service Gap under Jordan's Principle, to offer grant-based supports to facilitate access to culture-based, community-based and healing-based programs, services and activities to Class Members and the Children of First Nations parents who experienced a Delay, Denial or Service Gap under Jordan's Principle.

i) Such grant-based supports may include funding the following:

(1) Family and community unification, reunification, connection and reconnection for youth in care and formerly in care:

i. facilitating First Nations youth in care and formerly in care to identify birth family and their First Nation, which may include accessing records or files, meeting family members or travelling to their First Nation;

ii. accessing holistic wellness supports for First Nations youth in care and formerly in care during the family and community reunification and reconnection process; and

iii. reducing the costs associated with travel and accommodations to visit community and family, including for First Nations youth in care and formerly in care, support person(s) or family members.

(2) Cultural access:

i. facilitating access to cultural programs, activities and supports, including: youth groups, ceremony, language, Elders and Knowledge Keepers, mentors, land-based activities, and culturally-based arts and recreation.

(3) Transition and Navigation supports:

i. Facilitating access for First Nations youth in care and formerly in care to transition supports for First Nations youth in care and formerly in care who are either not eligible for post-majority care and services under the reformed First Nations Child and Family Services Program or that are not covered elsewhere, in their transition to adulthood, including: safe and accessible housing, life skills and independent living, financial literacy, planning and services, continuing education, health and wellness supports.

ii. Facilitating access to navigational supports for Class Members and the children of First Nations parents who experienced a Delay, Denial or Service Gap under Jordan's Principle who are not eligible to receive post-majority services under Jordan's Principle or are not covered elsewhere.

iii. Facilitating access to a scholarship for the Jordan's Principle Class and the children of First Nations parents who experienced a Delay, Denial or Service Gap in the provision of services under Jordan's Principle. The scholarship will be designed to acknowledge the adverse effects associated with the experience of a Delay, Denial or Service Gap under Jordan's Principle.

(b) A National First Nations Youth In/From Care Network may also be established through the grants, or through the formation of a fund, foundation or similar organization, which may include funding an existing national network and existing regional networks. The networks would share best practices and updates, provide advocacy, discuss and make recommendations on policy. The structure, scope and membership of the networks is to be determined by First Nations Youth In/From Care.

8.03 Post-Majority Supports for Jordan's Principle

1) On the sixtieth (60^{th}) day following the Court's approval of the Cy-près Fund, the Trustee will transfer $90,000,000 from the Settlement Funds to the trust entity administering the Jordan's Principle Post-Majority Fund. The Jordan's Principle trust entity will administer the funds in accordance with this Article.

2) The Caring Society, with input from the Plaintiffs, will select the Jordan's Principle trust entity. Such entity will act in the best interests of the Jordan's Principle Post-Majority Fund Beneficiaries and in a manner that promotes public confidence.

3) The purpose of the Jordan's Principle Post-Majority Fund is to provide some additional supports to high needs Approved Jordan's Principle Class Members between the Age of Majority and such Class Members' 26th birthday necessary to ensure their personal dignity and well-being.

4) In cooperation with the Jordan's Principle trust entity, the Caring Society will have the following responsibilities in relation to the Jordan's Principle Post-Majority Fund:

    (a) designing the trust agreement reflecting the purpose of the Jordan's Principle Post-Majority Fund and the terms and conditions of same;

    (b) determining the eligibility criteria and process for accessing benefits under the Jordan's Principle Post-Majority Fund; and

    (c) receiving and reviewing an accounting from the Jordan's Principle trust entity on a quarterly basis.

5) Jordan's Principle Post-Majority Beneficiaries may access benefits under the Jordan's Principle Post-Majority Fund by making a request to the trust entity. If an Approved Jordan's Principle Class Member who is approaching or is past the Age of Majority contacts ISC through mechanisms for accessing Jordan's Principle, ISC will refer the Class Member to the trust entity. ISC will collaborate with the Caring Society and the Plaintiffs regarding public information that can be provided by ISC regarding the Jordan's Principle Post-Majority Fund.

6) Any income generated on the Jordan's Principle Post-Majority Fund which is not distributed to the Jordan's Principle Post-Majority Beneficiaries in any year will be accumulated in the Jordan's Principle Post-Majority Fund.

ARTICLE 9 – SUPPORTS TO CLASS IN CLAIMS PROCESS

1) The Parties will agree to culturally sensitive health, information, and other supports to be provided to Class Members in the Claims Process, as well as funding for health care professionals to deliver support to Class Members who suffer or may suffer trauma for the duration of the Claims Process, consistent with Schedule I, Framework for Supports for Claimants in Compensation Process, and the responsibilities of the Administrator in providing navigational and other supports under Article 3.02.

2) Canada will provide funding to the AFN in the amount of $2,550,000 to provide supports to First Nations Claimants for a five (5) year term beginning April 1, 2024, and ending March 31, 2029. This process will include administering a help desk with AFN line liaisons and providing culturally safe assistance to Claimants in completing relevant Claims Forms if not covered by the supports available to Class Members by the Administrator (the "**AFN Supports**"). By April 2028, the AFN may approach the Settlement Implementation Committee for an extension of the funding for the AFN Supports. Subject to the Settlement Implementation Committee's approval to an extension of the AFN Supports, Canada will provide further block funding to the AFN to continue the AFN Supports for a period agreeable to the AFN, the Settlement Implementation Committee, and Canada.

3) Canada will fund the enhancement of the Hope for Wellness Line to include training to their call operators and counsellors on the Actions and promote this service to Class Members as soon as possible and prior to the approval of the Settlement. The Parties will recommend that the Court will appoint a third-party Indigenous organization funded by Canada, to provide a culturally safe, youth-specific support line that would provide counselling services for youth and young adult class members and to refer to post-majority care services when appropriate.

4) Without limitation to the foregoing, Canada will pay for mental health, and cultural supports, navigators to promote communications and provide referrals to health services, help desk with AFN line liaisons, reasonable costs incurred by First Nations service providers in providing access to records to support Claimant eligibility from provinces, territories, and agencies, Child Welfare Records Technicians, and professional services (taxonomy and actuarial services), and reasonable fees relating to a structured settlement (if applicable) to be agreed. Canada will fund mental health and cultural supports based on evolving needs of the Class, with over half of the Class Members being adults expected to access compensation in the first five years, and transitioning to a focus on young adults in the remaining years of implementation of the Agreement, building on the existing suite of First Nations mental wellness services. Canada will work with the Parties to also adapt supports to include innovative, First Nations-led mental health and wellness initiatives.

5) The costs of supports pursuant to this Article are payable by Canada and will not be deducted from the Settlement Funds.

6) Canada will provide annual reports to the Settlement Implementation Committee on the health supports, trauma-informed mental supports set out in Schedule I, Framework for Supports for Claimants in Compensation Process.

ARTICLE 10 - EFFECT OF AGREEMENT

10.01 Releases

1) The Settlement Approval Order issued by the Court will declare that, except as otherwise agreed to in this Agreement and in consideration for Canada's obligations and liabilities under this Agreement, each Class Member or their Estate Executor, estate Claimant, or Personal Representative on behalf of such Individual Class Member or their estate (hereinafter collectively the "**Releasors**") has fully, finally and forever released Canada and its servants, agents, officers and employees, predecessors, successors, and assigns (hereinafter collectively the "**Releasees**"), from any and all actions, causes of action, claims, and demands of every nature or kind available, whether or not known or anticipated, which the Releasers had, now have or may in the future have against the Releasees in respect of the claims asserted or capable of being asserted in the Actions, including any claim with regard to the costs referred to under Article 12.02(3).

2) It is understood that Class Members retain their rights to make claims against third parties for the physical, sexual or emotional abuse they suffered, restricted to whatever liability such third party may have severally, not including any liability that the third party may have jointly or otherwise with Canada, such that the third party will have no basis to seek contribution, indemnity or relief over by way of equitable subrogation, declaratory relief or otherwise against Canada for the physical, sexual or emotional abuse they suffered. No compensation paid to a Class Member under this settlement will be imputed to payment for injuries suffered as a result of physical, sexual abuse or emotional abuse.

3) For greater certainty, each Releasor is deemed to agree that, if they make any claim or demand or take any action or proceeding against another person, persons or entity in which any claim could arise against Canada for damages or contribution or indemnity and/or other relief over, whether by statute, common law, or Quebec civil law, in relation to allegations and matters set out in the Actions, including for physical, sexual or emotional abuse they suffered while in care, the Releasor will expressly limit their claim so as to exclude any portion of Canada's responsibility, and in the event Canada is found to have any such liability, the Releasors will indemnify Canada to the full extent of any such liability including any liability as to costs.

4) Upon a final determination of a Claim made under and in accordance with the Claims Process, the Releasors are also deemed to fully and finally release the Parties, counsel for the Parties, Class Counsel, counsel for Canada, the Settlement Implementation Committee and its Members, the Administrator, and the Third-Party Assessor with respect to any claims that have arisen, arise or could arise out of the implementation of the Claims Process, including any claims relating to the calculation of compensation, the sufficiency of the compensation received, and the allocation and distribution of a Trust Fund Surplus.

10.02 Continuing Remedies

1) The Parties acknowledge and agree that, notwithstanding any provision of this Agreement, Class Members do not release, and specifically retain, their claims or causes of action for any breach by Canada of its ongoing obligations under this Agreement, including:

   (a) failing to pay the Settlement Funds in their entirety;

   (b) funding reasonable notice and other administration fees involved in carrying out this Agreement, including information and notice to the Class Members about certification, this Agreement, settlement approval, and the Claims Process, as well as third-party administration costs;

   (c) paying reasonable legal fees to Class Counsel, over and above the Settlement Funds;

   (d) communicating with provincial and territorial Deputy Ministers responsible for child and family services, health, and education, as well as other relevant Deputy Ministers regarding taxation, Children's Special Allowance, social assistance payments, post-majority care or other provincial/territorial benefits "claw backs" without affecting funding received through a Jordan's Principle request, whether pending or approved;

   (e) proposing a public apology by the Prime Minister;

   (f) working toward the intention of the Parties that the Settlement Funds, including any income earned on the Settlement Funds awaiting distribution, will be distributed to Class Members as compensation, as opposed to "income" subject to taxation; and

   (g) jointly seeking an order from the Tribunal declaring that the Compensation Orders are fully satisfied.

2) The Parties agree that, subject to the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, the Parties will be entitled to seek relief to prevent breaches or threatened breaches of this Agreement, and to enforce compliance with the terms of this Agreement, without any requirement for the securing or posting of any bond in connection with the obtaining of any such injunctive or other equitable relief allowed by law, this being in addition to damages and any other remedy to which the Parties may be entitled at law or in equity for any breach of this Agreement.

10.03 Canadian Income Tax and Social Benefits

1) Canada will make best efforts to ensure that any Class Member's entitlement to federal social benefits or social assistance benefits will not be negatively affected in any manner by the Class Member's receipt, directly or indirectly, of any payment in accordance with this Agreement, and that no such payment will be considered taxable income within the meaning of the *Income Tax Act*.

2) The Parties agree that the payments to Class Members, including payments of any income earned on the Settlement Funds, are in the nature of personal injury damages and are not taxable income and Canada will make best efforts to obtain a technical interpretation to the same effect from the Income Tax Rulings Directorate of the Canada Revenue Agency.

3) Upon approval of this Agreement by the Court, Canada will write to all provincial and territorial Deputy Ministers responsible for child and family services, health, and education, as well as other relevant Deputy Ministers, to encourage them to collaborate in:

   (a) exempting Class Member claims payouts under this Agreement from taxation, including payments of any income earned on the Settlement Funds, the Children's Special Allowance, social assistance payments, post-majority care or other provincial/territorial benefits "claw backs";

   (b) ensuring that receipt of any compensation under this Agreement will in no way affect funding received through a Jordan's Principle request, whether pending or approved; and

   (c) encouraging them to support Class Members during the term of the Agreement.

4) Canada will not in any way consider receipt of compensation under this Agreement as a factor in deciding any pending, approved or future requests pursuant to Jordan's Principle or with respect to individual entitlements under ISC programs where ISC makes a decision with respect to an individual's eligibility for funding.

ARTICLE 11 - IMPLEMENTATION OF THIS AGREEMENT

11.01 Settlement Approval Order

1) This Agreement is conditional upon the Tribunal confirming the full satisfaction of the Compensation Orders, as well as the approval by the Court of this Agreement.

2) Prior to seeking the Settlement Approval Order from the Court, the AFN and Canada will jointly seek an order from the Tribunal declaring that the Compensation Orders have been

fully satisfied. The Parties will take all reasonable steps to support the application before the Tribunal, including filing such evidence and submissions as may be required.

3) The AFN agrees to act as a lead applicant before the Tribunal in seeking the above order, and to take all reasonable steps to publicly promote and defend the Agreement.

4) The Representative Plaintiffs, or any of them, in the Consolidated Action and the Trout Action may seek interested party status and/or standing to make representations before, and to answer questions posed by, the Tribunal in respect of the satisfaction of the Compensation Orders, and Canada and the AFN consent to them obtaining such standing in a hearing.

5) The Parties will consent to the issuance of the Settlement Approval Order.

6) The Parties will take all reasonable measures to cooperate in requesting that the Court issue the Settlement Approval Order and related orders on notice of certification, Settlement Approval Hearing, and any other orders required for the implementation of this Agreement.

7) The Parties will schedule the Settlement Approval Hearing as soon as practicable considering the requirements of the Notice Plan, the decision required from the Tribunal and the Court's availability.

8) The Parties will consider seeking orders from provincial superior courts to obtain relevant data from provinces and territories should that become necessary and agree to cooperatively approach the provinces and territories to encourage their compliance.

9) The Parties will take all reasonable measures to cooperate in seeking federal, provincial and territorial privacy legislation exemptions and consents as may be needed to implement the Agreement.

11.02 Notice Plan

The Parties will seek approval from the Court of the Notice Plan as the means by which Class Members will be provided with notice pertaining to the Opt-Out Period and settlement approval.

ARTICLE 12 - SETTLEMENT IMPLEMENTATION COMMITTEE

12.01 Composition of Settlement Implementation Committee

1) A Settlement Implementation Committee will be formed in accordance with this Article, subject to approval by the Court.

2) The Settlement Implementation Committee will consist of five (5) members as follows:

(a) two First Nations members ("**Non-Counsel SIC Members**"); and

(b) three Counsel members ("**Counsel SIC Members**").

3) All Non-Counsel SIC Members and all Counsel SIC Members are subject to the Court's order appointing them as such.

4) No person will serve for more than two (2) five-year terms, consecutive or cumulative, as one of the Non-Counsel SIC Members and/or of the Counsel SIC Members.

5) The terms of the five members of the Settlement Implementation Committee will be staggered such that the end of their terms does not occur all at the same time. For that purpose, the first term of one (1) of the Non-Counsel SIC Members and one (1) of the Counsel SIC Members will not exceed three (3) years, which terms may be renewed for a subsequent term of five (5) years. The first term of the balance of the members of the Settlement Implementation Committee will be for five years.

6) The two Non-Counsel SIC Members will be First Nations individuals only, as defined in Article 1.01.

7) The two Non-Counsel SIC Members will be selected through a solicitation for applications conducted by the AFN Executive Committee.

8) For the first round of nominations prior to the establishment of the Settlement Implementation Committee, the AFN Executive Committee will recommend to the Court for approval two Non-Counsel SIC Members selected in accordance with this Article, one for an initial term of three years and one for an initial term of five years.

9) After the establishment of the Settlement Implementation Committee, the AFN Executive Committee will recommend to the Settlement Implementation Committee any necessary replacement Non-Counsel SIC Members as those positions become vacant from time to time under this Article for the purposes of seeking the Court's approval of the appointment of such members.

10) The three Counsel SIC Members will consist of one (1) lawyer appointed by Sotos LLP, one (1) lawyer appointed by Kugler Kandestin LLP, and one (1) lawyer appointed by the AFN Executive Committee.

11) For the first round of nominations prior to the establishment of the Settlement Implementation Committee, Sotos LLP, Kugler Kandestin LLP, and the AFN Executive Committee will each recommend one lawyer to the Court for approval in accordance with this Article. One of these three lawyers will be nominated for an initial term of three years and the other two for an initial term of five years in accordance with this Article. If Sotos LLP, Kugler Kandestin LLP, and the AFN Executive Committee cannot agree on which lawyer will be recommended to the Court for an initial term of three years, they will ask

the Court to select any one of the three recommended lawyers for a term of three years in the Court's full discretion.

12) After the establishment of the Settlement Implementation Committee, Sotos LLP, Kugler Kandestin LLP, and the AFN Executive Committee will recommend to the Settlement Implementation Committee the necessary number of replacement Counsel SIC Members separately for each of their respective counsel as those positions become vacant from time to time in accordance with this Article for the purposes of seeking the Court's approval of the appointment of such members.

13) A member of the Settlement Implementation Committee may be removed prior to the expiry of their term with a special majority vote of four (4) members of the Settlement Implementation Committee. Such a removal is not effective unless and until approved by the Court.

14) The Court may substitute any member of the Settlement Implementation Committee in accordance with this Article in the best interests of the Class.

15) A meeting of the Settlement Implementation Committee may be held if at least four (4) members are present. In making decisions under this Agreement, the Settlement Implementation Committee will make reasonable efforts to reach consensus. If consensus is not possible, the Settlement Implementation Committee will decide by majority vote unless specified otherwise in this Agreement.

16) If any member of the Settlement Implementation Committee believes that the majority of the Settlement Implementation Committee has taken a decision that is not in the best interests of the Class, that Member may refer the decision to confidential mediation in accordance with the ADR Chambers Mediation Rules. If the members of the Settlement Implementation Committee cannot agree on a mediator, they may ask the Court to appoint one. The reasonable costs of the mediation will be a disbursement of the Settlement Implementation Committee payable in accordance with Article 3.04. If the matter cannot be resolved at mediation, the matter may be referred to the Court for determination.

17) For the first two (2) years following the Claims Process Approval Date, the Settlement Implementation Committee will meet monthly, either in-person or virtually, and thereafter, the Settlement Implementation Committee will meet quarterly, unless the Settlement Implementation Committee believes that more frequent meetings are required. Notwithstanding this Article, the Settlement Implementation Committee may deal with administrative and urgent issues, if and when necessary.

18) The Settlement Implementation Committee, all Non-Counsel SIC Members, and all Counsel SIC Members will at all times act in their personal capacity and solely in the best interests of the Class, and not in the interests of any other party, stakeholder or entity.

19) In the event that either Sotos LLP or Kugler Kandestin LLP merges with another law firm, this Agreement will be binding on the successor firm.

20) If after the Claims Process Approval Date, Sotos LLP, Kugler Kandestin LLP or the AFN Executive Committee determine in their respective sole and unfettered discretion that they no longer need or want to nominate members to the Settlement Implementation Committee in accordance with this Article, they will advise the Settlement Implementation Committee in writing. In that event, the Court will determine a prospective replacement for such members in the best interests of the Class on the recommendation of the Settlement Implementation Committee.

12.02 Settlement Implementation Committee Fees

1) Canada's liability for the fees of Counsel SIC Members and any other counsel to whom work is delegated will be negotiated by the Parties by way of the process identified in Article 17, Legal Fees.

2) Counsel SIC Members may delegate the legal work reasonably necessary for the fulfillment of the Settlement Implementation Committee's responsibilities under this Agreement among Class Counsel or retain other counsel as Counsel SIC Members consider necessary.

3) Canada will pay a total of $750,000, separate and in addition to any other amounts in this Agreement to be paid at the direction of the AFN Executive Committee to fund an honorarium of $200 per hour to each of the Non-Counsel SIC Members for reasonable participation in the work of the Settlement Implementation Committee, up to a maximum of $1000 per day, subject to the Court's approval. The Settlement Implementation Committee may propose, and the Court may implement a change in the quantum of such honoraria from time to time.

12.03 Settlement Implementation Committee Responsibilities

1) In addition to matters specified elsewhere in this Agreement, the Settlement Implementation Committee's responsibilities will include the following:

   (a) monitoring the work of the Administrator and the Third-Party Assessor, and the Claims Process overall;

   (b) receiving and considering reports from the Administrator, including on administrative costs;

(c) engaging experienced practitioners as needed who are familiar with family and child welfare documents and records in each province and territory to assist with the work of the Administrator and the Third-Party Assessor, where necessary to substantiate allegations of Abuse, verify certain Claims where necessary, or conduct isolated audits of some Claims Forms where ISC data is insufficient or lacking;

(d) giving such process directions to the Administrator or the Third-Party Assessor as may be necessary in accordance with the mandate of the Settlement Implementation Committee and the provisions of this Agreement;

(e) proposing for the Court's approval such protocols as may be necessary for the implementation of this Agreement, including any amendments to the Claims Process and distribution protocol as may be necessary;

(f) addressing any other matter referred to the Settlement Implementation Committee by the Court;

(g) receiving, through the Investment Committee, and seeking Court approval on advice from the Actuary and investment experts on the investment of the Trust Fund;

(h) receiving a copy of the annual report of the Cy-près Fund and, if considered appropriate, communicating with the trustees of the Cy-près Fund;

(i) recommending to the Court any change of the Administrator;

(j) setting Terms of Reference for the Investment Committee regarding investment objectives and strategy (the "**Investment Committee Terms of Reference**") in accordance with the principles set out in Schedule G, Investment Committee Guiding Principles;

(k) engaging experts as reasonably needed including experts in First Nations data governance, trauma, community relations, health and social services, and the Actuary to assist with the Claims Process;

(l) receiving annual reports from Canada on the health supports, trauma-informed mental supports, and Claims Process supports provided to Class Members;

(m) providing an annual Settlement Implementation Report to the Court, which includes updates on the implementation of the Agreement, actuarial reporting on the Trust Fund and distribution, annual audited financial reporting, any issues with the Trust, any systemic issues in implementation and proposed or approved resolution to such issues, etc.; and

(n) providing the AFN Executive Committee with a concurrent copy of the annual Settlement Implementation Report, and ensuring that said report is posted on a public website.

2) The Settlement Implementation Committee may retain experts and consultants as reasonably required for the implementation of this Agreement. The fees and disbursements of such experts and consultants will be a disbursement of the Settlement Implementation Committee payable by Canada in accordance with Article 3.04.

3) The Settlement Implementation Committee may bring or respond to whatever motions or institute whatever proceedings it considers necessary to advance its responsibilities under this Agreement and the interests of Class Members.

12.04 Investment Committee

1) The Investment Committee will adhere to the Investment Committee Terms of Reference as set by the Settlement Implementation Committee.

2) The Investment Committee will be constituted of up to two (2) members that are not investment professionals but have relevant board experience regarding the management of funds and one (1) independent investment professional (the "**Investment Professional Member**").

3) The Investment Committee members will be nominated by the Settlement Implementation Committee to five (5) year renewable terms, subject to approval by the Court.

4) The reasonable fees of the Investment Committee, including the Investment Professional Member, will be payable by Canada to a maximum of four quarterly meetings per annum and will be subject to Court approval. The reasonable fees of any investment consultant retained by the Investment Committee will be payable by Canada, subject to Court Approval. Canada will not be responsible for the payment of fees for investment managers retained by the Investment Committee.

5) The Investment Committee will meet quarterly, or more frequently as required, during the first five (5) years following its establishment. In subsequent years, the Investment Committee will meet at least once annually, or more frequently if required and approved by the Settlement Implementation Committee. The Investment Committee will periodically, and no less than annually, review the viability of the investment strategy of the Trust Fund and submit such a review to the Settlement Implementation Committee.

ARTICLE 13 - OPTING OUT

13.01 Opting Out

A Class Member may Opt-Out of the Actions by:

(a) delivery to the Administrator of the Opt-Out Form; or

(b) after the Opt-Out Deadline, by individually obtaining leave of the Court to Opt-Out of the Actions if the Claimant was unable, as a result of physical or psychological illness or challenges, including homelessness or addiction, or other significant obstacles as found by the Court, to take steps to Opt-Out within the Opt-Out Deadline.

13.02 Automatic Exclusion for Individual Claims

A Class Member will be excluded from the Actions if the Class Member does not, before the expiry of the Opt-Out Deadline, discontinue a proceeding brought by the Class Member against Canada to the extent that the separate proceeding raises the common questions set out in the Certification Orders.

ARTICLE 14 - PAYMENTS FOR DECEASED INDIVIDUAL CLASS MEMBERS AND PERSONS UNDER DISABILITY

14.01 Persons Under Disability

If a Claimant who submitted a Claim to the Administrator within the Claims Deadline is or becomes a Person Under Disability prior to their receipt of compensation, the Personal Representative of the Claimant will be eligible to receive compensation on behalf of the Claimant for the sole benefit of the Claimant.

14.02 Approach to Compensation for Deceased Children

1) The estate's representative of a deceased Removed Child Class Member placed off-Reserve as of and after January 1, 2006, a deceased Kith Child Class Member, and a deceased Jordan's Principle Class Member, will be entitled to claim Base Compensation of $40,000 and interest and may be eligible to receive any applicable Enhancement Payments in accordance with this Agreement on behalf of the estate of the deceased Claimant.

2) The estate's representative of a deceased Removed Child Class Member (other than those in 14.02(1)), a deceased Essential Service Class Member, or a deceased Trout Child Class Member may be eligible for direct compensation and may be eligible to

receive any applicable Enhancement Payments in accordance with this Agreement on behalf of the estate of the deceased Claimant.

14.03 Approach to Compensation for Deceased Caregiving Parents and Caregiving Grandparents

1) A Claim may be made on behalf of a deceased Caregiving Parent or Caregiving Grandparent in relation to the following classes: Removed Child Family Class Members (of a Child placed off-Reserve with non-Family as of and after January 1, 2006), Kith Family Class Members, or Jordan's Principle Family Class Members.

2) Where a Claim is approved for a deceased Caregiving Parent or Caregiving Grandparent referred to in Article 14.03(1), Base Compensation of $40,000 and interest will be paid directly to the living Child or Children of the deceased Caregiving Parent or living grandchild or grandchildren of the deceased Caregiving Grandparent on a pro rata basis.

3) The estates of the Removed Child Family Class, other than those in Article 14.03(1) and the Trout Family Class under Article 6.09(3), are not eligible for compensation, unless a complete Claim was submitted by such a Class Member prior to death. Where a Claim was submitted by the deceased Claimant prior to death, compensation will be paid directly to the estate pursuant to Article 14.04 where a grant of authority has been made or in accordance with Article 14.05 where no grant of authority has been made.

14.04 Compensation if Deceased: Grant of Authority or the Like

1) This Article does not apply to the deceased Class Members identified in Article 14.03(1) and (2).

2) Where an Estate Executor or Estate Administrator of an Eligible Deceased Class Member has been appointed under the *Indian Act* or under the governing provincial or territorial legislation, the Estate Executor or Estate Administrator may submit a Claim for compensation in accordance with this Agreement.

3) A Claim made by an Eligible Deceased Class Member must include the following:

    (a) applicable Claims Form(s);

    (b) evidence that such Eligible Deceased Class Member is deceased and the date on which such Eligible Deceased Class Member died;

    (c) evidence in the following form identifying such representative as having the legal authority to receive compensation on behalf of the estate of the Eligible Deceased Class Member:

        i) if the claim to entitlement to receive compensation on behalf of an estate is based on a will or other testamentary instrument or on intestacy, a copy of a

grant of probate or a grant and letters testamentary or other document of like import, or a grant of letters of administration or other document of like import, issued by any court or authority in Canada; or

ii) if in Quebec, a notarial will, a probated holograph will, a probated or other document of like import made in the presence of witnesses in accordance with the *Civil Code of Quebec* and the *Indian Act*.

14.05 Compensation if Deceased: No Grant of Authority or the Like

1) This Article does not apply to deceased Class Members identified under Article 14.03(1) and (2).

2) For the purpose of this Article, “spouse” means either of two persons who:

(a) are legally married; or

(b) are not married, but:

i) have a common law relationship for a period of not less than one year, the time prescribed in accordance with the *Indian Act*, at the time of death; or

ii) have a relationship of some permanence if they are the parents of a child.

3) Except in the case of an estate of an Eligible Deceased Class Member where an eligible recipient is identified and otherwise eligible in accordance with Article 14.04, if a Claim is submitted to the Administrator on behalf of an Eligible Deceased Class Member without proof of a will or the appointment of an Estate Executor or Estate Administrator, the Administrator may, upon receiving Supporting Documentation, treat the Eligible Deceased Class Member’s Claim in accordance with the priority level of heirs under the *Indian Act* in respect of distribution of property on intestacy as follows:

(a) The spouse of the Eligible Deceased Class Member at the time of death.

(b) Where the Eligible Deceased Class Member has no spouse, the child or children of the eligible Deceased Class Member. The compensation will be divided pro rata amongst all the children of the Eligible Deceased Class Member who are living at the time when the Claim is received by the Administrator.

(c) Where the Eligible Deceased Class Member has no spouse or child, the grandchildren of the Eligible Deceased Class Member. The compensation will be divided pro rata amongst all the grandchildren of the Eligible Deceased Class Member who are living at the time when the Claim is received by the Administrator.

(d) Where the Eligible Deceased Class Member has no spouse, child or grandchild, the parents of the Eligible Deceased Class Member. The compensation will be

divided pro rata between the parents of the Eligible Deceased Class Member who are alive when the Claim is received by the Administrator.

(e) Where an Eligible Deceased Class Member leaves no spouse, child, grandchild or parent, the sibling(s) of the Eligible Deceased Class Member. The compensation will be distributed equally among the siblings of the Eligible Deceased Class Member who are alive when the claim is received by the Administrator.

(f) Where the Eligible Deceased Class Member has no spouse, child, grandchild, parents or sibling(s), the grandparents of the Eligible Deceased Class Member. The compensation will be divided pro rata between the grandparents of the Eligible Deceased Class Member who are alive when the Claim is received by the Administrator.

4) Subject to sections 4(3) and 42 to 51 of the *Indian Act*, Canada, as represented by the Minister of Indigenous Services, may administer or appoint administrators for the estates of Eligible Deceased Class Members who are under Canada's jurisdiction and who have or are entitled to receive direct compensation under this Agreement.

5) Canada may consult with the Settlement Implementation Committee to utilize the existing ISC framework for the administration of the estates of Eligible Deceased Class Members consistent with the exercise of Ministerial discretion considering individual circumstances. Canada will conduct the administration process in a trauma-informed manner and with a view to ensuring that it is as expeditious, cost-effective, user-friendly, and culturally sensitive as possible. This may include:

(a) where Canada is advised that an Estate Executor or Estate Administrator has not already been appointed on behalf of the estate of an Eligible Deceased Class Member, Canada may appoint an Estate Administrator as needed who will act in accordance with their fiduciary and statutory duties, which may include submitting a Claim on behalf of such Class Member; and

(b) where Canada administers an estate of an Eligible Deceased Class Member, there will be no cost recovery against the estate for doing so and, except in exceptional circumstances, Canada will seek to minimize or eliminate any related third-party costs.

6) Subject to issues that may arise in individual cases, Canada may, but is not obligated to, exercise its discretion under the *Indian Act* to assume jurisdiction over the administration of the estates referred to above. Nothing in this Article should be taken to extend the jurisdiction under the *Indian Act* over the administration of estates.

7) A Caregiving Parent or Caregiving Grandparent who is excluded from compensation under Article 6.04(4) or Article 7.03(2) due to Abuse will not receive compensation from the estate of the deceased Child.

14.06 Release by the Estates of Eligible Deceased Class Members

Payments made in accordance with this Article will constitute a release by the estate of any Eligible Deceased Class Member, including on behalf of any beneficiaries of the estate of any Eligible Deceased Class Member who would otherwise be eligible to receive benefits.

14.07 Canada, Administrator, Class Counsel, Third-Party Assessor, Settlement Implementation Committee, and Investment Committee Held Harmless

Canada and its counsel, the Administrator, Class Counsel, AFN in-house counsel, the Third-Party Assessor, the Settlement Implementation Committee and its members, and the Investment Committee will be held harmless from any and all claims, counterclaims, suits, actions, causes of action, demands, damages, penalties, injuries, setoffs, judgments, debts, costs, expenses (including legal fees and expenses) or other liabilities of every character whatsoever by reason of or resulting from a payment or non-payment to or on behalf of an Eligible Deceased Class Member or a Person Under Disability, or to an Estate Executor, estate, or Personal Representative pursuant to this Agreement, and this Agreement will be a complete defence.

ARTICLE 15 - TRUSTEE AND TRUST

15.01 Trust

1) Subject to advice received by third-party professionals, the Parties agree to the following provisions.

2) No later than thirty (30) days following the appointment by the Court of the Trustee, Canada will settle a single trust (the "**Trust**") with ten dollars ($10), to be held by the Trustee in accordance with the terms of this Agreement.

3) The Plaintiffs will submit the initial investment strategy created with help from experts to the Court for approval together with this Agreement.

15.02 Trustee

The Court will appoint the Trustee to act as the trustee of the Trust, with such powers, rights, duties, and responsibilities as the Court orders. Without limiting the generality of the foregoing, the duties and responsibilities of the Trustee will include:

(a) to hold the Trust Fund;

(b) to invest the Settlement Funds in accordance with the Statement of Investment Policies and Procedures as instructed by the Investment Committee, having regard to the best interests of Class Members and the ability of the Trust to meet its financial obligations, subject to the Court's ongoing supervision;

(c) upon instructions from the Administrator and approval of the Settlement Implementation Committee in accordance with the policies of the Settlement Implementation Committee, to provide such amounts from the Trust to the Administrator and any other person as described in Article 3.02, Article 4.02, Article 8, and Article 18(3), as required from time to time in order to give effect to any provision of this Agreement, including the payment of compensation to Approved Class Members in the Claims Process;

(d) to engage, upon consultation with and approval of the Settlement Implementation Committee, the services of professionals to assist in fulfilling the Trustee's duties;

(e) to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances;

(f) to keep such books, records and accounts as are necessary or appropriate to document the assets held in the Trust, and each transaction of the Trust;

(g) to take all reasonable steps and actions required under the *Income Tax Act* as set out in the Agreement;

(h) to report to the Administrator, Canada and the Settlement Implementation Committee on a quarterly basis the assets held in the Trust at the end of each such quarter, or on an interim basis if so requested; and

(i) to do such other acts and things as are incidental to the foregoing, and to exercise all powers that are necessary or useful to carry on the activities of the Trust or to carry out the provisions of this Agreement.

15.03 Trustee Fees

Canada will pay the reasonable fees, disbursements, and other costs of the Trustee relating to the management of the Trust Fund.

15.04 Nature of the Trust

The Trust will be established for the following purposes:

(a) to acquire the Settlement Funds payable by Canada;

(b) to hold the Settlement Funds in the Trust;

(c) to pay compensation in accordance with this Agreement;

(d) to invest cash in investments in the best interests of Class Members, as provided in this Agreement; and

(e) to do such other acts and things as are incidental to the foregoing, and to exercise all powers that are necessary or useful to carry out the provisions of this Agreement.

15.05 Legal Entitlements

The legal ownership of the assets of the Trust, including the Trust Fund, and the right to conduct the activities of the Trust, including the activities with respect to the Trust Fund, will be, subject to the specific limitations and other terms contained herein, vested exclusively in the Trustee, and the Class Members or any other beneficiaries of the Trust have no right to compel or call for any partition, division or distribution of any of the assets of the Trust or a rendering of accounts. No Class Member or any other beneficiary of the Trust will have or is deemed to have any right of ownership in any of the assets of the Trust.

15.06 Records

The Trustee will keep such books, records, and accounts as are necessary or appropriate to document the assets of the Trust and each transaction of the Trust. Without limiting the generality of the foregoing, the Trustee will keep at its principal office records of all transactions of the Trust and a list of the assets held in trust, including each Fund, and a record of each Fund's account balance from time to time.

15.07 Quarterly Reporting

The Trustee will deliver to the Administrator, Canada, and the Settlement Implementation Committee, within thirty (30) days after the end of each calendar quarter, a quarterly report setting forth the assets held as at the end of such quarter in the Trust and each Fund (including the term, interest rate or yield and maturity date thereof) and a record of the Trust's account balance during such quarter.

15.08 Annual Reporting

1) The Auditors will deliver to the Administrator, the Trustee, Canada, the Settlement Implementation Committee, the AFN Executive Committee and the Court, within sixty (60) days after the end of each calendar year (the calendar year-end being the fiscal year-end for the Trust):

(a) the audited financial statements of the Trust for the most recently completed fiscal year, together with the report of the Auditors thereon;

(b) a report setting forth a summary of the assets held in trust as at the end of the fiscal year for each Fund and the disbursements made by the Trust during the preceding fiscal year; and

(c) the audited financial statements of the Administrator.

2) The Administrator will ensure that the documents in Article 15.08(1)(a)-(c) are posted on a public website.

15.09 Method of Payment

The Trustee will have sole discretion to determine whether any amount paid or payable out of the Trust is paid or payable out of the income of the Trust or the capital of the Trust.

15.10 Additions to Capital

Any income of the Trust not paid out in a fiscal year will at the end of such fiscal year be added to the capital of the Trust.

15.11 Tax Elections

For each taxation year of the Trust, the Trustee will file any available elections and designations under the *Income Tax Act* and equivalent provisions of the *Income Tax Act* of any province or territory and take any other reasonable steps such that the Trust and no other person is liable to taxation on the income of the Trust, including the filing of an election under the *Income Tax Act* and equivalent provisions of the *Income Tax Act* of any province or territory for each taxation year of the Trust and the amount to be specified under such election will be the maximum allowable under the *Income Tax Act* or the *Income Tax Act* of any province or territory, as the case may be.

15.12 Canadian Income Tax

1) Canada will make best efforts to exempt any income earned by the Trust from federal taxation, and Canada will take into account the measures that it took in similar circumstances for the class action settlements addressed in section 81 (1) (g.3) of the *Income Tax Act*.

2) The Parties agree that the payments to Class Members, including payments of any income earned on the Settlement Funds, are in the nature of personal injury damages and are not taxable income and Canada will make best efforts to obtain a technical interpretation to the same effect from the Income Tax Rulings Directorate of the Canada Revenue Agency.

ARTICLE 16 – AUDITORS

16.01 Appointment of Auditors

On the recommendation of the Settlement Implementation Committee, the Court will appoint Auditors with such powers, rights, duties and responsibilities as the Court directs. On the recommendation of the Parties, or of their own motion, the Court may replace the Auditors at any time. Without limiting the generality of the foregoing, the duties and responsibilities of the Auditors will include:

(a) to audit the accounts for the Trust in accordance with generally accepted auditing standards on an annual basis;

(b) to provide the reporting set out in Article 15.08;

(c) to audit the financial statements of the Administrator in relation to the administration of this Agreement; and

(d) to file the financial statements of the Trust together with the Auditors' report thereon with the Court and deliver a copy thereof to Canada, the Settlement Implementation Committee, the Administrator, and the Trustee within sixty (60) days after the end of each financial year of the Trust.

16.02 Payment of Auditors

Canada will pay the reasonable fees, disbursements, and other costs of the Auditors in accordance with Article 3.04, as approved by the Court.

ARTICLE 17 - LEGAL FEES

17.01 Class Counsel Fees

1) Canada will pay Class Counsel the amount approved by the Court, plus applicable taxes, in respect of their legal fees and disbursements for the prosecution of the Actions to the date of the Settlement Approval Hearing, together with advice to Class Members regarding the Agreement and Acceptance, over and above the Settlement Funds. Subject to Article 12.02(1), Canada will also pay the reasonable legal fees of Class Counsel for their work on or for the Settlement Implementation Committee and the Investment Committee. A disagreement between the Parties over legal fees will not prevent the Parties from signing this Agreement. Canada and Class Counsel will participate in mediation if they are unable to agree upon the legal fees, to be presided over by a mediator to be agreed upon by and between Canada and Class Counsel or, failing agreement, appointed by the Court. In the event that Canada and Class Counsel are not able to agree upon legal fees during mediation, fees will be subject to the approval of the

Court, subject to appeal. Canada will have standing to make submissions to the Court regarding such fees.

2) No such amounts will be deducted from the Settlement Funds.

3) Class Counsel will not charge individual Class Members any amounts for legal services rendered in accordance with this Agreement. Such assistance to Class Members will not be considered to constitute or be cause for a conflict.

17.02 Ongoing Legal Services

1) Following the Implementation Date, responsibility for representing the interests of the Class as a whole (as distinct from assisting a particular Class Member or Class Members, as reasonably requested) will pass from Class Counsel to the Settlement Implementation Committee, and Class Counsel will have no further obligations in that regard.

2) In addition to the legal services provided to the Settlement Implementation Committee in Article 12, Counsel SIC Members may also respond to legal inquiries from Class Members about this Agreement that are beyond the training and/or competence of the navigational support services provided by the Administrator. Legal fees for such services are subject to Article 12.02(1).

17.03 Ongoing Fees

1) The Settlement Implementation Committee will maintain appropriate records of payment, fees and disbursements for Ongoing Legal Services.

2) The Settlement Implementation Committee may submit the bills relating to Counsel SIC Members to Canada for payment on a monthly basis, subject to Article 12.02(1).

3) The Settlement Implementation Committee will seek approval of its accounts from the Court on an annual basis.

ARTICLE 18 - GENERAL DISPUTE RESOLUTION

1) Where a dispute arises regarding any right or obligation under this Agreement ("**Dispute**"), the parties to the Dispute will refer the Dispute to confidential mediation in accordance with the ADR Chambers Mediation Rules. If the parties to the Dispute cannot agree on a mediator, they may ask the Court to appoint one (the "**Dispute Resolution Process**").

2) If the Dispute cannot be resolved through the Dispute Resolution Process, it can be referred to the Court for determination.

3) The costs of dispute resolution amongst members of the Settlement Implementation Committee, in accordance with the Dispute Resolution Process, or by referral to the Court, may be paid out of the Trust Fund in circumstances where deemed appropriate by the mediator or the Court.

4) Where Canada is a party to a matter referred to the Dispute Resolution Process, the mediator will have the discretion to award costs of the mediation against any party.

5) For greater certainty, this Article will not apply to disputes regarding Claimants in the Claims Process, including eligibility for membership in the Class, extension of the Claims Deadline for an individual Class Member or compensation due to any Class Member.

ARTICLE 19 - TERMINATION AND OTHER CONDITIONS

19.01 Termination of Agreement

1) Except as set forth in Article 18.01(2), this Agreement will continue in full force and effect until all obligations under this Agreement are fulfilled and the Court orders that the Agreement has terminated.

2) Notwithstanding any other provision in the Agreement, the following provisions will survive the termination of this Agreement:

   (a) Article 10.01 – Releases

   (b) Article 21 – Confidentiality

   (c) Article 23 – Immunity

19.02 Amendments

Except as expressly provided in this Agreement, no amendment may be made to this Agreement unless agreed to by the Parties in writing, and if the Court has issued the Settlement Approval Order, then any amendment will only be effective once approved by the Court. A material amendment to the Schedules hereto will require the Court's approval.

19.03 Non-Reversion of Settlement Funds

No amount or earned interest that remains after the distribution of the Settlement Funds will revert to Canada. Such amounts will instead be further distributed in accordance with the distribution protocol designed and approved for the Claims Process.

19.04 No Assignment

1) No compensation payable, in whole or in part, under this Agreement to a Class Member can be assigned, charged, pledged, hypothecated and any such assignment, charge, pledge, or hypothecation is null and void except as expressly provided for in this Agreement.

2) Unless the Court orders otherwise pursuant to a protocol to be approved, no person may collect a fee or disbursement from a Claimant for completing Claims Forms or providing Supporting Documentation.

3) Except for directions made pursuant to Article 6.14, any payment to which a Claimant is entitled will solely be made to the Claimant, and not in accordance with any directions to the contrary, unless the Court has ordered otherwise.

4) Any payments in respect of a Deceased Class Member or a Person Under Disability will be made in accordance with Article 14.

5) In the absence of fraud, any amount paid pursuant to this Agreement is not refundable in the event that it is later determined that the Claimant was not entitled to receive or be paid all or part of the amount so paid, but the Claimant may be required to account for any amount that they were not entitled to receive against any future payments that they would otherwise be entitled to receive pursuant to this Agreement.

ARTICLE 20 – WARRANTIES AND REPRESENTATIONS ON SIZE OF THE CLASS

1) The Parties acknowledge that, in preparing the Joint Report, the Experts relied on data from ISC to determine the Estimated Removed Child Class Size. Both the Plaintiffs and Canada were aware that parts of this data came from third parties, was incomplete and, in some cases, inaccurate. The Parties, including Canada, took account of the nature of this data in entering into this Agreement.

2) Canada warrants and represents that it provided to the Experts all of the data in Canada's possession relating to the Estimated Removed Child Class Size. However, Canada does not represent or warrant the accuracy of the data it provided nor the accuracy of the Joint Report of the Experts.

ARTICLE 21 – CONFIDENTIALITY

21.01 Confidentiality

Any information provided, created, or obtained in the course of implementing this Agreement will be kept confidential and will not be used for any purpose other than this Agreement unless otherwise agreed by the Parties.

21.02 Destruction of Class Member Information and Records

1) Subject to Article 21.02(2), two (2) years after completing the payment of all compensation under this Agreement, the Administrator will destroy all Class Member information and documentation in its possession, unless a Class Member or their Estate Executor or estate Claimant specifically requests the return of such information within the two-year period. Upon receipt of such request, the Administrator will forward the Class Member information as directed. Before destroying any information or documentation in accordance with this Article, the Administrator will prepare an anonymized statistical analysis of the Class in accordance with the Claims Process.

2) Prior to the destruction of the records, the Administrator will create and provide to Canada a list showing the Approved Class Member's: (i) name, (ii) Indian registration number, (iii) Band or First Nation affiliation, (iv) birthdate, (v) class membership, and (vi) amount and date of payment with respect to each compensation payment made. Notwithstanding anything else in this Agreement, this list must be retained by Canada in strict confidence and can only be used in a legal proceeding or settlement where it is relevant to demonstrating that a Claimant received a payment under this Agreement.

3) The destruction of records in the possession or control of Canada is subject to the application of any relevant provincial or federal legislation such as the *Privacy Act*, the *Access to Information Act*, the *Personal Information Protection and Electronic Documents Act* and the *Library and Archives of Canada Act*.

21.03 Confidentiality of Negotiations

Save as may otherwise be agreed between the Parties, the undertaking of confidentiality as to the discussions and all communications, whether written or oral, made in and surrounding the negotiations leading to the AIP and this Agreement continues in force. The Parties expressly agree that the AIP and the materials and discussions related to it are inadmissible as evidence to determine the meaning and scope of this Agreement, which supersedes the AIP.

ARTICLE 22 – COOPERATION

22.01 Cooperation on Settlement Approval and Implementation

Upon execution of this Agreement, the Representative Plaintiffs in the Actions, the AFN, Class Counsel, and Canada will make best efforts to obtain approval of this Agreement by the Court and to support and facilitate participation of Class Members in all aspects of this Agreement. If this Agreement is not approved by the Court, the Parties will negotiate in good faith to attempt to cure any defects identified by the Court but will not be obligated to agree to any material amendment to the Agreement executed by the Parties.

22.02 Public Announcements

Upon the issuance of the Settlement Approval Order, the Parties will release a joint public statement announcing the settlement in a form to be agreed by the Parties and, at a mutually agreed time, will make public announcements in support of this Agreement. The Parties will continue to speak publicly in favour of the Agreement as reasonably requested by any Party.

22.03 Termination of Judicial Review Application and Appeal

1) Within five (5) business days of the Implementation Date, Canada and the AFN will file a Notice of Discontinuance with the Federal Court in relation to their respective judicial review applications of 2022 CHRT 41 on a without costs basis.

2) Within five (5) business days of the Implementation Date, Canada will file a Notice of Discontinuance with the Federal Court of Appeal for Court File No. A-290-21 on a without costs basis.

22.04 Training and Education

The Parties will ensure that the Administrator, members of the Settlement Implementation Committee, members of the Investment Committee, the Trustee, the Third-Party Assessor, and any other individuals responsible to act in the best interests of the Class Members receive First Nations specific cultural competency training and training regarding the history of colonialism including residential schools and this proceeding with a particular focus on the egregious impacts of systemic discrimination on children, youth, families and Nations. Training will also be provided on the CHRT Proceeding.

22.05 Involvement of the Caring Society

1) The Caring Society will have standing to make submissions on any applications brought for Court approval by the Settlement Implementation Committee or the Parties pertaining to the administration and implementation of this Agreement after the Settlement Approval

hearing, including approval of the Claims Process and distribution protocol to the extent that issues impact the rights of the following classes:

(a) Removed Child Class Members placed off-Reserve as of and after January 1, 2006, and Removed Child Family Class Members in relation to Children placed off-Reserve as of and after January 1, 2006, including deceased members of these classes;

(b) Kith Child Class Members and Kith Family Class Members, including deceased members of these classes; and

(c) Jordan's Principle Class Members and Jordan's Principle Family Class Members, including deceased members of these classes.

2) The Caring Society is entitled to notice and receipt of all applications brought in relation to matters in Article 22.05(1) in advance of any hearing before the Court in keeping with the timeline requirements under the *Federal Courts Rules*.

ARTICLE 23 – IMMUNITY

Canada and its counsel, Class Counsel, AFN and its in-house counsel, the Administrator, the Settlement Implementation Committee and its Members and counsel, the Investment Committee, and the Third-Party Assessor will be released from, be immune to, and be held harmless from any and all claims, counterclaims, suits, actions, causes of action, demands, damages, penalties, injuries, setoffs, judgments, debts, costs, expenses (including legal fees and expenses) or other liabilities of every character whatsoever by any reason, except fraud relating to the Actions and to this Agreement, and this Agreement will be a complete defence.

ARTICLE 24 – PUBLIC APOLOGY

Upon execution of this Agreement, Canada will propose to the Office of the Prime Minister that the Prime Minister make a public apology for the discriminatory conduct underlying the Class Members' claims and the past and ongoing harm it has caused.

ARTICLE 25 – COMPLETE AGREEMENT

1) This Agreement constitutes the entire agreement among the Parties with respect to the subject matter hereof and cancels and supersedes any prior or other understandings and agreements between or among the Parties with respect thereto, including the AIP. There

are no representations, warranties, terms, conditions, undertakings, covenants or collateral agreements, express, implied or statutory between or among the Parties with respect to the subject matter hereof other than as expressly set forth or referred to in this Agreement.

2) The Parties acknowledge that the Caring Society has entered into separate minutes of settlement with the AFN and Canada regarding the Compensation Orders.

[The remainder of this page is left intentionally blank. Signature pages follow.]

IN WITNESS WHEREOF, the Parties have each executed this Agreement with effect as of the Effective Date.

CANADA, as represented by the Attorney General of Canada

(Authorized signatory)

Attorney General of Canada

for the defendant in Moushoom Action, AFN Action and Trout Action

Print Name: Paul B. Vickery

Position: legal agent & counsel

THE PLAINTIFFS in Moushoom Action and Trout Action, as represented by class counsel

BY:

(Authorized signatory)

Sotos LLP / Kugler Kandestin LLP / Miller Titerle + Co.

for the plaintiffs

Print Name: Robert Kugler

Position: Class Counsel

THE PLAINTIFFS in AFN Action, as represented by class counsel

BY:

(Authorized signatory)

Nahwegahbow, Corbiere / Fasken LLP / Stuart Wuttke, General Counsel, AFN

for the plaintiffs

Print Name: Dianne Corbiere

Position: Class Counsel

SCHEDULES

Schedule A: Order dated February 23, 2023 on Opt-Out Deadline

Federal Court Cour fédérale

Date: 20230223

Docket: T-402-19
T-141-20
T-1120-21

Ottawa, Ontario, February 23, 2023

PRESENT: The Honourable Madam Justice Aylen

Docket: T-402-19

BETWEEN:

XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige), JONAVON JOSEPH MEAWASIGE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

Docket: T-141-20

AND BETWEEN:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo, CAROLYN BUFFALO, and DICK EUGENE JACKSON also known as RICHARD JACKSON

Plaintiffs

and

HIS MAJESTY THE KING
AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Defendant

Docket: T-1120-21

AND BETWEEN:

ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

ORDER

UPON INFORMAL MOTION made by the Plaintiffs, in writing, for an order extending the deadline previously set by this Court for opting out of these actions for a further one hundred and eighty days (180) days;

CONSIDERING that the Defendant consents to the relief sought;

THIS COURT ORDERS that:

1. The period of time in which class members may opt-out of these actions is extended to August 23, 2023.

2. Class Counsel and the Administrator shall post this Order on the websites dedicated to these actions.

3. There shall be no costs of this motion.

"Mandy Aylen"
Judge

Schedule B: Order dated August 11, 2022 on Appointment of Administrator

Federal Court Cour fédérale

Date: 20220811

Docket: T-402-19
T-141-20
T-1120-21

Ottawa, Ontario, August 11, 2022

PRESENT: The Honourable Madam Justice Aylen

CLASS PROCEEDING

BETWEEN:

XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige) AND JONAVON JOSEPH MEAWASIGE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

T-141-20

BETWEEN:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON (by his litigation guardian, Carolyn Buffalo), CAROLYN BUFFALO AND DICK EUGENE JACKSON also known as RICHARD JACKSON

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

T-1120-21

BETWEEN:

ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

ORDER

UPON MOTION by the Plaintiffs, heard at a special sitting of the Court on August 8, 2022, for:

(a) An order approving the proposed notice plan for the distribution of the Notices of Certification and Settlement Approval Hearing, substantially in the form appended as Schedule "A" to the Notice of Motion [Notice Plan];

(b) An order that Canada pay the reasonable costs of giving notice in accordance with the Notice Plan;

(c) An order appointing Deloitte LLP as the administrator for notice, opt-out and the claims implementation in the proposed settlement in these class proceedings;

(d) An order that Canada pay the reasonable costs and disbursements of the administrator in accordance with the terms of the proposed settlement agreement, including subject to Canada's right to dispute the reasonableness of such costs and disbursements; and

(e) Such further and other relief as this Honourable Court may deem just and appropriate;

CONSIDERING the Plaintiffs' motion record and the submissions of counsel for the parties at the hearing of the motion;

AND CONSIDERING that the Defendant consents to the relief sought;

AND CONSIDERING that the Court is satisfied that the Notice Plan meets the requirements of Rules 334.32 and 334.34 and shall constitute good and sufficient service upon class members of the certification of these proceedings and of the Settlement Approval Hearing;

AND CONSIDERING that the provision of notice to class members of any approval of the Settlement Agreement will be the subject of a future notice plan to be submitted to the Court for approval;

AND CONSIDERING that the Court is satisfied that the balance of the relief sought should be granted;

THIS COURT ORDERS that:

1. The Notices of Certification and Settlement Approval Hearing shall be delivered in the manner set out in the Notice Plan attached hereto as Schedule "A" commencing immediately upon the issuance of this Order and continuing until the commencement of the Settlement Approval Hearing.

2. The Defendant shall pay the reasonable costs of giving notice in accordance with the Notice Plan, including the costs of translation of the notices.

3. In the event that the proposed settlement agreement is approved, the notice plan for the distribution of the notice of approval of the proposed settlement shall be the subject of a future order of this Court.

4. Deloitte LLP is hereby appointed as the Administrator in the proposed settlement of these class proceedings.

5. The Defendant shall pay the reasonable costs and disbursements of the Administrator in accordance with the terms of the proposed settlement agreement, including subject to the Defendant's right to dispute the reasonableness of such costs and disbursements.

6. The Administrator shall, within ninety days of the date of this Order, provide the parties with a detailed estimate of the anticipated costs in an illustrative budget based on expected claims/services for the administration during the first year of the administration including the anticipated costs of case setup, monthly

overhead, claim intake, claim processing, support centre and distribution and communication/noticing.

7. There shall be no costs of this motion.

"Mandy Aylen"
Judge

SCHEDULE "A"

NOTICE PLAN

(Certification and Settlement Approval Hearing)

First Nations Child and Family Services, Jordan's Principle and Trout Essential Services

I. BACKGROUND

A. Parties

The parties to this matter are as follows:

(a) Xavier Moushoom, Jeremy Meawasige by his litigation guardian, Jonavon Joseph Meawasige, and Jonavon Joseph Meawasige (together, the "**Moushoom Plaintiffs**");

(b) Assembly of First Nations ("**AFN**"), Ashley Dawn Louise Bach, Karen Osachoff, Melissa Walterson, Noah Buffalo-Jackson by his litigation guardian, Carolyn Buffalo, Carolyn Buffalo, and Dick Eugene Jackson also known as Richard Jackson (together, the "**AFN Plaintiffs**");

(c) AFN and Zacheus Joseph Trout (together, the "**Trout Plaintiffs**"), and;

(d) Her Majesty the Queen in Right of Canada ("**Canada**") (collectively, "**Parties**").

B. Background of the litigation

The Moushoom Plaintiffs commenced a Federal Court class action against Canada over the discriminatory provision of child and family services and essential services to First Nations dating back to April 1, 1991. The AFN Plaintiffs subsequently commenced a similar action in the Federal Court. The Moushoom Plaintiffs and AFN Plaintiffs later agreed to advance the matter jointly and cooperatively in the best interests of the class.

The Federal Court ordered the consolidation of the claims in July 2021 ("**Consolidated Action**"). The Federal Court also ordered the separate prosecution of the claims relating to delays, denials or gaps in the provision of essential services between 1991 and 2007, and therefore the Trout Plaintiffs commenced an action in July 2021 ("**Trout Action**", and together with the Consolidated Action, "**Actions**").

The Federal Court certified the Consolidated Action on November 26, 2021, and the Trout Action on February 11, 2022.

C. The Class

The Actions and the Final Settlement Agreement affect several groups of people (*i.e.*, the class) as follows: The Removed Child Class, The Removed Child Family Class, The Jordan's Principle Class, The Jordan's Principle Family Class, The Trout Child Class, and The Trout Family Class. These classes were defined in the certification orders.

II. FACTORS AFFECTING NOTICE DISSEMINATION

This plan is designed to notify the class members of certification and the settlement approval hearing in a trauma-informed and culturally sensitive manner, and to provide them with the opportunity to see, read, or hear the notice of certification and settlement approval hearing, understand their rights, and respond if they choose to.

The following factors inform the dissemination method needed to achieve an appropriate notice effort: class size, location of class members, the literacy and education level of class members, and the languages spoken by class members.

A. Targeted Groups

i. First Nations Composition of the Class

The Actions solely concern First Nations people amongst the Indigenous population (not Inuit or Métis).[1] Given the publicity that has surrounded these class proceedings and the overlapping proceedings before the Canadian Human Rights Tribunal, many class members are expected to be aware of the proceedings.

ii. Class Size

The class is primarily a subset of the First Nations population in Canada. The 2016 Census[2] shows that 977,235 individuals identified as being First Nations.[3] The more recent 2021 Census relating to First Nations people is expected to be released on September 21, 2022.[4] Relevant information that becomes available in the 2021 Census will form part of any ongoing notice dissemination at that time, and for the next phase of notice in this proposed settlement further particularized below.

The Parties retained experts to estimate the size of the Removed Child Class. They estimated the size of the Removed Child Class to be 115,000 based on historical data on First Nations children whose out of home care was funded by Indigenous Services Canada between April 1991 and March 2022. The number of Removed Child Family Class members is unknown. The Office of the Parliamentary Budget Officer has estimated that on average there may be 1.5 parents or grandparents per First Nations child.[5]

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[1] With the exception of non-common law caregiving parents and caregiving grandparents, where a First Nations condition does not exist in the class definition and those class members may be from the general population or non-First Nations Indigenous persons.

[2] Statistics Canada. 2018. *Canada [Country]* (table). *Aboriginal Population Profile*. 2016 Census. Statistics Canada Catalogue no. 98-510-X2016001. Ottawa. Released July 18, 2018. http://www12.statcan.gc.ca/census-recensement/2016/dp-pd/abpopprof/index.cfm?Lang=E (accessed July 24, 2022).

[3] Statistics Canada. 2018. *Canada [Country]* (table). Aboriginal Population Profile. 2016 Census. Statistics Canada Catalogue no. 98-510-X2016001. Ottawa. Released July 18, 2018. http://www12.statcan.gc.ca/census-recensement/2016/dp-pd/abpopprof/index.cfm?Lang=E (accessed July 24, 2022).

[4] See Statistics Canada: https://www12.statcan.gc.ca/census-recensement/2021/ref/prodserv/release-diffusion-eng.cfm.

[5] Compensation for the delay and denial of services to First Nations children, February 23, 2021, page 7: <https://publications.gc.ca/collections/collection_2021/dpb-pbo/YN5-219-2021-eng.pdf>.

The information on the size of the Jordan's Principle Class and the Trout Child Class is far less precise because reliable data does not exist. One method of arriving at a rough estimate has been to extrapolate the number of individual service requests accepted under the current Jordan's Principle service delivery program to the past. An extrapolation of this form with a pre-COVID quarter of individual requests since Canada has been found to be compliant with Jordan's Principle yields an estimated Jordan's Principle Class size of between 58,385 and 69,728—with a conservatively high median class size estimate of 65,000 class members. On the same basis as above, the Trout Child Class can be roughly estimated at 104,000 for the period of 1991-2007, by the simple multiplication of the median Jordan's Principle Class size estimate by the longer time period of 1991-2007. The number of Jordan's Principle Family Class and Trout Family Class members is unknown.

iii. Place of Residence

Class members are located throughout Canada, on and off First Nations reserves, within First Nations communities including northern and remote communities, and within the non-Indigenous population. Those residing outside of a First Nation community are in rural and urban areas. A percentage of the class members are incarcerated or currently reside outside of Canada.

The 2016 census data reported that 334,385 First Nations people were living on reserves.[6] This compares to 642,845-First Nations people living outside reserves.[7]

[6] Statistics Canada. 2018. *Canada [Country]* (table). Aboriginal Population Profile. 2016 Census. Statistics Canada Catalogue no. 98-510-X2016001. Ottawa. Released July 18, 2018. http://www12.statcan.gc.ca/census-recensement/2016/dp-pd/abpopprof/index.cfm?Lang=E (accessed July 24, 2022).

[7] Statistics Canada. 2018. *Canada [Country]* (table). *Aboriginal Population Profile*. 2016 Census. Statistics Canada Catalogue no. 98-510-X2016001. Ottawa. Released July 18, 2018.nhttp://www12.statcan.gc.ca/census-recensement/2016/dp-pd/abpopprof/index.cfm?Lang=E (accessed July 24, 2022).

Ontario, British Columbia and Alberta are home to the largest First Nations populations in Canada, although most of the First Nations population in Canada is generally concentrated in the prairie provinces and the West Coast. The following chart shows the First Nations population in Canada, by province/territory:[8]

Location	First Nations
Canada	977,235
Ontario	236,680
Quebec	92,655
British Columbia	172,520
Alberta	136,585
Manitoba	130,505
Saskatchewan	114,570
Nova Scotia	25,830
New Brunswick	17,575
Newfoundland and Labrador	28,375
Prince Edward Island	1,875
Northwest Territories	13,185
Nunavut	190
Yukon	6,690

The population reporting of First Nations identity is prevalent both in urban centres and northern and remote communities. Metropolitan areas, such as Toronto, Winnipeg, Edmonton and Vancouver contain large populations of First Nations who live outside reserves: The following chart shows the number of First Nations residents of some metropolitan areas:[9]

Metropolitan Area	Population of First Nations
Toronto	27,805
Ottawa-Gatineau	17,790

[8] Statistics Canada. 2018. Canada [Country] (table). Aboriginal Population Profile. 2016 Census. Statistics Canada. Ottawa. Released Date modified October 2, 2020. http://www12.statcan.gc.ca/census-recensement/2016/dp-pd/abpopprof/index.cfm?Lang=E (accessed July 24, 2022).

[9] Statistics Canada. 2018. *Canada [Ontario]* (table). Aboriginal Population Profile. 2016 Census. Statistics Canada. Ottawa. Released Date modified October 2, 2020. https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hlt-fst/abo-aut/Table.cfm?Lang=Eng&T=103&S=102&O=D&RPP=25 (please note to toggle between provinces at the link in order to find the related data for the cities) (accessed July 26, 2022).

Sudbury	7,395
Thunder Bay	11,340
Hamilton	9,695
London	8,725
St. Catherines - Niagara	6, 815
Winnipeg	38,700
Edmonton	33,885
Calgary	17,955
Vancouver	35,765
Victoria	9,935
Prince George	7,050
Kelowna	5,235
Kamloops	6,340
Montreal	16,130
Quebec City	6,230
Saskatoon	15,775
Regina	13,150
Prince Albert	9,045
Halifax	7,955

iv. Anticipated Age of Class Members

Communications will be attentive to different experiences amongst class members to ensure awareness and understanding of all class members. The class members targeted for notice are mostly expected to be youths and young adults.

The experts retained by the Parties estimated that about 44,000 of the Removed Child Class were under the age of majority as of March 2022. Insofar as the Family of Removed Child Class members is concerned: parents and grandparents are expected to be almost exclusively adults. Siblings are expected to include both minors and adults. As such, the class is mostly young but includes several generations of First Nations: children, youth, parents, and grandparents.

The Jordan's Principle Class is likewise expected to include minors for a number of years given that the end date of that class affecting children is November 2, 2017. The Trout Child Class, which ended in 2007, is expected to consist almost entirely of adults. The age range of the

Jordan's Principle Family Class and the Trout Family Class is expected to be similar to the Removed Child Family Class.

In general terms, the 2016 Census showed a national trend toward a younger First Nations population. The following figure shows a breakdown of the age distribution. The age composition of the First Nations population in Canada is generally as follows:[10]

Age	First Nation Population
Total	977,230
0 to 24 years	456,530
25 to 34 years	136,920
35 to 44 years	116,625
45 to 54 years	117,945
55 to 64 years	87,135
65 years and over	62,075
65 to 74 years	43,610
75 years and over	18,460

v. Literacy and Education Level

Literacy and education levels are expected to vary widely amongst the class members. While a significant number of class members did not complete a high school diploma, some have received higher university education. This is further exacerbated by the wide age range of class members, which often interrelates with education levels.

Amongst the general population of First Nations people of 20 years or older, 196,305 individuals had not obtained a high school or equivalent level of education. Conversely, 603,305 individuals

[10] Statistics Canada, 2016 Census of Population, Statistics Canada Catalogue no. 98-400-X2016156. Ottawa. Released Date modified: June 19, 2019. (accessed July 24, 2022). https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/abpopprof/details/page.cfm?Lang=E&Geo1=PR&Code1=01&Data=Count&SearchText=Canada&SearchType=Begins&B1=All&C1=All&SEX_ID=1&AGE_ID=1&RESGEO_ID=1

had obtained that level of education. In percentage terms, this represents 32% and 68% of the First Nations population, respectively.[11]

vi. Languages

The majority of First Nations people (826,295 individuals) have identified English or French as their mother tongue, while approximately 166,120 individuals have identified a First Nations language as their mother tongue.[12] These numbers represent approximately 83% of the First Nations population and 17% of the population, respectively. Those First Nations who identified an Indigenous language as a mother tongue were more likely to reside on reserve, at 74%.[13]

The Federal Court has ordered that the long-form notice, short-form notice and the opt-out form in this case be translated into four First Nations languages: Cree, Dene, Mi'kmaq, and Ojibway. These four languages were spoken as the mother tongue of the largest number of First Nations. Cree has the largest number of speakers, at 89,550, with Ojibway, Dene, and Mi'kmaq, following at 34,835, 9,950, and 7,010, respectively.[14]

III. NOTICE OF CERTIFICATION AND SETTLEMENT APPROVAL HEARING

A. The two phases of notice in the settlement, and the focus of this notice plan

[11] Statistics Canada. 2018. Canada [Country] (table). Aboriginal Population Profile. 2016 Census. Statistics Canada Catalogue no. 98-510-X2016001. Ottawa. Released July 18, 2018. (accessed July 26, 2022); Statistics Canada. 2018. Canada [Country] (table). Aboriginal Population Profile. 2016 Census. Statistics Canada Catalogue no. 98-510-X2016001. Ottawa. Released July 18, 2018. (accessed July 26, 2022).

[12] Statistics Canada. 2018. Canada [Country] (table). Aboriginal Population Profile. 2016 Census. Statistics Canada Catalogue no. 98-510-X2016001. Ottawa. Released July 18, 2018. (accessed July 26, 2022); Statistics Canada. 2018. Canada [Country] (table). Aboriginal Population Profile. 2016 Census. Statistics Canada Catalogue no. 98-510-X2016001. Ottawa. Released July 18, 2018. (accessed July 26, 2022).

[13] Statistics Canada. 2018. Canada [Country] (table). Aboriginal Population Profile. 2016 Census. Statistics Canada Catalogue no. 98-510-X2016001. Ottawa. Released July 18, 2018. (accessed July 26, 2022).

[14] Statistics Canada. 2018. Canada [Country] (table). Aboriginal Population Profile. 2016 Census. Statistics Canada Catalogue no. 98-510-X2016001. Ottawa. Released July 18, 2018. (accessed July 26, 2022); Statistics Canada. 2018. Canada [Country] (table). Aboriginal Population Profile. 2016 Census. Statistics Canada Catalogue no. 98-510-X2016001. Ottawa. Released July 18, 2018. (accessed July 26, 2022).

The Parties anticipate that notice will be given to the class members in two phases. **This plan only deals with the first phase of notice distribution**, further described below, while the distribution of notice regarding the process to claim compensation will be subject to a further plan specific to that purpose and subject to judicial approval at a future date. The two phases of notice are as follows:

(a) **Phase I**: This phase, which is the subject of this notice plan, disseminates the notices already approved by the Court. The approved notices adopt a trauma-informed, culturally and age-appropriate method of communication. They announce that the Actions have been certified pursuant to the Federal Court's certification orders. The notices advise class members of their legal rights as a result of certification, including the binding nature of the Actions on all class members who do not opt out of the settlement. Further, the notices advise of the procedures and deadlines whereby those who wish to opt-out of the settlement may do so. This phase also describes the proposed Final Settlement Agreement, the dates and location for the settlement approval hearing, where and how to access information about the settlement, as well as providing information on how to object, if desired. The Parties expect many class members to already be aware of the Actions and the proposed settlement, and for class members to have significant interest in the settlement approval hearing.

(b) **Phase II**: This phase will be the subject of a further notice plan and includes a more extensive notice plan that is in effect for a longer period. Notice in the second phase announces the approval of the settlement by the Federal Court

and outlines the settlement and its benefits. It also provides information on how to access the claims process. Given that there are multiple distinct classes, this phase will provide instructions and direct class members to dedicated support to assist in clarifying eligibility, filling out claim forms, and obtaining supporting documentation. The Phase II notice plan will be presented to the Court at a later date.

B. Phase I Notice Plan

i. Notice of Certification

In its order certifying the Consolidated Action on November 26, 2021, the Court stated: "The form of notice of certification, the manner of giving notice and all other related matters shall be determined by separate order(s) of the Court." The Federal Court's certification order in the Trout Action dated February 11, 2022 was to the same effect.

The Federal Court approved the short-form and long-form notice of certification and settlement approval hearing on June 24, 2022. This included a short-form notice, a long-form notice, and an opt-out form. The Federal Court's June 24, 2022 order and its schedules is enclosed as **Schedule "A"** to this notice plan.

In this phase of notice, class members are advised that the Federal Court has certified the Actions. The dissemination of this notice triggers the opt-out period and the opt-out right of the class members. The short-form notice and the long-form notice approved by the Federal Court provide accessible information to class members about their options, the implications of opting out of the Actions, and how they can opt out should they choose to.

Any class member who wishes to be excluded from the Actions needs to complete the opt-out form approved by the Federal Court on June 24, 2022 and submit the completed opt-out form to the administrator before the expiry of the six-month deadline from the date on which notice is disseminated to the class pursuant to this notice plan.

Class members who have already commenced a proceeding that raises the common questions of law or fact set out in the certification orders are excluded from the Actions and cannot benefit from the Final Settlement Agreement if those class members do not discontinue such individual proceedings before the opt-out deadline. Class members who do not opt out of the Actions will be bound by the results achieved in the Actions, including the terms of the Final Settlement Agreement if approved by the Federal Court.[15]

ii. Notice of Settlement Approval Hearing

The notices advise of the date that the court has set for the settlement approval hearing and provide specific information about the hearing in order to allow class members to attend in person, participate, or to file objections to the settlement in advance. In this case, class members will have virtual attendance options in order to maximize opportunity for class members across the country to participate in the settlement approval process.

Class members who wish to object to the settlement must send their written objections to the administrator so that the comments can be compiled and sent to the Federal Court in advance of the hearing. The Federal Court can only approve or deny the Final Settlement Agreement and cannot change the terms of the Final Settlement Agreement.

[15] Rule 344.21 of the *Federal Courts Rules*, SOR/98-106.

IV. NOTICE PLAN DELIVERY

The approved short-form and long-form notices direct class members to the extensive mental health and wellness supports that the Parties have negotiated as part of the Final Settlement Agreement. Those supports are summarized in "Schedule C: Framework for Supports for Claimants in Compensation Process" to the Final Settlement Agreement, which is enclosed hereto as **Schedule "B"**.

Given the vulnerability of many class members, notice must take into account that concepts such as opt-out may not be easily understandable to some class members and a real risk exists that such class members think they need to opt out in order to receive compensation under the Final Settlement Agreement. Therefore, the approved notices seek to explain the implications of opting out and the approval of the Final Settlement Agreement clearly and in plain language.

The distribution of notice in this phase is expected to start immediately upon approval by the Federal Court of this notice plan and the appointment of the proposed administrator, both of which are necessary in order to disseminate notice to the class.

The proposed method of disseminating Phase I notice includes four approaches described below. These approaches will enable Phase I notice to reach class members for the purposes of certification and settlement approval.

The notice plan for Phase II will be developed and submitted to the Court for approval at a later date.

A. Direct Communication with Class Members

During the course of this litigation, class counsel have maintained a website dedicated to this case where class members can obtain information, learn how to contact class counsel and register for updates. This website is: https://www.sotosclassactions.com/cases/first-nations-youth/. The

AFN has also created a website where class members can obtain information and register for updates: http://www.fnchildcompensation.ca/.

Through these websites, thousands of interested class members and organizations assisting class members have signed up for updates. The information provided includes name, email address, phone number (optional) and mailing address (optional). Further, when class members contact class counsel by phone and do not have an email, their information and mailing address is recorded and entered into the database.

This information enables direct communication with such class members by email or regular mail, where no email exists. This direct communication will include the short-form and long-form notice of certification and settlement approval under this notice plan.

Further, class counsel and the AFN have travelled and established communication channels with First Nations child and family service providers and First Nations leadership across Canada. Class counsel have presented on the Actions before First Nations child and family stakeholders in British Columbia and Quebec and attended related gatherings in Saskatchewan. The AFN consulted with First Nations leadership to provide updates of the status on the negotiations, the structure of the settlement, and the substance of the Final Settlement Agreement at approximately 50 such briefings across the country. Further meetings and presentations are planned and invitations to provide information sessions across communities are always welcomed.

B. Dissemination by the Assembly of First Nations

The AFN is a national advocacy organization that works to advance the collective aspirations of First Nations individuals and communities across Canada on matters of national or international nature and concern. The AFN hosts two Assemblies a year where mandates and directives for the

organization are established through resolutions directed and supported by elected Chiefs or proxies from member First Nations across Canada.

The AFN is guided by an Executive Committee consisting of an elected National Chief and Regional Chiefs from each province and territory. Representatives from five national councils (Knowledge Keepers, Youth, Veterans, 2SLGBTQQIA+ and Women) support and guide the decisions of the Executive Committee.

The AFN is thus connected to 634 First Nation communities in the country and will circulate the short-form notice and long-form notice to class members through those communications channels.

C. Dissemination through Social Media

Given that the targeted population is generally younger, the notices will be disseminated through targeted advertising on social media, including Facebook and Instagram. These media enable the selection of criteria that ensure that the notices are brought to the attention of individuals and organizations with an interest in the subject matter of this litigation through an efficient, relevant, and trauma-informed process.

Given that internet accessibility will vary across the regions and provinces, the use of social media will complement, where possible, the other dissemination approaches specified in this notice plan.

D. Circulation Through Indigenous Media

Notice will also be published in the following Indigenous newspapers/publications upon approval and may be repeated in some or all of these media during the opt-out period, which is six months from the date of dissemination of notice: First Nations Drum, The Windspeaker, Mi'kmaq Maliseet Nations News, APTN National News.

V. CONCLUSION

The notice plan for the Actions recognizes the scope and breadth of the class members, particularly in terms of age of the target, individual experiences, geographic distribution, language representation and familiarity with traditional and social media means of communication.

The notice plan seeks a proportionate, multi-faceted, culturally appropriate, relevant and trauma-informed approach to notice dissemination, backed by extensive mental health and wellbeing supports available to class members.

As ordered by the Federal Court, the notice plan is intended to commence at least one month prior to the settlement approval hearing date set by the court. As approved by the Federal Court, the notices provide sufficient information on certification and the Final Settlement Agreement in plain language so that class members understand how the Final Settlement Agreement may affect them. The approved notices also specify the terms upon which judicial approval is being sought, providing critical information on the settlement approval hearing itself in terms of logistics and class members' right to participate or file an objection to the proposed settlement.

Schedule C: Provincial and Territorial Ages of Majority

Province / Territory	**Age of Majority**	**Governing Statute / Provision**
Alberta	18 years old	"Every person attains the age of majority and ceases to be a minor on attaining the age of 18 years" Source: *Age of Majority Act*, RSA 2000, c A-6, s 1
British Columbia	19 years old	"From April 15, 1970, (a) a person reaches the age of majority on becoming age 19 instead of age 21, and (b) a person who on that date has reached age 19 but not 21 is deemed to have reached majority on that date" Source: *Age of Majority Act*, RSBC 1996, c 7, s 1(1)
Manitoba	18 years old	"Every person attains the age of majority, and ceases to be a minor, on attaining the age of 18 years" Source: *The Age of Majority Act*, CCSM 1988, c A-7, s 1
New Brunswick	19 years old	"A person attains the age of majority and ceases to be a minor on attaining the age of 19 years" Source: *Age of Majority Act*, RSNB 2011, c 103, s 1(1)
Newfoundland And Labrador	19 years old	"Every person who attains the age of 19 years (a) attains the age of majority; and (b) ceases to be a minor person" Source: *Age Of Majority Act*, SNL 1995, c A-4.2, s 2
Northwest Territories	19 years old	"Every person attains the age of majority, and majority ceases to be a minor, on attaining the age of 19 years" Source: *Age of Majority Act*, RSNWT 1988, c A-2, s 2

Nova Scotia	19 years old	"Every person attains the age of majority, and ceases to be a minor, on attaining the age of nineteen years" Source: *Age of Majority Act*, RSNS 1989, c 4, s 2(1)
Nunavut	19 years old	"Every person attains the age of majority, and ceases to be a minor, on attaining the age of 19 years" Source: *Age of Majority Act*, RSNWT (Nu) 1988, c A-2, s 2
Ontario	18 years old	"Every person attains the age of majority and ceases to be a minor on attaining the age of eighteen years" Source: *Age of Majority and Accountability Act*, RSO 1990, c A.7, s 1
Prince Edward Island	18 years old	"Every person attains the age of majority and ceases to be a minor on attaining the age of eighteen years" Source: *Age of Majority Act*, RSPEI 1988, c A-8, s 1
Quebec	18 years old	"Full age or the age of majority is 18 years. On attaining full age, a person ceases to be a minor and has the full exercise of all his civil rights" Source: *Civil Code of Quebec*, c CCQ-1991, c 64, s 153
Saskatchewan	18 years old	"Every person attains the age of majority and ceases to be a minor on attaining the age of eighteen years" Source: *Age of Majority Act*, RSS 1978, c A-6, s 2(1)
Yukon	19 years old	"Every person reaches the age of majority, and ceases to be a minor, on reaching the age of 19 years" Source: *Age of Majority Act*, RSY, c 2, s 1

Schedule D: Certification Order dated November 26, 2021 in Court File Nos. T-402-19 and T-141-20 (2021 FC 1225)

Federal Court Cour fédérale

Date: 20211126

Docket: T-402-19
T-141-20

Citation: 2021 FC 1225

Ottawa, Ontario, November 26, 2021

PRESENT: The Honourable Madam Justice Aylen

CLASS PROCEEDING

BETWEEN:

XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, JONAVON JOSEPH MEAWASIGE) AND JONAVON JOSEPH MEAWASIGE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

BETWEEN:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON (by his litigation guardian, CAROLYN BUFFALO), CAROLYN BUFFALO AND DICK EUGENE JACKSON also known as RICHARD JACKSON

Plaintiffs

and

HER MAJESTY THE QUEEN

AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

UPON MOTION by the Plaintiffs, on consent and determined in writing pursuant to Rule 369 of the *Federal Courts Rules*, for an order:

(a) Granting the Plaintiffs an extension of time to make this certification motion past the deadline in Rule 334.15(2)(b);

(b) Certifying this proceeding as a class proceeding and defining the class;

(C) Stating the nature of the claims made on behalf of the class and the relief sought by the class;

(d) Stipulating the common issues for trial;

(e) Appointing the Plaintiffs specified below as representative plaintiffs;

(f) Approving the litigation plan; and

(g) Other relief;

CONSIDERING the motion materials filed by the Plaintiffs;

CONSIDERING that the Defendant has advised that the Defendant consents in whole to the motion as filed;

CONSIDERING that the Court is satisfied, in the circumstances of this proceeding, that an extension of time should be granted to bring this certification motion past the deadline prescribed in Rule 334.15(2)(b);

CONSIDERING that while the Defendant's consent reduces the necessity for a rigorous approach to the issue of whether this proceeding should be certified as a class action, it does not relieve the Court of the duty to ensure that the requirements of Rule 334.16 for certification are met [see *Varley v Canada (Attorney General)*, 2021 FC 589];

CONSIDERING that Rule 334.16(1) of the *Federal Courts Rules* provides:

Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if	Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :
(a) the pleadings disclose a reasonable cause of action;	a) les actes de procédure révèlent une cause d'action valable;
(b) there is an identifiable class of two or more persons;	b) il existe un groupe identifiable formé d'au moins deux personnes;
(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;	c) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;
(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and	d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;
(e) there is a representative plaintiff or applicant who	e) il existe un représentant demandeur qui :
(i) would fairly and adequately represent the interests of the class,	(i) représenterait de façon équitable et adéquate les intérêts du groupe,

(ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,	(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,
(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and	(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,
(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.	(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

CONSIDERING that, pursuant to Rule 334.16(2), all relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether: (a) the questions of law or fact common to the class members predominate over any questions affecting only individual members; (b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings; (c) the class proceeding would involve claims that are or have been the subject of any other proceeding; (d) other means of resolving the claims are less practical or less efficient; and (e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means;

CONSIDERING that:

(a) The conduct of the Crown at issue in this proposed class action proceeding, as set out in the Consolidated Statement of Claim, concerns two alleged forms of

discrimination against First Nations children: (i) the Crown's funding of child and family services for First Nations children and the incentive it has created to remove children from their homes; and (ii) the Crown's failure to comply with Jordan's Principles, a legal requirement that aims to prevent First Nations children from suffering gaps, delays, disruptions or denials in receiving necessary services and products contrary to their *Charter*-protected equality rights.

(b) As summarized by the Plaintiffs in their written representations, at its core, the Consolidated Statement of Claim alleges that:

(i) The Crown has knowingly underfunded child and family services for First Nations children living on Reserve and in the Yukon, and thereby prevented child welfare service agencies from providing adequate Prevention Services to First Nations children and families.

(ii) The Crown has underfunded Prevention Services to First Nations children and families living on Reserve and in the Yukon, while fully funding the costs of care for First Nations children who are removed from their homes and placed into out-of-home care, thereby creating a perverse incentive for First Nations child welfare service agencies to remove First Nations children living on Reserve and in the Yukon from their homes and place them in out-of-home care.

(iii) The removal of children from their homes caused severe and enduring trauma to those children and their families.

(iv) Not only does Jordan's Principle embody the Class Members' equality rights, the Crown has also admitted that Jordan's Principle is a "legal requirement" and thus an actionable wrong. However, the Crown has disregarded its obligations under Jordan's Principle and thereby denied crucial services and products to tens of thousands of First Nations children, causing compensable harm.

(v) The Crown's conduct is discriminatory, directed at Class Members because they were First Nations, and breached section 15(1) of the *Charter*, the Crown's fiduciary duties to First Nations and the standard of care at common and civil law.

(c) With respect to the first element of the certification analysis (namely, whether the pleading discloses a reasonable cause of action), the threshold is a low one. The question for the Court is whether it is plain and obvious that the causes of action are doomed to fail [see *Brake v Canada (Attorney General)*, 2019 FCA 274 at para 54]. Even without the Crown's consent, I am satisfied that the Plaintiffs have pleaded the necessary elements for each cause of action sufficient for purposes of this motion, such that the Consolidated Statement of Claim discloses a reasonable cause of action.

(d) With respect to the second element of the certification analysis (namely, whether there is an identifiable class of two or more persons), the test to be applied is whether the Plaintiffs have defined the class by reference to objective criteria such that a person can be identified to be a class member without reference to the merits

of the action [see *Hollick v Toronto (City of)*, 2001 SCC 68 at para 17]. I am satisfied that the proposed class definitions for the Removed Child Class, Jordan's Class and Family Class (as set out below) contain objective criteria and that inclusion in each class can be determined without reference to the merits of the action.

(e) With respect to the third element of the certification analysis (namely, whether the claims of the class members raise common questions of law or fact), as noted by the Federal Court of Appeal in *Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 72, the task under this part of the certification determination is not to determine the common issues, but rather to assess whether the resolution of the issues is necessary to the resolution of each class member's claim. Specifically, the test is as follows:

> The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significant of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit. (*Western Canadian Shopping Centres*, above at para 39; see also *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3 at paras 41 and 44-46.)

Having reviewed the common issues (as set out below), I am satisfied that the issues share a material and substantial common ingredient to the resolution of each class

member's claim. Moreover, I agree with the Plaintiff that the commonality of these issues is analogous to the commonality of similar issues in institutional abuse claims which have been certified as class actions (such as the Indian Residential Schools and the Sixties Scoop class action litigation). Accordingly, I find that the common issue element is satisfied.

(f) With respect to the fourth element of the certification analysis (namely, whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of fact and law), the preferability requirement has two concepts at its core: (i) whether the class proceeding would be a fair, efficient and manageable method of advancing the claim; and (ii) whether the class proceeding would be preferable to other reasonably available means of resolving the claims of class members. A determination of the preferability requirement requires an examination of the common issues in their context, taking into account the importance of the common issues in relation to the claim as a whole, and may be satisfied even where there are substantial individual issues [see *Brake*, *supra* at para 85; *Wenham*, *supra* at para 77 and *Hollick*, *supra* at paras 27-31]. The Court's consideration of this requirement must be conducted through the lens of the three principle goals of class actions, namely judicial economy, behaviour modification and access to justice [see *Brake*, *supra* at para 86, citing *AIC Limited v Fischer*, 2013 SCC 69 at para 22].

(g) Having considered the above-referenced principles and the factors set out in Rule 334.16(2), I am satisfied a class proceeding is the preferable procedure for the just

and efficient resolution of the common questions of fact and law. Given the systemic nature of the claims, the potential for significant barriers to access to justice for individual claimants and the Plaintiffs' stated concerns regarding the other means available for resolving the claims of class members, I am satisfied that the proposed class action would be a fair, efficient and manageable method of advancing the claims of the class members.

(h) With respect to the fifth element of the certification analysis (namely, whether there are appropriate proposed representatives), I am satisfied, having reviewed the affidavit evidence filed on the motion together with the detailed litigation plan, that the proposed representative plaintiffs (as set out below) meet the requirements of Rule 334.16(1)(e);

CONSIDERING that the Court is satisfied that all of the requirements for certification are met and that the requested relief should be granted;

THIS COURT ORDERS that:

1. The Plaintiffs are granted an extension of time, *nunc pro tunc*, to bring this certification motion past the deadline in Rule 334.15(2)(b) of the *Federal Courts Rules*.

2. For the purpose of this Order and in addition to definitions elsewhere in this Order, the following definitions apply and other terms in this Order have the same meaning as in the Consolidated Statement of Claim as filed on July 21, 2021:

(a) **"Class"** means the Removed Child Class, Jordan's Class and Family Class, collectively.

(b) **"Class Counsel"** means Fasken Martineau Dumoulin LLP, Kugler Kandestin LLP, Miller Titerle + Co., Nahwegahbow Corbiere and Sotos LLP.

(c) **"Class Members"** mean all persons who are members of the Class.

(d) **"Class Period"** means:

(i) For the Removed Child Class members and their corresponding Family Class members, the period of time beginning on April 1, 1991 and ending on the date of this Order; and

(ii) For the Jordan's Class members and their corresponding Family Class members, the period of time beginning on December 12, 2007 and ending on the date of this Order.

(e) **"Family Class"** means all persons who are brother, sister, mother, father, grandmother or grandfather of a member of the Removed Child Class and/or Jordan's Class.

(f) **"First Nation"** and **"First Nations"** means Indigenous peoples in Canada, including the Yukon and the Northwest Territories, who are neither Inuit nor Métis, and includes:

(i) Individuals who have Indian status pursuant to the *Indian Act*, R.S.C., 1985, c.I-5 [*Indian Act*];

(ii) Individuals who are entitled to be registered under section 6 of the *Indian Act* at the time of certification;

(iii) Individuals who met band membership requirements under sections 10-12 of the *Indian Act* and, in the case of the Removed Child Class members, have done so by the time of certification, such as where their respective First Nation community assumed control of its own membership by establishing membership rules and the individuals were found to meet the requirements under those membership rules and were included on the Band List; and

(iv) In the case of Jordan's Class members, individuals, other than those listed in sub-paragraphs (i)-(iii) above, recognized as citizens or members of their respective First Nations whether under agreement, treaties or First Nations' customs, traditions and laws.

(g) **"Jordan's Class"** means all First Nations individuals who were under the applicable provincial/territorial age of majority and who during the Class Period were denied a service or product, or whose receipt of a service or product was delayed or disrupted, on grounds, including but not limited to, lack of funding or lack of jurisdiction, or as a result of a jurisdictional dispute with another government or governmental department.

(h) **"Removed Child Class"** means all First Nations individuals who:

(i) Were under the applicable provincial/territorial age of majority at any time during the Class Period; and

(ii) Were taken into out-of-home care during the Class Period while they, or at least one of their parents, were ordinarily resident on a Reserve.

(i) **"Reserve"** means a tract of land, as defined under the *Indian Act*, the legal title to which is vested in the Crown and has been set apart for the use and benefit of an Indian band.

3. This proceeding is hereby certified as a class proceeding against the Defendant pursuant to Rule 334.16(1) of the *Federal Courts Rules*.

4. The Class shall consist of the Removed Child Class, Jordan's Class and Family Class, all as defined herein.

5. The nature of the claims asserted on behalf of the Class against the Defendant is constitutional, negligence and breach of fiduciary duty owed by the Crown to the Class.

6. The relief claimed by the Class includes damages, *Charter* damages, disgorgement, punitive damages and exemplary damages.

7. The following persons are appointed as representative plaintiffs:

(a) For the Removed Child Class: Xavier Moushoom, Ashley Dawn Louise Bach and Karen Osachoff;

(b) For the Jordan's Class: Jeremy Meawasige (by his litigation guardian, Jonavon Joseph Measwasige) and Noah Buffalo-Jackson (by his litigation guardian, Carolyn Buffalo); and

(c) For the Family Class: Xavier Moushoom, Jonavon Joseph Meawasige, Melissa Walterson, Carolyn Buffalo and Dick Eugene Jackson (also known as Richard Jackson),

all of whom are deemed to constitute adequate representative plaintiffs of the Class.

8. Class Counsel are hereby appointed as counsel for the Class.

9. The proceeding is certified on the basis of the following common issues:

(a) Did the Crown's conduct as alleged in the Consolidated Statement of Claim [Impugned Conduct] infringe the equality right of the Plaintiffs and Class Members under section 15(1) of the *Canadian Charter of Rights and Freedoms*? More specifically:

(i) Did the Impugned Conduct create a distinction based on the Class Members' race, or national or ethnic origin?

(ii) Was the distinction discriminatory?

(iii) Did the Impugned Conduct reinforce and exacerbate the Class Members' historical disadvantages?

(iv) If so, was the violation of section 15(1) of the *Charter* justified under section 1 of the *Charter*?

(v) Are *Charter* damages an appropriate remedy?

(b) Did the Crown owe the Plaintiffs and Class Members a common law duty of care?

(i) If so, did the Crown breach that duty of care?

(c) Did the Crown breach its obligations under the *Civil Code of Québec*? More specifically:

(i) Did the Crown commit fault or engage its civil liability?

(ii) Did the Impugned Conduct result in losses to the Plaintiffs and Class Members and if so, do such losses constitute injury to each of the Class Members?

(iii) Are Class Members entitled to claim damages for the moral and material damages arising from the foregoing?

(d) Did the Crown owe the Plaintiffs and Class Members a fiduciary duty?

(i) If so, did the Crown breach that duty?

(e) Can the amount of damages payable by the Crown be determined partially under Rule 334.28(1) of the *Federal Courts Rules* on an aggregate basis?

(i) If so, in what amount?

(f) Did the Crown obtain quantifiable monetary benefits from the Impugned Conduct during the Class Period?

(i) If so, should the Crown be required to disgorge those benefits?

(ii) If so, in what amount?

(g) Should punitive and/or aggravated damages be awarded against the Crown?

(i) If so, in what amount?

10. The Plaintiffs' Fresh as Amended Litigation Plan, as filed November 2, 2021 and attached hereto as Schedule "A", is hereby approved, subject to any modifications necessary as a result of this Order and subject to any further orders of this Court.

11. The form of notice of certification, the manner of giving notice and all other related matters shall be determined by separate order(s) of the Court.

12. The opt-out period shall be six months from the date on which notice of certification is published in the manner to be specified by further order of this Court.

13. The timetable for this proceeding through to trial shall also be determined by separate order(s) of the Court.

14. Pursuant to Rule 334.39(1) of the *Federal Courts Rules*, there shall be no costs payable by any party for this motion.

"Mandy Aylen"
Judge

ANNEX A

Court File Nos. T-402-19 / T-141-20

FEDERAL COURT
PROPOSED CLASS PROCEEDING

BETWEEN:

XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige), JONAVON JOSEPH MEAWASIGE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
PROPOSED CLASS PROCEEDING

BETWEEN:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON,
NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo, CAROLYN BUFFALO, and DICK EUGENE JACKSON also known as RICHARD JACKSON

Plaintiffs

and

HER MAJESTY THE QUEEN
AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Defendant

FRESH AS AMENDED LITIGATION PLAN

November 2, 2021

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I. DEFINITIONS

1. The definitions below will be used throughout this Litigation Plan. Any term defined in the Consolidated Statement of Claim that is also used in this Litigation Plan has the same meaning as that included in the Consolidated Statement of Claim or as otherwise defined by the Court.

Aggregate Damages Distribution Process means the system directed by the Court for the **Class Action Administrator** to distribute aggregate damages to **Approved Class Members**;

Approved Class Member(s) means **Approved Removed Child Class Member(s)** and/or **Approved Jordan's Class Member(s)** and/or **Approved Family Class Members**;

Approved Family Class Member(s) means a Family Class Member who has been approved by the **Class Action Administrator** as meeting the criteria for being a Family Class Member, including the brother, sister, mother, father, grandmother or grandfather of an Approved Removed Child Class Member (regardless of whether the Approved Removed Child Class Member is alive) and whose approval as a Family Class Member has not been successfully challenged;

Approved Jordan's Class Member(s) means a Jordan's Class Member who has been approved by the **Class Action Administrator** as meeting the criteria for being a Jordan's Class Member and whose approval as a Jordan's Class Member has not been successfully challenged;

Approved Removed Child Class Member(s) means a Removed Child Class Member who has been approved by the **Class Action Administrator** as meeting the criteria for being a Removed Child Class Member and whose approval as a Removed Child Class Member has not been successfully challenged;

Certification Notice means the information set out in Schedule A to this Litigation Plan, as may be subsequently amended and as approved by the Court;

CHRT Decision means the decision of the **CHRT** in the **CHRT Proceeding** dated January 26, 2016, bearing citation 2016 CHRT 2;

CHRT means the Canadian Human Rights Tribunal;

CHRT Proceeding means the proceeding before the **CHRT** under file number T1340/7008;

Claim Form means the form set out in Schedule C to this Litigation Plan used by the Removed Child Class Members and/or the Jordan's Class Members and/or the Family Class Members to submit a claim, as may be subsequently amended and as approved by the Court;

Class Action Administrator means any settlement administrator or other appropriate firm appointed by the Court to assist in the administration of the class proceeding;

Class Counsel means the consortium of law firms acting as co-counsel in this class proceeding, with the firms of Sotos LLP, Kugler Kandestin LLP, Miller Titerle + Company, Nahwegahbow, Corbiere and Faskens LLP as Solicitors of Record;

Class Member(s) means an individual who falls within the definition of the Removed Child Class and/or the Jordan's Class and/or the Family Class, as pleaded in the Consolidated Statement of Claim and as approved by the Court;

Common Issues means the issues listed in the Notice of Motion for Certification, or as found by the Court, as may be subsequently amended and as approved by the Court;

Common Issues Notice means the information set out in the notice regarding the **Common Issues** to be certified by the Court at Certification, as may be subsequently amended and as approved by the Court;

Crown Class Member Information means information to be provided by the Crown, at the request of the plaintiffs and/or as ordered by the Court, to the **Class Action Administrator** and/or **Class Counsel** regarding the names and last known contact information of all individuals who meet the criteria of Class Members as set out in the Consolidated Statement of Claim or as otherwise defined by the Court, including: (a) a list of all known Class Members' names and last known addresses using the information in the Crown's possession or under its control[1] as well as all individuals who received a product or service pursuant to Jordan's Principle following the CHRT Decision (estimated by the Crown in its representations to the CHRT to be individuals having received over 165,000 services under Jordan's Principle as of October 2018).

Individual Damage Assessment Form means the form set out in Schedule D to this Litigation Plan, as may be subsequently amended and as approved by the Court, to be used by **Approved Class Member(s)** to elect an individual assessment of their damages and commence an individual damage assessment under the **Individual Damage Assessment Process**;

Individual Damage Assessment Process means the procedure and system to be approved by the Court following the **Common Issues** trial to be used to assess and distribute damages to **Approved Class Member(s)** who have requested an individual damage assessment by submitting an **Individual Damage Assessment Form**;

Notice Program means the process, set out in the Litigation Plan, for communicating the **Certification Notice** and/or the **Common Issues Notice** to **Class Members**, as may be subsequently amended and as approved by the Court;

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[1] Where Class Members are known to be represented by counsel, only their name should be provided along with their counsel's name and address.

Opt Out Form means the form set out in Schedule B to this Litigation Plan used by Class Members to opt out of the class proceeding, as may be subsequently amended and as approved by the Court;

Opt Out Period means the deadline, proposed by the plaintiffs as six months from the date on which notice of certification to the Class is published in the manner to be specified by the Court or as otherwise determined by the Court, to opt out of the class proceeding;

Opt Out Procedures means the procedures, set out in the Litigation Plan, for Class Members to opt out of this class proceeding, as may be subsequently amended and as approved by the Court; and

Special Opt Out Procedures means the procedures, set out in the Litigation Plan, for Class Members who have already commenced a civil proceeding in Canada or who are known by the Crown to have already retained legal counsel to opt out of this class proceeding, as may be subsequently amended and as approved by the Court.

II. OVERVIEW

2. The plaintiffs have commenced this action on behalf of First Nations individuals who allege that the Crown has engaged in the discriminatory underfunding of child and family services and breached the equality obligations underlying Jordan's Principle. The class action advances the rights of tens of thousands of First Nations children, former children and family members.

3. This Litigation Plan is advanced as a workable method of advancing the proceeding on behalf of the Class and of notifying Class Members as to how the class proceeding is progressing, pursuant to rule 334.16(1)(e)(ii) of the *Federal Court Rules*. The Litigation Plan is modelled on the class action relating to the Indian Residential Schools.[2]

4. This Litigation Plan sets out a detailed plan for the common stages of this litigation, and sets out, on a without prejudice basis, an early plan for how the individual stage of the action may progress. Given the early stage of the litigation, the plan is necessarily subject to substantial revisions as the case progresses.

5. The plaintiffs are mindful that the CHRT has awarded statutory compensation to a subset of the Class Members pursuant to the CHRA (*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39). If CHRT compensation is paid to any Class Members, the plaintiffs will seek a determination from the Court as to whether the Crown is entitled to a set-off or deduction of damages in this action for such amounts.

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[2] See *Baxter v Canada (Attorney General)*, 2006 CanLII 41673 (Ont Sup Ct), and subsequent orders of the Court. See also information available on the website of the Indian Residential Schools Adjudication Secretariat, online <http://www.iap-pei.ca/home-eng.php>.

III. PRE-CERTIFICATION PROCESS

A. The Parties

i. The Plaintiffs

6. The plaintiffs have proposed three classes:

   (a) the Removed Child Class, represented by Xavier Moushoom, Ashley Dawn Louise Bach, and Karen Osachoff;

   (b) the Family Class, represented by Xavier Moushoom, Jonavon Joseph Meawasige, Melissa Walterson, Carolyn Buffalo, and Dick Eugene Jackson also known as Richard Jackson; and

   (c) the Jordan's Class, represented by Jeremy Meawasige, by his litigation guardian, Jonavon Joseph Meawasige; and Noah Buffalo-Jackson, by his litigation guardian, Carolyn Buffalo.

ii. The Defendant

7. The defendant is the Crown.

B. The Pleadings

i. Consolidated Statement of Claim

8. The plaintiffs have delivered a Consolidated Statement of Claim issued with leave of the Honourable Justice St-Louis dated July 7, 2021.

ii. Statement of Defence

9. The Crown has not delivered a Statement of Defence.

iii. Third Party Claim

10. The Crown has not issued any Third Party Claim.

C. Pre-Certification Communication Strategy

i. Responding to Inquiries from Putative Class Members

11. Both before and since the commencement of this class proceeding, Class Counsel have received many communications from Class Members affected by this class proceeding.

12. With respect to each inquiry, the individual's name, address, email and telephone number is added to a confidential database. Class Members are asked to register on the websites of Class Counsel. Once registered, they receive regular updates on the progress of the class proceeding in French and English. Any individual Class Members who contact Class Counsel are responded to in their preferred language.

ii. Pre-Certification Status Reports

13. In addition to responding to individual inquiries, Class Counsel have created a webpage concerning the class proceeding in English and French (see: https://sotosclassactions.com/cases/current-cases/first-nations-youth/). The most current information on the status of the class proceeding is posted and is updated regularly in English and French.

14. Copies of the publicly filed court documents and court decisions are accessible from the webpage. In addition, phone numbers for Class Counsel in Quebec and Ontario as well as email contact information are provided.

15. Class Counsel send update reports to Class Members who have provided their contact information and have indicated an interest in being notified of further developments in the class proceeding.

iii. Pre-certification outreach

16. Class Counsel have presented the proposed class action to a council of First Nations social services delivery personnel for the Province of Québec and the region of Labrador, as well as the First Nations youth directors forum in British Columbia. Class Counsel are in the process of arranging similar presentations to affected communities in Québec and elsewhere in Canada.

D. Settlement Conference

i. Pre-Certification Settlement Conference

17. The plaintiffs have participated in a pre-Certification mediation to determine whether any or all of the issues arising in the class proceeding can be resolved. Mediation is ongoing and may require that some of the targeted timelines in this Litigation Plan be amended on agreement of the parties or as otherwise ordered by the Court to allow negotiations to advance.

E. Timetable

IV. POST-CERTIFICATION PROCESS

A. Timetable

i. Plaintiffs' Timetable for the Post-Certification Process

18. The plaintiffs intend to proceed to trial on an expedited basis or a hybrid summary judgment/*viva voce* trial. It is anticipated that all of the documentary evidence produced by the Crown in the CHRT Proceeding will be relevant and producible in this class proceeding. Because of the extensive documentary production in the CHRT Proceeding, the plaintiffs expect few, if any, disputes as to documentary productions in this case relating to the time period covered by the CHRT Proceeding (*i.e.*, 2006-present). Furthermore, in light of the extensive testimony given at the CHRT Proceeding, it is anticipated that oral discovery can proceed quickly after certification and can be completed in a limited period of time. The plaintiffs have less clarity at this time regarding productions pertaining to the 1991-2006 period.

19. The plaintiffs propose that the following post-Certification process timetable, as explained in detail below:

Certification Notice to Class Members commences	at a date to be determined by the Court after certification
Exchange Affidavits of Documents within	90 days after Certification Notice to Class Members

Motions for Production of Documents, Multiple Examinations of Crown representatives or for Examinations of Non-Parties to be conducted within	120 days after Certification Notice to Class Members
Examinations for Discovery to be conducted within	150 days after Certification Notice to Class Members
Certification Notice to Class Members completed within	60 days from a date to be determined by the Court
Trial Management Conference re: Expert Evidence	180 days after Certification Notice to Class Members
Motions arising from Examinations for Discovery within	180 days after Certification Notice to Class Members
Undertakings answered within	200 days after Certification Notice to Class Members
Further Examinations, if necessary, within	240 days after Certification Notice to Class Members
Common Issues Pre-Trial to be conducted	290 days after Certification Notice to Class Members
Opt Out Period deadline	Six months after Notice of Certification to Class Members
Common Issues Trial or Hybrid Trial to be conducted within	330 days after Certification Notice to Class Members

B. Certification Notice, Notice Program and Opt Out Procedures

i. Certification Notice

20. The Certification Notice and all other notices to Class Members provided by the plaintiffs will, once finalized and approved by the Court, be translated into French. The plaintiffs will explore whether it will be necessary to translate the Certification Notice and/or other notices into some First Nations languages, subject to Court approval.

21. The Certification Notice will, subject to further amendments, be in the form set out in Schedule A hereto.

ii. Notice Program

22. The plaintiffs propose to communicate the Certification Notice to Class Members through the following Notice Program.

23. The plaintiffs will provide Certification Notice to Class Members by arranging to have the Certification Notice (and its translated versions whenever possible) communicated/published in the following media starting on a date to be determined by the Court, as frequently as may be reasonable or as directed by the Court under rule 334.32 of the *Federal Courts Rules*. In particular, the plaintiffs propose the following means of providing Certification Notice:

(a) A press release on the start date of notice of certification to the Class to be determined by order of the Court;

(b) Direct communication with Class Members:

(i) by email or regular mail to the last known contact information of Class Members provided by the Crown (*i.e.*, Crown Class Member Information);

(ii) by email or regular mail to all Class Members who have provided their contact information to Class Counsel, including through the Class Proceeding's webpage;

(iii) by regular mail to the last known addresses of all Status Card holders in Canada born on or after April 1, 1991;

(c) Distribution by the Assembly of First Nations to its membership of First Nations bands across Canada;

(d) Email to First Nations children's aid societies across Canada;

(e) Circulation through the following media:

(i) Aboriginal newspapers/publications such as First Nations Drum, The Windspeaker, Mi'kmaq Maliseet Nations News, APTN National News;

(ii) radio outlets, such as Aboriginal radio CFWE, CBC national and CBC regional;

(iii) television outlets, such as on The Aboriginal Peoples Television Network; and / or

(iv) social media outlets, such as Facebook and Instagram.

iii. Opt Out Procedures

24. The plaintiffs propose Opt Out Procedures for Class Members who do not wish to participate in the class proceeding.

25. The Certification Notice will include information about how to Opt Out of the class proceeding and will provide information about how to obtain and submit the appropriate Opt Out Forms to the Class Action Administrator and/or Class Counsel.

26. There will be one standard Opt Out Form for all Class Members.

27. Class Members will be required to file the Opt Out Form with the Class Action Administrator and/or Class Counsel within the Opt Out Period.

28. The Class Action Administrator or Class Counsel shall, within 30 days after the expiration of the Opt Out Period, deliver to the Court and the Parties an affidavit listing the names of all persons who have opted out of the Class Action.

iv. Special Opt Out Procedures

29. The plaintiffs propose Special Opt Out Procedures for Class Members who are either named party plaintiffs in a civil proceeding in Canada or who are known by the Crown to have retained legal counsel in respect of the subject matter of this action with the express purpose of starting a separate action against the Crown.

30. Ongoing civil actions by Class Members who do not opt out of the Class Action should be dealt with in a manner to be determined by this Court or by the Court in which such proceedings are brought.

C. Identifying and Communicating with Class Members

i. Identifying Class Members

31. As stated above, the plaintiffs intend to request the Crown Class Member Information.

ii. Database of Class Members

32. Class Counsel will maintain a confidential database of all Class Members who contact Class Counsel. The database will include each individual's name, address, telephone number, and/or email address where available.

iii. Responding to Inquiries from Class Members

33. Class Counsel and their staff respond to each inquiry by Class Members.

34. Class Counsel have a system in place to allow for responses to inquiries by Class Members in their language of choice whenever possible.

iv. Post Certification Status Reports

35. In addition to responding to individual inquiries, Class Counsel will continually update the webpage dedicated to this class action with information concerning the status of the class proceeding.

36. Class Counsel will send update reports to Class Members who have provided their contact information. These update reports will be sent as necessary or as directed by the Court.

D. Documentary Production

i. Affidavit/List of Documents

37. The plaintiffs will be required to deliver an Affidavit of Documents within 90 days after after notice of certification is given to Class Members. The Crown will similarly be required to deliver a List of Documents within 90 days after notice of certification is given to Class Members.

38. The Parties are expected to serve Supplementary Affidavits (or Lists) of Documents as additional relevant documents are located.

ii. Production of Documents

39. All Parties are expected to provide, at their own expense, electronic copies of all Schedule "A" productions at the time of delivering their Affidavit of Documents. All productions are to be made in electronic format.

40. Documentary productions are to include, but not be limited to, all documents produced and exhibits tendered in the CHRT Proceedings.

iii. Motions for Documentary Production

41. Any motions for documentary production shall be made within 120 days after certification notice is given to Class Members.

iv. Document Management

42. The Parties will each manage their productions with a compatible document management system, or as directed by the Court. All documents are to be produced in OCR format.

43. All productions should be numbered and scanned electronically to enable quick access and efficient organization of documents.

E. Examinations for Discovery

44. Examinations for Discovery will take place within 150 days after certification notice is given to Class Members.

45. The plaintiffs expect to request the Crown's consent to examine more than one Crown representative. In the event that a dispute arises in this regard, the plaintiffs propose to bring a motion within 120 days after certification notice is given to Class Members.

46. The plaintiffs anticipate that the Examination for Discovery of a properly selected and informed officer of the Crown will take approximately 10 days, subject to refusals and undertakings.

47. The plaintiffs anticipate that the Examination for Discovery of the representative plaintiffs will take approximately one day, subject to refusals and undertakings.

F. Interlocutory Matters

i. Motions for Refusals and Undertakings

48. Specific dates for motions for undertakings and refusals that arise from the Examinations for Discovery will be requested upon Certification. Motions for refusals and undertakings will be heard within 180 days after certification notice is given to Class Members.

ii. Undertakings

49. Undertakings are to be answered within 200 days after certification notice is given to Class Members.

iii. Re-attendances and Further Examinations for Discovery

50. Any re-attendances or further Examinations for Discovery required as a result of answers to undertakings or as a result of the outcome of the motions for refusals and undertakings should be completed within 240 days after certification notice is given to Class Members.

G. Expert Evidence

i. Identifying Experts and Issues

51. A Trial Management Conference will take place following Examinations for Discovery at which guidelines for identifying experts and their proposed evidence at trial will be determined.

H. Determination of the Common Issues

i. Pre-Trial of the Common Issues

52. Upon Certification, the Court will be asked to assign a date for a Pre-Trial relating to the Common Issues trial.

53. The plaintiffs expect that a full day will be required for a Pre-Trial and will request that the Pre-Trial be held within 290 days after certification notice is given to Class Members and, in any event, at least 90 days before the date of the Common Issues trial.

ii. Trial of the Common Issues

54. Upon Certification, the Court will be asked to assign a date for the Common Issues trial.

55. The plaintiffs propose that the trial of the Common Issues be held 330 days after certification notice is given to Class Members.

56. The length of time required for the Common Issues trial will depend on many factors and will be determined at the Trial Management Conference.

V. POST COMMON ISSUES DECISION PROCESS

A. Timetable

i. Plaintiffs' Timetable for the Post-Common Issues Decision Process

57. The plaintiffs propose that the following timetable be imposed by the Court following the Court's judgment on the Common Issues:

Common Issues Notice provided	Within 90 days of Common Issues decision
Individual Issue Hearings, if any, begin	120 days after decision
Individual Damage Assessments, if any, begin	240 days after decision
Deadline to Submit Claim Forms (as of right)	Within 1 year of decision
Deadline to Submit Claim Forms (as of right in prescribed circumstances or with leave of the Court)	1 year after decision

B. Common Issues Notice

i. Notifying Class Members

58. The Common Issues Notice will, subject to further amendments, be substantially in the form approved by the Court at the Common Issues trial. The Common Issues Notice may contain, amongst others, information on any aggregate damages awarded and any issues requiring individual determination, as approved by the Court.

59. The plaintiffs propose to circulate the Common Issues Notice within 90 days after the Common Issues judgment.

60. The Common Issues Notice will be circulated in the same manner as set out above dealing with the Certification Notice or as directed by the Court.

C. Claim Forms

i. Use of Claim Forms

61. The Court will be asked to approve under rule 334.37 the use of standardized Claim Forms by Class Members who may be entitled to a portion of the aggregate damage award or who may be entitled to have an individual assessment.

ii. Obtaining and Filing Claim Forms

62. The procedure for obtaining and filing Claim Forms will be set out in the Common Issues Notice.

63. The plaintiffs propose to use a single standard Claim Form, substantially in the form attached as Schedule C, for all three classes, subject to further amendments and as approved by the Court.

64. The plaintiffs propose that counselling be made available to Class Members in need of support and assistance when completing the Claim Forms. Where necessary, a process for appointing a guardian or trustee to assist the Class Members will be developed.

65. Before completing a Claim Form, Class Members will be able to review information about them in the possession of Canada relevant to their claim (the Crown Class Member Information). That information may include:

(a) any records relating to the Class Member's voluntary or involuntary placement in out-of-home care during the Class Period;

(b) any records relating to a need by the Class Member for a service or product;

(c) any records relating to a request made by the Class Member for a service or product;

(d) any records relating to the denial of a service or product to the Class Member;

(e) any records relating to any service(s) or product(s) provided by the Crown to the Class Member; and/or

(f) any records relating to the family status or family relationship between a Family Class Member and a Removed Child Class Member or a Jordan's Class Member.

66. Class Members will be required to file the appropriate Claim Form with the Class Action Administrator and/or Class Counsel within the deadlines set out below or as directed by the Court.

67. The Class Action Administrator will be responsible for receiving all Claim Forms.

iii. Deadline for Filing Claim Forms

68. Class Members will be advised of the deadline for filing Claim Forms in the Common Issues Notice.

69. The plaintiffs propose that Class Members be given one year, or such period as set out by the Court, after the Common Issues judgment to file Claim Forms as of right.

70. The plaintiffs propose that Class Members be entitled to file Claim Forms more than one year after the Court's judgment on the Common Issues in certain circumstances prescribed by the Court (*i.e.*, lack of awareness of entitlement, etc.) or with leave of the Court (*i.e.*, based on mental or physical health issues, etc.).

D. Determining and Categorizing Class Membership

i. Approving Removed Child Class Members

71. The Class Action Administrator will determine whether an individual submitting a Claim Form as a Removed Child Class Member properly qualifies as a Class Member.

72. In addition, the Class Action Administrator will determine and categorize the duration of the Removed Child Class Member's presence in out-of-home care. The Class Action Administrator will also determine the number of out-of-home care locations that the Removed

Child Class Member was placed in, as well as whether such locations were on or off Reserve and whether such locations were within the community of the Class Member.

73. The Class Action Administrator will make these determinations by referring to the information set out in the Claim Form as well as the Crown Class Member Information.

74. The Class Action Administrator will, where appropriate and necessary, request in writing further information from the individual filing the Removed Child Class Claim Form or the Crown to make these determinations.

ii. Approving Jordan's Class Members

75. The Class Action Administrator will determine whether an individual submitting a Claim Form as a Jordan's Class Member properly qualifies as a Class Member.

76. The Class Action Administrator will make these determinations following guidelines determined by the Court at the Common Issues trial in part by referring to the information set out in the Claim Form. Such guidelines may include: (a) whether the Class Member needed a service or product at any point during the Class Period; (b) whether the Class Member was denied that service or product; (c) whether the Class Member's receipt of a service or product was delayed or disrupted; (d) whether such denial, delay or disruption was based on lack of funding, lack of jurisdiction or a jurisdictional dispute between governments or government departments; and/or (e) whether such denial, disruption or delay happened while the Class Member was under the applicable provincial/territorial age of majority.

77. The Class Action Administrator will also make these determinations in part by referring to the Crown Class Member Information regarding the number of Class Members who have received a service or product under Jordan's Principle since the CHRT Decision.

78. The Class Action Administrator will, where appropriate and necessary, request in writing further information from the individual submitting the Jordan's Class Claim Form or the Crown to make these determinations.

iii. Approving Family Class Members

79. The Class Action Administrator will determine whether an individual submitting a Family Class Claim Form properly qualifies as a Family Class Member.

80. These determinations will be made by the Class Action Administrator by referring to Crown Class Member Information and the information set out in the Claim Form with respect to the relationship of the proposed Family Class Member with an Approved Removed Child Class Member.

81. The Class Action Administrator will, where appropriate and necessary, request in writing further information from the individual filing the Claim Form to make these determinations.

iv. Deceased Class Members

82. The estate of a deceased Class Member may submit a Claim Form if the deceased Class Member died on or after April 1, 1991.

83. If the deceased Class Member would otherwise have qualified as an Approved Class Member, the estate will be entitled to be compensated in accordance with the Aggregate Damages Distribution Process. The estate will not have the option to proceed under the Individual Damage Assessment Process except with leave of the Court.

v. Notifying Class Members, Challenging and Recording Decisions

84. Within 30 days of receipt of a Claim Form, the Class Action Administrator will notify the individual of its decision on whether the individual is an Approved Class Member. Individuals

who are not approved as Class Members will be provided with information on the procedures to follow to challenge the decision of the Class Action Administrator. The plaintiffs propose that these procedures include an opportunity to resubmit an amended Claim Form with supporting documentation capable of verifying that the individual is a Class Member.

85. All interested parties will be provided with the ability to appeal a decision by the Class Action Administrator to the Court or in a manner to be prescribed. Class Counsel may challenge the decision on behalf of affected individuals.

86. The Class Action Administrator will keep records of all Approved Class Members and their respective Claim Forms and will provide this information to Class Counsel, the Crown and other interested parties on a monthly basis. Class Counsel and/or other interested parties will have 30 days after receiving this information to challenge the Class Action Administrator's decision by advising the Class Action Administrator and the other affected parties in writing of the basis for their challenge. The responding party will be given 30 days thereafter to respond in writing to the challenge at which time the Class Action Administrator will reconsider its decision and advise all parties.

E. Aggregate Damages Distribution Process

i. Distribution of Aggregate Damages

87. The Class Action Administrator will distribute the aggregate damages to all Approved Class Members in the manner directed by the Court.

88. The plaintiffs will propose that Approved Class Members be entitled to a proportion of the aggregate damages as determined by the Class Action Administrator based on factors to be approved by the Court, including but not limited to: (a) the duration of the Class Member's

presence in out-of-home care; (b) the number of out-of-home care locations where the Class Member was placed as a child; (c) the duration of deprivation from a service or product as a result of a delay, denial or disruption contrary to Jordan's Principle; and (d) the family relationship of the Family Class Member to a given Removed Child Class Member.

89. The Class Action Administrator, upon advising Approved Class Members of its decision on their membership as set out above, will within a reasonable period of time to be determined by the Court, advise the Approved Class Members of the proportion of aggregate damages owing to each Approved Class Member under the Aggregate Damages Distribution Process to be approved by the Court.

90. In addition, if applicable, the Class Action Administrator will provide Approved Class Members with a package of materials including: information on how to collect their aggregate damage awards, information on Class Members' ability to proceed through the Individual Damage Assessment Process, copies of the Individual Damage Assessment Form along with a guide on how to complete the form, and contact information for obtaining independent legal advice and counselling. Such information is to be provided in a culturally responsive and appropriate style, making full use of interactive media, including video tutorials.

ii. Seeking an Individual Damage Assessment

91. Approved Class Members, when notified of their entitlement to aggregate damages, may be given information on their right to have their compensation individually assessed under the Individual Damage Assessment Process set out below.

F. Individual Damage Assessment Process

i. Individual Damage Assessment Forms

92. When Approved Class Members are notified of their aggregate damage entitlement and information on their right to proceed under the Individual Damage Assessment Process, they will be provided with an Individual Damage Assessment Form as set out in Schedule D.

93. If applicable, the plaintiffs propose that a request for individual damages be made by sending an Individual Damage Assessment Form to the Class Action Administrator, and that only those individuals who wish to proceed through the Individual Damage Assessment Process be required to submit Individual Damage Assessment Forms.

ii. Individual Damage Assessments

94. The Court may be asked to approve the use of an Individual Damage Assessment Process after a judgment on the Common Issues or otherwise as directed by the Court.

95. The Individual Damage Assessment Process would be available to all Approved Class Members except those who are found by the Court not to be entitled to individual damages following the Common Issues trial.

iii. Individual Issue Hearings

96. The Court will be asked to provide directions, or to appoint persons to conduct references under rule 334.26 of the *Federal Courts Rules* or appoint a judge to conduct test cases involving selected Approved Class Members who are proceeding under the Individual Damage Assessment Process to assist with the matters that may or may not remain in issue after the determination of the Common Issues, such as:

(a) Hearing rules for individual assessments;

(b) A compensation matrix for individual damages;

(c) Assistance in resolving disputes relating to the definitions of key terms such as "cultural and language loss", "pain and suffering", "physical abuse", and "sexual abuse"; and

(d) Other matters raised by the Court or the parties during the Common Issues litigation.

G. Class Proceeding Funding and Fees

i. Plaintiffs' Legal Fees

97. The plaintiffs' fees are to be paid on a contingency basis, subject to the Court's approval under rule 334.4 of the *Federal Courts Rules*.

98. The agreement between the representative plaintiffs and Class Counsel states that legal fees and disbursements to be paid to Class Counsel shall be on the following basis:

(a) Aggregate damages recovery: 20% of the first two hundred million dollars ($200,000,000) in recovery by settlement or judgment, plus 10% of any amounts recovered by settlement or judgment beyond the first two hundred million dollars; and

(b) Individual damages recovery: 25% of settlement or judgment.

ii. Funding of Disbursements

99. Funding of legal disbursements for the representative plaintiffs has been, and will continue to be, available through Class Counsel, unless the plaintiffs and Class Counsel subsequently deem it to be in the best interests of the Class to obtain third-party funding. Class Counsel will advise the Court of such third-party funding and seek approval thereof.

H. Settlement Issues

i. Settlement Offers and Negotiations

100. The plaintiffs have been conducting settlement negotiations with the Crown with a view to achieving a fair and timely resolution.

ii. Mediation and Other Non Binding Dispute Resolution Mechanisms

101. The plaintiffs have been participating in mediation and negotiations in an effort to try to resolve the dispute or narrow the issues in dispute between the Parties.

I. Review of the Litigation Plan

i. Flexibility of the Litigation Plan

102. This Litigation Plan will be reconsidered on an ongoing basis and may be revised under the continued case management authority of the Court before or after the determination of the Common Issues or as the Court sees fit.

October 29, 2021

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SCHEDULE "A"

FIRST NATIONS YOUTH CARE (THE MILLENNIUM SCOOP) CLASS ACTION

PROPOSED NOTICE OF CERTIFICATION

THIS NOTICE MAY AFFECT YOUR RIGHTS. PLEASE READ CAREFULLY.

The Nature of the Lawsuit

In March 2019, Sotos LLP, Kugler Kandestin LLP and Miller Titerle + Co. (collectively "Class Counsel") commenced an action on behalf of First Nations plaintiffs in the Federal Court of Canada in Montreal, against the Attorney General of Canada (the "Crown").

The lawsuit claims that starting in 1991 the Crown instituted discriminatory funding policies across Canada that led to First Nations children being removed from their homes and communities and placed in out-of-home care. The lawsuit also claims that the Crown delayed, disrupted or denied the delivery of needed public services and products to First Nations youth contrary to Jordan's Principle.

The action was brought on behalf of a Class of:

(a) all First Nations youths who were taken into out-of-home care since April 1, 1991, while they or at least one of their parents were ordinarily resident on a Reserve;

(b) all First Nations youths who were denied a public service or product, or whose receipt of a public service or product was delayed or disrupted, on the grounds of lack of funding or lack of jurisdiction, or as a result of a jurisdictional dispute with another government or governmental department (contrary to Jordan's Principle);

(c) family members of the Class Members cited in (a) above.

By order dated [**INSERT DATE**], The Honourable Justice St-Louis certified the action as a class proceeding, appointing Xavier Moushoom and Jeremy Meawasige (by his litigation guardian, Maurina Beadle) as representative plaintiffs for the class.

The Court found that the following issues affecting the Class will be tried at a Common Issues trial:

- [**INSERT CERTIFIED COMMON ISSUE**]
- …

Participation in the Class Action

If you fall within the class definition, you are automatically included as a member of the Class, unless you choose to opt out of the Class Action, as explained below. All members of the Class will be bound by the judgment of the Court, or any settlement reached by the parties and approved by the Court.

At this juncture, the Court has not taken a position as to the likelihood of recovery for the representative plaintiffs or the Class, or with respect to the merits of the claims or defences asserted by the Crown.

Fees and Disbursements

You do not need to pay any legal fees out of your own pocket. A retainer agreement has been entered into between the representative plaintiffs and Class Counsel with respect to legal fees. The agreement provides that the law firms have been retained on a contingency fee basis, which means they will only be paid their fees in the event of a successful result in the litigation or a Court-approved settlement.

You will not be responsible for Defendant's legal costs if the class action is unsuccessful. Any fee paid to lawyers for the Class is subject to the Court's approval.

Opt Out

If you are a class member and wish to exclude yourself from this class proceeding ("opt out"), you must complete and return the "Class Member Opt Out" form by no later than [**INSERT DATE**]. The Opt Out form may be downloaded at: [**INSERT WEBSITE ADDRESS**].

Class members who choose to opt out within the above noted deadline will not recover any monies if the representative plaintiffs are successful in this action. If class members do not choose to opt out by the deadline, they will be bound by any judgment ultimately obtained in this class action, whether favourable or not, or any settlement if approved by the Court.

Contact Information

If you have any questions or concerns about the matters in this Notice or the status of the class action, you may contact Class Counsel in a number of ways.

By phone: [**INSERT PHONE NUMBER**]

By email: [**INSERT EMAIL**]

Toll-Free Hotline: [**INSERT TELEPHONE**]

By mail: [**INSERT ADDRESS**]

SCHEDULE "B"

OPT OUT FORM

TO:
[CLASS ACTION ADMINISTRATOR TO BE APPOINTED]
[Address]
[Email]
[Fax]
[Phone number]

ATTN: [CLASS ACTION ADMINISTRATOR TO BE APPOINTED]

I do not want to participate in the class action styled as ***Xavier Moushoom et al v. The Attorney General of Canada*** regarding the claims of discrimination against First Nations children. I understand that by opting out, I will not be eligible for the payment of any amounts awarded or paid in the class action, and if I want an opportunity to be compensated, I will have to make an individual claim and decide whether to engage a lawyer at my own expense.

Dated: _____

_____
Signature

_____
Full Name

_____
Address

_____
City, Province, Postal Code

_____
Telephone

_____
Email

This Notice must be delivered by regular mail, email or fax on or before_____, 201_ to be effective.

SCHEDULE "C"

CLAIM FORM

TO:
[CLASS ACTION ADMINISTRATOR TO BE APPOINTED]
[Address]
[Email]
[Fax]
[Phone number]

ATTN: [CLASS ACTION ADMINISTRATOR TO BE APPOINTED]

I, _____ (insert full name(s), including maiden name if applicable), have received Notice of the National Class Action styled as ***Xavier Moushoom et al v. The Attorney General of Canada*** regarding the claims of discrimination against First Nations children. My date of birth is _____ (insert day, month, year of birth).

I believe that I am a Class Member and I wish to submit a claim as a member of the following Class or Classes (mark the applicable item(s) with an X):

[_] Removed Child Class

[_] Jordan's Class

[_] Family Class

If you selected the Removed Child Class, please summarize below your placement(s) in out-of-home care since April 1, 1991:

Number of foster home(s)	**Number of years of placement in foster home(s)**	**Was foster home(s) on-reserve or off-reserve?**	**Was foster home(s) within your own First Nations community?**

If you selected the Jordan's Class, please summarize below the public services or products that you needed since April 1, 1991, and that were denied, delayed or disrupted:

Product(s) or service(s) needed	**Was a request made for the**	**Was the service(s) or product(s) denied, delayed or disrupted?**	**The date(s) of need, request, and/or denial,**

	service(s) or product(s)?		delay or disruption

If you selected the Family Class, please summarize below your relationship to the member(s) of the Removed Child Class:

Full name(s) and claim number of the Approved Removed Child Class Member in your family	Your relationship to the Class Member (only the brother, sister, mother, father, grandmother or grandfather of an Approved Removed Child Class Member)

My mailing address is:

_____
Street name, Apartment #

_____
City, Province

_____
Postal Code

_____
Telephone Number(s)

_____
Email address

Signed: _____ Date: _____

SCHEDULE "D"

INDIVIDUAL DAMAGE ASSESSMENT FORM

TO:
[CLASS ACTION ADMINISTRATOR TO BE APPOINTED]
[Address]
[Email]
[Fax]
[Phone number]

ATTN: [CLASS ACTION ADMINISTRATOR TO BE APPOINTED]

I, _____ [insert full name(s), including maiden name if applicable], have been notified that I am an Approved Removed Child Class Member or Approved Jordan's Class Member. My claim number is _____ [insert assigned claim number].

I have been provided with a package of information outlining and explaining my option to request an individual damage assessment in accordance with the Individual Damage Assessment Process.

I am also aware that I can obtain independent legal advice with respect to this request and can obtain assistance to complete this form at no charge to me by contacting [insert assigned contact #].

Below is information relating to my experience in out-of-home care and the impacts and harms that resulted from my experience:

[The Individual Damage Assessment Form will be designed after a Court decision on the Common Issues. The goal of the Individual Damage Assessment Form though will be to obtain, amongst others, the following information from Approved Class Members:

- *Information relating to the Class Member's age at apprehension, the foster households where the Class Member was placed, duration of out-of-home care;*
- *Information relating to any abuse on the Class Member, including each incident of a compensable harm/wrong, such as the dates, places, times of the incidents and information about the alleged perpetrator for each incident;*
- *Information relating to compensable impacts, including cultural and language impacts;*
- *A narrative relating to the experience of the individual while in care;*
- *The reason(s) for apprehension;*
- *Whether expert evidence will be provided to support a claim for certain consequential harms such as past and future income loss;*

- *Information on the treatment records including records of customary or traditional counsellors or healers they will be submitting to assist in proving either the abuse or the harm suffered or both;*
- *Authorizations for the Crown to obtain documents; and*
- *Such further and other information that is deemed necessary and appropriate.]*

Below is information relating to my experience with the denial/delay/disruption of the receipt of a public service or product and the impacts and harms that resulted from my experience:

[The Individual Damage Assessment Form will be designed after a Court decision on the Common Issues. The goal of the Individual Damage Assessment Form though will be to obtain, amongst others, the following information from Approved Class Members:

- *Any conditions or circumstances that required a public service or product;*
- *Reasons for denial of a public service or product;*
- *Department(s) of contact;*
- *Authorizations for the Crown to obtain documents; and*
- *Such further and other information that is deemed necessary and appropriate.]*

Signed: _____ Date: _____

Schedule E: Certification Order dated February 11, 2022 in Court File No. T-1120-21 (2022 FC 149)

Federal Court Cour fédérale

Date: 20220211

Docket: T-1120-21

Citation: 2022 FC 149

Ottawa, Ontario, February 11, 2022

PRESENT: The Honourable Madam Justice Aylen

CLASS PROCEEDING

BETWEEN:

ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

UPON MOTION by the Plaintiffs, on consent and determined in writing pursuant to Rule 369 of the *Federal Courts Rules*, for an order:

(a) Granting the Plaintiffs an extension of time to make this certification motion past the deadline in Rule 334.15(2)(b);

(b) Certifying this proceeding as a class proceeding and defining the class;

(c) Stating the nature of the claims made on behalf of the class and the relief sought by the class;

(d) Stipulating the common issues for trial;

(e) Appointing the Plaintiff, Zacheus Joseph Trout, as representative plaintiff;

(f) Approving the litigation plan; and

(g) Other relief;

CONSIDERING the motion materials filed by the Plaintiffs;

CONSIDERING that the Defendant has advised that the Defendant consents in whole to the motion as filed;

CONSIDERING that the Court is satisfied, in the circumstances of this proceeding, that an extension of time should be granted to bring this certification motion past the deadline prescribed in Rule 334.15(2)(b);

CONSIDERING that while the Defendant's consent reduces the necessity for a rigorous approach to the issue of whether this proceeding should be certified as a class action, it does not relieve the Court of the duty to ensure that the requirements of Rule 334.16 for certification are met [see *Varley v Canada (Attorney General)*, 2021 FC 589];

CONSIDERING that Rule 334.16(1) of the *Federal Courts Rules* provides:

Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if

(a) the pleadings disclose a reasonable cause of action;

(b) there is an identifiable class of two or more persons;

(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;

(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and

(e) there is a representative plaintiff or applicant who

(i) would fairly and adequately represent the interests of the class,

(ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,

(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :

a) les actes de procédure révèlent une cause d'action valable;

b) il existe un groupe identifiable formé d'au moins deux personnes;

c) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;

d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;

e) il existe un représentant demandeur qui :

(i) représenterait de façon équitable et adéquate les intérêts du groupe,

(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,

(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

CONSIDERING that, pursuant to Rule 334.16(2), all relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether: (a) the questions of law or fact common to the class members predominate over any questions affecting only individual members; (b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings; (c) the class proceeding would involve claims that are or have been the subject of any other proceeding; (d) other means of resolving the claims are less practical or less efficient; and (e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means;

CONSIDERING that:

(a) The conduct of the Crown at issue in this proposed class action proceeding, as set out in the Statement of Claim, concerns discrimination against First Nations children in the provision of essential services and the Crown's failure to prevent First Nations children from suffering gaps, delays, disruptions or denials in receiving services and products contrary to their *Charter*-protected equality rights. The Plaintiffs allege that the Crown's conduct was discriminatory, directed at Class Members because they were First Nations, and breached section 15(1) of the *Charter*, the Crown's fiduciary duties to First Nations and the standard of care at common and civil law.

(b) With respect to the first element of the certification analysis (namely, whether the pleading discloses a reasonable cause of action), the threshold is a low one. The question for the Court is whether it is plain and obvious that the causes of action are doomed to fail [see

Brake v Canada (Attorney General), 2019 FCA 274 at para 54]. Even without the Crown's consent, I am satisfied that the Plaintiffs have pleaded the necessary elements for each cause of action sufficient for purposes of this motion, such that the Statement of Claim discloses a reasonable cause of action.

(c) With respect to the second element of the certification analysis (namely, whether there is an identifiable class of two or more persons), the test to be applied is whether the Plaintiffs have defined the class by reference to objective criteria such that a person can be identified to be a class member without reference to the merits of the action [see *Hollick v Toronto (City of)*, 2001 SCC 68 at para 17]. I am satisfied that the proposed class definitions for the Child Class and Family Class (as set out below) contain objective criteria and that inclusion in each class can be determined without reference to the merits of the action.

(d) With respect to the third element of the certification analysis (namely, whether the claims of the class members raise common questions of law or fact), as noted by the Federal Court of Appeal in *Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 72, the task under this part of the certification determination is not to determine the common issues, but rather to assess whether the resolution of the issues is necessary to the resolution of each class member's claim. Specifically, the test is as follows:

> The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must

> share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significant of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit. (Western Canadian Shopping Centres, above at para 39; see also Vivendi Canada Inc. v. Dell'Aniello, 2014 SCC 1, [2014] 1 S.C.R. 3 at paras 41 and 44-46.)

Having reviewed the common issues (as set out below), I am satisfied that the issues share a material and substantial common ingredient to the resolution of each class member's claim. Moreover, I agree with the Plaintiffs that the commonality of these issues is analogous to the commonality of similar issues in institutional abuse claims which have been certified as class actions (such as the Indian Residential Schools and the Sixties Scoop class action litigation), as well as those certified in the Moushoom class action (T-402-19/T-141-20). Accordingly, I find that the common issue element is satisfied.

(e) With respect to the fourth element of the certification analysis (namely, whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of fact and law), the preferability requirement has two concepts at its core: (i) whether the class proceeding would be a fair, efficient and manageable method of advancing the claim; and (ii) whether the class proceeding would be preferable to other reasonably available means of resolving the claims of class members. A determination of the preferability requirement requires an examination of the common issues in their context, taking into account the importance of the common issues in relation to the claim as a whole, and may be satisfied even where there are substantial individual issues [see *Brake*, *supra* at para 85; *Wenham*, *supra* at para 77 and *Hollick*, *supra* at paras 27-31]. The

Court's consideration of this requirement must be conducted through the lens of the three principle goals of class actions, namely judicial economy, behaviour modification and access to justice [see *Brake*, *supra* at para 86, citing *AIC Limited v Fischer*, 2013 SCC 69 at para 22].

(f) Having considered the above-referenced principles and the factors set out in Rule 334.16(2), I am satisfied a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of fact and law. Given the systemic nature of the claims, the potential for significant barriers to access to justice for individual claimants and the concerns regarding the other means available for resolving the claims of class members, I am satisfied that the proposed class action would be a fair, efficient and manageable method of advancing the claims of the class members.

(g) With respect to the fifth element of the certification analysis (namely, whether there are appropriate proposed representatives), I am satisfied, having reviewed the affidavit evidence filed on the motion together with the detailed litigation plan, that the proposed representative plaintiff meets the requirements of Rule 334.16(1)(e);

CONSIDERING that the Court is satisfied that all of the requirements for certification are met and that the requested relief should be granted;

THIS COURT ORDERS that:

1. The Plaintiffs are granted an extension of time, *nunc pro tunc*, to bring this certification motion past the deadline in Rule 334.15(2)(b) of the *Federal Courts Rules*.

2. For the purpose of this Order and in addition to definitions elsewhere in this Order, the following definitions apply and other terms in this Order have the same meaning as in the Statement of Claim:

(a) **"Child Class"** means all First Nations individuals who were under the applicable provincial/territorial age of majority and who, during the Class Period, did not receive (whether by reason of a denial or a gap) an essential public service or product relating to a confirmed need, or whose receipt of said service or product was delayed, on grounds, including but not limited to, lack of funding or lack of jurisdiction, or as a result of a service gap or jurisdictional dispute with another government or governmental department.

(b) **"Class" means** the Child Class and Family Class, collectively.

(c) **"Class Counsel"** means Sotos LLP, Kugler Kandestin LLP, Miller Titerle + Co., Nahwegahbow Corbiere and Fasken Martineau Dumoulin LLP.

(d) **"Class Members"** mean all persons who are members of the Class.

(e) **"Class Period"** means the period of time beginning on April 1, 1991 and ending on December 11, 2007.

(f) **"Family Class"** means all persons who are brother, sister, mother, father, grandmother or grandfather of a member of the Child Class.

(g) **"First Nation"** and **"First Nations"** means Indigenous peoples in Canada, including the Yukon and the Northwest Territories, who are neither Inuit nor Métis, and includes:

i. Individuals who have Indian status pursuant to the *Indian Act*, R.S.C., 1985, c.I-5 [*Indian Act*];

ii. Individuals who are entitled to be registered under section 6 of the *Indian Act* at the time of certification;

iii. Individuals who met band membership requirements under sections 10-12 of the *Indian Act*, such as where their respective First Nation community assumed control of its own membership by establishing membership rules and the individuals were found to meet the requirements under those membership rules and were included on the Band List; and

iv. Individuals, other than those listed in sub-paragraphs (i)-(iii) above, recognized as citizens or members of their respective First Nations whether under agreement, treaties or First Nations' customs, traditions and laws by the date of trial or resolution otherwise of this action.

3. This proceeding is hereby certified as a class proceeding against the Defendant pursuant to Rule 334.16(1) of the *Federal Courts Rules*.

4. The Class shall consist of the Child Class and Family Class, all as defined herein.

5. The nature of the claims asserted on behalf of the Class against the Defendant is constitutional, negligence and breach of fiduciary duty owed by the Crown to the Class.

6. The relief claimed by the Class includes damages, *Charter* damages, disgorgement, punitive damages and exemplary damages.

7. Zacheus Joseph Trout is appointed as representative plaintiff and is deemed to constitute an adequate representative of the Class, complying with the requirements of Rule 334.16(1)(e).

8. Class Counsel are hereby appointed as counsel for the Class.

9. The proceeding is certified on the basis of the following common issues:

   (a) Did the Crown's conduct as alleged in the Statement of Claim [Impugned Conduct] infringe the equality right of the Class under section 15(1) of the *Canadian Charter of Rights and Freedoms*? More specifically:

      i. Did the Impugned Conduct create a distinction based on the Class' race, or national or ethnic origin?

      ii. Was the distinction discriminatory?

      iii. Did the Impugned Conduct reinforce and exacerbate the Class' historical disadvantages?

iv. If so, was the violation of section 15(1) of the *Charter* justified under section 1 of the *Charter*?

v. Are *Charter* damages an appropriate remedy?

(b) Was the Crown negligent towards the Class? More specifically:

i. Did the Crown owe the Class a duty of care?

ii. If so, did the Crown breach that duty of care?

(c) Did the Crown breach its obligations under the *Civil Code of Québec*? More specifically:

i. Did the Crown commit fault or engage its civil liability?

ii. Did the Impugned Conduct result in losses to the Class and if so, do such losses constitute injury to each of the members of the Class?

iii. Are members of the Class entitled to claim damages for the moral and material damages arising from the foregoing?

(d) Did the Crown owe the Class a fiduciary duty? If so, did the Crown breach that duty?

(e) Can the amount of damages payable by the Crown be determined partially under Rule 334.28(1) of the *Federal Courts Rules* on an aggregate basis? If so, in what amount?

(f) Did the Crown obtain quantifiable monetary benefits from the Impugned Conduct during the Class Period? If so, should the Crown be required to disgorge those benefits and if so, in what amount?

(g) Should punitive and/or aggravated damages be awarded against the Crown? If so, in what amount?

10. The Litigation Plan attached hereto as Schedule "A" is hereby approved, subject to any modifications necessary as a result of this Order and subject to any further orders of this Court.

11. The form of notice of certification, the manner of giving notice and all other related matters shall be determined by separate order(s) of the Court.

12. Notice of certification shall be given at the same time as the notice of certification of the companion Moushoom class action (Court File Nos. T-402-19/T-141-20), which shall be determined by separate order of this Court.

13. The opt-out period shall be six months from the date on which notice of certification is published in the manner to be specified by further order of this Court.

14. Pursuant to Rule 334.39(1) of the *Federal Courts Rules*, there shall be no costs payable by any party for this motion.

"Mandy Aylen"
Judge

ANNEX A

20

Court File No. T-1120-21

FEDERAL COURT
PROPOSED CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

LITIGATION PLAN

September 24, 2021

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I. DEFINITIONS

1. The definitions below will be used throughout this Litigation Plan. Any term defined in the Statement of Claim that is also used in this Litigation Plan has the same meaning as that included in the Statement of Claim or as otherwise defined by the Court.

Aggregate Damages Distribution Process means the system directed by the Court for the **Class Action Administrator** to distribute aggregate damages to **Approved Class Members**;

Approved Class Member(s) means **Approved Child Class Member(s)** and/or **Approved Family Class Members**;

Approved Family Class Member(s) means a Family Class Member who has been approved by the **Class Action Administrator** as meeting the criteria for being a Family Class Member, including the brother, sister, mother, father, grandmother or grandfather of an Approved Child Class Member (regardless of whether the Approved Child Class Member is alive) and whose approval as a Family Class Member has not been successfully challenged;

Approved Child Class Member(s) means a Child Class Member who has been approved by the **Class Action Administrator** as meeting the criteria for being a Child Class Member and whose approval as a Child Class Member has not been successfully challenged;

Certification Notice means the information set out in Schedule A to this Litigation Plan, as may be subsequently amended and as approved by the Court;

CHRT Proceeding means the proceeding before the **CHRT** under file number T1340/7008;

Claim Form means the form set out in Schedule C to this Litigation Plan used by the Child Class Members and/or the Family Class Members to submit a claim, as may be subsequently amended and as approved by the Court;

Class Action Administrator means any settlement administrator or other appropriate firm appointed by the Court to assist in the administration of the class proceeding;

Class Counsel means the consortium of law firms acting as co-counsel in this class proceeding, with the firms of Sotos LLP, Kugler Kandestin LLP, Miller Titerle + Company, Nahwegahbow Corbiere, and Fasken LLP as Solicitors of Record;

Class Member(s) means an individual who falls within the definition of the Child Class and/or the Family Class, as pleaded in the Statement of Claim and as approved by the Court;

Common Issues means the issues listed in the Notice of Motion for Certification, or as found by the Court, as may be subsequently amended and as approved by the Court;

Common Issues Notice means the information set out in the notice regarding the **Common Issues** to be certified by the Court at Certification, as may be subsequently amended and as approved by the Court;

Crown Class Member Information means information to be provided by the Crown, at the request of the plaintiffs and/or as ordered by the Court, to the **Class Action Administrator** and/or **Class Counsel** regarding the names and last known contact information of all individuals who meet the criteria of Class Members as set out in the Statement of Claim or as otherwise defined by the Court, including a list of all known Class Members' names and last known addresses using the information in the Crown's possession or under its control.[1]

Individual Damage Assessment Form means the form set out in Schedule D to this Litigation Plan, as may be subsequently amended and as approved by the Court, to be used by **Approved Class Member(s)** to elect an individual assessment of their damages and commence an individual damage assessment under the **Individual Damage Assessment Process**;

Individual Damage Assessment Process means the procedure and system to be approved by the Court following the **Common Issues** trial to be used to assess and distribute damages to **Approved Class Member(s)** who have requested an individual damage assessment by submitting an **Individual Damage Assessment Form**;

Notice Program means the process, set out in this Litigation Plan, for communicating the **Certification Notice** and/or the **Common Issues Notice** to **Class Members**, as may be subsequently amended and as approved by the Court;

Opt Out Form means the form set out in Schedule B to this Litigation Plan used by Class Members to opt out of the class proceeding, as may be subsequently amended and as approved by the Court;

Opt Out Period means the deadline, proposed by the plaintiffs as 180 days post Certification or as determined by the Court, to opt out of the class proceeding;

Opt Out Procedures means the procedures, set out in the Litigation Plan, for Class Members to opt out of this class proceeding, as may be subsequently amended and as approved by the Court; and

Special Opt Out Procedures means the procedures, set out in the Litigation Plan, for Class Members who have already commenced a civil proceeding in Canada or who are known

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[1] Where Class Members are known to be represented by counsel, only their name should be provided along with their counsel's name and address.

by the Crown to have already retained legal counsel to opt out of this class proceeding, as may be subsequently amended and as approved by the Court.

II. OVERVIEW

2. The plaintiffs have commenced this action on behalf of First Nations individuals who allege that the Crown has breached their equality rights, depriving them of public services and products. The class action advances the rights of thousands of First Nations children and family members.

3. This Litigation Plan is advanced as a workable method of advancing the proceeding on behalf of the Class and of notifying Class Members as to how the class proceeding is progressing, pursuant to rule 334.16(1)(e)(ii) of the *Federal Court Rules*. The Litigation Plan is modelled on the class action relating to the Indian Residential Schools,[2] with numerous alterations made in order to streamline the procedure and to take into account lessons learned from that settlement.

4. This Litigation Plan sets out a detailed plan for the common stages of this litigation, and sets out, on a preliminary without prejudice basis, an early plan for how the individual stage of the action may progress. Given the early stage of the litigation, the plan is necessarily subject to substantial revisions as the case progresses.

III. PRE-CERTIFICATION PROCESS

5. The plaintiffs are litigating this action in parallel with a closely interrelated consolidated class action (Court File Nos. T-402-19 / T-141-20) about First Nations child and family services

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[2] See *Baxter v Canada (Attorney General)*, 2006 CanLII 41673 (Ont Sup Ct), and subsequent orders of the Court. See also information available on the website of the Indian Residential Schools Adjudication Secretariat, online <http://www.iap-pei.ca/home-eng.php>.

and Jordan's Principle. Therefore, much of the work and processes are shared between the two actions.

A. The Parties

i. The Plaintiffs

6. The plaintiffs have proposed two classes:

   (a) the Child Class; and

   (b) the Family Class.

7. The proposed representative plaintiff is Zacheus Joseph Trout.

ii. The Defendant

8. The defendant is the Crown.

B. The Pleadings

i. Statement of Claim

9. The plaintiffs have delivered a Statement of Claim.

ii. Statement of Defence

10. The Crown has not delivered a Statement of Defence.

iii. Third Party Claim

11. The Crown has not issued any Third Party Claim.

C. Preliminary Motions

12. The plaintiffs propose that any preliminary motions be dealt with at the Motion for Certification or as directed by the Court.

D. Pre-Certification Communication Strategy

i. Responding to Inquiries from Putative Class Members

13. Both before and since the commencement of this class proceeding, Class Counsel have received many communications from Class Members affected by this class proceeding.

14. With respect to each inquiry, the individual's name, address, email and telephone number are added to a confidential database. Class Members are asked to register on the websites of Class Counsel. Once registered, they receive updates on the progress of the class proceeding in French and English. Any individual Class Members who contact Class Counsel are responded to in their preferred language.

ii. Pre-Certification Status Reports

15. In addition to responding to individual inquiries, Class Counsel have created a webpage concerning the class proceeding in English and French (see: https://sotosclassactions.com/cases/current-cases/first-nations-youth/). The most current information on the status of the class proceeding is posted and is updated regularly in English and French.

16. Copies of the publicly filed court documents and court decisions are accessible from the webpage. In addition, phone numbers for Class Counsel in Quebec and Ontario as well as email contact information are provided.

17. Class Counsel sends update reports to Class Members who have provided their contact information and have indicated an interest in being notified of further developments in the class proceeding.

iii. Pre-certification outreach

18. Class Counsel have presented the proposed class action to a council of First Nations social services delivery personnel for the Province of Québec and the region of Labrador, as well as the First Nations youth directors forum in British Columbia. Class Counsel are in the process of arranging similar presentations to affected communities in Québec and elsewhere in Canada.

E. Settlement Conference

i. Pre-Certification Settlement Conference

19. The plaintiffs will participate in a pre-Certification Settlement Conference to determine whether any or all of the issues arising in the class proceeding can be resolved.

20. The plaintiffs propose that a pre-Certification Settlement Conference be conducted at least one month after the Motion for Certification and responding materials, if any, have been filed with the Court.

F. Timetable

i. Plaintiffs' Proposed Timetable for the Pre-Certification Process

21. The plaintiffs propose that the pre-Certification process timetable set out below be imposed by Court Order at an early case conference.

	Deadline
Plaintiffs' Certification Motion Record	Date of Serving and Filing the Notice of Motion for Certification and Motion Record ("**DOF**")
Respondent's Motion Record, if any	Within 90 days from DOF
Plaintiffs' Reply Motion Record, if any	Within 120 days from DOF

Cross-examinations, if any, to be completed	Within 150 days from DOF
Undertakings answered	Within 180 days from DOF
Motions arising from cross-examinations, if any, heard	Within 210 days from DOF
Further cross-examinations, if necessary, completed by	Within 230 days from DOF
Plaintiffs' Memorandum of Fact and Law	Within 250 days from DOF
Respondent's Memorandum of Fact and Law	Within 280 days from DOF
Plaintiffs' Reply, if any	Within 300 days from DOF
Motion for Certification and all other Motions commencing	Within 310 days from DOF

IV. POST-CERTIFICATION PROCESS

A. Timetable

i. Plaintiffs' Timetable for the Post-Certification Process

22. The plaintiffs intend to proceed to trial on an expedited basis or a hybrid summary judgment/*viva voce* trial.

23. The plaintiffs propose that the following post-Certification process timetable, as explained in detail below, be imposed by the Court upon Certification:

Certification Notice to Class Members commences	Upon Certification
Exchange Affidavits of Documents within	70 days from certification
Motions for Production of Documents, Multiple Examinations of Crown representatives or for Examinations of Non-Parties to be conducted within	110 days from certification

Examinations for Discovery to be conducted within	140 days from certification
Certification Notice to Class Members completed within	90 days from certification
Trial Management Conference re: Expert Evidence	170 days from certification
Motions arising from Examinations for Discovery within	190 days from certification
Undertakings answered within	160 days from certification
Further Examinations, if necessary, within	210 days from certification
Common Issues Pre-Trial to be conducted	250 days from certification
Opt Out Period deadline	180 days from certification
Common Issues Trial or Hybrid Trial to be conducted within	300 days from certification

B. Certification Notice, Notice Program and Opt Out Procedures

i. Certification Notice

24. The Certification Notice and all other notices to Class Members provided by the plaintiffs will, once finalized and approved by the Court, be translated into French. The plaintiffs will explore whether it will be necessary to translate the Certification Notice and/or other notices into some First Nations languages, subject to Court approval.

25. The Certification Notice will, subject to further amendments, be in the form set out in Schedule A hereto.

ii. Notice Program

26. The plaintiffs propose to communicate the Certification Notice to Class Members through the following Notice Program.

27. The plaintiffs will provide Certification Notice to Class Members by arranging to have the Certification Notice (and its translated versions whenever possible) communicated/published in the following media within 90 days of Certification, as frequently as may be reasonable or as directed by the Court under rule 334.32 of the *Federal Courts Rules*. In particular, the plaintiffs propose the following means of providing Certification Notice:

(a) A press release within 15 days of the Certification order being issued;

(b) Direct communication with Class Members:

(i) by email or regular mail to the last known contact information of Class Members provided by the Crown (*i.e.*, Crown Class Member Information);

(ii) by email or regular mail to all Class Members who have provided their contact information to Class Counsel, including through the Class Proceeding's webpage;

(c) Distribution to the Assembly of First Nations for circulation to its membership of First Nations bands across Canada;

(d) Email to First Nations children's aid societies across Canada;

(e) Circulation through the following media:

(i) Aboriginal newspapers/publications such as First Nations Drum, The Windspeaker, Mi'kmaq Maliseet Nations News, APTN National News; and

(ii) social media outlets, such as Facebook and Instagram.

iii. Opt Out Procedures

28. The plaintiffs propose Opt Out Procedures for Class Members who do not wish to participate in the class proceeding.

29. The Certification Notice will include information about how to Opt Out of the class proceeding and will provide information about how to obtain and submit the appropriate Opt Out Forms to the Class Action Administrator and/or Class Counsel.

30. There will be one standard Opt Out Form for all Class Members.

31. Class Members will be required to file the Opt Out Form with the Class Action Administrator and/or Class Counsel within the Opt Out Period, proposed by the plaintiffs as 180 days post Certification or as directed by the Court.

32. The Class Action Administrator or Class Counsel shall, within 30 days after the expiration of the Opt Out Period, deliver to the Court and the Parties an affidavit listing the names of all persons who have opted out of the Class Action.

iv. Special Opt Out Procedures

33. The plaintiffs propose Special Opt Out Procedures for Class Members who are either named party plaintiffs in a civil proceeding in Canada or who are known by the Crown to have retained legal counsel in respect of the subject matter of this action with the express purpose of starting a separate action against the Crown.

C. Identifying and Communicating with Class Members

i. Identifying Class Members

34. As stated above, the plaintiffs intend to request the Crown Class Member Information.

ii. Database of Class Members

35. Class Counsel will maintain a confidential database of all Class Members who contact Class Counsel. The database will include each individual's name, address, telephone number, and email address where available.

iii. Responding to Inquiries from Class Members

36. Class Counsel and their staff will respond to each inquiry by Class Members.

37. Class Counsel will have a system in place to allow for responses to inquiries by Class Members in their language of choice whenever possible.

iv. Post Certification Status Reports

38. In addition to responding to individual inquiries, Class Counsel will continually update the webpage dedicated to this class action with information concerning the status of the class proceeding.

39. Class Counsel will send update reports to Class Members who have provided their contact information. These update reports will be sent as necessary or as directed by the Court.

D. Documentary Production

i. Affidavit/List of Documents

40. The plaintiffs will be required to deliver an Affidavit of Documents within 70 days after Certification. The Crown will similarly be required to deliver a List of Documents within 70 days after Certification.

41. The Parties are expected to serve Supplementary Affidavits (or Lists) of Documents as additional relevant documents are located.

ii. Production of Documents

42. All Parties are expected to provide, at their own expense, electronic copies of all Schedule "A" productions at the time of delivering their Affidavit of Documents. All productions are to be made in electronic format.

iii. Motions for Documentary Production

43. Any motions for documentary production shall be made within 110 days of Certification.

iv. Document Management

44. The Parties will each manage their productions with a compatible document management system, or as directed by the Court. All documents are to be produced in OCR format.

45. All productions should be numbered and scanned electronically to enable quick access and efficient organization of documents.

E. Examinations for Discovery

46. Examinations for Discovery will take place within 140 days of Certification.

47. The plaintiffs expect to request the Crown's consent to examine more than one Crown representative. In the event that a dispute arises in this regard, the plaintiffs propose to bring a motion within 110 days after Certification.

48. The plaintiffs anticipate that the Examination for Discovery of properly selected and informed officers of the Crown will take approximately 10 days, subject to refusals and undertakings.

49. The plaintiffs anticipate that the Examination for Discovery of the representative plaintiffs will take approximately one day, subject to refusals and undertakings.

F. Interlocutory Matters

i. Undertakings

50. Undertakings are to be answered within 160 days of Certification.

ii. Motions for Refusals and Undertakings

51. Specific dates for motions for undertakings and refusals that arise from the Examinations for Discovery will be requested upon Certification. Motions for refusals and undertakings will be heard within 190 days of Certification.

iii. Re-attendances and Further Examinations for Discovery

52. Any re-attendances or further Examinations for Discovery required as a result of answers to undertakings or as a result of the outcome of the motions for refusals and undertakings should be completed within 210 days of Certification.

G. Expert Evidence

i. Identifying Experts and Issues

53. A Trial Management Conference will take place following Examinations for Discovery at which guidelines for identifying experts and their proposed evidence at trial will be determined.

H. Determination of the Common Issues

i. Pre-Trial of the Common Issues

54. Upon Certification, the Court will be asked to assign a date for a Pre-Trial Conference relating to the Common Issues trial.

55. The plaintiffs expect that a full day will be required for a Pre-Trial Conference and will request that the Pre-Trial be held 250 days after Certification and, in any event, at least 90 days before the date of the Common Issues trial.

ii. Trial of the Common Issues

56. Upon Certification, the Court will be asked to assign a date for the Common Issues trial.

57. The plaintiffs propose that the trial of the Common Issues be held 300 days after Certification.

58. The length of time required for the Common Issues trial will depend on many factors and will be determined at the Trial Management Conference.

V. POST COMMON ISSUES DECISION PROCESS

A. Timetable

i. Plaintiffs' Timetable for the Post-Common Issues Decision Process

59. The plaintiffs propose that the following timetable be imposed by the Court following the Court's judgment on the Common Issues:

Common Issues Notice provided	Within 90 days of Common Issues decision
Individual Issue Hearings, if any, begin	120 days after decision
Individual Damage Assessments, if any, begin	240 days after decision
Deadline to Submit Claim Forms (as of right)	Within 1 year of decision
Deadline to Submit Claim Forms (as of right in prescribed circumstances or with leave of the Court)	1 year after decision

B. Common Issues Notice

i. Notifying Class Members

60. The Common Issues Notice will, subject to further amendments, be substantially in the form approved by the Court at the Common Issues trial. The Common Issues Notice may contain, amongst others, information on any aggregate damages awarded and any issues requiring individual determination, as approved by the Court.

61. The plaintiffs propose to circulate the Common Issues Notice within 90 days after the Common Issues judgment.

62. The Common Issues Notice will be circulated in the same manner as set out above dealing with the Certification Notice or as directed by the Court.

C. Claim Forms

i. Use of Claim Forms

63. The Court will be asked to approve under rule 334.37 the use of standardized Claim Forms by Class Members who may be entitled to a portion of the aggregate damage award or who may be entitled to have an individual assessment.

ii. Obtaining and Filing Claim Forms

64. The procedure for obtaining and filing Claim Forms will be set out in the Common Issues Notice.

65. The plaintiffs propose to use a single standard Claim Form, substantially in the form attached as Schedule C, for all three classes, subject to further amendments and as approved by the Court.

66. The plaintiffs propose that counselling be made available to Class Members in need of support and assistance when completing the Claim Forms. Where necessary, a process for appointing a guardian or trustee to assist the Class Members will be developed.

67. Before completing a Claim Form, Class Members will be able to review information about them in the possession of Canada relevant to their claim (the Crown Class Member Information). That information may include:

(a) any records relating to the Class Member's voluntary or involuntary placement in out-of-home care during the Class Period;

(b) any records relating to a need by the Class Member for a service or product;

(c) any records relating to a request made by the Class Member for a service or product;

(d) any records relating to the denial of a service or product to the Class Member;

(e) any records relating to any service(s) or product(s) provided by the Crown to the Class Member; and/or

(f) any records relating to the family status or family relationship between a Family Class Member and a Child Class Member.

68. Class Members will be required to file the appropriate Claim Form with the Class Action Administrator and/or Class Counsel within the deadlines set out below or as directed by the Court.

69. The Class Action Administrator will be responsible for receiving all Claim Forms.

iii. Deadline for Filing Claim Forms

70. Class Members will be advised of the deadline for filing Claim Forms in the Common Issues Notice.

71. The plaintiffs propose that Class Members be given one year, or such period as set out by the Court, after the Common Issues judgment to file Claim Forms as of right.

72. The plaintiffs propose that Class Members be entitled to file Claim Forms more than one year after the Court's judgment on the Common Issues in certain circumstances prescribed by the Court (*i.e.*, lack of awareness of entitlement, etc.) or with leave of the Court (*i.e.*, based on mental or physical health issues, etc.).

D. Determining and Categorizing Class Membership

i. Approving Child Class Members

73. The Class Action Administrator will determine whether an individual submitting a Claim Form as a Child Class Member properly qualifies as a Class Member.

74. The Class Action Administrator will make these determinations following guidelines determined by the Court at the Common Issues trial in part by referring to the information set out in the Claim Form. Such guidelines may include: (a) whether the Class Member needed a service or product at any point during the Class Period; (b) whether the Class Member was denied that service or product; (c) whether the Class Member's receipt of a service or product was delayed or disrupted; (d) whether such denial, disruption or delay was based on lack of funding, lack of jurisdiction or a jurisdictional dispute between governments or government departments; and/or (e) whether such denial, disruption or delay happened while the Class Member was under the applicable provincial/territorial age of majority.

75. The Class Action Administrator will also make these determinations in part by referring to the Crown Class Member Information regarding the number of Class Members who have received a service or product under Jordan's Principle under orders made in the CHRT Proceeding.

76. The Class Action Administrator will, where appropriate and necessary, request in writing further information from the individual submitting the Child Class Claim Form or the Crown to make these determinations.

ii. Approving Family Class Members

77. The Class Action Administrator will determine whether an individual submitting a Family Class Claim Form properly qualifies as a Family Class Member.

78. These determinations will be made by the Class Action Administrator by referring to Crown Class Member Information and the information set out in the Claim Form with respect to the relationship of the proposed Family Class Member with an Approved Child Class Member.

79. The Class Action Administrator will, where appropriate and necessary, request in writing further information from the individual filing the Claim Form to make these determinations.

iii. Deceased Class Members

80. The estate of a deceased Class Member may submit a Claim Form if the deceased Class Member died on or after April 1, 1991.

81. If the deceased Class Member would otherwise have qualified as an Approved Class Member, the estate will be entitled to be compensated in accordance with the Aggregate Damages Distribution Process. The estate will not have the option to proceed under the Individual Damage Assessment Process except with leave of the Court.

iv. Notifying Class Members, Challenging and Recording Decisions

82. Within 30 days of receipt of a Claim Form, the Class Action Administrator will notify the individual of its decision on whether the individual is an Approved Class Member. Individuals who are not approved as Class Members will be provided with information on the procedures to follow to challenge the decision of the Class Action Administrator. The plaintiffs propose that these procedures include an opportunity to resubmit an amended Claim Form with supporting documentation capable of verifying that the individual is a Class Member.

83. All interested parties will be provided with the ability to appeal a decision by the Class Action Administrator to the Court or in a manner to be prescribed. Class Counsel may challenge the decision on behalf of affected individuals.

84. The Class Action Administrator will keep records of all Approved Class Members and their respective Claim Forms and will provide this information to Class Counsel, the Crown and other interested parties on a monthly basis. Class Counsel and/or other interested parties will have 30 days after receiving this information to challenge the Class Action Administrator's decision by advising the Class Action Administrator and the other affected parties in writing of the basis for their challenge. The responding party will be given 30 days thereafter to respond in writing to the challenge at which time the Class Action Administrator will reconsider its decision and advise all parties.

E. Aggregate Damages Distribution Process

i. Distribution of Aggregate Damages

85. The Class Action Administrator will distribute the aggregate damages to all Approved Class Members in the manner directed by the Court.

86. The plaintiffs will propose that Approved Class Members be entitled to a proportion of the aggregate damages as determined by the Class Action Administrator based on factors to be approved by the Court, including but not limited to: (a) the duration of deprivation from a service or product as a result of a delay, denial or disruption; (b) the importance of the service or product to the child; and (c) the family relationship of the Family Class Member to a given Child Class Member.

87. The Class Action Administrator, upon advising Approved Class Members of its decision on their membership as set out above, will within a reasonable period of time to be determined by the Court, advise the Approved Class Members of the proportion of aggregate damages owing to each Approved Class Member under the Aggregate Damages Distribution Process to be approved by the Court.

88. In addition, if applicable, the Class Action Administrator will provide Approved Class Members with a package of materials including: information on how to collect their aggregate damage awards, information on Class Members' ability to proceed through the Individual Damage Assessment Process, copies of the Individual Damage Assessment Form along with a guide on how to complete the form, and contact information for obtaining independent legal advice and counselling. Such information is to be provided in a culturally responsive and appropriate style, making full use of interactive media, including video tutorials.

ii. Seeking an Individual Damage Assessment

89. Approved Class Members, when notified of their entitlement to aggregate damages, may be given information on their right to have their compensation individually assessed under the Individual Damage Assessment Process set out below.

F. Individual Damage Assessment Process

i. Individual Damage Assessment Forms

90. When Approved Class Members are notified of their aggregate damage entitlement and information on their right to proceed under the Individual Damage Assessment Process, they will be provided with an Individual Damage Assessment Form as set out in Schedule D.

91. If applicable, the plaintiffs propose that a request for individual damages be made by sending an Individual Damage Assessment Form to the Class Action Administrator, and that only those individuals who wish to proceed through the Individual Damage Assessment Process be required to submit Individual Damage Assessment Forms.

ii. Individual Damage Assessments

92. The Court may be asked to approve the use of an Individual Damage Assessment Process after a judgment on the Common Issues or otherwise as directed by the Court.

93. The Individual Damage Assessment Process would be available to all Approved Class Members except those who are found by the Court not to be entitled to individual damages following the Common Issues trial.

iii. Individual Issue Hearings

94. The Court will be asked to provide directions, or to appoint persons to conduct references under rule 334.26 of the *Federal Courts Rules* or appoint a judge to conduct test cases involving selected Approved Class Members who are proceeding under the Individual Damage Assessment Process to assist with the matters that may or may not remain in issue after the determination of the Common Issues, such as:

(a) Hearing rules for individual assessments;

(b) A compensation matrix for individual damages;

(c) Assistance in resolving disputes relating to the definitions of key terms such as "essential service", "delay", and "jurisdictional dispute"; and

(d) Other matters raised by the Court or the parties during the Common Issues litigation.

G. Fees

i. Plaintiffs' Legal Fees

95. The plaintiffs' fees are to be paid on a contingency basis, subject to the Court's approval under rule 334.4 of the *Federal Courts Rules*.

96. The agreement between the representative plaintiffs and Class Counsel states that legal fees and disbursements to be paid to Class Counsel shall be on the following basis:

(a) Aggregate damages recovery: 20% of the first two hundred million dollars ($200,000,000) in recovery by settlement or judgment, plus 10% of any amounts recovered by settlement or judgment beyond the first two hundred million dollars; and

(b) Individual damages recovery: 25% of settlement or judgment.

ii. Funding of Disbursements

97. Funding of legal disbursements for the representative plaintiffs has been, and will continue to be, made through Class Counsel, unless the plaintiffs and Class Counsel subsequently deem it to be in the best interests of the Class to obtain third-party funding, in which case Class Counsel will advise the Court of such third-party funding and seek approval thereof.

H. Settlement Issues

i. Settlement Offers and Negotiations

98. The plaintiffs will conduct settlement negotiations with the Crown from time to time with a view to achieving a fair and timely resolution.

ii. Mediation and Other Non Binding Dispute Resolution Mechanisms

99. The plaintiffs will participate in mediation or other non-binding dispute resolution mechanisms, if and when appropriate, in an effort to try to resolve the dispute or narrow the issues in dispute between the Parties.

I. Review of the Litigation Plan

i. Flexibility of the Litigation Plan

100. This Litigation Plan will be reconsidered on an ongoing basis and may be revised under the continued case management authority of the Court before or after the determination of the Common Issues or as the Court sees fit.

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SCHEDULE "A"

PROPOSED NOTICE OF CERTIFICATION

THIS NOTICE MAY AFFECT YOUR RIGHTS. PLEASE READ CAREFULLY.

The Nature of the Lawsuit

As of March 2019, Sotos LLP, Kugler Kandestin LLP, Miller Titerle + Co., Nahwegahbow Corbiere, and Fasken LLP (collectively "Class Counsel") have prosecuted an action on behalf of First Nations plaintiffs in the Federal Court of Canada in Montreal, against the Attorney General of Canada (the "Crown").

The lawsuit claims that between April 1, 1991 and December 11, 2007 the Crown instituted discriminatory policies across Canada, delaying, disrupting or denying the delivery of needed public services and products to First Nations youth.

The action was brought on behalf of a Class of:

(a) all First Nations youths who were denied a public service or product, or whose receipt of a public service or product was delayed or disrupted, on the grounds of lack of funding or lack of jurisdiction, or as a result of a jurisdictional dispute with another government or governmental department between April 1, 1991 and December 11, 2007;

(b) family members of the Class Members cited in (a) above.

By order dated [**INSERT DATE**], The Honourable Justice [**INSERT NAME**] certified the action as a class proceeding, appointing Zacheus Joseph Trout as representative plaintiffs for the class.

The Court found that the following issues affecting the Class will be tried at a Common Issues trial:

- [**INSERT CERTIFIED COMMON ISSUE**]
- …

Participation in the Class Action

If you fall within the class definition, you are automatically included as a member of the Class, unless you choose to opt out of the Class Action, as explained below. All members of the Class will be bound by the judgment of the Court, or any settlement reached by the parties and approved by the Court.

At this juncture, the Court has not taken a position as to the likelihood of recovery for the representative plaintiffs or the Class, or with respect to the merits of the claims or defences asserted by the Crown.

Fees and Disbursements

You do not need to pay any legal fees out of your own pocket. A retainer agreement has been entered into between the representative plaintiffs and Class Counsel with respect to legal fees. The agreement provides that the law firms have been retained on a contingency fee basis, which means they will only be paid their fees in the event of a successful result in the litigation or a Court-approved settlement.

You will not be responsible for Defendant's legal costs if the class action is unsuccessful. Any fee paid to lawyers for the Class is subject to the Court's approval.

Opt Out

If you are a class member and wish to exclude yourself from this class proceeding ("opt out"), you must complete and return the "Class Member Opt Out" form by no later than [**INSERT DATE**]. The Opt Out form may be downloaded at: [**INSERT WEBSITE ADDRESS**].

Class members who choose to opt out within the above noted deadline will not recover any monies if the representative plaintiffs are successful in this action. If class members do not choose to opt out by the deadline, they will be bound by any judgment ultimately obtained in this class action, whether favourable or not, or any settlement if approved by the Court.

Contact Information

If you have any questions or concerns about the matters in this Notice or the status of the class action, you may contact Class Counsel in a number of ways.

By phone: [**INSERT PHONE NUMBER**]

By email: [**INSERT EMAIL**]

Toll-Free Hotline: [**INSERT TELEPHONE**]

By mail: [**INSERT ADDRESS**]

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SCHEDULE "B"

OPT OUT FORM

TO:
[CLASS ACTION ADMINISTRATOR TO BE APPOINTED]
[Address]
[Email]
[Fax]
[Phone number]

ATTN: [CLASS ACTION ADMINISTRATOR TO BE APPOINTED]

I do not want to participate in the class action entitled ***Zacheus Joseph Trout et al v. The Attorney General of Canada*** regarding the claims of discrimination against First Nations children. I understand that by opting out, I will not be eligible for the payment of any amounts awarded or paid in the class action, and if I want an opportunity to be compensated, I will have to make an individual claim and decide whether to engage a lawyer at my own expense.

Dated: _____

_____
Signature

_____
Full Name

_____
Address

_____
City, Province, Postal Code

_____
Telephone

_____
Email

This Notice must be delivered by regular mail or email on or before_____, 202_ to be effective.

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SCHEDULE "C"

CLAIM FORM

TO:
[CLASS ACTION ADMINISTRATOR TO BE APPOINTED]
[Address]
[Email]
[Fax]
[Phone number]

ATTN: [CLASS ACTION ADMINISTRATOR TO BE APPOINTED]

I, _____ (insert full name(s), including maiden name if applicable), have received Notice of the National Class Action entitled ***Zacheus Joseph Trout et al v. The Attorney General of Canada*** regarding the claims of discrimination against First Nations children. My date of birth is _____ (insert day, month, year of birth).

I believe that I am a Class Member and I wish to submit a claim as a member of the following Class or Classes (mark the applicable item(s) with an X):

[_] Child Class

[_] Family Class

If you selected the Child Class, please summarize below the public services or products that you needed between April 1, 1991 and December 11, 2007, and that were denied, delayed or disrupted:

Product(s) or service(s) needed	**Was a request made for the service(s) or product(s)?**	**Was the service(s) or product(s) denied, delayed or disrupted?**	**The date(s) of need, request, and/or denial, delay or disruption**

If you selected the Family Class, please summarize below your relationship to the member(s) of the Child Class:

Full name(s) and claim number of the Approved Child Class Member in your family	**Your relationship to the Class Member (only the brother, sister, mother, father, grandmother or grandfather of an Approved Child Class Member)**

My mailing address is:

Street name, Apartment #

City, Province

Postal Code

Telephone Number(s)

Email address

Signed: _____ Date: _____

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SCHEDULE “D”

INDIVIDUAL DAMAGE ASSESSMENT FORM

TO:
[CLASS ACTION ADMINISTRATOR TO BE APPOINTED]
[Address]
[Email]
[Fax]
[Phone number]

ATTN: [CLASS ACTION ADMINISTRATOR TO BE APPOINTED]

I, _____ [insert full name(s), including maiden name if applicable], have been notified that I am an Approved Child Class Member. My claim number is _____ [insert assigned claim number].

I have been provided with a package of information outlining and explaining my option to request an individual damage assessment in accordance with the Individual Damage Assessment Process.

I am also aware that I can obtain independent legal advice with respect to this request and can obtain assistance to complete this form at no charge to me by contacting [insert assigned contact #].

Below is information relating to my experience with the denial/delay/disruption of the receipt of a public service or product and the impacts and harms that resulted from my experience:

[The Individual Damage Assessment Form will be designed after a Court decision on the Common Issues. The goal of the Individual Damage Assessment Form though will be to obtain, amongst others, the following information from Approved Class Members:

- *Any conditions or circumstances that required a public service or product;*
- *Reasons for denial of a public service or product;*
- *Department(s) of contact;*
- *Authorizations for the Crown to obtain documents; and*
- *Such further and other information that is deemed necessary and appropriate.]*

Signed: _____ Date: _____

Schedule F: Framework of Essential Services

First Nations Child and Family Services and Jordan's Principle Class Action

Framework of Essential Services

Who can claim compensation for not receiving an essential service from Canada or receiving it after delay?

A claim for compensation can be made if:

1. An essential service was needed by the claimant; and

2. The claimant or someone on behalf of the claimant asked Canada for an essential service that was denied or delayed in being provided. Or, the claimant needed the essential service, but it was not available or accessible to them (there was a gap in services), even if they did not ask for the service.

What is an "essential service"?

A service is considered essential if the claimant's condition or circumstances required it and the delay in receiving it, or not receiving it at all, caused material impact on the child.

Examples of types and categories of essential services are attached as an appendix to this Framework.

If the claimant needed a service that is not on the list of examples, it may still be considered an essential service under the settlement if not receiving the service had a material impact on the child.

What timeframe is covered?

Claimants are covered by this settlement if they needed the essential service as a child at any time from April 1, 1991 to November 2, 2017.

How to make a claim?

1. If the claimant requested a service from Canada that was delayed or denied, they may provide a copy of the letter, email or other document submitted to Canada requesting the service. If they do not have a copy, they may provide a statutory declaration confirming that they requested the service.

2. If the claimant did not request a service from Canada but required an essential service that was not available or accessible, they need to provide confirmation from a professional saying what essential service they needed, why it was essential and when they needed it, either through historical documentation or contemporary confirmation by a professional.

Confirmation can be in two forms depending on the answer to the following question:

Does the claimant have any kind of historical document stating that an essential service was needed?

If the answer is **YES**, please follow **Procedure A.**

If the answer is **NO**, please follow **Procedure B.**

Procedure A (to be completed if claimant has historical documentation confirming that an essential service(s) was/were needed)

1. Complete the Claim Form (when available).
2. Provide copies of the historical documentation confirming that an essential service(s) was/were needed.
3. If the historical documentation lacks specifics on the confirmed need for the identified essential service, a professional may complete the Professional Confirmation of Essential Services Form.
4. Complete the questionnaire (when available).

Procedure B (to be completed if the claimant has NO historical documentation stating that an essential service(s) was needed.

1. Complete the Claim Form (when available).
2. A professional completes the Professional Confirmation of Essential Services Form (when available).
3. Complete the questionnaire (when available).

What is historical documentation?

Historical documentation refers to old documents such as a health record or an assessment conducted by a health, social care professional, educator, or other professional or individual with expertise and knowledge of the need for this essential service and/or support.

Is there help in claiming compensation?

Yes. Once the claim form and other supporting documents are available, they will be released online at www.fnchildcompensation.ca. Support in completing these forms will be available through the Administrator.

Appendix – Examples of Essential Services

1. Some services provided by, or under the guidance and direction of, health, social care, and educational professionals who specialize in:

    a) Recommending services and supports with activities of daily living and safety in the home, school and community (e.g., occupational therapists, *adapted feeding devices*)

    b) Helping individuals with expressive and receptive language skills (e.g., speech and language pathologists, *augmentative and alternative communication*)

    c) Helping individuals with movement of their hands, arms, and legs (e.g., physiotherapists, *mobility devices*)

    d) Giving and interpreting hearing tests and recommending assistive devices related to hearing (e.g., assessment of hearing by audiologists, *hearing devices*)

    e) Testing vision and recommending corrective eyewear (e.g., optometrists, *advising on eyewear*)

    f) Teaching children with learning needs (e.g., special needs education teachers; supported child development consultants)

    g) Promoting infant, early childhood or adolescent development[1] (e.g., infant development consultants, child and youth workers, or early childhood educators).

    h) Conducting psychoeducational assessments, and provision of counselling (e.g., psychologists, social workers)

    i) Addressing delayed or problematic behaviours (e.g., early childhood educators, behavioural specialists, child and youth workers, social workers,)

    j) Recommending a specialized diet or nutritional intake (e.g., nutritionist, dietitian)

2. Equipment, products, processes, methods and technologies that are recommended in a cognitive assessment or individualized education plan.

3. Medical equipment, such as:

    a) Equipment, products and technology used by people to assist with daily activities (e.g., environmental aids, including lifts and transfer aids and professional installation thereof)

[1] Development refers to physical, social, cognitive, and mental health development

b) Products and technology for personal indoor and outdoor mobility and transportation (e.g., mobility aids that include standing and positioning aids and wheelchairs)

c) Hospital bed

d) Medical equipment related to diagnosed illnesses (e.g., percussion vests, oxygen, insulin pumps, feeding tubes)

e) Prostheses and orthotics

f) Specialized communication equipment (e.g., equipment, products, and technologies that allow people to send and receive information that would otherwise be done verbally)

4. Medical transportation related to access to essential services, supports or products where the lack of transportation prevented access to the recommended service (e.g., people in remote/isolated, semi-isolated communities)

5. Specialized dietary requirements

6. Treatment for mental health and/or substance misuse, including inpatient treatment

7. Oral health (excluding orthodontics), such as:

    a. Oral surgery services, including general

    b. Restorative services, including cavities and crowns

    c. Endodontic services, including root canals

    d. Dental treatment required to restore damage resulting from unmet dental needs

8. Respite care

9. Surgeries

Schedule G: Investment Committee Guiding Principles

SCHEDULE "G"

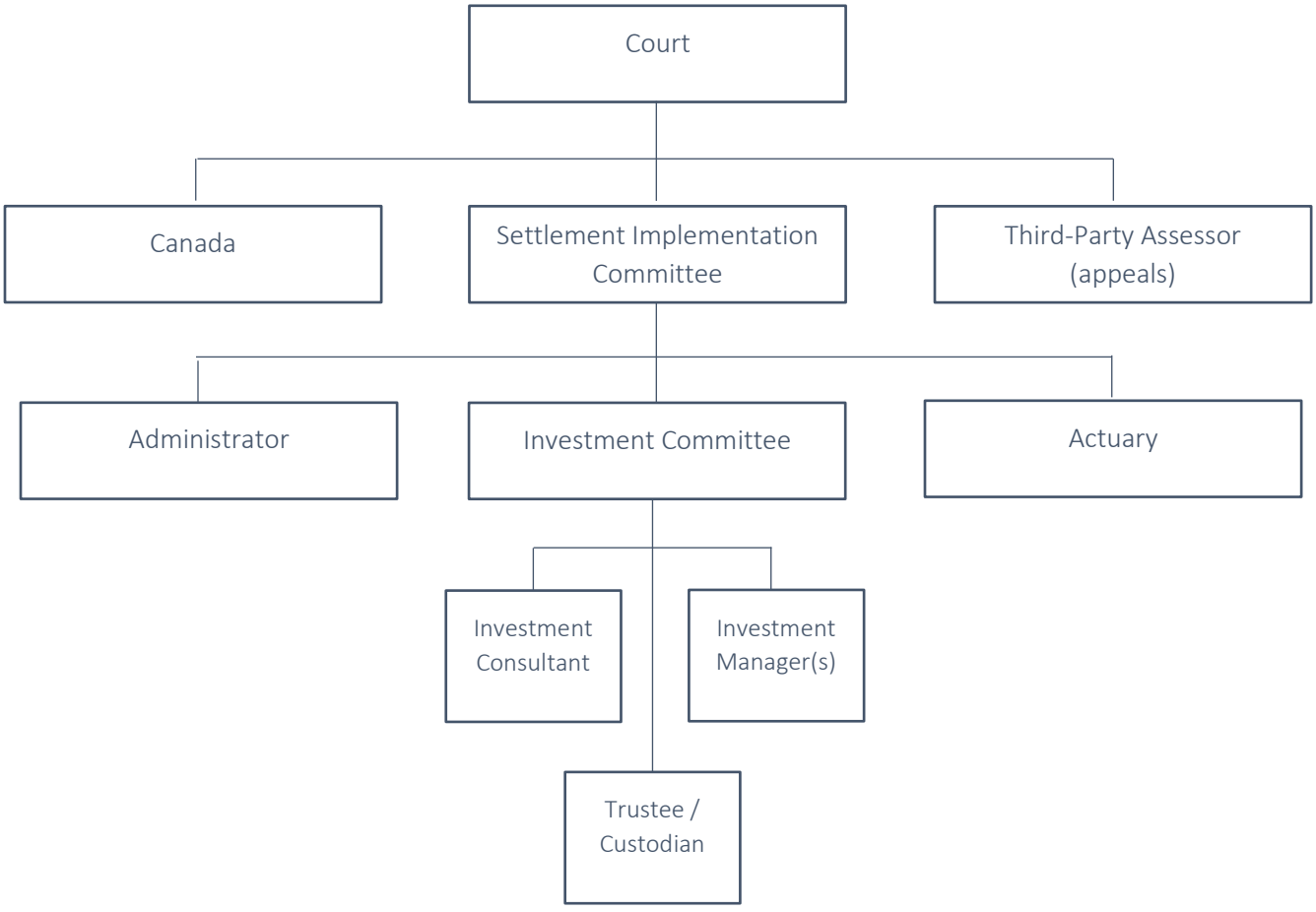
Investment Committee Guiding Principles

This Schedule sets out the principles that shall inform the drafting of the Investment Committee Terms of Reference by the Settlement Implementation Committee, as set out in the Final Settlement Agreement.

Basic Governance Structure relating to Investment Committee:

1. **In order to facilitate the effective management of the Settlement Funds, the Investment Committee should be constituted in a manner that is directly overseen by the Settlement Implementation Committee.** The Investment Committee should be permitted to make decisions within the scope of the Terms of Reference with independence, but is accountable to the Settlement Implementation Committee and, ultimately, the Court. The Investment Committee must be able to communicate with both the Administrator and the Actuary, whether independent of, or through the Settlement Implementation Committee.

2. **The Settlement Implementation Committee should be responsible for oversight of the entire process, including resolving any issues that may arise from time to time.** Where necessary, the Settlement Implementation Committee is the body responsible for seeking guidance from the Court, on behalf of the Class, the Administrator, the Actuary or the Investment Committee.



3. **The Investment Committee should be guided by a statement of investment goals established by the Settlement Implementation Committee.** These goals should not be prescriptive of methods, but rather establish desired outcomes, with the implementation to achieve these outcomes assigned to the Investment Committee.

4. **The Investment Committee should be empowered, through its Terms of Reference to take the following actions:**

    a. Establish, review and maintain a Statement of Investment Policies and Procedures, consistent with the investment goals established by the Settlement Implementation Committee;

    b. Review investment goals and recommending changes to the investment goals to the Settlement Implementation Committee;

    c. On advice from the Investment Consultant and the Actuary, review the asset mix of the Trust to ensure it is consistent with the Trust's return objectives and risk tolerances. As required, modify the asset allocation to ensure the Trust remains prudently invested and diversified to achieve its long-term objectives.

    d. Identify and recommend to the Settlement Implementation Committee an Investment Consultant and corporate trustee for the Fund and for an expenses fund, in the case that implementation expenses are pre-paid by Canada.

    e. Determine the number of investment managers to use from time to time. Select and appoint investment manager(s), set the mandate for each investment manager, terminate investment manager(s) and/or rebalance the funds among the investment manager(s), all based on the advice of the Investment Consultant.

    f. Periodically (bi-annually, annually, semi-annually, or quarterly) review the performance of the Investment Consultant, custodian and corporate trustee and report the results of the review to the Settlement Implementation Committee.

    g. Engage the Investment Consultant to provide advice as considered appropriate from time to time.

    h. Receive, review and approval of reports from the Investment Consultant, investment manager(s) and corporate trustee for the Fund.

    i. Direct the Investment Consultant and/or investment manager(s) to implement any decisions of the Investment Committee.

j. Delegate to the investment manager(s) such decisions regarding the investment of the Fund consistent with the Statement of Investment Policies and Procedures.

k. Monitor compliance of the Trust's investment and investment procedures with the Statement of Investment Policies and Principles.

l. With assistance from the Investment Consultant, monitor the investment performance of the Fund as a whole. Monitor and review all aspects of the performance and services of the Investment Manager(s) including style, risk profile and investment strategies.

m. Monitor risks to the Fund with respect to the overall compensation plan.

    i. With assistance from the Investment Consultant, conduct an annual risk review of the Fund in conjunction with the review by the Settlement Implementation Committee and at such other times as the Investment Committee considers prudent.
    ii. Implement such risk mitigation strategies as considered prudent and report results to the Settlement Implementation Committee.

n. Provide assistance to the Auditor as required.

o. Make recommendations to the Settlement Implementation Committee regarding any Court Approved Protocols and policies that affect the investments of the Fund, including adoption, amendment and termination.

p. Receive periodic reports from the Actuary regarding expected future compensation payments (amount and timing) and based on advice from the Investment Consultant, determine whether any changes to the Statement of Investment Policies and Procedures is necessary or if any changes to the mandates given to the investment manager(s) is necessary.

q. Take direction from and being responsive to the Settlement Implementation Committee on a timely basis.

Schedule H: Opt-Out Form

First Nations Child and Family Services and Jordan's Principle Class Action

OPT-OUT FORM

TO: Deloitte LLP, Claims Administrator
Mail: PO Box 7030, Toronto, ON, M5C 2K7
Email: fnchildclaims@deloitte.ca
Fax: 416-815-2723
Phone: 1-833-852-0755

I do not want to participate in the class actions styled as ***Xavier Moushoom et al v. The Attorney General of Canada*** and ***Zacheus Trout et al v. The Attorney General of Canada*** regarding the claims of discrimination against First Nations children and families. I understand that by opting out, **I will NOT be eligible for the payment of any amounts** awarded or paid in the class actions, and those associated with the Canadian Human Rights Tribunal File No.: T1340/7008. If I want an opportunity to be compensated, I will have to make a separate individual claim and if I decide to pursue my own claim, and I want to engage a lawyer this will be at my own expense.

Please state your reason for opting out: _____

If you are sending this form on behalf of someone else, what is your full name and relationship to that person: Full Name: _____ Relationship: _____

Date: _____ _____
Signature

_____
Full Name of the Person Opting Out

_____
Date of Birth of the Person Opting Out

_____
Indian Registry/Status Number (if available)
of the Person Opting Out

_____
Address of the Person Opting Out

_____
Reserve/Town/City, Province, Postal Code

_____
Telephone

_____
Email

This notice must be delivered on or before **August 23, 2023** to be effective.

Schedule I: Framework for Supports for Claimants in Compensation Process

Holistic Wellness Supports Relating to Compensation Under the Class Actions on First Nations Child and Family Services and Jordan's Principle

The parties to the compensation settlement negotiations regarding First Nations Child and Family Services (FNCFS) and Jordan's Principle recognize the need to provide trauma-informed, culturally safe, and accessible health and cultural supports to class members as they navigate the compensation process, as well as supports they may require following the claims process and over the course of their lives. Given that First Nations partners have emphasized the cultural appropriateness of the Indian Residential Schools Resolution Health Support Program (IRS-RHSP), the presented components are services that mirror the IRS-RHSP with special consideration for the needs of children, youth and families. The approach would seek to build from and emphasize the best practices and innovation demonstrated through the IRS-RHSP and support the First Nations mental wellness continuum and continuity of services for class members. Funding provided to First Nations service providers under the IRS-RHSP does not exclude other community members from accessing cultural and emotional supports. This approach would continue in the current claims process. Fee for service mental health counselling is available to class members regardless of their eligibility for Non-Insured Health Benefits.

Components for the approach are based on the following considerations:

- Ensuring services are aligned with the First Nations Mental Wellness Continuum Framework (FNMWCF), which is widely endorsed and developed with First Nations partners, to guide culture as foundation and holistic navigation supports.
- Supporting the largest class action client cohort to date, and unique given the focus on children and youth and/or adverse childhood experiences.
- Recognizing the generational nature of this compensation, mental health and cultural supports will need to be available over the duration of the claims process and flexible to accommodate differing timelines on compensation and support needs as class members reach the age of majority. The approach outlined in this annex builds on the existing network of service providers to enable access to a continuity of services, including First Nations community-based programs, mental wellness teams, Non-Insured Health Benefits counselling and other services.
- Supporting, including funding, regional First Nations partners and First Nations governments to implement supports in the claims process.
- Mental health and cultural supports provided by service providers under contribution agreement will be accessible to all impacted community members.
- Adult class members will be appropriately served by the existing network of health and cultural supports with enhancements to capacity.
- Children and youth will be better served by specialized trauma-informed services, provided through existing First Nations organizations that are already serving children, youth, and families.
- Lessons learned from the Missing and Murdered Indigenous Women and Girls (MMIWG) Inquiry are that client utilization ramped up more quickly than in the first years of the IRS-RHSP. This is likely due to increased awareness and availability of services.
- There is a need for a specific line with chat/text function and case management supports for class members on a confidential basis to easily navigate access to trauma-informed services supported by culturally relevant assessments and comprehensive case management.
- The role of case management is to prevent class members having to repeat their stories and minimize re-traumatization.
- Collaboration with Correctional Services of Canada (CSC), provincial and territorial correctional services and youth detention centers (YDC) is needed to ensure services are provided to class members that are in custody.
- Collaboration with a variety of educational providers (community based, federal, and provincial and territorial) is needed to ensure that services are provided/referred in a way that is accessible to school-aged children, including leveraging expertise in existing youth programs and mental wellness teams that work closely with schools.

Guiding principles for building options:

PRINCIPLES	DESCRIPTION
Child & youth focus, competent service	Healthy child [and youth] development is a key social determinant of health and is linked to improved health outcomes in First Nations families and communities. Successful services for Indigenous children and youth include programs that: are holistic, community-driven and owned; build capacity and leadership; emphasize strengths and resilience; address underlying health determinants; focus on protective factors; incorporate Indigenous values, knowledge and cultural practices; and meaningfully engage children, youth, families and the community (FNMWCF, p. 16 & Considerations for Indigenous child and youth population mental health promotion in Canada). Creating safe and welcoming environments where First Nations children, youth and families are assured their needs will be addressed in a timely manner is essential. Child development expertise, neuro-diverse services and other considerations must be accounted for.
Client-centred care within holistic family and community circle/context	Services and supports build on individual, family and community strengths, considers the wholistic needs of the person, [family and community] (e.g., physical, spiritual, mental, cultural, emotional and social) and are offered in a range of settings (Honouring Our Strengths, p. 41). Services are accessible regardless of status eligibility and place of residence. Services consider neuro-diversity, especially in the case of children and youth.
Trauma-informed, Child development-informed	Trauma-informed care involves understanding, recognizing, and responding to the effects of all types of trauma experienced as individuals at different development stages of life and understands trauma beyond individual impact to be long-lasting, transcending generations of whole families and communities. A trauma-informed care approach emphasizes physical, psychological and emotional safety for both consumers and providers, and helps survivors (individuals, families, and communities) rebuild a sense of control and empowerment. Trauma-informed services recognize that the core of any service is genuine, authentic and compassionate relationships. With trauma-informed care, communities, service providers or frontline workers are equipped with a better understanding of the needs and vulnerabilities of First Nations clients affected by trauma (FNMWCF: Implementation Guide, p. 81).
Provision of culturally safe assessments	Assessment frameworks, tests, and processes must be developed from an Indigenous perspective, including culturally appropriate content (Thunderbird Partnership Foundation's *A Cultural Safety Toolkit for Mental Health and Addiction Workers In-Service with First Nations People*).
Provision of coordinated & comprehensive continuum of services (i.e. awareness of other programs & services)	Active planned support for individuals and families to find services in the right element of care transition from one element to another and connect with a broad range of services and supports to meet their needs. A comprehensive continuum of essential services includes: Health Promotion, Prevention, Community Development, Education, Early Identification and Intervention, Crisis Response, Coordination of Care and Care Planning, Withdrawal Management, Trauma-informed Treatment, Support and Aftercare (Honouring Our Strengths, p.3 & FNMWCF, p. 45). The Continuum of Services will aim to prevent class members needing to repeat their stories.
Enhanced care coordination & planning	Ensure timely connection, increased access, and cultural relevancy [and safety] across services and supports. It is intended to maximize the benefits achieved through effective planning, use, and follow-up of available services. It includes collaborative and consistent communication, as well as planning and monitoring among various care options specific to individual's holistic needs. It relies upon a range of individuals to provide ongoing support to facilitate access to care (Honouring Our Strengths, p. 60 & FNMWCF, p. 17).
Culturally competent workforce through ongoing self-reflection	Awareness of one's own worldviews and attitudes towards cultural differences, including both knowledge of and openness to the cultural realities and environments of the individuals served. A process of ongoing self-reflection and organizational growth for service providers and the system as a whole to respond effectively to First Nations people (Honouring Our Strengths, p. 8).

PRINCIPLES	DESCRIPTION
Culturally-informed and sustainable workforce: long-term development of First Nations service providers	Education, training and professional development are essential building blocks to a qualified and sustainable workforce of First Nations service providers through long-term approaches, whereby ensuring service continuity. Building and refining the skills of the workforce can be realized by ensuring workers are aware of what exists through both informal and formal learning opportunities, supervision, as well as sharing knowledge within and outside the community (FNMWCF, p. 48).
Community-based multi-disciplinary teams (i.e. Mental Wellness Teams)	Grounded in culture and community development, multi-disciplinary teams are developed and driven by communities, through community engagement and partnerships. It supports an integrated approach to service delivery (multi-jurisdictional, multi-sectoral) to build a network of services for First Nations people living on and off reserve (FNMWCF, p. 52, Honouring Our Strengths, p. 79). This approach could link with, or build within, navigation supports for class members to assess their eligibility and access the claims process.
Community-based programming	Comprehensive, culturally relevant, and culturally safe community-based services and supports are developed in response to community needs. Community-based programs considers all levels of knowledge, expertise and leadership from the community (FNMWCF, p. 44).
Flexible service delivery	Services are developed to embrace diversity and are flexible, responsive, accessible and adaptable to multiple contexts to meet the needs of First Nations peoples, family, and community across the lifespan (FNMWCF, p. 45). There will need to be special consideration for remote communities.

Component 1: Service Coordination and Care Teams approach for supports to claimants

Elements	FNMWCF Alignment
• Interdisciplinary Care Teams for class members to support coordinated, seamless access to services and supports, wherever possible. • Service Coordinators housed in First Nations organizations across the country to exercise case management role and pull assigned team leads for administrative, financial literacy and health and cultural supports (including professional oversight/supervision when necessary) depending on the class member's needs. Service Coordinators would not be delivering the services themselves but acting as the central point of contact for class members. • Care Teams are based on partnerships between various local/regional organizations (e.g., First Nations financial institutions, IRS-RHSP providers, peer support networks, etc.). • The Final Settlement Agreement would indicate what the base standard for Care Team services must include and the description of Service Coordination functions. • Wherever possible, services are available in local/regional First Nations languages. • Community contact person to be identified as an extension of the sub-regional Care Team. • A national/regional network of Service Coordinators would be brought together for feedback and this would be shared with the Settlement Implementation Committee. These networks would also offer peer support, training, evaluation.	• Effective and innovative way to increase access to and enhance the consistency of services; outreach, assessment, treatment, counselling, case management, referral, and aftercare. • Culture as foundation. • Developed and driven by communities. • Based on community needs and strengths. • Effective model for developing relationships that support service delivery collaborations both with provinces and territories and between community, cultural, and clinical service providers.

Component 2: Bolstering existing network of health and cultural supports

Elements	FNMWCF Alignment
• Leveraging and expanding the existing network of health and cultural supports housed within First Nations and Indigenous organizations, with an emphasis on child and family-focused supports, to provide trauma-informed care while class members navigate the settlement process. Some of the organizations would be part of the existing network of IRS-RHSP, MMIWG, day schools and other service providers, while others could be new providers, particularly to increase access for children and youth.	• Enhanced flexible funding. • Community development, ownership and capacity building. • Self-determination. • Culture as foundation. • First Nations play key role in hiring of personnel to ensure personnel is recognized by their community. • Communities can ensure service provision are culturally safe and appropriate.

Component 3: Access to mental health counselling to all class members

Elements	FNMWCF Alignment
• Mental health counselling for individuals, families and communities is provided by regulated health professionals (i.e. psychologists, social workers, culture-based practitioners/ceremonialists) who are in good standing with their respective regulatory body and are enrolled with ISC. Access to counselling is not dependent on residence or Non-Insured Health Benefits eligibility. • Counselling would be provided in health professionals, culture-based practitioners/ceremonialists private practice and are primarily paid by ISC on a fee-for-service basis. Counsellors can travel into communities and be reimbursed on a per diem basis. • Virtual mental health counselling will be eligible, depending on regulatory college specifications.	• Enhanced flexible funding. • Community development, ownership and capacity building. • Self-determination. • To increase access to services to class members and their families as defined by First Nations partners.

Component 4: Support enhancement to the Hope for Wellness Help Line or dedicated line

Elements	FNMWCF Alignment

• Dedicated support team for class action members that is accessible in First Nations languages, including:
  ○ Access to specialized child and youth expertise, including trauma-informed, child development perspective.
  ○ Case management function.
  ○ Referrals to dedicated Care Teams through Service Coordinators (component 1).
  ○ Referral to information line relating to the application process.
• Phone line employees will receive training on the class actions, the course of the CHRT complaint and other related legal, policy and social documentation.
	• Quality care system and competent service delivery.
	• Increase access to necessary services.

Schedule J: Summary Chart of Essential Service, Jordan's Principle, and Trout Approach

Summary Chart of Essential Service, Jordan's Principle, and Trout Approach

CLASS		CRITERIA	COMPENSATION
Essential Service Class (2007-2017)	**Jordan's Principle Class Members**	• Approved Essential Service Class Members who are determined to have experienced the highest level of impact (including pain, suffering or harm of the worst kind) in relation to a Delay, Denial or Service Gap pursuant to Schedule F, Framework of Essential Services, subject to piloting. • The Parties' intention is that the way that the highest level of impact is defined, and the associated threshold set for membership in the Jordan's Principle Class, fully overlap with the First Nations children entitled to compensation under the Compensation Orders.	Minimum $40,000*
	Other Essential Service Class Members	• All Other Approved Essential Service Class Members who do not meet the Jordan's Principle Class threshold of impact described above pursuant to Schedule F, Framework of Essential Services.	Up to but not more than $40,000

* Plus applicable interest on $40,000.

Trout Child Class (1991-2007)	• Approved Trout Child Class Members who are determined to have experienced the highest level of impact (including pain, suffering or harm of the worst kind) in relation to a Delay, Denial or Service Gap pursuant to Schedule F, Framework of Essential Services, subject to piloting.	Minimum $20,000
	• All Other Approved Trout Child Class Members who do not meet the threshold of impact described above pursuant to Schedule F, Framework of Essential Services.	Up to but not more than $20,000

This is **Exhibit "L"** to the Affidavit of David Sterns, Affirmed remotely before me in the City of Toronto, in the Province of Ontario, on October 6, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration remotely

Commissioner for taking Affidavit
(or as may be)

Georgia Elizabeth Scott-McLaren, a Commissioner, etc.
Province of Ontario, for
Sotos LLP, Barristers and Solicitors
Expires February 20, 2024

Tribunal File No: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and ASSEMBLY OF FIRST NATIONS

Complainants

- and –

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and –

ATTORNEY GENERAL OF CANADA (Representing the Minister of Indigenous Services Canada)

Respondent

- and -

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA and NISHNAWBE ASKI NATION

Interested Parties

Honouring First Nations Children, Youth and Families

We honour all the children, youth and families affected by Canada's discriminatory conduct in child and family services and Jordan's Principle. We acknowledge the emotional, mental, physical, spiritual, and yet to be known harms that this discrimination had on you and your loved ones. We stand with you and admire your courage and perseverance while recognizing that your struggle for justice often brings back difficult memories. We pay tribute to those who have passed on to the Spirit World before seeing their experiences recognized in this Agreement.

We are so grateful to Residential School Survivors, Sixties Scoop Survivors, the families of Murdered and Missing Women and Girls and 2SLGBTQQIA persons, First Nations leadership, and the many allies, particularly the children and youth who called for the full implementation of Jordan's Principle, substantively equal child welfare supports and fair compensation for those who were harmed. We thank you for continuing to stand with First Nations children, youth, and families to ensure the egregious discrimination stops and does not recur.

We honour and give thanks to Jordan River Anderson, founder of Jordan's Principle, and his family along with the representative plaintiffs, including Ashley Dawn Bach, Karen Osachoff, Melissa Walterson, Noah Buffalo-Jackson, Carolyn Buffalo, Richard Jackson, Xavier Moushoom, Jeremy Meawasige, Jonavon Meawasige, the late Maurina Beadle, and Zacheus Trout and his two late children, Sanaye and Jacob. We also recognize Youth in and from care, Residential School and Sixties Scoop Survivors who shared their truths to ensure funding for culturally competent and trauma informed supports are available to all affected by this Agreement.

To all the First Nations children, youth and families reading this - remember that you belong. You are children of Chiefs, leaders, matriarchs, and knowledge keepers, and you have the right to your culture, language, and land.

MINUTES OF SETTLEMENT

A. These Minutes of Settlement are intended to resolve the Canadian Human Rights Tribunal Compensation Decisions. The Assembly of First Nations (the "**AFN**"), Canada and the First Nations Child and Family Caring Society (the "**Caring Society**") have collaborated to revise the Final Settlement Agreement in line with the Tribunal's decisions.

B. In 2007, the Caring Society and the AFN commenced this human rights complaint, alleging that Canada discriminated against First Nations children and families on the prohibited grounds of race and national or ethnic origin in the provision of child and family services and in Canada's failure to fully implement Jordan's Principle. The AFN, the Caring Society and Canada are collectively referred to herein as the Parties.

C. In 2016 CHRT 2, the Canadian Human Rights Tribunal (the "**Tribunal**") found that Canada discriminated against First Nations children on reserve and in the Yukon in a systemic way on the prohibited grounds of race and national or ethnic origin, by underfunding the First Nations Child and Family Services Program ("**FNCFS Program**"), and through its design, management, and control. Canada's wilful and reckless discrimination was linked to the unnecessary separation of First Nations children from their families. With respect to Jordan's Principle, the Tribunal found that Canada wilfully and recklessly discriminated against First Nations children on the prohibited grounds of race and national or ethnic origin pursuant to its narrow definition and inadequate implementation of Jordan's Principle, resulting in adverse service gaps, delays, and denials for First Nations children. The Tribunal established Canada's liability for systemic discrimination on the prohibited grounds of race and national or ethnic origin and ordered Canada to cease the discriminatory practices, take measures to redress and prevent discrimination from reoccurring, reform the FNCFS Program, and implement the full meaning and scope of Jordan's Principle.

D. Between 2019 and 2021, three class actions were commenced in the Federal Court seeking compensation for discrimination dating back to April 1, 1991, including a class action commenced by the AFN (the "**Consolidated Class Action**"). The AFN is a party to both the class actions and this proceeding. The Caring Society is not a party to the Consolidated Class Action.

E. In 2019 CHRT 39 (the "**Compensation Entitlement Order**") the Tribunal determined that Canada's systemic discrimination on the prohibited grounds of race and national or ethnic origin caused harms of the worst kind to First Nations children and families, ordering compensation to the victims of Canada's systemic racial discrimination. The Tribunal set an end date of 2017 for compensation for the Jordan's Principle child and family victims and an open-end date with respect to removed children and their parents/caregiving

grandparents pending a further order. In 2021 CHRT 7, the Tribunal ordered the implementation of a framework for the distribution of the compensation, (the "**Compensation Framework Order**").

F. On September 29, 2021, Justice Favel of the Federal Court of Canada dismissed Canada's judicial review and upheld the Compensation Entitlement Order. Canada appealed the decision to the Federal Court of Appeal.

G. In 2022 CHRT 8, the Tribunal established March 31, 2022, as the end date for compensation payable to removed children and their parents/caregiving grandparents under the Compensation Entitlement Order.

H. In June 2022, the class action parties, to the Consolidated Class Action (including Canada and AFN) signed a final settlement agreement (the "**2022 FSA**"). In September 2022, the AFN and Canada brought a motion to the Tribunal seeking a declaration that the 2022 FSA is fair, reasonable and satisfies the Compensation Entitlement Order and all related clarifying orders and in the alternative, an order varying the Compensation Entitlement Order, Compensation Framework Order and other compensation orders, to conform to the 2022 FSA.

I. The Tribunal dismissed the Canada and AFN motion in October 2022, with full reasons at 2022 CHRT 41. The Tribunal found that the 2022 FSA substantially satisfied the Compensation Entitlement Order. However, it failed to fully satisfy the Compensation Entitlement Order as the 2022 FSA disentitled, or reduced entitlements, for certain victims/survivors already entitled to compensation awarded by the Tribunal under the Compensation Entitlement Order and made entitlements for other victims unclear.

J. Following the release of 2022 CHRT 41, the First Nations-in-Assembly unanimously adopted Resolution No. 28/2022. On April 4, 2023, the First Nations-in-Assembly unanimously adopted Resolution No. 04/2023, fully supporting the revised settlement agreement. First Nations- In-Assembly Resolutions No. 28/2022 and No. 04/2023 are attached hereto as Schedule "A".

K. The Parties to this proceeding and the parties to the Consolidated Class Action engaged in negotiations resulting in a revised final settlement agreement drafted to account for the direction in First Nations-in-Assembly Resolution No. 28/2022 and to satisfy the Tribunal's 2022 CHRT 41 decision (the "**Agreement**") attached hereto as Schedule "B".

NOW THEREFORE in consideration of the mutual agreements, covenants, and undertakings set out herein, the Parties agree as follows:

1. As the Caring Society is not a party to the Consolidated Class Action, the Caring Society's involvement in reviewing and commenting on the Agreement is focused on the victims identified by the Tribunal for compensation pursuant to the *Canadian Human Rights Act* within this proceeding.

2. In the opinion of the Parties, the Agreement, as revised by the Parties, now satisfies the Compensation Entitlement Order, the Compensation Framework Order, and all other Tribunal orders related to compensation such that the victims of Canada's discriminatory conduct shall be compensated pursuant to the direction of the Tribunal and in satisfaction of the Tribunal's orders, including the Tribunal's direction and guidance set out in 2022 CHRT 41.

3. As directed by the First Nations-in-Assembly Resolution 04/2023, the Parties shall cooperate to bring a consent motion to the Tribunal seeking its approval of the Agreement in full satisfaction of the Compensation Entitlement Order and the Compensation Framework Order (the "**Joint Compensation Motion**"). Each Party shall file affidavit evidence in support of the Joint Compensation Motion.

4. The Parties commit to supporting the Agreement as it relates to the victims identified by the Tribunal and to make no submissions to the Tribunal suggesting that the balance of the Agreement ought not to be approved.

5. As part of the relief sought on the Joint Compensation Motion, the Parties shall request that the Tribunal retain jurisdiction on compensation until the Federal Court approves the Agreement and the appeal period has expired or until any appeals are resolved. The Parties shall further request that upon approval of the Agreement by the Federal Court on a final basis, the Tribunal's jurisdiction in this proceeding in relation to compensation shall come to an end and that the Federal Court shall supervise the implementation of the Agreement. Should the Tribunal approve the Joint Compensation Motion but the Federal Court reject all or part the Agreement at the Settlement Approval Hearing, or if the Federal Court order approving the Agreement is overturned on appeal, Canada and the AFN shall support the Caring Society's participation in any further steps at the Federal Court / Federal Court of Appeal and, if needed, at the Supreme Court of Canada in relation to seeking approval of the Agreement.

6. The Parties agree that the funds payable by Canada in the amount of $23,343,940,000 and any other commitments and safeguards specifically set out in the Agreement satisfy Canada's obligations with respect to payments associated with the Tribunal's Compensation Entitlement Order, the Compensation Framework Order and all other Tribunal orders related to compensation.

7. As part of the $23,343,940,000 funds payable under the Agreement, $90,000,000 will be transferred to a trust entity for the purposes of providing additional supports to high needs members of the Approved Jordan's Principle Class between the Age of Majority and the Class Member's 26th birthday necessary to ensure their personal dignity and well-being (the "**Jordan's Principle Post-Majority Fund**"). The terms of the Jordan's Principle Post-Majority Fund are set out in the Agreement and include the following:

    a. In cooperation with the Jordan's Principle trust entity, the Caring Society will have the following responsibilities in relation to the Jordan's Principle Post-Majority Fund:

        i. Designing the trust agreement reflecting the purpose of the Jordan's Principle Post-Majority Fund and the terms and conditions of same;

        ii. Determining the eligibility criteria and process for accessing benefits under the Jordan's Principle Post-Majority Fund; and

        iii. Receive and review an accounting from the Jordan's Principle trust entity on a quarterly basis.

    b. Jordan's Principle Post Majority Beneficiaries may access benefits under the Jordan's Principle Post-Majority Fund by making a request to the trust entity. If a Jordan's Principle Approved Class Member who is approaching or is past the Age of Majority contacts Indigenous Services Canada, or its successor, through mechanisms for accessing Jordan's Principle, Indigenous Services Canada will refer the Class Member to the trust entity. Indigenous Services Canada will collaborate with the Caring Society and the plaintiffs to the Consolidated Class Action regarding public information that can be provided by Indigenous Services Canada regarding the Jordan's Principle Post-Majority Fund.

    c. Any income generated on the Jordan's Principle Post Majority Fund which is not distributed to the Jordan's Principle Post Majority Beneficiaries in any year will be accumulated in the Jordan's Principle Post Majority Fund.

8. Canada will pay $5 million to the Caring Society to facilitate the Caring Society's participation in the implementation and administration of the Agreement over the approximately twenty (20) year term of the Agreement on a non-profit basis.

9. As part of the approval of the Agreement at the Federal Court, Canada and the AFN will seek a further extension of the Opt-Out Deadline to October 6, 2023.

10. By signing these Minutes of Settlement, each Party confirms that in their opinion the Agreement satisfies the Tribunal's Compensation Entitlement Order, the Compensation Framework Order and all other Tribunal orders related to compensation.

11. No Party will judicially review the Tribunal's order should it determine that the Agreement satisfies its compensation orders and grant the relief sought on the Joint Compensation Motion.

12. Nothing in these Minutes of Settlement impacts any commentary with respect to the administration of the Agreement following its implementation.

13. Upon approval of the Agreement by the Tribunal and the Federal Court, and the resolution of any judicial reviews and appeals, no further orders for compensation shall be sought by any Party to this proceeding relating to the victims subject to the Tribunal's compensation orders or the Consolidated Class Action.

14. Upon approval of the Agreement by the Tribunal, each Party agrees that it shall not engage in the Federal Court proceeding to oppose or promote others to oppose the terms of the Agreement at the Settlement Approval Hearing.

15. Within five (5) business days of the later of the following dates, Canada and the AFN shall file a Notice of Discontinuance in relation to their respective judicial review applications of 2022 CHRT 41, with the Federal Court on a without costs basis:

    (a) the day following the last day on which an individual may appeal or seek leave to appeal the decision of the Federal Court, approving the Agreement ("**Federal Court Settlement Approval Order**"); or

    (b) the date on which the last of any appeals of the Federal Court Settlement Approval Order are finally determined.

16. Within five (5) business days of the expiry of the appeal period or the date on which the last of any appeals of the Federal Court Settlement Approval Order are finally determined, Canada shall file a Notice of Discontinuance with the Federal Court of Appeal for Court File No. A-290-21 on a without costs basis.

17. In consideration of the agreement by Canada to assume the obligations and pay the amounts referred to in the Agreement in order to enable its implementation, the Caring Society and the AFN, "the Releasors," hereby release, remise and forever discharge Canada and its servants, agents, officers and employees,

predecessors, successors, and assigns (hereinafter collectively the "**Releasees**"), from any claim for compensation arising from this proceeding and all actions, causes of action, claims, and demands of every nature or kind available, whether or not known or anticipated, which the Releasors had, now have or may in the future have against the Releasees, in any capacity, whether personal or representative, in respect of the claims asserted or capable of being asserted with regard to compensation for the discrimination found to have occurred by the Tribunal in this proceeding or asserted and all claims asserted or capable of being asserted in the Consolidated Class Action. For clarity, this release in no way affects the ongoing long-term reform issues in the Tribunal proceeding in Tribunal File No. T1340/7008.

18. If the Tribunal dismisses the Joint Compensation Motion these Minutes of Settlement, including any releases given thereunder to the Releasees, shall be null and void.

Dated this 19th day of April, 2023.

CANADA, as represented by the Ministers of Indigenous Services and Crown-Indigenous Relations

The Honourable Patty Hajdu, P.C., M.P.
Minister of Indigenous Services

The Honourable Marc Miller, P.C., M.P.
Minister of Crown-Indigenous Relations

THE ASSEMBLY OF FIRST NATIONS

Cindy Woodhouse
Regional Chief

THE FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA

Cindy Blackstock, PhD
Executive Director

Schedule “A” – First Nations-in-Assembly Resolutions

This is **Exhibit "M"** to the Affidavit of David Sterns, Affirmed remotely before me in the City of Toronto, in the Province of Ontario, on October 6, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration remotely

_____

Commissioner for taking Affidavit
(or as may be)

Georgia Elizabeth Scott-McLaren, a Commissioner, etc.
Province of Ontario, for
Sotos LLP, Barristers and Solicitors
Expires February 20, 2024

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David Sterns
Phone: 416-977-5229
Email: dsterns@sotos.ca

Assistant: Georgia Scott-McLaren
Phone: 416-977-5333 ext. 310
Email: gscott-mclaren@sotos.ca

File No: 26965

November 4, 2022

VIA EMAIL

The Honourable Madam Justice Aylen and
Associate Judge Molgat

Federal Court of Canada
90 Sparks Street
Ottawa ON K1A 0H9

Madam Justice Aylen and Associate Judge Molgat:

Re: Xavier Moushoom et al. v. The Attorney General of Canada
Court File No.: T-402-19/T-141-20

And re: Assembly of First Nations et al v The Attorney General of Canada
Court File No.: T-1120-21

I write with a proposed agenda for the upcoming case management conference on Monday, November 7, 2022; and an update regarding a proposed timetable for the December 20, 2022 injunction motion as directed by the Court on October 21, 2022.

The parties propose the following agenda for the November 7, 2022 case management conference:

1. Discussion of CHRT letter decision and its implications;
3. Notices of certification combined with settlement approval – renewed or amended notices sought to be discussed at the next case management conference when there will be more clarity on next steps;
4. Vacate currently scheduled dates in November and December, 2022;
5. Injunction motion versus Consumer Law Group: the parties propose that the interlocutory order be extended until the end of February 2023 (Consumer Law Group consents); and
6. Scheduling of next case management conference at which the parties will present scheduling positions.

Considering items 4 and 5 above, we will request that a timetable not be set for the injunction motion until closer to the date proposed so as to enable a decision based on the circumstances at the time.

Yours very truly,
SOTOS LLP

David Sterns
DS/geMc

c. Paul Vickery, Jonathan Tarlton, Sarah-Dawn Norris, Department of Justice
Dianne Corbiere, Nahwegahbow Corbiere LLP
Geoff Cowper, Nathan Surkan, Fasken Martineau Dumoulin LLP
Robert Kugler, Kugler Kandestin LLP
Joelle Walker, Miller Titerle & Co.
Mohsen Seddigh, Sotos LLP

This is **Exhibit "N"** to the Affidavit of David Sterns, Affirmed remotely before me in the City of Toronto, in the Province of Ontario, on October 6, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration remotely

_____

Commissioner for taking Affidavit
(or as may be)

Georgia Elizabeth Scott-McLaren, a Commissioner, etc.
Province of Ontario, for
Sotos LLP, Barristers and Solicitors
Expires February 20, 2024

Canadian Human Rights Tribunal
Tribunal canadien des droits de la personne
Ottawa, Canada K1A 1J4

July 26, 2023

By e-mail

(See Distribution List)

Dear Parties,

Re: First Nations Child and Family Caring Society et al. v. Attorney General of Canada
Tribunal File: T1340/7008

The Panel (Chair Marchildon and Member Lustig) wishes to provide the parties with the following decision with reasons to follow.

Ruling from the Bench akin to an oral ruling with reasons to follow on the Revised Agreement for compensation

Introduction

It took great leadership for the Assembly of First Nations (AFN) and Canada to collaborate and arrive at the previous historic Final Settlement Agreement (FSA). It took even greater leadership from the AFN and Canada's Ministers and their teams to receive the Tribunal's criticism of some aspects of the FSA (for example, leaving out some of the victims/survivors already recognized by this Tribunal), consult the Chiefs-in-Assembly, bring the Caring Society back to the negotiation table and arrive at this transformative and unprecedented Revised Settlement Agreement. According to the parties, this is the largest compensation settlement in Canadian history and it now includes a commitment from the Minister of Indigenous Services to request an apology from the Prime Minister. The Tribunal believes this was an example of grace under pressure and commends the parties to the Revised Agreement and everyone involved for this outstanding achievement that will provide some measure of justice to First Nations children and families who have unjustly suffered because of their race instead of being treated honorably and justly. First Nations children ought to be honored for who they are, beautiful, valuable, strong and precious First Nations persons. Governments, leaders and adults in any Nation have the sacred responsibility to honor, protect and value children and youth, not harm them. Complete justice will be achieved when systemic racial discrimination no longer exists. The compensation in this case is only one component. The Tribunal assisted meaningfully by the parties, has always focused on the need for

a complete reform, the elimination of the systemic racial discrimination found and the need to prevent similar practices from arising. This continues to be the Tribunal's focus to see transformation and justice established for generations to come.

The Panel is grateful for the Commissions' human rights centered contributions and for the Caring Society's courageous leadership ensuring that no child is left behind and that no one loses entitlement to compensation ordered by the Tribunal. The Panel also commends the First Nations Chiefs-in-Assembly at the AFN for their leadership in adopting a resolution in the spirit of reconciliation and prompting further negotiations on compensation to ensure that no child is left behind.

The Panel recognizes the valuable contributions of the Chiefs of Ontario and the Nishnawbe Aski Nation.

The Panel also recognizes Amnesty International's past contributions on this important issue of compensation.

Finally, the Panel recognizes the AFN's and the Caring Society's instrumental role in an effort to obtain meaningful compensation for First Nations children and families.

The Panel wishes to recognize and honor the true overcomers and heroes in this case, the First Nations children and families.

The Panel Chair speaks peace to every First Nations child, youth and young adult's heart in Turtle Island (Canada) and, to all First Nations individuals and their Communities and Nations.

The joint motion is allowed.

Before turning to the orders that the Tribunal is granting, the Panel wishes to address two points about its interpretation of the Revised Agreement.

First, the Tribunal notes that Canadians cannot prospectively renounce their rights under the *CHRA*. Accordingly, the release in s. 10.01 of the Revised Agreement cannot release Canada from human rights violations for subsequent actions. The Tribunal wishes to explicitly note its observation that any human rights complaints for events post-dating the end of the Revised Agreement (2017 for Jordan's Principle; 2022 for removed children) are not precluded by the releases. The Tribunal understands the releases to intend to prevent Class Members who have not opted-out – as well as their estates, heirs, Estate Executors, estate Claimants, and Personal Representatives – from the Revised Agreement from claiming further compensation from Canada for harms described in the Revised Agreement even after 2017 and 2022.

For non-class members, the Tribunal does not view the release as limiting liability for any discrimination that may occur subsequent to 2017 or 2022 should Canada fail to eliminate the systemic racial discrimination identified in this case and prevent the emergence of similar practices. Finally, the Revised Agreement cannot bar claims of discrimination in other federal programs or services.

The Tribunal does not anticipate that its interpretation of the release differs from that of the parties. Further, the Tribunal clarifies that it has only considered the release from the perspective of the *CHRA*, not a civil or class action claim. The Tribunal intends its comments on the release to

confirm what already appears obvious from the language of the release itself. This does not reflect hesitation on the Tribunal's part in approving the Revised Agreement but the Tribunal's experience that it is often valuable to make wording abundantly clear. These comments should not cause the parties any hesitation in seeking the Federal Court's approval of the Revised Agreement.

Second, the Tribunal finds that the Revised Agreement does not resolve the issue of long-term remedies, reform, eliminating the systemic discrimination found and preventing similar practices from recurring. Accordingly, this ruling does not address those issues.

Orders

A) The Tribunal finds that the revised First Nations Child and Family Services, Jordan's Principle and Trout Class Settlement Agreement dated April 19, 2023, fully satisfies the Tribunal's Compensation Orders (2019 CHRT 39, 2020 CHRT 7, 2020 CHRT 15, 2021 CHRT 6, 2021 CHRT 7 and 2022 CHRT 41) in this proceeding;

B) The Tribunal finds that the Revised Agreement fully addresses the derogations identified by the Tribunal by providing full compensation to all those entitled further to the Tribunal's Compensation Orders, including: First Nations children removed from their homes, families and communities; First Nations caregiving parents/grandparents who experienced multiple First Nations children removed from their homes, families, and communities; and, First Nations children eligible for compensation due to denials, unreasonable delays, and gaps in essential services due to Canada's discriminatory approach to Jordan's Principle;

C) The Tribunal makes an order clarifying its order 2021 CHRT 7 further to the Compensation Framework, providing that together caregiving parents and caregiving grandparents will be limited to $80,000 in total compensation regardless of the number of sequential removals of the same child.

D) The Tribunal makes an order varying 2020 CHRT 7, providing that compensation of $40,000 plus applicable interest shall be paid directly to the child(ren) of the deceased parent/caregiving grandparent on a pro rata basis where the estate of that deceased parent/caregiving grandparent would otherwise be entitled to compensation under 2020 CHRT 7. Where there are no surviving children, the compensation will flow to the estate of the deceased parent/caregiving grandparent;

E) The Tribunal makes an order clarifying its order 2019 CHRT 39, to confirm that caregiving parents (or caregiving grandparents) of Canada's discrimination towards Jordan's Principle victims/survivors must themselves have experienced the highest level of impact (including pain, suffering or harm of the worst kind) in order to receive compensation ($40,000 plus applicable interest) for their child's essential service denials, unreasonable delays and gaps;

F) The Tribunal makes an order finding that the claims process set out in the Revised Agreement and further measures to be developed by class counsel in consultation with experts (including the Caring Society) and approved by the Federal Court satisfies the requirements under the compensation framework as ordered in 2019 CHRT 39 and 2021 CHRT 7. This order supersedes the Tribunal's order in 2021 CHRT 7;

G) The Tribunal makes an order that, conditional upon the Federal Court's approval of the Revised Agreement, the Tribunal's jurisdiction over its Compensation Orders will end on the day that all appeal periods in relation to the Federal Court's approval of the Revised Agreement expire or, alternatively, on the day that any appeal(s) from the Federal Court's decision on the approval motion for the Revised Agreement are finally dismissed;

H) The Tribunal makes an order that the parties will report to the Tribunal, within 15 days of each of the following: (1) the result of the Federal Court's decision on approval of the Revised Agreement; (2) the expiry of the appeal period relating to the Federal Court's decision on the Revised FSA or of an appeal having been commenced;

Retention of jurisdiction.

This ruling does not affect the Panel's retention of jurisdiction on other issues and orders in this case other than as specified in A) and G).". Consistent with the approach to remedies taken in this case, the Panel continues to retain jurisdiction on all its rulings and orders to ensure that they are effectively implemented and that systemic discrimination is eliminated. The Panel will revisit its retention of jurisdiction once the parties have filed a final and complete agreement on long-term relief, whether on consent or otherwise, that is found to be satisfactory by this Panel in eliminating the systemic discrimination found and preventing its reoccurrence or, after the adjudication of outstanding issues leading to final orders or, as the Panel sees fit considering the upcoming evolution of this case.

Should you have any questions, please do not hesitate to contact the Registry Office by e-mail at registry.office@chrt-tcdp.gc.ca by telephone at 613-878-8802 or by fax at 613-995-3484.

Yours truly,

Judy Dubois Digitally signed by Judy Dubois
Location: Ottawa, Ontario
Date: 2023.07.26 15:40:15-04'00'

Judy Dubois
Registry Officer

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This is **Exhibit "O"** to the Affidavit of David Sterns, Affirmed remotely before me in the City of Toronto, in the Province of Ontario, on October 6, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration remotely

_____

Commissioner for taking Affidavit
(or as may be)

Georgia Elizabeth Scott-McLaren, a Commissioner, etc.
Province of Ontario, for
Sotos LLP, Barristers and Solicitors
Expires February 20, 2024

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June 27, 2023

Class Counsel:
Robert Kugler, Kugler Kandestin LLP
Geoff Cowper, KC, Fasken Martineau DuMoulin LLP **Via email**

Dear Geoff and Robert,

Re: First Nations Child Welfare - Investment of Settlement Funds

Under the First Nations Child and Family Services, Jordan's Principle, and Trout Class Final Settlement Agreement dated April 19, 2023 (the "FSA"), Canada will make payments of $23,343,940,000 (the "Settlement Funds").

Over time, the Settlement Funds are expected to generate investment income from coupon and principal payments on bonds, and will be subject to capital gains or losses as the bond market rises and falls. The yields currently available on Government of Canada bonds are summarised in the table below.

Bond Duration	Government of Canada Marketable Bond: Average Yields
1 to 3 year	4.55%
3 to 5 year	3.79%
5 to 10 year	3.38%
Over 10 years	3.21%

Source: Bank of Canada data as at June 26, 2023

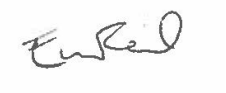
The figures in the table above suggest that if the Settlement Funds were fully invested today in bonds issued by the Government of Canada, with a mixture of durations, they would be expected to generate investment returns of around 3.5%-4.5% per year on average.

This equates to a return of around $35 - 45 million per $1 billion of funds invested, or $815 - 1,050 million based on the initial 12-month investment period for the full Settlement Funds of around $23.3 billion.

The longer-term return on assets will ultimately depend on the asset mix chosen by the Investment Committee, which may include assets other than bonds.

Please let me know if you should have any questions.

Yours sincerely,



Euan Reid, FCIA, FIA

This is **Exhibit "P"** to the Affidavit of David Sterns, Affirmed remotely before me in the City of Toronto, in the Province of Ontario, on October 6, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration remotely

Commissioner for taking Affidavit
(or as may be)

Georgia Elizabeth Scott-McLaren, a Commissioner, etc.
Province of Ontario, for
Sotos LLP, Barristers and Solicitors
Expires February 20, 2024

FIRST NATIONS CHILD WELFARE: COMPENSATION FOR REMOVALS

OFFICE OF THE PARLIAMENTARY BUDGET OFFICER
BUREAU DU DIRECTEUR PARLEMENTAIRE DU BUDGET

The Parliamentary Budget Officer (PBO) supports Parliament by providing economic and financial analysis for the purposes of raising the quality of parliamentary debate and promoting greater budget transparency and accountability.

This report estimates the financial cost of complying with a Canadian Human Rights Tribunal decision (2019 CHRT 39) as it relates to First Nations children taken into care. It was prepared at the request of Mr. Charlie Angus, Member of Parliament for Timmins-James Bay.

Some data used in this publication came from the First Nations Component of the 2008 Canadian Incidence Study of Reported Child Abuse and Neglect (FNCIS 2008). These data were used with the permission of the First Nations Child Welfare Research Committee. The study was funded by the federal, provincial, and territorial governments of Canada, the Social Sciences and Humanities Research Council of Canada, and the Canadian Foundation for Innovation.

The PBO thanks the First Nations Child and Family Caring Society, the First Nations Child Welfare Research Committee and Indigenous Services Canada for the information and explanations they provided to assist with this analysis. The analyses and interpretations presented in this report are those of the PBO and do not necessarily reflect the opinions of the above-mentioned organizations.

For readability, all counts have been rounded to hundreds of persons.

Lead Analyst:
Ben Segel-Brown, Financial Analyst

Contributors:
Salma Mohamed Ahmed, Research Assistant

This report was prepared under the direction of:
Mark Mahabir, Director of Costing and General Counsel

Nancy Beauchamp, Jocelyne Scrim, and Rémy Vanherweghem assisted with the preparation of the report for publication.

For further information, please contact pbo-dpb@parl.gc.ca

Yves Giroux
Parliamentary Budget Officer

RP-2021-001-M_e

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Executive Summary

In September 2019, the Canadian Human Rights Tribunal (CHRT) ordered Canada to pay compensation to First Nations children and caregivers who were affected by the on-reserve child welfare system.

The Government of Canada has applied for judicial review of the CHRT decision, which could result in the compensation order being dramatically narrowed or voided entirely. This report estimates the cost of complying with the decision as it relates to children taken into care.

The preliminary estimate of Indigenous Services Canada (ISC) was that 125,600 people are eligible for compensation totalling $5.4 billion. Based on the PBO's assumed legal interpretation, the PBO estimates that 19,000 to 65,100 people are eligible for compensation in a range of $0.9 billion to $2.9 billion. Both estimates assume compensation is paid by the end of 2020.

Summary Table 1

High-level comparison of estimates

	ISC	PBO
# Eligible	125,600	19,000 to 65,100
Cost to compensate ($ billions)	$5.4	$0.9 to $2.9

The PBO expects fewer people to be eligible primarily because we assume that children placed within their extended family or community are not eligible for compensation.

Our estimate is presented as a range, as it is unclear what proportion of children will be excluded, either because the CHRT deems that their removal was necessary, or that their family benefited from prevention services. This report examines a number of scenarios under which these two eligibility criteria might be applied, and their possible impact on eligibility for compensation.

The Government of Canada has indicated that it intends to compensate those harmed by removals through the settlement of a class action. There may be significant barriers to a successful class action, which could result in fewer families receiving compensation. In addition, compensation for each removed child would not necessarily be more than the amount awarded by the CHRT.

1. Introduction

In September 2019, the Canadian Human Rights Tribunal (CHRT) ordered Canada to pay compensation to certain First Nations children and caregivers who were harmed by racial discrimination in federal funding for child and family services on-reserve and in Yukon.[1]

The decision included orders of compensation related to the removal of children from their family and related to delays and denials of essential services to children. This report focuses solely on compensation for removals. It includes compensation for removals to receive services but excludes compensation for delays and denials of services to children who remained in their homes.

The preliminary estimate of Indigenous Services Canada (ISC) was that 125,600 people are eligible for compensation totalling $5.4 billion, including interest. Based on the PBO's assumed legal interpretation, we estimate that 19,000 to 65,100 individuals are eligible for compensation that would range from $0.9 billion to $2.9 billion, including interest.

The PBO assumes that the CHRT decision requires Canada to pay $40,000 to all First Nations children ordinarily resident on-reserve or in Yukon at the time of their removal who were:

1. Unnecessarily removed from their home, family, and community after 1 January 2006 due to poverty, poor housing, neglect, or substance abuse and did not benefit from prevention services that would have permitted them to remain safely in their home, family and community;

2. Removed from their homes after 1 January 2006 due to abuse and placed outside their family and community; or

3. Were deprived of essential services within the scope of Jordan's Principle[2] and placed in care outside their homes, families and communities in order to receive those services between 12 December 2007 and 2 November 2017.

For each eligible child removed for reasons other than abuse, the parent(s) or grandparents of that removed child are also entitled to $40,000 in compensation.[3]

All the major parties to the CHRT proceedings have varying legal interpretations that differ from each other and from the PBO's assumptions set out above.[4] The PBO's assumed legal interpretation is an objective assessment of what the CHRT order requires; it is not a normative position regarding what compensation should have been ordered. The CHRT may

revise its order as parties seek clarification, as the CHRT did through a letter dated 16 March 2020.[5]

The Government of Canada has applied for judicial review of the decision, which could dramatically reduce or entirely void this compensation order.[6] The Tribunal's orders are also suspended pending a decision by the Tribunal regarding the process to be used to identify those eligible for compensation. Ongoing discussions or future CHRT orders could change the scope of who is entitled to compensation relative to what is required by the September CHRT order.

The PBO's estimate reflects the cost of paying the compensation ordered by the CHRT; it is not discounted for the probability of that order being reduced or voided through judicial review.

2. Cost of complying with the CHRT order

2.1. Placements by type

Based on data supplied by ISC from their financial records, the PBO estimates that 53,700 children will have been removed from their home - either on-reserve or in Yukon[7] - and placed in ISC-funded placements from 1 January 2006 to the end of 2020. This includes 8,500 children already in care in 2006.

Because this figure is based on ISC's financial records, it excludes unfunded placements of First Nations children with family, family friends or community members, where no federal expenditure would be recorded.

ISC classifies funded placements into four types: kinship care, foster care, institutional care, and group homes. The estimated breakdown of placements is shown in Table 2-1.

Table 2-1 Number of children taken into funded care for the first time by care type (2006-2020)

	#
Kinship[8]	12,500
Foster[9]	36,700
Institutional	2,100
Group Homes	2,400
Total	***53,700***

Source: PBO based on data derived from ISC's Child and Family Services Information Management System (CFS IMS).

Notes: This represents an estimate of the number of unique children who will have been taken into care for the first time at some point from 2006 up to the end of 2020. Removals prior to 2014 were estimated based on indexing to point-in-time counts.[10] The type of care is based on the child's first placement.

2.2. Placements outside family and community

According to the CHRT decision, compensation is awarded in relation to children placed in care outside of their homes, families and communities.[11] Thus, children removed from their home and placed within their extended family or community are not eligible for compensation.

By definition, children placed in informal or formal kinship foster care remain within their families or their communities for that placement. In addition, some children placed in non-kinship foster care and group homes remain within their communities. The estimated proportion and number of children in each type of care who were removed from their family and from their community is shown in Table 2-2.

Table 2-2 **Share and number of children removed from their family and from their community by care type (2006-2020)**

Share removed from their family and from their community	%	#
Kinship[12]	8%	1,000
Foster[13]	76%	27,900
Institutional and Group Homes[14]	84%	3,900
Total removed from their home, family and community		***32,700***

Source: PBO based on 2016 Census and 2011 Census and ISC's CFS IMS
Note: See endnotes for assumptions and calculations. For foster care, institutional care and group homes, these proportions reflect the share of children placed off-reserve, either in their initial placement or in a subsequent placement. Some First Nations may consider some off-reserve placements with families sharing the same Aboriginal identity to be placements within the child's community. In the 2011 National Household Survey, 21 per cent of First Nations foster children living off-reserve lived with at least one First Nations foster parent.[15]

2.3. Reason for removal

Of those children who were removed from their home, family, and community, the estimated breakdown of reasons for removal is shown in Table 2-3 below. Two-thirds of children, roughly 22,000, were removed for reasons other than abuse. They are analyzed together because they cannot be distinguished based on caseworker-reported reasons for removal; both children and parents would be eligible for compensation in almost all cases.[16]

Table 2-3 **Share and number of children removed from home, family and community by primary reason for removal (2006-2020)**

Primary reason for removal	%	#
Abuse	33%	10,700
Reasons Other than Abuse	67%	22,000
Total		***32,700***

Source: PBO based on custom analysis of First Nations Component of the 2008 Canadian Incidence Study of Reported Child Abuse and Neglect (FNCIS 2008).

Note: The breakdown was based on the primary reason for removal as recorded in the FNCIS 2008. Exposure to intimate partner violence (the primary reason for removal in 8 per cent of removals)[17] and emotional maltreatment (3 per cent) were classified as removals due to abuse. Multiple factors are often present in a removal. For example, poverty and substance abuse may be factors in a removal due to abuse. This breakdown is based on caseworker's primary classification of the reason for removal which focused on the type of maltreatment rather than underlying causes.

2.4. Necessity and prevention services

Families with children removed for reasons other than abuse are entitled to compensation only if:

- The child was "unnecessarily apprehended"; and
- The family "especially in regards to substance abuse, did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting them to remain safely in their homes, families and communities." [18]

The PBO considered seven possible scenarios for how these criteria might be applied. (The scenarios are outlined in Appendix A.) Under these possible scenarios, the proportion of otherwise eligible families who would be excluded from compensation would range from 0 per cent to 85 per cent. In other words, at the upper bound, all 22,000 eligible children removed for reasons other than abuse would receive compensation, compared with only 3,300 at the lower bound.

2.5. Parents

Parents of children removed due to abuse are not entitled to compensation; however, parents who had a child removed for reasons other than abuse are entitled to compensation.[19] To be eligible for compensation, the parent must have been caring for the child at the time of the child's removal.

Grandparents are eligible for compensation only if the parents were absent and the children were in their care.[20] The term parent was not defined by the Tribunal. However, the PBO assumes that it includes step-parents and adoptive parents, including parents under customary adoptions not formalized by court order.

Children who were removed from their homes have a second in-home caregiver in 47 per cent of cases.[21] So, it is assumed that there are 1.47 eligible caregivers per child. No limitation was applied with respect to the relationship between the in-home caregiver(s) and child, so this includes adoptive parents and step-parents acting as in-home caregivers.

The number of parents who are eligible depends on the number of children who are eligible for reasons other than abuse. This number of children is affected by the extent to which children are excluded because their removal was necessary or their family received preventative services.

If none are excluded, 22,000 children would be removed for reasons other than abuse. This implies that 32,400 parents would be eligible for compensation.

If 85 per cent are excluded, 3,300 children would be removed for reasons other than abuse. This implies that 4,900 parents would be eligible for compensation.

2.6. Compensation

According to the CHRT ruling, each eligible parent and child would receive $40,000 plus applicable interest.[22]

Again, compensation depends on the extent to which children are excluded because their removal was necessary or their family received preventative services.

If no children are excluded, this would result in $1,309 million in pre-interest compensation for the 32,700 eligible children, and $1,295 million in pre-interest compensation for the 32,400 eligible parents.

If 85 per cent are excluded, this would result in $564 million in pre-interest compensation for the 14,100 eligible children. For the 4,900 eligible parents, the pre-interest compensation would amount to $194 million.

The range of estimated compensation is shown in Table 2-4.

Table 2-4 **Summary of the number of children and parents eligible and associated compensation costs**

	Upper Bound		Lower Bound	
	Children	**Parents**	**Children**	**Parents**
# Eligible	32,700	32,400	14,100	4,900
Pre-interest compensation per eligible person	40,000	40,000	40,000	40,000
Pre-interest compensation ($ millions)	$1,309	$1,295	$564	$194
Interest on compensation ($ millions)	$340		$99	
Total cost of compensation ($ millions)	$2,944		$857	

All figures represent the costs up to the end of 2020. Additional costs will continue to accumulate after that time, including interest and compensation in relation to ongoing removals. By the end of 2025, the expected cost would reach $3.7 billion under the 0% scenario.

2.7. Differences in assumptions

The PBO's estimate relies on factual and legal assumptions that differ substantially from those used in ISC's preliminary cost estimate and eligibility criteria proposed by other parties.

Children already in care in 2006

About 8,500 children were in care as of 1 January 2006. The PBO assumes these children are eligible.[23] ISC's preliminary estimate assumes they are not eligible.

Adjustment factor

ISC's preliminary estimate of 48,200 children coming into care for the first time up to the end of 2017-18 is significantly higher than the PBO's estimate of 36,400 children. This is due to an adjustment factor ISC applied in projecting backwards children in care prior to 2014. ISC found that indexing to point-in-time counts underestimated the number of children coming into care relative to administrative data kept by three regions and grossed up its backwards projections accordingly. The PBO chose not to apply a similar

adjustment factor because we could not verify the methodology used by those regions and ISC could not provide us with the regional data.

Children off-reserve

The Chiefs of Ontario argued in recent submissions that "in Ontario, the Compensation Entitlement Order should apply equally to First Nations persons on or off reserve."[24]

The PBO did not adopt this approach because the Tribunal's order is explicitly limited to "First Nations children living on reserve and in the Yukon Territory." Ontario has 182,890 off-reserve individuals who identify as First Nations, just under half of the 380,355 persons on-reserve in all of Canada.[25]

Children placed within their extended family or community

In its written representations on its application for judicial review, ISC defines the eligible group as "every child removed from their home, temporarily or long-term, and every caregiving parent or grandparent to that child, unless they abused the child or children."[26]

Under this interpretation, all children removed from their homes are entitled to compensation, even if they were placed with family or within their community. This is the approach taken in ISC's preliminary estimate. If these children who were placed within their extended family or community were included, it would roughly double the number of eligible children.

Children placed in informal care

ISC's preliminary estimate is based on its child expenditure records. Thus, it implicitly excludes compensation for children removed from their homes and placed in unfunded kinship care where no expenditure would be recorded. Children in unfunded care are not relevant to the PBO's estimate because these children are all placed within their family or community and are thus ineligible for compensation.

However, under the definition set out in ISC's written representations, these children placed in unfunded care would appear to be eligible, even though they are not included in ISC's preliminary estimate. Since 49 per cent of all children removed from their homes are placed in informal kinship care, including these children would roughly double the cost of complying with the order.[27]

Prevalence of abuse

ISC's preliminary estimate assumes that 40 per cent of parents are ineligible because they abused their child. This assumption was made on the basis that 40 per cent of aboriginal respondents reported experiencing childhood physical and/or sexual abuse in a 2015 survey. (An alternative scenario showed 20 per cent of parents ineligible due to abuse.)[28]

The PBO obtained access to the First Nations Component of the Canadian Incidence Study of Reported Child Abuse and Neglect 2008; it showed that 33 per cent of children taken into care on-reserve were the result of abuse. As noted above, the PBO assumes that parents of children removed due to abuse are not eligible even if they did not abuse their child.

Unnecessary removal and non-benefit from prevention services
ISC's preliminary estimate does not incorporate any further inquiry into whether a child's removal was unnecessary or whether their family benefited from preventative services allowing the child to remain in the home.

Number of parents and eligibility of grandparents
With respect to factual assumptions, ISC's preliminary estimate assumes that each child has two eligible caregivers. Based on the First Nations Component of the Canadian Incidence Study of Reported Child Abuse and Neglect 2008, the PBO estimates that removed children have an average of 1.47 in-home caregivers.

It is not clear whether ISC's interpretation of the Tribunal's decision requires the parents to be absent for grandparents to receive compensation. If caregiving grandparents are eligible irrespective of whether the parents of the child are absent, the number of eligible grandparents could be much higher.

The Chiefs of Ontario argued in recent submissions that "the reality of families in First Nations communities means that aunties, uncles and other family members may well have been caring for children at the time of removal, and submits that such people should not be precluded from entitlement to compensation."[29]

The Tribunal rejected this approach, stating: "While the Panel does not want to diminish the pain experienced by other family members such as other grand-parents not caring for the child, siblings, aunts and uncles and the community, the Panel decided in light of the record before it to limit compensation to First Nations children and their parents or if there are no parents caring for the child or children, their grand-parents."

The PBO's estimate is based on compensation for up to two in-home caregivers irrespective of their relationship with their child, so it is not strictly limited to biological parents. However, it would exclude the broader family and community providing care and companionship to a removed child.

Interest calculation
ISC's estimate includes compound interest at the Bank of Canada Policy Rate with unspecified adjustments, whereas the PBO estimate includes simple interest at the Bank of Canada's Bank Rate consistent with the default under section 9(12) of the CHRT *Rules of Procedure*.[30]

The decision nominally awards compensation at the Bank of Canada Rate. However, given the absence of any rationale for deviating from the Tribunal's rules of procedure, the PBO assumes the Tribunal intended to award compensation at the slightly higher Bank of Canada Bank Rate.

Resolution date

ISC's estimates also explore the implications of it taking until 2025-26 to resolve the claim. Under that scenario, ISC's preliminary cost estimate rises to $6.7 billion. The PBO's estimate rises to $3.7 billion under the scenario where all children removed from their home, family, and community for reason other than abuse are eligible.

Impact of assumptions

It seems reasonably clear that ISC's interpretation as set out in court filings deems children placed within their extended family or community to be eligible. It does not incorporate any further inquiry into whether a child's removal was unnecessary or whether their family benefited from preventative services allowing the child to remain in the home.

However, ISC's interpretation is unclear with respect to two of the other most consequential differences in assumptions, specifically:

1. The eligibility of children placed in unfunded care, and
2. The eligibility of caregiving grandparents where the parents are not absent.

If children placed in unfunded care are excluded and the grandparents of children in the care of their parents are excluded, the cost under ISC's interpretation is estimated to be $4.8 billion. Including children placed in unfunded care and four caregiving grandparents per child, the cost under ISC's interpretation would be $22.8 billion.

If proposals to compensate children off-reserve in Ontario were accepted by the Tribunal, the cost would increase by about 50 per cent. Compensating all relatives of a child who provided care to a removed child would result in an indeterminable, but likely large, increase in the cost.

3. Comparative cost of settling a class action

The Government of Canada (hereafter referred to as "Canada") has publicly indicated that it intends to compensate families entitled to compensation under the CHRT order through a settlement of a class action. This could be *Xavier Moushoom and Jeremy Meawasige v. The Attorney General of Canada* or a similar class action recently filed by the Assembly of First Nations.

Canada cannot void the CHRT's order simply by settling a class action. So, the framing of a class action settlement as an alternative to complying with the CHRT decision still relies on Canada having that order quashed through judicial review. If the CHRT order was paid out, Canada has argued that any compensation awarded under the CHRT order would be offset against damages awarded in a class action.[31]

It appears that eligibility for compensation under either class action could be broader in terms of three factors: the time period covered; the relatives entitled to compensation; and the eligibility of families of children removed due to abuse.

However, there may be barriers to the success of a class action. Federal funding for child welfare differs dramatically between provinces, between agencies, and over time. Families differ in the prevention services they received, the reasons their child was taken into care, and where their child was placed. Responsibility for removals and the circumstances leading to removals are shared among many parties.

To establish a clear relationship between an action for which the federal government is liable and harm suffered by the plaintiffs, it may be necessary lawyers representing the plaintiffs to dramatically limit the scope of who is eligible for compensation, or the harm for which they are being compensated. For example, in the *Sixties Scoop* class action, the group eligible for compensation was limited to children who were placed in non-aboriginal foster homes, and only included compensation for loss of culture.[32]

In terms of the amount of compensation, previous class action settlements regarding the removal of children from their homes, families and communities suggest that compensation for each removed child would not necessarily be any more than the $40,000 maximum awarded by the CHRT. The amounts awarded in previous similar cases are shown in Table 3-1.

However, individuals who suffered exceptional harm as a result of their removal, such as children who suffered abuse while in a foster home, could potentially receive much more if an individualized assessment process is implemented. An example of that would be the process used for the Indian Residential School Settlement.

The scope of eligibility and amount of compensation are negotiated and are, therefore, difficult to predict.

Table 3-1 Summary of compensation awarded in previous similar cases

	Common experience payments	Individualized compensation	Differences
Indian Residential Schools Settlement (2006)	$10,000 for the first year, $3,000 for subsequent years, averaging $20,457 ($25,900 in 2020 dollars) for emotional abuse, loss of family life, loss of language/culture, etc.	38,178 claims out of 105,530 claimants with awards averaging $111,265	Longer average duration, more abuse
Sixties Scoop Settlement (2017)	Likely <= $25,000, solely for loss of cultural identity	Not settled	Generally permanent

Appendix A – Possible interpretations of further restrictions

Families with children removed for reasons other than abuse are entitled to compensation only if:

- The child was "unnecessarily apprehended" and
- The family "especially in regards to substance abuse, did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting them to remain safely in their homes, families and communities."

The CHRT's decision does not clearly explain how these eligibility criteria are supposed to be applied. Seven possible approaches were considered, including:

- Canada-wide approaches,
- province-year specific approaches,
- group-by-group analysis of the presence of factors or services, and
- group-by-group causal analysis.

The 0 per cent to 85 per cent range reflects the possible exclusions under these interpretations.

Among these possible approaches, the most likely interpretation is that the CHRT's eligibility criteria require a further group-by-group assessment of whether each child was unnecessarily removed. The evidence would be that they did not benefit from prevention services which would have permitted them to remain at home.

The assessment would not be the extent of harm, which the Tribunal rejected as harmful and unnecessary. Rather, it would be whether the harm associated with a child's removal arose from the underfunding of preventative services.

One factor that supports the interpretation that an additional group-by-group assessment is required is that the evidence summarized by the CHRT and the conclusions it drew accept the existence of unnecessary removals, but do not address the prevalence of unnecessary removals.

In summarizing the evidence, the CHRT states that the least disruptive measures to address neglect are underfunded, and that "without funding for [the] provision of preventative services many children […] are unnecessarily removed from their homes and families."[33]

The necessity of a case-by-case assessment is further supported by the reference to substance abuse in the CHRT order. The CHRT appears to be making some attempt to define a population it expects to be found ineligible as a result of a further assessment.

It does so when it restricts eligibility to families who "especially in regards to substance abuse, did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting [the children] to remain safely in their homes, families and communities."[34]

This suggests that removals due to caregiver substance abuse, where the caregiver benefited from prevention services intended to allow the child to remain in the home, do not give rise to compensation. The term "especially" suggests that families benefiting from prevention services may be excluded in other circumstances. Determining whether caregivers benefited from prevention services intended to allow the child to remain in the home requires a case-by-case assessment.

Another important contextual factor is that the order was issued in response to a request by the Assembly of First Nations (AFN) to establish an expert panel to determine appropriate case-by-case compensation. This proposal was not just for a case-by-case assessment of individual damages, which the Tribunal rejected as harmful and unnecessary. It was also to determine whether preventative services would have prevented abuse leading to a child's removal.[35]

Canada-wide approaches

Under these approaches, no children are screened out and no case-by-case assessment is required.

Scenario 1: Reliance on finding of systemic discrimination

A taxonomy of compensation category proposed by the First Nations Child and Family Caring Society (FNCFCS) argues that a prior CHRT ruling "found that First Nations children living on-reserve were discriminated against by the Canadian government in part because they did not receive adequate prevention services." [36] On this basis, the taxonomy appears to accept that all children did not benefit from prevention services. This would result in no cases being screened out.

Scenario 2: Reliance on placement outside of family and community

Alternately, the Tribunal could reason, as it did in relation to cases of abuse, that all First Nations children should have been placed within their family and community. If the Tribunal does not entertain evidence that equitable funding to find and support such placements was in place or that an equitable level of such placements occurred, this would result in no cases being screened out (the PBO's cost estimate already excludes placements with family and community).

Province-year specific approach

Under these approaches, children are screened out depending on the province and year in which they were taken into care.

Scenario 3: Removals in province-years where funding for prevention services was in place

The eligibility criteria ask specifically about whether a family benefited from prevention services. Canada has been incrementally providing funding for prevention services on a province-by-province basis in an attempt to address the systemic discrimination identified by the Tribunal.

For about 85 per cent of removals for which compensation has been ordered, prevention services were funded under a bilateral agreement or the enhanced prevention focused approach. This suggests that if children are screened out in province-years for which the additional funding for prevention services was in place, as much as 85 per cent of cases could be screened out.

Group-by-group and case-by-case analysis of the presence of factors

Under these approaches, the Tribunal or delegated body would determine, or has determined, that children removed in certain circumstance are eligible. Then it would consider whether each case falls within an eligible group.

Scenario 4: Removals related to poverty, housing, or substance abuse

The FNCFCS's taxonomy has an eligibility requirement asking whether the child experienced neglect related to poverty, housing and substance abuse. This is in conflict with the wording of the CHRT order, which includes neglect as a parallel ground. However, in this way, the taxonomy indirectly restricts eligibility to those found to be harmed in the Wen:de reports prepared by the First Nations Child and Family Caring Society of Canada.

Those reports speak of neglect related to poverty, housing and substance abuse as circumstances where removals are potentially preventable.[37] In this way, looking at whether a removal was related to poverty, housing or

substance abuse may be a reasonable proxy for determining the circumstance where removals are potentially preventable in the view of the CHRT.

To assess the impact of this approach, the PBO requested a custom tabulation from the First Nations Component of the 2008 Canadian Incidence Study of Reported Child Abuse and Neglect. That custom tabulation shows that this approach would only slightly restricts eligibility, as poverty, housing and substance abuse were a suspected or confirmed factor in 94 per cent of investigations resulting in placements outside the home.

Table A-1 **Presence of risk factors among investigation resulting in an out-of-home placement for First Nations on-reserve children, as reported by caseworkers**

	%
Unsafe housing conditions	23%
Home overcrowding	10%
Household income only from social assistance, EI, other benefits, or none	54%
Household ran out of money for necessities within the past six months	19%
Suspected or confirmed drug or alcohol abuse by caregiver	84%
Any of above risk factors	94%

Source: PBO based on custom analysis of FNCIS 2008.

Scenario 5: Exclusion of substance abuse cases

The decision indicates that the exclusion related to benefit from prevention services applies especially with regard to cases of substance abuse. The particular emphasis placed on substance abuse in the context of the availability of prevention services mirrors earlier quotes from the Wen:de reports. These quotes express the view that where treatment services were available, continuing substance misuse lies within the personal domain for change.[38]

First Nations addiction treatment centres and community-based prevention programs are offered at various locations across Canada.[39] Without a clear definition and further data, it cannot be determined whether these services were adequate and available in the context of a particular removal. If the

assessment were to screen out all families where caseworkers flagged suspected or confirmed substance abuse, 84 per cent of families could be excluded.

Group-by-group and case-by-case causal analysis

If the CHRT requires evidentiary proof that prevention funding would have averted the removal of a group of children on a balance of probabilities, the outcome will depend on the evidence accepted and the scope of least disruptive measures and prevention services the CHRT believes should have been provided.

Scenario 6: Causal analysis based on ISC definition of preventative services

The types of "prevention services" funded by Canada over most of the relevant period were non-medical services delivered to families, such as education, counselling and intensive in-home supports.[40] Between 2007-08 and 2013-14, Canada increased funding for prevention services under an "Enhanced Prevention Focused Approach" (EPFA).

However, it was not possible to identify a distinct group of children who are no longer coming into care as a result of the EPFA. In the decade since implementation of the EPFA began, the number of children in ISC-funded care has increased in some provinces with EPFA funding, while decreasing in others.

In total, the number of children in care increased 18 per cent in provinces with EPFA funding, whereas the number of children in care decreased 9 per cent in the remaining provinces and single territory (Yukon).

However, excluding kinship care, the number of children in care in EPFA provinces with EPFA funding is estimated to have decreased 25 per cent. Beyond the absence of a clear aggregate impact, it is difficult to identify a causal relationship for a variety of other reasons.[41]

Based on experiences over the last decade with EPFA funding, it would be difficult to prove that the removal of any particular group of children would not have occurred with adequate funding for prevention services.

Academic literature is inconclusive regarding the effectiveness of prevention services. Several types of home visitation programs have been found to reduce child maltreatment or maltreatment risk factors in some cases; but, in other cases the same or similar programs have not been effective or even increased maltreatment.[42] Such results may also not be generalizable to First-Nations on-reserve families and few studies look at impacts on probabilities of being taken into care. Even where effective, these programs only reduce the probability of a child being taken into care. It would still be difficult to say

that any particular family would not have been taken into care if the intervention had been in place. It is difficult to predict what conclusions the CHRT would draw from such a mixed body of research.

Scenario 7: Causal analysis based on broader definition of preventative services

Under a broader definition of preventative services, there do appear to be services which could reduce the number of children removed from their homes, families and communities. Specifically, funding to find and support kinship placements and foster care on-reserve, funding for housing and income assistance could avoid the removal of some children. It might even be possible to show that the removal of a particular family's child could have been prevented if the child was removed from to their home due to poverty, unsafe housing, or if a family member would have been willing and able to take in a child if more support was available.[43] However, for many cases of neglect, it would be difficult to point to any particular program that would have prevented the removal of a child.

Notes

1 *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39.

2 As set out in 2017 CHRT 35, Jordan's Principle relates to the approval of and reimbursement for government services for First Nations children. Where a government service is available to all other children, the government department of first contact must pay for the service. Where a service is not necessarily available to all other children, the government department of first contact must evaluate the needs of the child to determine whether the requested services should be provided to ensure substantive equality or culturally appropriate services, or to safeguard the best interests of the child. The CHRT decision orders compensation to be paid to each First Nations child who "was denied services or received services after an unreasonable delay or upon reconsideration ordered by this Tribunal." The parents or grandparents of those children are also eligible for compensation.

3 Compensation will be paid to caregiver grandparents only if the parents were absent. 2019 CHRT 39 at para 185.

4 Written Representations of the Applicant/Moving Party on Motion to Stay at para 9; Affidavit of Cindy Blackstock at p 117 (Page 5 of Exhibit 12) [FNCFCS taxonomy]; Assembly of First Nations (AFN), Compensation Order / Questions and Answer.

5 CHRT, Letter of 16 March 2020.

6 Among other issues, the Application for Judicial Review challenges the Tribunal's decision to award individual compensation in a case of systemic discrimination, its decision to award individual compensation in light of a lack of evidence proper funding could have prevented all removals, and the amount of compensation awarded in the case of short temporary removals. Attorney General of Canada, Written Representations of the Applicant/Moving Party on Motion to Stay.

7 This differs from the approach taken by the FNCFCS's taxonomy, which limits eligibility to children who have, or are eligible, for Indian Status. Eligibility is not expected to be restricted to Status Indian children because:

- The decision refers to First Nations children rather than "Status Indian" children;
- Canada has jurisdiction over lands reserved for Indians; and
- Underfunding of on-reserve prevention services would negatively affect all children on-reserve. irrespective of their status.

The definition of a First Nations child is an open issue being considered by the CHRT.

[8] Because kinship care was not distinguished in ON, MB, and YK for the entire period, point-in-time counts for the number of children in kinship care in ON, MB, and YK were interpolated based on provinces that distinguished kinship care. Interpolated kinship placements were deducted from foster placements.

[9] Quebec and the Atlantic provinces include placements with family within foster placements in some circumstances. This error also effects the result for Ontario and Manitoba due to interpolation for these provinces. In addition, and possibly as a result, the share of children in non-kinship foster care is higher than found in the First Nations Component of the Canadian Incidence Study of Reported Child Abuse and Neglect, where non-kinship foster care accounted for 53 per cent of placements with expenditures. As defined in the FNCIS 2008, kinship foster care includes all formal placements arranged within the family support network, including placements with extended family and in customary care.

[10] Expenditures have only been nationally tracked at the child level since 2013, meaning children entering care for the first time can only be identified for 2014 onwards. The number of children taken into care for the first time prior to 2014 was estimated based on indexing the number of children taken into care for the first time in 2014 by care type to point-in-time counts of the number of children in care by care type. The 2014 base year only excluded children in care in 2013. So this approach may overestimate the number of unique children who were taken into care to the extent there are recurrent placements with a gap of more than one year between placements. If this were common, one would expect to see a decline in unique children coming in care for the first time since 2014, which has not occurred.

[11] This differs from the approach taken by the FNCFCS taxonomy and by Indigenous Services Canada, which both ask whether children were removed from their "homes, families, or communities." That would result in compensation being paid to children placed within their family or community. See: Affidavit of Sony Perron at para 5; Attorney General of Canada, Written Representations of the Applicant/Moving Party on Motion to Stay at para 9; Affidavit of Cindy Blackstock at p 117 (Page 5 of Exhibit 12).

The PBO interprets the decision to only compensate children removed from their family and community because:

- The decision uses the word "and" rather than "or";
- The references to families and communities would be redundant if all children removed from the home qualified;
- The panel's corresponding factual finding is that "removing a child from its family and community is a serious harm" (paras 161, 169, 184);
- Similar wording specifying that compensation is for children "placed in care outside of their extended families and communities" (para 249) is used with respect to abused children. The CHRT had earlier found that

abused children "should have been placed in kinship care with a family member or within a trustworthy family within the community" (para 149). This suggests that the CHRT believes no wrong was done in cases where a child was placed with a family member outside of the child's community or a non-family member within the child's community.

12 Over a 3-year period, a study Perry et al. found 13.6% of children placed in kinship care were moved to another family or group. Gretchen Perry, Martin Daly and Jennifer Kotler, Placement stability in kinship and non-kin foster care: A Canadian study (2011).

It was assumed subsequent placements had an equal probability of being non-kinship placements. Children moved to non-kinship placements were assumed to have an equal probability of being placed off-reserve as a child directly placed in a non-kinship placement.

13 Based on ISC data, the PBO estimated the number of First Nations children in ISC-funded non-kinship foster care in 2016. Based on 2016 Census data, the PBO could determine the number of children in non-kinship foster care on reserve. The probability of any particular placement being on-reserve for each province was assumed to be equal to the percentage of these children ISC funded care who were in care on reserve. The number of subsequent placements for First Nations children was derived from Quebec administrative data. An expected probability of being placed on reserve in any placement was calculated using the Quebec distribution of number of placements and each province's probability of being placed off-reserve for each placement. That probability was weighted based on the provincial distribution of children in care to produce a national probability of being placed on reserve in any placement.

The key assumptions in this approach are:

- All First Nations children placed in foster care on-reserve came from homes on-reserve,
- The duration of time in care for placements on-reserve is similar to the duration of placements off-reserve and,
- The probability of a subsequent placement being off-reserve is independent of the probability of the initial placement being off-reserve.

ISC, Response to PBO IR0437; Statistics Canada, Aboriginal Population Profile, Census 2016. First Nations of Quebec and Labrador Health and Social Services Commission: Trajectories of First Nations youth subject to the Youth Protection Act COMPONENT 3: Analysis of mainstream youth protection agencies administrative data.

14 The estimated share of children placed in group homes is based on the number of Status Indians in residential care facilities (which includes group homes) on-reserve based on the 2016 Census, as a percentage of the number of children who had been in group homes for 6 months or longer as of census day based on ISC's CFS IMS. This assumes that individuals residing in the group home less than six months would have been recorded at their ordinary residence and there is no significant difference in the duration of

group home placements on and off reserve. An expected probability of being placed on reserve in any placement was calculated using Quebec distribution of number of placements for placements in group homes and institutions.

Institutions are generally distinguished from group homes by capacity. Given the low total number of children in residential care facilities in any province, it was deemed unlikely that there were any children in institutional care on reserve. The figure presented represents the weighted average of the two figures.

ISC, Response to PBO IR0437; Statistics Canada, Custom Tabulation based on 2016 Census; Tonino Espositoa, Nico Trocmé et al., The stability of child protection placements in Québec, Canada 42 Children and Youth Services Review (2014) 10-19.

15 Statistics Canada, Living arrangements of Aboriginal children aged 14 and under (2016).

16 There may be rare cases in which a child is removed for reasons other than abuse, poverty, poor housing, neglect, or substance abuse, or in order to receive services. For example, a child could be taken into care because the parents are unable to care for them for other reasons, such as illness, death or incarceration.

17 The order elaborates on abuse as including sexual, physical and psychological abuse (2019 CHRT 39 at para 256). The term psychological abuse is not actually defined in provincial child welfare legislation. But the most comparable definitions of 'emotional injury', 'emotional harm', 'psychological ill-treatment' typically all include exposure to family violence (See Affidavit of Cindy Blackstock at p 196, Page 84 of Exhibit 12). This is not to say that the victim of intimate partner abuse abused their child by exposing their child to intimate partner violence. However, the abused parent is nevertheless not eligible because their child was necessarily removed due to abuse by the perpetrator of intimate partner violence. There is no order of compensation that covers even innocent parents of children removed due to abuse.

The primary reason for removal differs from the prevalence because multiple factors may be present in a particular case. As reported by caseworkers in cases where children were removed, 39 per cent of caregivers were victims of intimate partner violence, while 31 per cent of caregivers were perpetrators of intimate violence. This was the case even though intimate partner violence was the primary reason for removal in only 8 per cent of removals.

18 2019 CHRT 39 at para 245.

The PBO assumes the order for compensation is to be limited to those groups found to be harmed as described within the order. This is the approach taken by the FNCFCS taxonomy, but not the approach taken by ISC. ISC appears to read each order as not limited by the preceding findings of harms. Despite the lack of a demonstrative pronoun indicating this

restriction, the orders are assumed to be limited to those found to be harmed because:

- The explicit purpose of the decision is to compensate children and caregivers harmed by discriminatory underfunding of child protection services, so one would expect compensation to be limited to those found to be harmed;
- The identical orders made in paragraph 245 (regarding neglected children) and 249 (regarding abused children) would be redundant if not limited to the groups found to be harmed;
- Without being restricted to those found to be harmed, the order would include First Nations children residing off-reserve, who receive services funded by provincial governments;
- In further restricting eligibility to children who "especially in regards to substance abuse, did not benefit from prevention services [...] permitting them to remain safely in their homes, families and communities", the Tribunal is excluding a group of households.

The order appears to accept that the fact an abused child was placed in care outside of their extended families and communities is sufficient proof that an abused child did not benefit from prevention services. This flows from the use of the phrase "and therefore, did not benefit from prevention services". This implies that the Tribunal is finding, as a matter of fact, that removed abused children placed outside their families and communities did not benefit from prevention services. The Tribunal made this factual finding explicit earlier in its reasons at paragraph 149. The word 'therefore' was not used in the corresponding order regarding removals for reasons other than abuse.

Although the CHRT uses the term "apprehended" in English, it uses the term "placés" in French and "removed" in the heading and later in the same paragraph. This suggests the term is not being used in a precise legal sense to limit eligibility to children apprehended by children's aid societies to the exclusion of children voluntarily placed in care. Voluntary placements in care account for about 6 per cent of placements in care. Even if excluded on this ground, they would likely be eligible on the basis their child was taken into care in order to receive essential services.

19 As written, the decision would not compensate parents of children removed due to abuse even when the parent was not the perpetrator of the abuse. Specifically, the decision explicitly excludes caregivers who abused their children (para 256). However, the decision also does not include a positive order to compensate the parents of children necessarily removed due to abuse. For physical abuse, the only category for which a sufficient sample size was available, the primary caregiver was the perpetrator in 97 per cent of cases, and a secondary caregiver the perpetrator in 3 per cent.

20 2019 CHRT 39 at para 185.

21 Based on custom analysis of the FNCIS-2008.

22 The interest on compensation was calculated assuming simple interest at the Bank of Canada's Bank Rate.

23 CHRT, Letter of 16 March 2020.

24 Chiefs Of Ontario, Submissions.

25 2016 Census, Aboriginal Population Profile.

26 Attorney General of Canada, Written Representations of the Applicant/Moving Party on Motion to Stay at para 9.

27 Based on custom analysis of the FNCIS-2008.

28 Statistics Canada, Family violence in Canada: A statistical profile, 2015.

29 COO, Submissions.

30 The Bank of Canada's Bank Rate was the series used in *O'Bomsawin v. Abenakis of Odanak Council*, 2018 CHRT 25 (CanLII), <http://canlii.ca/t/hxsvq>.

31 2019 CHRT 39.

32 Brown v. Canada (Attorney General), 2017 ONSC 251. The final settlement was broader that established in that case, see Sixties Scoop Settlement Agreement (2017).

33 2019 CHRT 39 at paras 163-165).

34 2019 CHRT 39 at para 245.

35 AFN, Written Submissions Regarding Compensation returnable April 25-26, 2019 at para 12.

36 Affidavit of Cindy Blackstock at p 117, Page 5 of Exhibit 12.

37 2019 CHRT 39 at para 163.

38 2019 CHRT 39 at para 163.

39 ISC, National Native Alcohol and Drug Abuse Program.

40 ISC, National Social Programs Manual 2012 at § 4.4.2. ISC, Mid-Term National Review for the Strategic Evaluation of the Implementation of the Enhanced Prevention Focused Approach for the First Nations Child and Family Services Program at § 1.2.1 ["Prevention services may include, but are not limited to, respite care, after-school programs, parent/teen counselling, mediation, in-home supports, mentoring and family education, in accordance with services similarly offered by the province of residence off reserve."];.ISC, Program Directive: Prevention/Least Disruptive Measures (Draft).

41 Many other changes occurred over the decade. The count of children in care may be affected by expansions in funding eligibility for kinship and customary care placements. In addition, significant prevention funding may have been diverted towards other purposes, including intake services, which can increase the number of children taken into care. ISC does not know how much prevention funding was actually spent on prevention services.

According to a survey of agencies by the IFSD, 12 per cent of federal funding was used for prevention services. IFSD, Enabling Children to Thrive, Figure 36.

42 Anne Blumenthal, Child Neglect II: Prevention and Intervention; Preventing Violence Across the Lifespan Research Network, RESEARCH BRIEF: Interventions to Prevent Child Maltreatment; WHO, Child maltreatment prevention: a systematic review of reviews; Sarah Dufour and Claire Chamberland, The Effectiveness of Child Welfare Interventions: A Systematic Review; Richard P. Barth, Preventing Child Abuse and Neglect with Parent Training: Evidence and Opportunities; Prinz et all, Population-Based Prevention of Child Maltreatment: The U.S. Triple P System Population Trial.

43 Anne Blumenthal, Child Neglect II: Prevention and Intervention; Lyn Morland, Effect Of Safety Net Policies On Child Neglect; Cancian et al, The Effect of Family Income on Risk of Child Maltreatment.

This is **Exhibit "Q"** to the Affidavit of David Sterns, Affirmed remotely before me in the City of Toronto, in the Province of Ontario, on October 6, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration remotely

Commissioner for taking Affidavit
(or as may be)

Georgia Elizabeth Scott-McLaren, a Commissioner, etc.
Province of Ontario, for
Sotos LLP, Barristers and Solicitors
Expires February 20, 2024

Court File Nos.: T-402-19/T-141-20

FEDERAL COURT
PROPOSED CLASS PROCEEDINGS

BETWEEN:

XAVIER MOUSHOOM and JEREMY MEAWASIGE
(by his litigation guardian Maurina Beadle)

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
PROPOSED CLASS PROCEEDINGS

BETWEEN:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, and MELISSA WALTERSON

Plaintiffs

and

HER MAJESTY THE QUEEN AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Defendant

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and

THE ATTORNEY GENERAL OF CANADA

Defendant

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PROPOSED CLASS PROCEEDINGS

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Plaintiffs

and

HER MAJESTY THE QUEEN AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Defendant

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PART I – OVERVIEW

1. Amicus makes these representations in furtherance of the mandate conferred by the Order of this Court dated June 10, 2021 (the "Order Appointing Amicus"). That mandate is:

> … to assist the Court in safeguarding the interests of class members throughout these proceedings, including but not limited to their consolidation and bifurcation into the Consolidated Proceeding (on behalf of, among others, the Jordan's Principle class members whose claims arose from December 12, 2007 onward) and the Separated Proceeding (on behalf of the Jordan's Principle class members whose claims arose from April 1, 1991 to December 11, 2007), given that the same counsel act for the plaintiffs in both proceedings.[1]

2. Among other forms of relief, the plaintiffs move for Orders consolidating the Actions in Court File No. T-402-19 and Court File No. T-141-20 (hence, the Consolidated Proceeding) and for leave under the Preclusion Order for Zacheus Joseph Trout to commence a new class action, the Separated Proceeding, on behalf of claimants separated from the Consolidated Proceeding.

3. The parties have agreed to the expedited prosecution of the Consolidated Proceeding, which consists of the majority of class members.[2] The Crown has consented to certification of the class proceeding with respect to those class members and, in respect of this portion of the claim, has agreed to participate in a mediation facilitated by a retired member of the Federal Court who possesses subject-matter expertise.[3] In relation to the Separated Proceeding, which is comprised of a subset of class members,[4] the Crown is exercising its right to contest certification.[5]

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[1] Order of Mr. Justice Phelan and Madam Justice St-Louis dated June 10, 2021, para. 1.
[2] These include the Removed Child Class (April 1, 1991 to present), Family Members of the Removed Child Class (April 1, 1991 to present), Jordan's Class (December 12, 2007 to present) and Family members of Jordan's Class (December 12, 2007 to present).
[3] Written Submissions of the Moving Parties, November 2, 2020, para. 18.
[4] This subset is comprised of Jordan's Class (April 1, 1991 to December 11, 2007) and family members of Jordan's Class (April 1, 1991 to December 11, 2007).
[5] Written Submissions of the Moving Parties, November 2, 2020, para. 19.

4. The plaintiffs' counsel have made submissions and offered assurances to the Court as to the effectiveness of their representation of the Separated Proceeding class members, should the relief they seek be granted. Counsel take the position that:

a. "[T]he remainder of the class (i.e., those within the Separated Proceeding) have given up none of their rights";[6]

b. The separate prosecution of the claims in the Separated Proceeding will not prejudice the interests of class members in that action because

i. they have not given up their claims; instead, they retain all of their rights to seek certification and advance their claims, and the hearing of the certification motion will not be delayed due to mediation of the Consolidated Proceeding;[7]

ii. the proposed representative plaintiff in the Separated Proceeding, Mr. Trout is motivated to vigorously advance the cause of the class members in the Separated Proceeding regardless of the outcome in the Consolidated Proceeding;[8] and

iii. "Class counsel will vigorously advance their claims";[9]

c. "Proceeding in this bifurcated manner will advance the litigation for a large portion of the class without affecting or compromising the interests of those class

[6] Written Submissions of the Moving Parties, November 2, 2020, para. 21; April 9, 2021, para. 5.
[7] Written Submissions of the Moving Parties, November 2, 2020, para. 37.
[8] Written Submissions of the Moving Parties, November 2, 2020, para. 39; April 9, 2021, paras. 20-21. Counsel posited that while creation of a subclass would have no real purpose and would have the same practical effect as the bifurcation that is being jointly proposed by the parties, in that event they would seek to add Mr. Trout as a representative plaintiff of the subclass: Written Submissions of the Moving Parties, para. 22.
[9] Written Submissions of the Moving Parties, November 2, 2020, para. 21.

members whose claim does not fall within the Crown's consent to certification"; and[10]

d. "These class members benefit from the work done to date in preparation for contested certification in the Moushoom Action."[11]

5. Counsel submit that whether in the Separated Proceeding or in the Consolidated Proceeding, all class members advance the same rights of action against the Crown. Counsel further submit that the interests of class members in both proceedings are identical and not in conflict.[12] The fact that their claims arose at different times (April 1, 1991 to December 11, 2007 in the case of the Separated Proceeding; December 12, 2007 to the present in the case of the Consolidated Proceeding) is no basis for concluding that they are adverse in interest.[13] Moreover, they submit, bifurcation does not raise any spectre of adverse interests in the future.[14]

PART II – SHOULD BIFURCATION BE REFUSED / IS OTHER COURT INTERVENTION WARRRANTED?

6. As a general and guiding principle, the Supreme Court of Canada has accepted the proposition that "a litigant should not be deprived of his or her choice of counsel without good cause".[15] Thus, in general, the plaintiffs in the Consolidated Proceeding and Separated Proceeding should be entitled to proceed with their chosen counsel, unless a good reason exists to prevent it, such as a conflict of interest.

7. In *McKercher*, the Supreme Court identified three different types of conflicts of interest that may arise, particularly where a conflict is alleged to exist as a result of a lawyer's or firm's

[10] Written Submissions of the Moving Parties, November 2, 2020, para. 21.
[11] Written Submissions of the Moving Parties, November 2, 2020, paras. 21 and 38.
[12] Written Submissions of the Moving Parties, April 9, 2021, para. 8.
[13] Written Submissions of the Moving Parties, November 2, 2020, para. 42.
[14] Written Submissions of the Moving Parties, November 2, 2020, para. 43.
[15] *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, at 1243.

concurrent representation of two or more clients. *Firstly*, the "bright line rule" absolutely prohibits the simultaneous representation of two current clients where the "*immediate legal* interests" of the clients are "*directly* adverse".[16] *Secondly*, a lawyer cannot act where there is a risk that he or she will misuse confidential information obtained from a client.[17] *Finally*, even where the bright line rule does not apply and there is no risk of a misuse of confidential information, a conflict will still exist where "the concurrent representation of clients creates a substantial risk that the lawyer's representation of the client would be materially and adversely affected", such as where the lawyer's effective representation of the client would be compromised by the lawyer's own interests, or the interests of a current client, former client, or a third person.[18]

8. Amicus submits that none of these conflicts of interest would result from bifurcating the Consolidated Proceeding and the Separated Proceeding.

9. Firstly, the bright line rule is not applicable. In *McKercher*, the Court stressed that, for the bright line rule to apply, the *direct legal interests* of the clients must be adverse – such as where the clients are opposing parties in the same proceeding. It does not apply where any adversity is indirect, or merely based on strategic considerations, rather than legal ones.[19] Here, it is clear that the immediate legal interests of the plaintiffs in the two proceedings would not be directly adverse. Bifurcating the proceedings would not make the different classes opposing parties in the same proceeding.

10. The members of each class raise similar claims against the same defendant based on similar conduct arising in two separate time periods. There is no zero sum game here: the success

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[16] *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, at para. 32 [emphasis in original].
[17] *McKercher*, at paras. 23-24.
[18] *McKercher*, at paras. 26, 38.
[19] *McKercher*, at paras. 32-35.

of the plaintiffs in the Consolidated Proceeding does not necessarily result in any detriment to the plaintiffs in the Separated Proceeding, and vice versa.

11. Secondly, there does not appear to be any risk of the misuse of confidential information. Amicus does not see how counsel may obtain confidential information in one proceeding that could then be used to the disadvantage of the plaintiffs in the other proceeding. This situation is completely distinct from situations where a lawyer or firm acts against a former client in a related matter, where concerns regarding the misuse of confidential information are most acute.[20]

12. Finally, Amicus does not believe that there is a substantial risk that counsel's effective representation of one client would be materially and adversely affected by the bifurcation of the proceedings and counsel's concurrent representation in both actions. In the present circumstances, there does not appear to be a substantial risk that plaintiffs' counsel would prefer the interests of one set of class members over the other, or "soft peddle" their representation of one in order the benefit the other (or themselves).

13. This third category of conflicts identified in *McKercher* is the most prevalent one in the class actions context. The Ontario Superior Court has recognized the inherent conflicts of interest that arise from the "entrepreneurial model of the class proceedings legislation".[21] As a result, it is appropriate for the courts to be particularly wary of conflicts of interests in class proceedings. Indeed, it is ultimately the responsibility of the courts to defend against such conflicts and ensure that the interests of class members are not subordinated to the interests of class counsel, or their other clients.[22]

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[20] *McKercher*, at para. 24.
[21] *Singh v. RBC Insurance Agency Ltd.*, 2020 ONSC 5368, at para. 42; *Persaud v. Talon International Inc.*, 2018 ONSC 5377, at para. 175.
[22] *Singh*, at para. 42.

14. In a number of cases, the Ontario Superior Court has disallowed counsel from acting both as class counsel and as counsel in related individual actions against the same defendants – whether the plaintiff in the individual actions is also the representative plaintiff in the class action,[23] merely a putative class member,[24] or even a class member who has opted out of the class.[25] In these cases, the courts have highlighted concerns related to counsel's duty of commitment to zealously represent class members, given their duties and interests with respect to their clients in the individual actions.

15. For example, in *Singh*, counsel sought to act for the same client both as representative plaintiff in a class action and in a related individual action. Glustein J. noted that the client's interests regarding what claims to pursue in the class action could be impacted by the individual action, a settlement of the individual action would likely require a release of the defendant which would affect the class action, and there was a significant risk of conflicting instructions from the client.[26] In such circumstances, the law firm could not simultaneously fulfill its duty of zealous advocacy to the plaintiff in the individual action and the class members in the class action.

16. Similarly, in *Persaud*, Perell J. did not permit counsel to act as class counsel while also acting for sixteen putative class members in related individual actions. In that case, the court also identified the risk of conflicting instructions, as well as risks that the firm could be incentivized to seek the highest settlement in the class proceeding at the expense of the individual actions.[27]

17. In *Vaeth*, Perell J. similarly identified a conflict based on the concern that, if a fixed pool of settlement funds existed, settlement in one action could leave fewer funds available to resolve

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[23] *Singh*.
[24] *Persaud*, at para. 165.
[25] *Vaeth v North American Palladium Ltd.*, 2016 ONSC 5015.
[26] *Singh*, at paras. 85-86, 89, 93.
[27] *Persaud*, at paras. 175-181.

the other actions and counsel would be forced to advance the interests of one client at the expense of the other.[28]

18. These risks that courts have recognized do not arise from plaintiffs' counsel's representation in both the Consolidated Proceeding and the Separated Proceeding.

19. Crucially, unlike the other cases, this is not a situation of counsel acting in both a class proceeding and a related individual action. Both the Consolidated Proceeding and the Separated Proceeding are proposed class actions. Accordingly, there is little risk of counsel being incentivized to settle one action at the expense of the other in order to obtain higher remuneration for themselves.

20. Importantly, in *Singh*, *Persaud*, and *Vaeth*, there was overlap between the plaintiffs in the various actions, in the sense that all of the plaintiffs in the individual actions were also putative class members. This circumstance alone created potential and, in some situations, actual conflicts. In this case, the Consolidated Proceeding and the Separated Proceeding are legally distinct in the sense that the allegations relate to different time periods, creating different putative classes based on when the class members were allegedly wronged. This fact substantially reduces any risk that the interests of class members in one proceeding will come into direct conflict with the interests of the others, thereby requiring counsel to favour one class over the other in their advice.

21. Further, while the class members may seek to adopt different strategies with respect to the different proceedings, this will not result in conflicting instructions to counsel on how to proceed in each individual proceeding.

22. Finally, it is significant that the defendant in the proceedings is the Attorney General of Canada. As a result, unlike with private defendants, there is not a risk that settlement in one

[28] *Vaeth*, at paras. 67-73.

proceeding will directly reduce the amount of money in the other proceeding by implicating the solvency of the defendant or exhausting the defendant's insurance.

23. For these reasons, the concerns related to the duty of commitment that the Ontario Superior Court has identified in the class actions context are not applicable to this case. Amicus agrees with plaintiffs' counsel that this situation is more closely analogous to a scenario where counsel represents different sub-classes in the same proceeding, rather than representing plaintiffs in both a class action and related individual actions.

24. One potential source of conflict that might arise from bifurcation is a risk that counsel may be incentivised to prioritize and devote their attention to the Consolidated Proceeding – where certification is not being contested, mediation is already being contemplated, and therefore a settlement may appear more likely – at the expense of proceeding expeditiously in the Separated Proceeding. Such a scenario, in which the Separated Proceeding would be placed on the "back burner", would clearly not be in the best interests of the class members in the Separated Proceeding.

25. However, Amicus is satisfied that safeguards already exist to prevent this scenario. Plaintiff's counsel point out that the Separated Proceeding is not being stayed or delayed as a result of bifurcation and the Crown has already agreed to an expedited determination of the certification motion. They explain that class counsel have instructions to proceed with the certification motion, regardless of the mediation of the Consolidated Proceeding. They have offered assurances about the conduct of the Separated Proceeding (including that the proposed representative plaintiff in the Separated Proceeding, Mr. Trout is motivated to vigorously advance the cause of the class members in the Separated Proceeding regardless of the outcome in

the Consolidated Proceeding and that they, too, will do so) and it will be salutary that the Court has noted those assurances and will keep them in mind as the matter proceeds.

26. Moreover, Amicus submits that any residual concerns in this regard can be adequately addressed by the Court imposing a timetable for the certification motion in the Separated Proceeding that ensures that those class members are not being forced to wait as a result of bifurcation.

27. Accordingly, Amicus submits that a sufficient basis does not exist to refuse bifurcation due to plaintiffs' counsel's proposed representation in both the Consolidated Proceeding and the Separated Proceeding. The Court may consider it appropriate to impose a timetable on the certification motion in the Separated Proceeding to ensure that it is not unduly delayed as a result of bifurcation, to the detriment of the class members.

PART III – AMICUS' RECOMMENDED COURSE OF ACTION

28. The Order Appointing Amicus provides that Amicus' mandate continues after the Courts' determination of the issue as to whether bifurcation of the proceeding into the Consolidated Proceeding and the Separated Proceeding would place the plaintiffs' counsel in an actual or potential conflict of interest, such that bifurcation should be refused or other court intervention should be warranted. Amicus remains available to provide any assistance that the Court may require.[29]

29. Should the parties in the Consolidated Proceeding reach a settlement, the Courts may wish to seek representations from Amicus at the hearing of the settlement approval motion. The Ontario Court of Appeal has recognized the desirability of involving amicus curiae to assist the

[29] Order of Mr. Justice Phelan and Madam Justice St-Louis dated June 10, 2021, subpara. 1(b).

court in reviewing settlement agreements and determining related issues, as such motions generally proceed unopposed.[30]

30. In this case, if a settlement is reached in the Consolidated Proceeding, it may be appropriate to have Amicus make submissions on the approval of the settlement, in order to ensure that no aspect of the settlement would prejudice the interests of the class members in the Separated Proceeding, whether advertently or inadvertently.

31. In the meantime, in Amicus' respectful view, the Consolidated Proceeding and the Separated Proceeding should be permitted to proceed to their respective resolutions, bifurcated from each other.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of June, 2021.

[30] *Smith Estate v. National Money Mart Company*, 2011 ONCA 233, at paras. 15-26.

SCHEDULE A

AUTHORITIES

1. *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39
2. *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235
3. *Persaud v. Talon International Inc.*, 2018 ONSC 5377
4. *Singh v. RBC Insurance Agency Ltd.*, 2020 ONSC 5368
5. *Smith Estate v. National Money Mart Company*, 2011 ONCA 233
6. *Vaeth v North American Palladium Ltd.*, 2016 ONSC 5015

MOUSHOOM et al.
Plaintiffs
ASSEMBLY OF FIRST NATIONS et al.
Plaintiffs

-and-

THE ATTORNEY GENERAL OF CANADA.
Defendant
HER MAJESTY THE QUEEN
Defendant

Court File Nos.: T-402-19/T-141-20

FEDERAL COURT
PROPOSED CLASS PROCEEDINGS

WRITTEN REPRESENTATIONS OF AMICUS CURIAE

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This is **Exhibit "R"** to the Affidavit of David Sterns, Affirmed remotely before me in the City of Toronto, in the Province of Ontario, on October 6, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration remotely

_____

Commissioner for taking Affidavit
(or as may be)

Georgia Elizabeth Scott-McLaren, a Commissioner, etc.
Province of Ontario, for
Sotos LLP, Barristers and Solicitors
Expires February 20, 2024

G12 =SUM(G4:G11)

SUMMARY	Start to May 31, 2023			Additional Fees to May 31, 2023 incurred by KK & Fasken in first quarter 2023			June 1 to August 31, 2023			TOTAL BY FIRM	
	Hours	Fees	Disbursements	Hours	Fees	Disbursements	Hours	Fees	Disbursements	Fees	Disbursements
Sotos LLP	7339.3	$ 4,116,386.00	$ 296,521.58				515.3	$ 337,877.50	$ 867.63	$ 4,454,263.50	$ 297,389.21
Miller Titerle	1483.4	$ 632,667.00	$ 53,995.47					$ 106,561.00		$ 739,228.00	$ 53,995.47
Kugler Kandestin	3008.27	$ 2,971,604.20	$ 74,616.28		$ 117,619.75		371.67	$ 263,012.50	$ 86,194.54	$ 3,352,236.45	$ 160,810.82
											$ -
Fasken	4081.12	$ 3,375,948.00	$ 59,181.00		$ 194,061.00			$ 438,931.00	$ 10,897.00	$ 4,008,940.00	$ 70,078.00
Nahwegahbow, Corbiere	4369.3	$ 3,010,527.00	$ 55,633.45				253.3	$ 182,580.00	$ 3,262.30	$ 3,193,107.00	$ 58,895.75
Strosberg	515.4	$ 477,103.00	$ 28,506.86				0	$ -		$ 477,103.00	$ 28,506.86
paid by canada* incl taxes			-$ 68,430.00							$ -	$ (68,430.00)
	20796.79	$ 14,584,235.20	$ 500,024.64		$ 311,680.75			$ 1,328,962.00	$ 101,221.47	**$ 16,224,877.95**	**$ 601,246.11**
										$ 16,224,877.95	$ 601,246.11

KK Fees in 1st quarter 2023	
2020: W Colish rate increase	$ 2,715.00
2021: Increased hours spent	$ 117,619.75
Faskens:	
1st quarter 2023 additional hours spent	$ 194,061.00

SUMMARY | Sotos | KK | MT | NCG | Fasken | Strosberg | Disb

ME	YEAR OF CALL	2019			2020			2021			2022			January 1 to May 31,2023			June 1 to August 31, 2023			Total Hours	Total Fees
WYER/PROFESSIONAL		Hours	Rate	Total	Hours	Rate	Total	Hours	Rate	Total	Hours	Rate	Total	Hours	Rate	Total	Hours	Rate	Total		
vid Sterns	1992	314.8	$875.00	$ 275,450.00	227.4	$900.00	$ 204,660.00	534.6	$ 900.00	$481,140.00	817.6	$ 950.00	$ 776,720.00	227.7	$ 975.00	$222,007.50	158.2	$ 975.00	$154,245.00	2052.6	$ 2,114,222.50
hsen Seddigh	2016	768.6	$372.83	$ 286,560.00	735.1	$400.00	$ 294,040.00	834.3	$ 435.00	$362,920.50	1222.7	$ 475.65	$ 581,575.00	515.5	$ 550.00	$283,525.00	305.9	$ 550.00	$168,245.00	3866.6	$ 1,976,865.50
tricia Julian Son (Law Clerk)								15.9	$ 175.00	$ 2,782.50	255.2	$ 175.00	$ 44,660.00	32.6	$ 250.00	$ 8,150.00	6.8	$ 250.00	$ 1,700.00	277.9	$ 57,292.50
il Abdulla	2021							19.1	$ 350.00	$ 6,685.00	37.3	$ 350.00	$ 13,055.00	26.9	$ 480.00	$ 12,912.00				56.4	$ 32,652.00
uis Sokolov	1993	7.8	$875.00	$ 6,825.00	0.3	$900.00	$ 270.00	4.1	$ 900.00	$ 3,690.00	1.3	$ 950.00	$ 1,235.00				0.4	$ 975.00	$ 390.00	13.9	$ 12,410.00
nathan Schachter	2013	146.1	$420.00	$ 61,362.00	30.1	$475.00	$ 14,297.50	10.1	$ 525.00	$ 5,302.50										186.3	$ 80,962.00
na Thompson-Amadei (stu)	2019	36.5	$200.00	$ 7,300.00			$ -	0.3	$ 350.00	$ 105.00	0.7	$ 375.00	$ 262.50							37.5	$ 7,667.50
ren Whibley (Law Clerk)		8.8	$275.00	$ 2,420.00	10.9	$275.00	$ 2,997.50	18.5	$ 275.00	$ 5,087.50	31.2	$ 275.00	$ 8,580.00	40.1	$ 350.00	$ 14,035.00	24.1	$ 350.00	$ 8,435.00	93.5	$ 41,555.00
rah Alleyne (Law Clerk)		15.1	$175.00	$ 2,642.50	16.3	$175.00	$ 2,852.50	0.5	$ 175.00	$ 87.50										31.9	$ 5,582.50
sia Poynter	2016	12.7	$370.00	$ 4,699.00	14.6	$390.00	$ 5,694.00													27.3	$ 10,393.00
ren Baker (stu/lawyer)		0.3	$200.00	$ 60.00			$ -	27	$ 350.00	$ 9,450.00										27.3	$ 9,510.00
n-Marc Leclerc	2001				0.6	$800.00	$ 480.00													0.6	$ 480.00
rick Liao (stu)					6	$200.00	$ 1,200.00													21.4	$ 1,200.00
ily Marris																	15.4	$ 250.00	$ 3,850.00	15.4	$ 3,850.00
n Yiokaris	2000							0.2	$ 695.00	$ 139.00	1.9	$ 710.00	$ 1,349.00							2.1	$ 1,488.00
an McCabe (stu)								21.9	$ 200.00	$ 4,380.00	29.2	$ 200.00	$ 5,840.00							51.1	$ 10,220.00
nkhuri Malik (stu)																	4.5	$ 225.00	$ 1,012.50	4.5	$ 1,012.50
da Robinson											13.8	$ 175.00	$ 2,415.00							13.8	$ 2,415.00
rienne Boudreau	2009										0.4	$ 595.00	$ 238.00							0.4	$ 238.00
an McCabe	2022										0.4	$ 350.00	$ 140.00							0.4	$ 140.00
uya Dabiran-Zohoory											198.1	$ 375.00	$ 74,287.50							198.1	$ 74,287.50
price Pilla (stu)											6	$ 200.00	$ 1,200.00							6	$ 1,200.00
ria Robles (stu)											23.6	$ 200.00	$ 4,720.00	6.2	$ 225.00	$ 1,395.00				23.6	$ 6,115.00
n Houston (stu)											11.4	$ 200.00	$ 2,280.00	1	$ 225.00	$ 225.00				11.4	$ 2,505.00
tal Hours / Fees by Year		**1310.7**		**$ 647,318.50**	**1041.3**		**$ 526,491.50**	**1486.5**		**$881,769.50**	**2650.8**		**$ 1,518,557.00**	**850**		**$542,249.50**	**515.3**		**$337,877.50**	**7004.6**	**$ 4,454,263.50**
tal Fees Hours / Fees																				**7020**	**$ 4,454,263.50**
T on Fees (13%) - ESTIMATE																					
nual from acumin		1310.7		$ 647,318.50	1041.3		$ 526,491.50	1486.5		$881,769.50	2650.8		1518557	810.3		$516,419.50	515.3		$337,877.50		
TAL FEES + HSTv- ESTIMATE																					

SUMMARY | Sotos | KK | MT | NCG | Fasken | Strosberg | Disb | +

gler Kandestin
L COUNSEL TIME — ON- Reserve Indigenous Class Actions

ME	YEAR OF CALL																									
WYER/PROFESSIONAL		2019			2020			2021			2022			January 1 to May 31, 2023			June 1 to August 31, 2023			Total Hours	Total Fees				
		Hours	Rate	Total	Hours	Rate	Total	Hours	Rate	Total	Hours	Rate	Total	Hours	Rate	Total	Hours	Rate	Total						
erre Boivin	1989	157.85	$ 600.00	$ 94,710.00	191.1	$ 660.00	$ 126,126.00	237.75	$ 660.00	$ 156,915.00	166	$ 800.00	$ 132,800.00	7	$ 800.00	$ 5,600.00	11.5	$ 800.00	$ 9,200.00	598.2	$ 525,351.00					
bert Kugler	2001	406.5	$ 600.00	$ 243,900.00	377.25	$ 660.00	$ 248,985.00	569.25	$ 660.00	$ 375,705.00	1018.5	$ 800.00	$ 814,800.00	244.75	$ 800.00	$ 195,800.00	273	$ 800.00	$ 218,400.00	1626	$ 2,097,590.00					
illiam Colish	2013	287.12	$ 350.00	$ 100,492.00	163.87	$ 385.00	$ 63,089.95	230.5	$ 415.00	$ 95,657.50	505.74	$ 500.00	$ 252,870.00	115.78	$ 500.00	$ 57,890.00	54.48	$ 500.00	$ 27,240.00	735.97	$ 597,239.45					
a Richard	2013	6.7	$ 350.00	$ 2,345.00	0.75	$ 385.00	$ 288.75													7.45	$ 2,633.75					
remie Longpre	2016	5.6	$ 300.00	$ 1,680.00				6.5	$ 300.00	$ 1,950.00										12.1	$ 3,630.00					
exandre Paquette-Dénommé																	32.69	$ 250.00	$ 8,172.50	$ 32.69	$ 8,172.50					
tal Hours / Fees by Year		**863.77**		**$ 443,127.00**	**732.97**		**$ 438,489.70**	**1044**		**$ 630,227.50**	**1690.24**		**$ 1,200,470.00**	**367.53**		**$ 259,290.00**	**371.67**		**$ 263,012.50**	**3012.41**	**$ 3,234,616.70**					
tal Fees Hours / Fees																				**3012.41**	**$ 3,234,616.70**					
ST on Fees (5%)													**$ 60,023.50**			**$ 9,755.75**			**$ 13,150.62**		**$ 161,730.83**					
ST on Fees (9.975%)													**$ 119,746.88**			**$ 19,462.72**			**$ 26,235.50**		**$ 322,653.01**					
OTAL FEES + HSTv- ESTIMATE																					**$ 3,719,000.54**					

ditional time for 2020 and 2021 117619.8

all time to May 31st

SUMMARY | Sotos | KK | MT | NCG | Fasken | Strosberg | Disb | +

Miller Titerle																								
ALL COUNSEL TIME		ON- Reserve Indigenous Class Actions																						
Start to August 31, 2023																								
TIME	YEAR OF CALL																							
LAWYER/PROFESSIONAL		2019			2020			2021			2022			January 1 to May 31, 2023			June 1 to August 31, 2023							
		Hours	Rate	Total	Hours	Rate	Total	Hours	Rate	Total	Hours	Rate	Total	Hours	Rate	Total	Hours	Rate	Total	Total Hou	Total Fees			
Joelle Walker	2004	62.6	$ 450.00	$ 28,170.00	138.4	$ 470.00	$ 65,048.00	305.3	$ 500.00	$152,650.00	413.5	$ 525.00	$ 217,087.50	106.6	$550.00	$ 58,630.00			$ 106,561.00	1026.4	$ 628,146.50			
Erin Reimer	2018	77.1	$ 280.00	$ 357.10	130.8	$ 310.00	$ 40,548.00	6.6	$ 365.00	$ 2,409.00	32.5	$ 400.00	$ 13,000.00	1.3	$435.00	$ 565.50				248.3	$ 56,879.60			
Allison Sproule	2022							9.6	$ 290.00	$ 2,784.00	114.6	$ 290.00	$ 33,234.00	2.2	$360.00	$ 792.00				126.4	$ 36,810.00			
Hannah Roche											40.2	$ 330.00	$ 13,266.00							40.2	$ 13,266.00			
Tanny Nguyen		2	$ 160.00	$ 162.00	2.6		$ 2.60			$ -			$ -							4.6	$ 164.60			
Yvonne Choi		5	$ 160.00	$ 165.00			$ -			$ -			$ -							5	$ 165.00			
Braden Lauer					2	$ 330.00	$ 332.00			$ -			$ -							2	$ 332.00			
James Struthers					0.3	$ 310.00	$ 310.30			$ -			$ -							0.3	$ 310.30			
Leah George-Wilson	2015				2.6	$ 180.00	$ 182.60			$ -			$ -							2.6	$ 182.60			
Yvan Larocque		2.2	$ 300.00	$ 302.20	2	$ 330.00	$ 332.00			$ -			$ -							4.2	$ 634.20			
Linette Lubke	2021							0.6	$ 310.00	$ 186.00	3.3	$ 350.00	$ 1,155.00							3.9	$ 1,341.00			
Josh Regnier											0.3	$ 290.00	$ 87.00							0.3	$ 87.00			
Cameron Pollock											12.4	$ 310.00	$ 322.40							12.4	$ 322.40			
Jessica Jacobs											4.6	$ 290.00	$ 294.60							4.6	$ 294.60			
Katie Curry											2.2	$ 290.00	$ 292.20							2.2	$ 292.20			
Total Hours / Fees by Year		148.9		$ 29,156.30	278.7		$ 106,755.50	322.1		$158,029.00	623.6		$ 278,738.70	110.1		$ 59,987.50	0		$ 106,561.00	1483.4	$ 739,228.00			
Total Fees Hours / Fees																				1483.4	$ 739,228.00			
GST on Fees (5%)																					$ 36,961.40			
PST on Fees (7%)																					$ 51,745.96			
TOTAL FEES + TAXES																					$ 827,935.36			

Nahwegahbow, Corbiere

ALL COUNSEL TIME		ON- Reserve Indigenous Class Actions																							
Start to August 31, 2023																									
TIME	YEAR OF CALL	2019				2020				2021				2022				January 1 to May 31, 2023				June 1 to August 28, 2023				Total Hours	Total Fees
LAWYER/PROFESSIONAL		Hours	Rate	Total		Hours	Rate	Total		Hours	Rate	Total		Hours	Rate	Total		Hours	Rate	Total		Hours	Rate	Total			
Dianne Corbiere - NCG	1998	18.1	700	$ 12,670.00		338.1	$ 700.00	$ 236,670.00		638.3	$ 700.00	$ 446,810.00		1362.1	$ 779.22	$ 1,061,370.00		230	$800.00	$ 184,000.00		153	$800.00	$ 122,400.00		2586.6	$ 2,063,920.00
Karen Osachoff - NCG	2012	0	550	$ -		251.4	$ 550.00	$ 138,270.00		472.1	$ 550.00	$ 259,655.00		643.6	$ 582.07	$ 374,620.00		150.6	$600.00	$ 90,360.00		100.3	$600.00	$ 60,180.00		1517.7	$ 923,085.00
David Nahwegahbow	1982	20	900	$ 18,000.00		186.1	$ 900.00	$ 167,490.00						9.5	$ 900.00	$ 8,550.00										215.6	$ 194,040.00
Scott Robertson	2007	4.8	400	$ 1,920.00			$ 400.00																			4.8	$ 1,920.00
Stephen O'Neill				$ -		6	$ 600.00	$ 3,600.00																		6	$ 3,600.00
Thomas Milne				$ -		13.4	$ 250.00	$ 3,350.00																		13.4	$ 3,350.00
Alain Bartleman				$ -		0.6	$ 250.00	$ 150.00																		0.6	$ 150.00
Senior Law Clerk				$ -		0.7	$ 60.00	$ 42.00						16	$ 80.00	$ 1,280.00										16.7	$ 1,322.00
Daniel McCoy	2019			$ -						4.7	$ 225.00	$ 1,057.50														4.7	$ 1,057.50
Laura Sharp														1.7	$ 275.00	$ 467.50										1.7	$ 467.50
Articling Student																		1.5	$130.00	$ 195.00						1.5	$ 195.00
Total Fees Hours / Fees		**42.9**		**$ 32,590.00**		**796.3**		**$ 549,572.00**		**1115.1**		**$ 707,522.50**		**2032.9**		**$ 1,446,287.50**		**382.1**		**$ 274,555.00**		**253.3**		**$ 182,580.00**		**4369.3**	**$ 3,193,107.00**
																										4369.3	**$ 3,193,107.00**
HST on Fees (13%) - ESTIMATE																											
TOTAL FEES + HSTv- ESTIMATE																											

SUMMARY | Sotos | KK | MT | NCG | Fasken | Strosberg | Disb | +

FASKEN MARTINEAU DU MOULIN LLP

ALL COUNSEL TIME

to August 31, 2023

TIME	YEAR OF CALL	2020			2021			2022			January 1 to May 31, 2023			June 1 to August 31, 2023				
LAWYER/PROFESSIONAL		**Hours**	**Rate**	**Total**	**Hours**	**Rate**	**Total**	**Hours**	**Rate**	**Total**	**Hours**	**Rate**	**Total**	**Hours**	**Rate**	**Total**	**Total Hours**	**Total Fees**
Peter Mantas	1994	286.3	$ 725.00	$207,568.00	874.2	$ 775.00	$ 677,505.00	540.1	$ 850.00	$ 459,085.00			$ 79,600.00			$ 3,800.00	1700.6	$ 1,427,558.00
Geoff Cowper	1982	20.2	$ 895.00	$ 18,079.00	11	$ 925.00	$ 10,175.00	709.3	$ 975.00	$ 691,568.00			$ 226,170.00			$ 247,695.00	740.5	$ 1,193,687.00
Nathan Surkan	2020	90.1	$ 355.00	$ 31,986.00	195.1	$ 395.00	$ 127,235.00	900.1	$ 455.00	$ 409,546.00			$ 43,117.00			$ 45,784.00	1185.3	$ 657,668.00
Claire Vachon	1995				0.2	$ 950.00	$ 190.00			$ -							0.2	$ 190.00
Alexandra Mitretodis	2013				0.8	$ 515.00	$ 412.00	39.6	$ 550.00	$ 21,780.00							40.4	$ 22,192.00
Christopher Little	2022			$ 105.00	18.6	$ 235.00	$ 4,371.00			$ 288.00							18.6	$ 4,764.00
Gabrielle Cyr	2019			$ 6,283.00	0.6	$ 360.00	$ 216.00	189	$ 415.00	$ 78,435.00			$ 7,275.00				189.6	$ 92,209.00
Robin Roddey	1996				2.7	$ 975.00	$ 2,633.00			$ -							2.7	$ 2,633.00
Sophie Arsenault	2015				0.2	$ 400.00	$ 80.00			$ -							0.2	$ 80.00
Nicole Maylor (stu)					46	$ 300.00	$ 13,800.00	37.6	$ 325.00	$ 12,220.00							83.6	$ 26,020.00
Alan Schwartz	1970							17.4	$ 1,400.00	$ 24,360.00							17.4	$ 24,360.00
Andrew Borrell	1993							0.6	$ 750.00	$ 450.00						$ 1,430.00	0.6	$ 1,880.00
Courtney Gibbons	2021							28.92	$ 395.00	$ 11,423.00							28.92	$ 11,423.00
Elise Kohno	2020							1.1	$ 455.00	$ 501.00							1.1	$ 501.00
Helen Low	1989							0.6	$ 825.00	$ 495.00							0.6	$ 495.00
Jenny Mboutsiadis	2001							70.8	$ 1,125.00	$ 79,650.00							70.8	$ 79,650.00
Nicholas Carmichel													$ 378.00			$ 680.00		$ 1,058.00
Vivian Ho													$ 1,843.00					$ 1,843.00
Emily Hubling													$ 7,280.00			$ 45,920.00		$ 53,200.00
Rachel Hung													$ 941.00			$ 6,336.00		$ 7,277.00
Mahsa Pezeshki													$ 225.00			$ 4,095.00		$ 4,320.00
Alessandra Puopolo										$ 1,788.00			$ 1,440.00					$ 3,228.00
Tina Sun										$ 2,503.00								$ 2,503.00
Vera Toppings										$ 31,620.00			$ 31,730.00			$ 49,305.00		$ 112,655.00
Corinna Weigl													$ 8,875.00			$ 17,750.00		$ 26,625.00
Charlotte Chamberlain				$ 8,288.00														$ 8,288.00
Keira Boyd										$ 3,060.00								$ 3,060.00
Carolyn Flanagan										$ 1,802.00								$ 1,802.00

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X	Y
29	Tina Sun													$ 2,503.00											$ 2,503.00
30	Vera Toppings													$ 31,620.00				$ 31,730.00				$ 49,305.00			$ 112,655.00
31	Corinna Weigl																	$ 8,875.00				$ 17,750.00			$ 26,625.00
32	Charlotte Chamberlain					$ 8,288.00																			$ 8,288.00
33	Keira Boyd													$ 3,060.00											$ 3,060.00
34	Carolyn Flanagan													$ 1,802.00											$ 1,802.00
35	Julien Frigon													$ 4,428.00											$ 4,428.00
36	Peter Mangsley													$ 1,326.00											$ 1,326.00
37	Martin Stanley													$ 6,800.00											$ 6,800.00
38	Iryna Pomomarenko													$ 158.00											$ 158.00
39	Katrina Purcell													$ 5,395.00											$ 5,395.00
40	Mohena Singh																	$ 5,555.00							$ 5,555.00
41	Mitchell Thaw													$ 1,125.00								$ 14,500.00			$ 15,625.00
42	Benedict Turner													$ 1,950.00											$ 1,950.00
43	Montana Licari																	$ 842.00							$ 842.00
44	diff													-3				-2				-1			-6
45	**Total Hours / Fees by Year**			**396.6**		**$ 272,309.00**		**1149.4**		**$ 836,617.00**		**2535.12**		**$ 1,851,753.00**		**0**		**$ 415,269.00**		**0**		**$ 437,294.00**		**4081.12**	**$ 3,813,242.00**
46	**Total Fees Hours / Fees**																							**4081.12**	**$ 3,813,242.00**
47	**HST on Fees (13%) - ESTIMATE**																								
48																									
49	**TOTAL FEES + HSTv- ESTIMATE**																								
50																									
51																									
52																									
53	additional time for 1st qua	$194,061.00																							
54																									
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ON-RESERVE

COMBINED REPORT

FIRST NATIONS: MOUSHOOM/ AFN

		SOTOS	KUGLER KANDESTIN	FASKENS	NCG - CORBIERE	MILLER TITE	Strosberg	TOTAL ALL FIRMS
DISBURSEMENTS								
Advertising/Press Releases - Court Approved Notices		$ 22,606.00						
Agency Fees							$ 267.37	
Agency - Fees Paid for Commissioning affidavits		$ 706.04			$ 85.00			
Bank Charges/Wiring Fees		$ 30.00						
Conference Calls		$ 2,110.81			$ 442.77			
Courier/FedEx		$ 306.28		$ 26.00	$ 34.60	$ 60.51	$ 155.99	
Court filing fees	(HST exempt)	$ 200.00	$ 163.00					
Expert Fees		$ 138,878.90	$ 31,073.76	$ 6,090.00	$ 5,640.00			
Honorariums Paid to Elders					$ 600.00			
Meals		$ 5,082.07		$ 4,503.00				
Miscellaneous - Telephone, class rep travel and communications, parking, photocopies, taxis			$ 8,996.18					
On-Line Court Search						$ 20.16		
Pacer searches		$ 16.27						
Photocopies - InHouse		$ 843.25			$ 341.25		$ 423.75	
Photocopies - External		$ 852.54						
Photocpies - Binding/Laser/ Colour/Tabs				$ 3,404.00				
Postage		$ 142.00						
Press Releases - CNW		$ 6,842.55						
Process Servers / Bailiffs		$ 86.60	$ 583.47				$ 312.50	
Terida-AFN Registration System							$ 22,143.75	
Telephone				$ 239.00	$ 110.40			
Quick Law/ Research		$ 931.00		$ 572.00				
Research/ Carswell				$ 298.00				
SOQUIJ			$ 18.60					

	A	B	D	F	G	H	I	J	K
49	SOQUIJ			$ 18.60					
51	Transaction Levy					$ 100.00			
52	Transcription Fees		$ 394.50						
53	Translation Services (including Court ordered Indigenous translations)		$ 44,807.06	$ 2,768.80					
54	Travel expenses		$ 59,883.31	$ 31,012.47	$ 44,049.00	$ 48,279.43	$ 53,914.80	$ 4,588.50	
55	Videoconferencing							$ 615.00	
56	Website/Facebook/Google ads		$ 11,802.40						
57			**$ 296,521.58**	**$ 74,616.28**	**$ 59,181.00**	**$ 55,633.45**	**$ 53,995.47**	**$ 28,506.86**	**$ 568,454.64**
58	GST/QST			$ 11,173.79					**$ 11,173.79**
59	HST on Disbursements (13%)		$ 38,521.81		$ 7,693.53	$ 7,232.35	$ 7,510.63	$ 230.70	$ 61,189.02
60									
62	Less Amounts Paid by Canada (Notice advertisement and translation)		$ (68,430.00)						
63	**TOTAL DISBURSEMENTS & HST**		**$ 266,613.39**	**$ 85,790.07**	**$ 66,874.53**	**$ 62,865.80**	**$ 61,506.10**	**$ 28,737.56**	**$ 640,817.45**
65									
66	**Disbursements from June 1 to August 31, 2023**								
67	**Additional Costs to May 31, 2023**				$ 4,628.00				
68	Quick Law and Website		$ 867.63						
69	Travel					$ 3,734.80			
70					$ 6,269.00				
71	Non-taxable items			$ 150.00					
72	taxable items			$ 86,046.54					
73									
74	**TOTAL**		**$ 867.63**	**$ 86,196.54**	**$ 10,897.00**	**$ 3,734.80**			**$ 101,695.97**
75	**GRAND TOTAL (no tax) to Aug 31 2023**		**$ 228,959.21**	**$ 160,812.82**	**$ 70,078.00**	**$ 59,368.25**			**$ 519,218.28**
76									
77									
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84									

This is **Exhibit "S"** to the Affidavit of David Sterns, Affirmed remotely before me in the City of Toronto, in the Province of Ontario, on October 6, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration remotely

Commissioner for taking Affidavit
(or as may be)

Georgia Elizabeth Scott-McLaren, a Commissioner, etc.
Province of Ontario, for
Sotos LLP, Barristers and Solicitors
Expires February 20, 2024

How Much Does An Employment Lawyer Cost?

The cost of an employment lawyer depends on the type of matter and the experience of the lawyer. Minimal risk, commonplace matters like typical wrongful dismissals can be conducted via an accessible contingency fee arrangement, which means the client only pays a fee upon successful completion of the services and this is usually calculated as a percentage of the gain realized for the client. On the other hand, higher risk, more complicated matters which are appropriate for hourly fees such as defending against serious just cause allegations can be expensive if sophisticated counsel is needed and there could be a lengthy trial.

In any event, it is important to remember that speaking to a lawyer to understand your rights is never cost-prohibitive.

First Consultations

Most employment law firms that focus on employees (i.e., employee-side or plaintiff-side law firms) provide free consultations.

Some law firms do charge a small, fixed fee for a one-hour first consultation, and in that case, the consultation fee will depend on the hourly rate of the lawyer conducting the first consultation. However, it will usually be no more than $400.

At the end of a first consultation, if the lawyer suggests that he or would take the case, the lawyer will tell the client how long the matter will likely take, all about the risks involved, and the estimated costs. The lawyer will also tell the client what kind of cost structure is right.

There are three distinct kinds of cost structures for hiring an employment lawyer:

Hourly Rate

In Canada, in our experience, the range of employment lawyers' hourly rates is $300 to $1500 per hour. Junior lawyers who only recently started practicing the law are on the low end while long-standing lawyers with decades of experience and an earned reputation are on the high end.

In addition, the region of the lawyer also may decide how much an employment lawyer charges. Larger city lawyers usually charge more than smaller city lawyers. Even among the big cities, there is a disparity in costs. Toronto lawyers normally charge more than Ottawa lawyers, for example. All things being equal, a 10-year employment lawyer in downtown Toronto is typically going to cost about 25% more than an Ottawa lawyer with the exact same vintage.

Court File Nos. T-402-19 / T-141-20 / T-1120-21

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige), JONAVON JOSEPH MEAWASIGE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo, CAROLYN BUFFALO, and DICK EUGENE JACKSON also known as RICHARD JACKSON

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

WRITTEN REPRESENTATIONS
(Motion for Class Counsel Fee Approval, returnable October 27, 2023)

October 6, 2023

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Lawyers for the Defendant

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OVERVIEW

1. On this motion, class counsel seek approval of fees of $80 million (plus disbursements and taxes) for five law firms for two class actions spanning almost five years.

2. Class counsel have exceeded all expectations, as evidenced by the historic quantum of the settlement agreement ($23.34 billion) and by the lack of opposition or opt-out of any class member thus far. Beyond its exceptional quantum though, the settlement contains many unique provisions for the benefit and protection of the class which are the result of steadfast and skilled negotiation by class counsel guided by First Nations leadership.

3. The fee request honours a negotiated stipulation early in the proceedings between class counsel and the Assembly of First Nations ("**AFN**"), capping class counsel fees at this amount for a settlement before trial.

4. The AFN is a plaintiff with a unique history in Indigenous class actions. Informed by lessons learned in prior cases, it sought to impose a cap on fees to ensure that any fee request by counsel in a case in which it was a party would not be seen as unseemly or unreasonable. Counsel accepted this cap out of respect for the AFN. Given that context, a fee request within the cap ought to be presumptively valid, just as the Court treats a fee agreement with less sophisticated representative plaintiffs as presumptively valid. It should not be disturbed unless it is unfair or unreasonable.

5. This cap on fees was agreed to at a time when the course of the actions was unknown, when settlement was far from certain, and when the quantum of the settlement ultimately achieved would have seemed unfathomable.

6. The path to settlement was extraordinarily complex given the breadth and scope of the class and the need to satisfy the Court, the Canadian Human Rights Tribunal ("**CHRT**"), and the parties to the CHRT proceeding. Negotiations came to a halt twice. Settlement at times appeared unattainable. Protracted litigation was always an explicit alternative if the parties failed to arrive at an adequate settlement.

7. But for the cap, class counsel would have sought significantly higher fees on this motion in light of the extraordinary result achieved, the complexity of the case, and the unique risks anticipated at the commencement of the case.

8. The jurisprudence has made it clear that risk is to be assessed at the commencement of the case, not in hindsight. At that time, the cap was an amount deemed reasonable by a sophisticated First Nations plaintiff, when many of the risk factors were unknown and when the quantum of the settlement ultimately reached was likely beyond its most optimistic expectations.

9. While Canada has the right under the settlement agreement to oppose the fee request, its burden is to demonstrate why the fee request of $80 million is either unseemly or outside the zone of reasonableness so as to displace the presumptive validity.

10. It is neither. The fee requested represents a minute fraction (0.35%) of the amount recovered, and is within the range of multipliers on docketed fees recently approved by this Court in smaller, simpler, less protracted, and less risky class actions. For example, the requested quantum of fees is much less than was awarded in the Indian Residential Schools Settlement some 17 years ago, despite the quantum of this settlement being four times

larger and the terms of the settlement being more complex, more culturally-sensitive, and more favourable to the class.

11. In light of all the factors identified by the governing caselaw, it cannot be said that the fee request is unreasonable, unfair, or unseemly. The fees should be approved.

PART I – THE FACTS

12. This motion is brought after the settlement approval motion hearing scheduled for October 23, 2023. This motion is conditional on the Court's approval of the Final Settlement Agreement of April 19, 2023 ("**FSA**").

13. The substantive and procedural background of these class proceedings is fully canvassed in the settlement approval motion. The following paragraphs provide a summary of some of the facts relevant to this motion.

A. Procedural History of the Class Actions

14. These proceedings started with two underlying actions:

(a) The "**Moushoom Action**": The action commenced on March 4, 2019, with Xavier Moushoom (with the later addition of Jeremy Meawasige, and Jonavon Joseph Meawasige as plaintiffs), bearing court file number T-402-19. The Moushoom Action was filed first, with Sotos LLP, Kugler Kandestin LLP, and Miller Titerle + Company acting for the plaintiffs.

(b) The "**AFN Action**": The action commenced on January 28, 2020, with the AFN (and later addition of Noah Buffalo-Jackson, Carolyn Buffalo, Dick Eugene

Jackson, Ashley Dawn Louise Bach, Karen Osachoff, and Melissa Walterson as plaintiffs), bearing court file number T-141-20. The AFN Action was filed second, with Nahwegahbow, Corbiere and Fasken LLP acting for the plaintiffs.

15. From the beginning, the Moushoom Action advanced two sets of claims over a more than 30 year class period, namely:

(a) On-reserve child welfare claims, since April 1, 1991; and

(b) Essential services (Jordan's Principle) claims, since back to April 1, 1991.

16. The Moushoom Action and the AFN Action were competing overlapping claims. After several months of negotiations, the plaintiffs and their respective counsel were able to avoid a public carriage dispute and reached agreement to collaborate as a unified front in the best interests of the class.[1] The terms of that consortium agreement form the basis of the fees requested, as further described below.

17. Canada consented to *partial* certification. At that time, it did not consent to certification on behalf of the following class members:[2]

Class Members	Time Period
Jordan's Class	April 1, 1991 – December 11, 2007
Family members of Jordan's Class	April 1, 1991 – December 11, 2007

18. Canada conditioned its consent on the plaintiffs' removal of the above class members from the consolidated proceeding and the separate prosecution of their claims. Therefore, the

[1] Affidavit of David Sterns sworn October 6, 2023 ("**Sterns Affidavit**") at para 13, Motion Record ("**MR**"), Tab 9.
[2] Sterns Affidavit at para 23, MR, Tab 9.

plaintiffs brought a motion to consolidate the parts of the claims that were the subject of partial consent, and to bifurcate the claims that Canada was contesting.[3]

19. The Federal Court had concerns about the proposed bifurcation, and in particular wondered why all of the claims were not being addressed together. The simple reason was that Canada refused to do so. The Court appointed an *amicus*, who filed a brief supporting the proposed motion as in the best interests of the class.[4]

20. After a lengthy process, Madam Justice St-Louis granted the motion. The Moushoom Action and the AFN Action were joined into a "**Consolidated Action**", excluding the essential service claims listed above. The Consolidated Action was certified on consent on November 26, 2021.[5]

21. Meanwhile, Madam Justice St-Louis ordered that the excluded claims be separately prosecuted, granting leave to Zacheus Joseph Trout and the AFN to advance those claims as part of a fresh action.[6] Accordingly, on July 16, 2021, Mr. Trout and the AFN filed Court File No. T-1120-21 ("**Trout Action**").[7]

22. Mr. Trout sought to represent class members, like his late children and the late Jordan River Anderson, who had faced a delay, denial, or gap in the receipt of an essential service for which the class members had a confirmed need between April 1, 1991 and December 11,

[3] Sterns Affidavit at para 24, MR, Tab 9.
[4] Sterns Affidavit at paras 25-26, MR, Tab 9.
[5] Sterns Affidavit at paras 22, 27-28, MR, Tab 9.
[6] Sterns Affidavit at paras 27, MR, Tab 9.
[7] Sterns Affidavit at paras 1(b), 27, MR, Tab 9.

2007. All these children were excluded from the complaint before the CHRT described below.

23. The order of Madam Justice St-Louis expressly preserved Canada's right to contest the Trout Action:

> 10. THIS COURT ORDERS that this Order is **without prejudice to the defendant's rights to contest certification and defend against the [Trout Action]**, subject to paragraph 8 of this Order. [emphasis added][8]

24. Canada challenged the Trout Action. The claims of children and families covered by that action were therefore not part of any negotiations until shortly before the parties reached agreement in principle on the settlement of the Consolidated Action in late December 2021.[9] The negotiations are further described below.

25. Toward the end, Canada consented to the certification of the Trout Action, which Madam Justice Aylen granted on February 11, 2022.[10] Upon certification of each of these class actions, the Court appointed all five law firms as class counsel.

B. Interrelationship with the CHRT Proceeding

26. The Consolidated Action partly overlaps with a proceeding before the CHRT, where the AFN is a co-complainant (the "**CHRT Proceeding**"). In 2007, the AFN, and the First Nations Child and Family Caring Society of Canada (the "**Caring Society**") filed a

[8] Order of Madam Justice St-Louis dated July 7, 2021.
[9] Sterns Affidavit at paras 29, 95, 99-100, MR, Tab 9.
[10] Order of Madam Justice Aylen dated February 11, 2022.

complaint with the Canadian Human Rights Commission against Canada.[11] On October 14, 2008, the Commission referred this complaint to the CHRT.[12]

27. Class counsel law firm member, Nahwegahbow, Corbiere, was lead counsel for the AFN in the CHRT Proceeding from the beginning of the complaint in 2007, investing significant time and resources in the CHRT Proceeding and then these class actions over the course of 16 years.[13]

28. At the hearing of the CHRT Proceedings in 2014, Canada opposed any entitlement to compensation on the basis that it discriminated against First Nations children and families.[14] In its closing submissions before the CHRT, Canada stated, amongst other things:

> 238. The evidence before the Tribunal is insufficient to award the requested statutory maximum under special compensation for each child removed from their home since 2006.
>
> 239. **This request is fundamentally flawed as it depends on the unproven premise that all these children were removed from their homes because of the Respondent's funding practices**. To accept such an assertion requires a finding that had there been adequate/equal funding, no child would have been removed from his or her home. **This bare assertion is unsupported in the evidence** and overlooks the complex nature of the factors that lead to a child being removed from their home. The Complainants themselves have acknowledged that removal from the home is a valid approach in some cases to ensure the well being of a child. [emphasis added][15]

[11] Sterns Affidavit at para 32, MR, Tab 9.
[12] Sterns Affidavit at para 33, MR, Tab 9.
[13] Affidavit of Dianne Corbiere affirmed October 6, 2023 ("**Corbiere Affidavit**") at para 21, MR, Tab 8.
[14] Sterns Affidavit at para 35, MR, Tab 9.
[15] Canada's Submissions to the CHRT on Merits, Exhibit G to the Sterns Affidavit, MR, Tab 9.

29. The CHRT rendered its decision on the merits of the CHRT Complaint on January 26, 2016 (the "**Merits Decision**").[16] The CHRT found that Canada had discriminated against First Nations children and families on reserves and in the Yukon by its underfunding of child and family services under the FNCFS Program and by Canada's prohibitively restrictive interpretation of Jordan's Principle.

30. The Merits Decision did not decide the issue of remedy and adjourned that question until some three years later. In April 2019, after the Moushoom Action had already been filed, the CHRT returned to the question of remedy.[17]

31. Canada made further submissions to the CHRT, opposing any entitlement to individual compensation.[18] Canada did point to the Moushoom Action as a preferable forum to determine the class members' compensatory rights, if any, but not as a place where Canada had any genuine intention of settlement. To the contrary, Canada's submissions stated:

> 29. [The Moushoom Action] will determine **whether** the individuals harmed by the discrimination identified in this complaint are entitled to compensation and will do so with the benefit of the robust powers granted to courts hearing class actions. [emphasis added][19]

32. By that time, Canada had fought the CHRT proceeding for over 12 years.

33. In September 2019, the CHRT rejected Canada's arguments against compensation and found that the First Nations children and their caregiving parents and grandparents who

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[16] *First Nations Child and Family Caring Society of Canada v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2, Book of Authorities of the moving parties ("**BoA**"), Tab 4.
[17] Sterns Affidavit at para 39, MR, Tab 9.
[18] Sterns Affidavit at paras 40-42, MR, Tab 9.
[19] Sterns Affidavit at para 41, MR, Tab 9; Canada's Submissions to the CHRT on Compensation, Exhibit H to the Sterns Affidavit, MR, Tab 9.

were covered by the Merits Decision should receive human rights compensation (the "**Compensation Decision**").[20]

34. After the Compensation Decision, some federal politicians made comments concerning a purported desire to resolve the Consolidated Action. However, class counsel were under no illusion about a sudden change of heart by the government.[21]

35. Nor did the Parliamentary Budget Officer give much credence to these public statements. In a report dated April 2, 2020, the Parliamentary Budget Officer referred to these public statements, but questioned whether the statements were credible, noting:

> **However, there may be barriers to the success of a class action**. Federal funding for child welfare differs dramatically between provinces, between agencies, and over time. Families differ in the prevention services they received, the reasons their child was taken into care, and where their child was placed. Responsibility for removals and the circumstances leading to removals are shared among many parties.
>
> **To establish a clear relationship between an action for which the federal government is liable and harm suffered by the plaintiffs, it may be necessary lawyers representing the plaintiffs to dramatically limit the scope of who is eligible for compensation, or the harm for which they are being compensated.** For example, in the Sixties Scoop class action, the group eligible for compensation was limited to children who were placed in nonaboriginal foster homes, and only included compensation for loss of culture.
>
> In terms of the amount of compensation, **previous class action settlements regarding the removal of children from their homes, families and communities suggest that compensation for each removed child would not necessarily be any more than the $40,000 maximum** awarded by the

[20] *First Nations Child & Family Caring Society of Canada v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39, BoA, Tab 5. Subsequent decisions clarified certain aspects of the Compensation Decision: 2020 CHRT 7, BoA, Tab 6; 2020 CHRT 15, BoA, Tab 7; 2020 CHRT 20, BoA, Tab 8; 2020 CHRT 36, BoA, Tab 9; 2021 CHRT 6, BoA, Tab 10.

[21] Sterns Affidavit at paras 50, 66, 68, 72, 109, MR, Tab 9.

> CHRT. The amounts awarded in previous similar cases are shown in Table 3-1. [emphasis added][22]

36. The Compensation Decision granted remedies to children removed from their homes and families – if they were also removed from their communities – between 2006 and 2022, and Jordan's Principle children between 2007 and 2017, together with some caregiving parents or grandparents.[23]

37. The Consolidated Action and the Trout Action are collectively broader because:

    (a) They seek compensation for both groups going back to 1991, rather than 2006 (for child removals) or 2007 (for essential services); and

    (b) They seek compensation for children that were removed from their homes and families, but placed within their communities.

38. Canada sought judicial review of the Compensation Decision. In September 2021, the Federal Court upheld the Compensation Decision.[24] The Court ended its reasons urging the parties to the CHRT Proceeding to focus on good faith discussions to try to achieve a fair and just settlement.[25]

39. Canada appealed the Federal Court's judicial review decision. That appeal is still pending.[26]

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[22] Sterns Affidavit at para 93, MR, Tab 9.
[23] *First Nations Child & Family Caring Society of Canada v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39, BoA, Tab 5.
[24] *Canada (Attorney General) v First Nations Child and Family Caring Society*, 2021 FC 969 at para 85, BoA, Tab 2.
[25] *Canada (Attorney General) v First Nations Child and Family Caring Society*, 2021 FC 969 at para 300, BoA, Tab 2.
[26] Sterns Affidavit at para 45, MR, Tab 9.

C. Protracted Negotiations

40. From November 2020 until September 2021, the parties to the Consolidated Action engaged in mediation before the Honourable Mr. L. Mandamin.[27] The fact that this mediation lasted almost a year highlights the complexity of the issues.

41. Throughout that process, Canada refused to engage in any discussions regarding the Trout Action.[28] In Mr. Trout's words:

> Because Canada always fought my case, I was never allowed to attend the many months of mediation that took place with the other plaintiffs. I was always talking to my lawyer and telling him I felt shut out of that process and could not even get the opportunity to speak my mind in that process.[29]

42. Ultimately, the parties were unable to reach an agreement and class counsel sought to advance the litigation.[30]

43. Subsequently, the parties agreed to enter into further intensive negotiations outside of the Federal Court mediation process, to be facilitated by the Honourable Murray Sinclair.[31]

44. Initially, Canada was again unwilling to negotiate the Trout Action, which was scheduled for a contested certification hearing to take place on September 19, 2022. Finally, toward the end of the further intensive negotiations with Mr. Sinclair, Canada agreed to include the Trout Action in discussions.[32]

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[27] Sterns Affidavit at para 47, MR, Tab 9.
[28] Sterns Affidavit at paras 29, 95, 99-100, MR, Tab 9.
[29] Affidavit of Zacheus Joseph Trout, sworn October 5, 2023 at para 8, MR, Tab 4.
[30] Sterns Affidavit at para 47, MR, Tab 9.
[31] Sterns Affidavit at para 48, MR, Tab 9.
[32] Sterns Affidavit at paras 29, 58, 99-100, MR, Tab 9.

45. Canada made agreement on compensation conditional on the CHRT parties (*i.e.*, many different parties outside these class proceedings' class counsel and plaintiffs, except the AFN, with no legal or fiduciary obligation to the class or this Court) concurrently reaching an agreement on the long-term reform of the federal First Nations child welfare system, one of the most complex, chronically broken, and sensitive child welfare issues in the country.[33] The requirement also made it necessary for class counsel to undertake complicated work and problem-solving unprecedented in most other class proceedings.[34]

46. On December 31, 2021, the plaintiffs and Canada concluded an agreement in principle, which set out the principal terms of their agreement to settle all of the class actions.[35] Section 29 of the agreement in principle expressly stated:

> Canada enters into this Agreement in Principle **on the condition that an agreement in principle be reached on long-term reform**. If this condition is not fulfilled or waived by Canada by March 31, 2022, then the plaintiffs are entitled to take the position that there is no longer agreement as to the amount of the Settlement Funds, unless such deadline is extended by the parties in writing.[36] [emphasis added]

47. The parties then engaged in several months of intensive negotiations, which resulted in the execution of a final settlement agreement dated June 30, 2022 (the "**First FSA**"). The First FSA provided for a total settlement amount, excluding legal and administrative fees, of $20 billion.[37]

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[33] Corbiere Affidavit at paras 23-24, MR, Tab 8.
[34] Corbiere Affidavit at para 25, MR, Tab 8.
[35] Sterns Affidavit at para 49, MR, Tab 9.
[36] Sterns Affidavit, Exhibit I, MR, Tab 9(I).
[37] Sterns Affidavit at paras 50-52, MR, Tab 9.

D. CHRT Nullification of Settlement Agreement

48. The plaintiffs briefed the settlement approval motion to the Court for a settlement approval hearing scheduled for September 2022.[38]

49. However, the First FSA was conditional on the CHRT confirming the First FSA satisfied its Compensation Decision.[39] Thus, on July 22, 2022, the AFN and Canada brought a joint motion to the CHRT for confirmation that the First FSA satisfied the Compensation Decision.[40]

50. Amongst the various parties to the CHRT proceeding, only the Caring Society and the Commission opposed the joint motion. The motion was heard on September 14-15, 2022, immediately prior to the scheduled dates for settlement approval in the Federal Court. As the CHRT did not immediately render a decision following the hearing, the previously set settlement approval motion hearing in the Federal Court was vacated.[41]

51. On October 24, 2022, the CHRT issued a letter decision dismissing the joint motion.[42] On December 20, 2022, the CHRT issued its full reasons.[43] The CHRT found that the First FSA substantially satisfied the Compensation Decision, save for four differences that it identified between its various decisions and the First FSA.[44]

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[38] Sterns Affidavit at para 58, MR, Tab 9.
[39] Sterns Affidavit at para 53, MR, Tab 9.
[40] Sterns Affidavit at para 55, MR, Tab 9.
[41] Sterns Affidavit at para 58, MR, Tab 9.
[42] Sterns Affidavit at para 59, MR, Tab 9.
[43] *First Nations Child & Family Caring Society of Canada v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2022 CHRT 41, BoA, Tab 11.
[44] Sterns Affidavit at para 60, MR, Tab 9. *First Nations Child & Family Caring Society of Canada v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2022 CHRT 41 at paras 281-282, BoA, Tab 11.

52. Thus, the First FSA—unprecedented, unique, and First Nations-led as it was acknowledged to be by all parties and the CHRT—came to an end.[45]

53. The CHRT's decision created extreme uncertainty. Even with respect to the subgroup covered by the Compensation Decision, their entitlement was still exposed to delay and litigation risk on appeal, as Canada sought to overturn the Compensation Decision.[46]

54. At this point, all class members were completely exposed to the delay and uncertainties of a litigated outcome. In the months that followed, litigation appeared to be the likely road ahead, and class counsel were ready to proceed to scheduling next steps in the litigation.[47]

55. But for the ultimate decision of all parties and the Caring Society to resume negotiations aimed at a global resolution (which itself posed a material risk to settlement as it involved interests outside the control of the plaintiffs and class counsel[48]), the parties would now be moving toward trial.[49]

56. Eventually, however, the parties and the Caring Society re-engaged in negotiations and explored ways of addressing the Tribunal's decision on the joint motion, such that the CHRT might find that an agreement in these class actions fully satisfies the CHRT's orders. The parties and the Caring Society met numerous times and were eventually able to reach an updated agreement formalized into the FSA on April 19, 2023.[50] The FSA addressed

[45] Sterns Affidavit at para 63, MR, Tab 9.
[46] Sterns Affidavit at para 45, MR, Tab 9.
[47] Sterns Affidavit at paras 66, 73, MR, Tab 9. Corbiere Affidavit at para 33, MR, Tab 8.
[48] Sterns Affidavit at paras 72-73, 102-108, MR, Tab 9.
[49] Sterns Affidavit at paras 67-68, 73. Corbiere Affidavit at para 33, MR, Tab 8.
[50] Sterns Affidavit at paras 69-70, MR, Tab 9.

the issues raised by the CHRT, adding an additional $3.34 billion in compensation to cover the additional requirements.[51]

57. The FSA is the largest settlement in Canadian history,[52] and believed to be one of the three largest in world history. It is also First Nations-led by design, content, and process. It builds upon the lessons learned from previous settlements affecting First Nations by:

(a) Creating a First Nations-led Settlement Implementation Committee to ensure that the distribution process is quick and effective, with cultural sensitivity;

(b) Funding experts to act as actuary, investment consultant, investment committee, auditor, trauma support specialists, etc. to ensure that the settlement is carried out in a culturally-sensitive and trauma-informed manner;

(c) Funding navigators to help class members submit claims forms free of charge, and making the process as simple as possible;

(d) Ensuring that no class member will have to testify to the trauma and suffering they endured as a result of their removal;

(e) Protecting class members from non-class counsel seeking to exploit or to take advantage of class members; and

[51] Sterns Affidavit at para 76, MR, Tab 9. Final Settlement Agreement ("**FSA**"), Exhibit K to the Sterns Affidavit, MR, Tab 9(K).
[52] Sterns Affidavit at para 76, MR, Tab 9.

(f) Providing the option of structured settlements and other financial investment supports for those vulnerable to exploitation.[53]

58. However, this outcome was by no means a given. The representative plaintiffs and their counsel faced unprecedented risks, amongst others, because of Canada's CHRT conditions and the involvement of the CHRT and parties outside the class actions, such as the Caring Society, who adopted a distinct lens, as further outlined below, and who owed no duty to the majority of the class members who fall outside the scope of the CHRT's Compensation Decision. [54]

59. On June 30, 2023, the AFN and Canada brought a fresh joint motion before the CHRT for an order that the FSA satisfies the Compensation Decision.[55]

60. The CHRT granted that motion,[56] applauding the FSA:

> This is a good day for human rights, First Nations children and families in Canada and a significant step towards reconciliation. The Panel congratulates the parties and all people involved in reaching this milestone and more importantly, the Panel recognizes the First Nations children and families who were harmed as a result of Canada's discriminatory practices and whose lives are paving the way for justice. This is the largest settlement of its kind in Canadian history. Sadly, this stems from the magnitude of harms that were inflicted upon First Nations children, families, communities and Nations. Canada ought to bear this in mind as an important reminder so as to never repeat history. The cycle of harm must be broken.[57]

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[53] Sterns Affidavit at para 79, MR, Tab 9.
[54] Sterns Affidavit at paras 72, 102-108, MR, Tab 9.
[55] Sterns Affidavit at para 74, MR, Tab 9.
[56] Sterns Affidavit at para 75, MR, Tab 9.
[57] 2023 CHRT 44 at para 1, BoA, Tab 12.

E. Class Counsel's Fee Arrangement

61. In 2019, Moushoom class counsel entered into contingency fee retainer agreements with the Moushoom Plaintiffs for the Moushoom Action. The contingency fee retainer agreements contained standard provisions generally for 10 percent of the class's recovery subject to the Court's approval, as follows:

> (a) For any Aggregate Amount Recovered for the Class: twenty percent (20%) of the first two hundred million dollars of the Aggregate Amount Recovered, plus ten percent (10%) of any Aggregate Amount Recovered beyond the first two hundred million dollars (the percentages in this subparagraph shall not apply to any Individual Inquiry Recovery); plus
>
> (b) For any Individual Inquiry Recovery for individual Class members: twenty five percent (25%) of any such amounts; plus
>
> (c) Any amount of costs ordered by the Court in favour of the Client or the Class.[58]

62. AFN class counsel had roughly similar percentage-based contingency retainer agreements with their clients.[59] As mentioned above, after the filing of the AFN Action in January 2020, class counsel concluded that it would be better for the class to collaborate, rather than engage in a time-consuming and costly carriage battle. Their discussions over the course of the following months resulted in a consortium agreement executed in June 2020 (the "**Consortium Agreement**") wherein they agreed to work together to prosecute the Class Actions.[60]

63. AFN class counsel advised that the AFN required that the Consortium Agreement include certain provisions designed to improve upon past experiences in class actions instituted on

[58] Sterns Affidavit at paras 8-10, MR, Tab 9.
[59] Corbiere Affidavit at para 9, MR, Tab 8.
[60] Sterns Affidavit at para 14, MR, Tab 9.

behalf of First Nations individuals, including the perception of excessive legal fees. To this end, the AFN wished to include a cap on class counsel legal fees that it considered appropriate.[61]

64. Moushoom class counsel were reluctant to agree to a cap on legal fees—which was unprecedented in their experience and brought significant risk and uncertainty with it.[62] AFN class counsel shared similar risk and uncertainty concerns.[63]

65. Nevertheless, all counsel agreed to a cap on class counsel legal fees of $80 million in the event of settlement pre-trial despite their reservations and despite Moushoom class counsel's own separate and uncapped fee agreements with the representative plaintiffs.

66. Thus, the Consortium Agreement provided a provision for legal fees of 10 percent of the class's recovery, subject to a cap, as follows:

> 17. The Parties [Class Counsel] shall seek the following fees ("Fees"), subject to Court approval:
>
> > (a) Ten percent (10%) of any payment received by the Class by way of settlement or judgment ("Proceeds") obtained prior to the commencement of a common issues trial, **subject to a cap of $80 million**. … [Emphasis added][64]

67. From the perspective of Moushoom class counsel, they agreed to the cap because they were acting for co-plaintiffs with a sophisticated and experienced First Nations party in the AFN who had legitimate concerns based on lessons learned through previous class actions

[61] Sterns Affidavit at para 15, MR, Tab 9. Corbiere Affidavit at para 15, MR, Tab 8.
[62] Sterns Affidavit at paras 16-17, MR, Tab 9.
[63] Corbiere Affidavit at para 16, MR, Tab 8.
[64] Sterns Affidavit at para 18, MR, Tab 9.

involving Indigenous peoples that it wished to have reflected in the Consortium Agreement.[65]

68. While the retainer agreements and the Consortium Agreement envisioned the payment of legal fees out of the amounts recovered for the class, class counsel were able to negotiate that Canada will pay the legal fees directly, such that no fees would be deducted from the amounts recovered for the class. Article 17.01 of the FSA states:

> Canada will pay Class Counsel the amount approved by the Court, plus applicable taxes, in respect of their legal fees and disbursements for the prosecution of the Actions to the date of the Settlement Approval Hearing, together with advice to Class Members regarding the Agreement and Acceptance, over and above the Settlement Funds…[66]

F. Support for the Legal Fees

69. It is not only the AFN who determined that the requested $80 million was appropriate in this case. The representative plaintiffs strongly support their counsel's fee request. For example, Xavier Moushoom has testified:

> J'appuie entièrement mes avocats. Un montant de 80 millions $ est un montant qu'il m'est difficile de comprendre, mais je n'ai aucun doute que c'est raisonnable dans les circonstances pour les 5 cabinets qui ont travaillé et qui travaillent toujours si fort sur ce dossier. On m'a expliqué que des cabinets ont reçu des honoraires très importants pour des dossiers qui n'ont pas mené à un résultat aussi impressionnant que le résultat prévu à l'Entente.
>
> Le fardeau était très lourd, mais je suis fier d'avoir eu la possibilité de m'impliquer dans un dossier et une Entente qui est historique au niveau du résultat obtenu.[67]

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[65] Sterns Affidavit at paras 19, MR, Tab 9.

[66] FSA at article 17.01, Exhibit K to the Sterns Affidavit, MR, Tab 9(K).

[67] Affidavit de Xavier Moushoom, affirmé solennellement, octobre 2, 2023 at paras 12-13, MR, Tab 2.

70. Jonavon Meawasige has testified:

> I appreciate that my lawyers negotiated so that no legal fee is paid from the money for the class members although we had a different deal. … I appreciate that it was their decision to limit their requested fees to this amount [of $80 million]. It will be divided among some five or six law firms.
>
> My lawyers have been there for my brother and my family ever since we started this case. I know my mother would have been very happy with what we achieved, just like I am. For myself and for my brother, I ask the Court to approve counsel's fee request of $80 million.[68]

71. Zacheus Trout has testified:

> I especially think my case, the Trout case named after my kids, which has settled for about $3 billion is important.
>
> I became involved as a representative plaintiff because Canada said for years that I and people like me had no claim. There was no Jordan's Principle when my kids suffered. I spoke out about this a lot. …
>
> But my complaints and advocacy went nowhere until we brought this class action.
>
> My case is itself one of the largest cases ever and I am very proud of it. I think the settlement for my case alone justifies the fees.
>
> One last thing I will say is that I have had a professional and satisfactory relationship with my lawyers all this time. I want them to get their fair fees. They ask for $80 million and I think that is fair. I want good lawyers like them to be able to continue bringing these cases up against wrongdoers like Canada that caused me and my kids unimaginable suffering.[69]

72. Ashley Dawn Louise Bach has testified:

> In my view, the lawyers have been trying to achieve the best result for the class, and have put in significant effort to accomplish this goal. I understand that they have now achieved the largest settlement in Canada's history. At

[68] Affidavit of Jonavon Joseph Meawasige, sworn October 3, 2023 at paras 8, 11-12, MR, Tab 3.

[69] Affidavit of Zacheus Joseph Trout, sworn October 5, 2023 at paras 15-19, MR, Tab 4.

> various points, there were significant setbacks in the negotiations, and it was far from certain that the negotiations would ultimately lead to resolution. I also understand that the lawyers would not get paid at all if they were unsuccessful in their efforts to resolve the case.[70]

73. Carolyn Buffalo has testified:

> I was advised by my lawyer, Dianne Corbiere, that class counsel agreed with the Assembly of First Nations to only ask for $80 million if we settled before trial, no matter how and when that happened. I also understand that they would get nothing if we were unsuccessful. The years of negotiation and hard work have paid off, and I have no hesitation in supporting their fees.[71]

74. Melissa Walterson has testified:

> At various points, we were uncertain whether settlement could be achieved, as the negotiations were not easy. I am grateful that the lawyers persisted in the face of such adversity, and that they have achieved a significant result for First Nations children and their families who were the subject of Canada's discrimination.[72]

75. These are the voices of survivors, representative plaintiffs appointed by this Court to act on behalf of the class, and actual class members who have lived through the discriminatory systems at issue in this litigation and who have first-hand knowledge of class counsel's work in these proceedings.

PART II – POINTS IN ISSUE

76. The sole issue on this motion is whether class counsel's requested legal fees of $80 million are fair and reasonable in all of the circumstances. Class counsel submit that they are.

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[70] Affidavit of Ashley Dawn Louise Bach, affirmed October 6, 2023 at para 7, MR, Tab 6.
[71] Affidavit of Carolyn Buffalo, affirmed October 11, 2023 at para 12, MR, Tab 5.
[72] Affidavit of Melissa Walterson, affirmed October 6, 2023 at para 8, MR, Tab 7.

77. The payment of disbursements, HST, and legal fees for ongoing legal services under Article 17.03 of the FSA are not contested.

PART III – SUBMISSIONS

A. The Law

78. If the legal fees were coming out of the amount recovered for the class, the Federal Court would have jurisdiction to assess the fees under rule 334.4:

> No payments, including indirect payments, shall be made to a solicitor **from the proceeds recovered** in a class proceeding unless the payments are approved by a judge. [emphasis added][73]

79. In this case, class counsel negotiated to ensure that their fees would be paid by Canada, separately from the settlement funds recovered for the class. The FSA specifies that the fees are subject to the Court's approval. Thus, the source of the Court's jurisdiction over this fee request in this case is the FSA.[74] Article 17.01 of the FSA states:

> Canada will pay Class Counsel the amount approved by the Court, plus applicable taxes, in respect of their legal fees and disbursements for the prosecution of the Actions to the date of the Settlement Approval Hearing, together with advice to Class Members regarding the Agreement and Acceptance, over and above the Settlement Funds.[75]

80. The only question for the court is whether the requested fees are fair and reasonable. In assessing that question, the Federal Court has considered a variety of factors, but the Court has repeatedly held that the two most important factors are the results achieved by class

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[73] *Federal Court Rules*, SOR/98-106, r 334.4

[74] *McLean v Canada (Attorney General)*, 2019 FC 1077 at para 38, BoA, Tab 15.

[75] FSA at article 17.01, Exhibit K to the Sterns Affidavit, MR, Tab 9(K).

counsel and the risk assumed by class counsel.[76] Accordingly, these submissions focus primarily on those factors.

81. The Court has also considered the following factors:

(a) the character and importance of the litigation to the class,[77] as well as the monetary value of the matters at issue;[78]

(b) the fees approved in comparable cases;[79] and

(c) the amount of professional time incurred by class counsel, and the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation.[80]

82. The court has also considered the following factors which are not discussed in depth below, but which also favour approval in this case:

(a) the complexity of the issues;[81]

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[76] *Condon v Canada*, 2018 FC 522 at para 83, , BoA, Tab 3; *McLean v Canada (Attorney General)*, 2019 FC 1077 at para 25, , BoA, Tab 15; *Tk'emlúps te Secwépemc First Nation v Canada*, 2023 FC 357 at para 15, BoA, Tab 23.
[77] *Condon v Canada*, 2018 FC 522 at para 82, BoA, Tab 3; *McLean v Canada (Attorney General)*, 2019 FC 1077 at para 25, BoA, Tab 15; *Merlo v Canada*, 2017 FC 533 at paras 91-92, BoA, Tab 16.
[78] *Smith Estate v National Money Mart Co*, 2011 ONCA 233 at para 80, BoA, Tab 20.
[79] *Condon v Canada*, 2018 FC 522 at para 82, BoA, Tab 3; *McLean v Canada (Attorney General)*, 2019 FC 1077 at para 25, BoA, Tab 15; *Merlo v Canada*, 2017 FC 533at para 98, BoA, Tab 16.
[80] *Federal Court Rules* at Rule 334.4; *Riddle v Canada*, 2018 FC 641 at para 42, BoA, Tab 19; *Manuge v Canada*, 2013 FC 341 at para 28, BoA, Tab 14. *Smith Estate v National Money Mart Co*, 2011 ONCA 233 at para 80, BoA, Tab 20.
[81] *Condon v Canada*, 2018 FC 522 at para 82, BoA, Tab 3; see also *McLean v Canada (Attorney General)*, 2019 FC 1077 at para 25, BoA, Tab 15; *Merlo v Canada*, 2017 FC 533 at para 89, BoA, Tab 16.

(b) the degree of responsibility assumed by the class counsel,[82] the quality of legal representation,[83] and whether there is a causal link between the legal effort and the result achieved;[84]

(c) the likelihood that individual claims would have otherwise been litigated;[85]

(d) the views expressed by class members,[86] and the ability of the class to pay and the class expectation of fees.[87]

83. In this case, class counsel meet and exceed all of the above factors, and no factor points to the requested fees as being unfair or unreasonable.

B. Fee Arrangement is Presumed Valid

84. The starting presumption in the unique circumstances of this case is as follows:

> The percentage-based fee set out in a contingency fee retainer agreement is presumed to be fair and "should only be rebutted in clear cases based on principled reasons" (*Cannon v Funds for Canada Foundation*, 2013 ONSC 7686 at para 8). Examples of where a court may rebut the presumption that a percentage-based fee is fair include where:
>
> > a. There is a lack of full understanding or true acceptance on the part of the representative plaintiff;
> >
> > b. The agreed-to contingency amount is excessive; or

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[82] *McLean v Canada (Attorney General)*, 2019 FC 1077 at para 25, BoA, Tab 15; *Merlo v Canada*, 2017 FC 533 at para 90, BoA, Tab 16.
[83] *Condon v Canada*, 2018 FC 522 at para 82, BoA, Tab 3; *McLean v Canada (Attorney General)*, 2019 FC 1077 at para 25, BoA, Tab 15; *Merlo v Canada*, 2017 FC 533 at para 93, BoA, Tab 16.
[84] *Condon v Canada*, 2018 FC 522 at para 82, BoA, Tab 3; *McLean v Canada (Attorney General)*, 2019 FC 1077 at para 25, BoA, Tab 15.
[85] *Condon v Canada*, 2018 FC 522 at para 82, BoA, Tab 3.
[86] *Condon v Canada*, 2018 FC 522 at para 82, BoA, Tab 3; *McLean v Canada (Attorney General)*, 2019 FC 1077 at para 25, BoA, Tab 15.
[87] *McLean v Canada (Attorney General)*, 2019 FC 1077 at para 25, BoA, Tab 15; *Merlo v Canada*, 2017 FC 533 at paras 94-97, BoA, Tab 16.

> c. The presumptively valid contingency fee would result in a fee award so large as to be unseemly.[88]

85. The $80 million cap on fees was requested and negotiated by the AFN, a highly sophisticated and respected party. There can be no argument that the AFN did not understand the fee amount. It is a properly considered fee agreement that off-loaded all litigation risk onto class counsel and struck an appropriate balance between incentivizing competent representation of the class and avoiding excessive or unseemly fees. Thus, the first exception does not apply.

86. That leaves only one question: Is the $80 million cap on fees, which has now proven to be a minute fraction (0.35%) of the amount recovered, excessive or unseemly?

87. Again, the cap is a full answer. It was specifically designed to avoid even the appearance of a fee request being excessive or unseemly.[89]

88. Canada is unable to rebut the presumption of validity. The next two sections show that the two most important factors – results achieved and risks assumed – support the conclusion that the fee request is fair and reasonable. The following three sections show that additional factors support that conclusion. No factors identified under the law suggest otherwise.

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[88] *Condon v Canada*, 2018 FC 522 at para 85, BoA, Tab 3 (See also *Lin v Airbnb*, 2021 FC 1260 at para 94, BoA, Tab 24).

[89] Sterns Affidavit at paras 15, 19, MR, Tab 9.

C. Results Achieved

(i) *Quantum*

89. The $23.34 billion amount recovered is the largest settlement in Canadian history. It is one of the largest recoveries in the history of the world. Every class member will receive substantial compensation. For many, these amounts will be life changing. The FSA represents a significant step toward reconciliation.

90. Additionally, the settlement funds will be invested and are expected to generate billions of dollars over the course of the implementation of the FSA, all of which will accrue to the benefit of the class members on top of the settlement funds.[90]

91. No settlement funds will ever revert to Canada. The entirety of the settlement amount and all interest income belongs to the class.

92. The FSA is significantly more favourable to the class than the Compensation Decision:[91]

(a) It provides compensation to tens of thousands of class members who would have received nothing under the Compensation Decision. This includes children who were removed on reserves but placed into care within their communities; children who were removed between 1991 and 2006 (and their families); and children who were denied essential services between 1991 and 2007 (and their families). This applies the principle of equity and parity of treatment, to the extent possible,

[90] Sterns Affidavit at para 77, MR, Tab 9.
[91] Sterns Affidavit at paras 81-82, MR, MR, Tab 9. FSA, Exhibit K to the Sterns Affidavit, MR, Tab 9(K).

between those subject to the Compensation Decision and the tens of thousands of class members who are not.

(b) It provides enhanced payments and benefits – above the CHRT's statutory limits – to those who suffered greater harms. By contrast, due to its statutory limits, the Compensation Decision was restricted to providing the same compensation across the board, regardless of gravity. The FSA applies the principle of proportionality to account for the gravity of the harm suffered by each child.

(c) It provides a substantial First Nations-administered cy-près fund for class members who are not entitled to direct compensation.

93. Furthermore, the total compensation in the FSA, over and above what the CHRT awarded, amounts to approximately **$13.75 billion**.[92] The following chart summarizes some of the major differences:[93]

[92] Sterns Affidavit at para 83, MR, Tab 9.
[93] Sterns Affidavit at para 82, MR, Tab 9.

Award in Compensation Decision	FSA	Excess of FSA over award in Compensation Decision
Removed Children		
Children removed from homes, families, and communities between January 1, 2006 and December 31, 2020 • $1.308 billion for 32,700 children[94] ($40,000 each) Children removed from homes, families and communities between January 1, 2021 and March 31, 2022 • $292 million for 7,300 children ($40,000 each) Total • $1.6 billion for 40,000 children ($40,000 each)	Children removed between January 1, 1991 and March 31, 2022 (INCLUDING those who were removed and remained in care on reserves): • $7.25 billion for 115,000 children	The FSA provides **$5.65 billion more money**. The FSA benefits **75,000 more children**.
Caregivers of Removed Children		
Caregivers EXCLUDING 30% who engaged in actions that fall within a broad definition of abuse • $1.568 billion for 39,200 caregivers ($40,000 each)	Caregivers[95] • $5.75 billion for more than 39,200 caregivers	The FSA provides **$4.182 billion more money**.

[94] The source and reasoning for the statistics are in the Sterns Affidavit at para 82, MR, Tab 9.

[95] The FSA adopts a culturally sensitive definition of "abuse", which results in the non-exclusion of many caregivers who would otherwise be denied CHRT compensation, except in cases of serious physical or sexual abuse.

Award in Compensation Decision	FSA	Excess of FSA over award in Compensation Decision
Jordan's Principle Claimants		
Children • $2.6 billion for 65,000 children ($40,000 each) Families • $1 billion	Children • $3 billion for 65,000 children Families • $1 billion	The FSA provides **$400 million more money**.
Trout Claimants		
None	Children • $2 billion Families • $1 billion	The FSA provides **$3 billion more money**.
Families with Multiple Removed Children		
$477 million	$997 million	The FSA provides **$520 million more money**.

94. Even disregarding the amounts allocated to class members who were also covered by the Compensation Decision, the FSA represents the largest settlement in Canadian history.

95. While the tireless work and advocacy of the AFN, the Caring Society, and other parties to the CHRT Proceeding cannot be downplayed, none of this approximately $13.75 billion for the class would have been recovered without these class proceedings and the way they were prosecuted by class counsel.

96. No class member amongst hundreds of thousands has opted out of the FSA since the rollout of the opt-out notice in September 2022.

(ii) *Other Benefits to the Class*

97. While the headline focus may be on the quantum, the FSA offers many other advantages to the class that are unique and unprecedented within the class action context. For example:

(a) The FSA eschews individual trials or damages assessments. Survivors will not have to deal with contested hearings or give *viva voce* testimony.[96] Class counsel were sensitive to the fact that requiring traumatized youth to testify on their experiences would result in many class members not coming forward to claim compensation to which they have long been entitled. This would be a denial of justice.

(b) The FSA leaves settlement implementation in the hands of an independent First Nations-led Settlement Implementation Committee supervised by the Federal Court with continuing involvement from class counsel tasked with fiduciary responsibilities to preserve the best interests of the entire class.[97] While in previous class actions involving First Nations individuals, complaints were expressed that counsel *abandoned* the claimants once class counsel fees were paid, in the present case class counsel insisted that they would remain involved in the implementation of the FSA, in order to help ensure its seamless execution. While some other past settlements have had an implementation committee, the First Nations-led design,

[96] FSA at articles 6.01, 7.01, Exhibit K to the Sterns Affidavit, MR, Tab 9(K).
[97] FSA at article 12, Exhibit K to the Sterns Affidavit, MR, Tab 9(K).

fiduciary role, and institutional function of the Settlement Implementation Committee under the FSA is unprecedented.

(c) The claims process is being designed to be as simple and expeditious as possible to avoid requiring class members to seek legal counsel and pay any legal fees to recover compensation.[98] Class members will receive extensive free assistance from navigators in completing claims forms, will receive financial education and investment options, and will receive mental health and trauma support and assistance, further described below. Class counsel have done everything possible to ensure that class members retain all of the compensation to which they are entitled, instead of paying out a significant percentage to non-class counsel legal professionals as has occurred in the past. As a consequence, the fees for which class counsel seek approval are designed to be the *only* legal fees that are paid in respect of the prosecution of the class action.

98. Class counsel, the AFN, and the representative plaintiffs have incorporated measures to:

(a) prevent the exploitation and re-traumatization of vulnerable class members in the claims process through "form fillers", lenders, and non-class counsel lawyers. Class counsel obtained an injunction with broad interim protections against all lawyers advertising to the class,[99] and have developed a strict protocol to apply to all non-class counsel wishing to act for individual class members—that motion is scheduled to be before the Court immediately prior to this fee approval motion;

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[98] FSA at recitals, articles 3.02(1)(j), 9, Exhibit K to the Sterns Affidavit, MR, Tab 9(K).
[99] *Moushoom v Canada (Attorney General)*, 2022 FC 1212 at para 14, BoA, Tab 17.

(b) provide holistic, culturally appropriate supports to class members at unprecedented levels;[100]

(c) involve dozens of multi-disciplinary experts in all aspects of the FSA to ensure informed and proper design and administration of the FSA;[101]

(d) bring attention to class members who are further marginalized, such as incarcerated class members;[102]

(e) ensure that measures are available for class members to receive their funds in regular instalments (structured settlement) or to avoid re-victimization as a result of the sudden flow of settlement funds;[103] structured settlements have never been used previously in a Canadian class action;[104]

(f) communicate with and support countless class members seeking assistance during the course of the litigation; and

(g) provide notice to the class with the assistance of qualified experts, while also reflecting First Nations views, cultures, languages, and perspectives.[105]

99. This combination of support and preventative measures is unprecedented in a class action settlement and a considerable achievement for the class. It required steadfast commitment, relentless work, skilled negotiation, and advocacy by class counsel to the benefit of the

[100] FSA at articles 3.02(1)(j), 9, Schedule I, Exhibit K to the Sterns Affidavit, MR, Tab9(k)
[101] Sterns Affidavit at paras 87-88, MR, Tab 9(K).
[102] FSA at article 1, Exhibit K to the Sterns Affidavit, MR, Tab 9(K).
[103] FSA at article 6.14, Exhibit K to the Sterns Affidavit, MR, Tab 9(K).
[104] Sterns Affidavit at para 79(f) , MR, Tab 9.
[105] FSA at Schedule B, Exhibit K to the Sterns Affidavit, MR, Tab 9(K).

class. It is the result of devotion and steadfast commitment to class members' wellbeing and a First Nations-led and trauma-informed focus.

(iii) *The First Fully First Nations-led Settlement*

100. The FSA sets the standard on how class proceedings involving vulnerable and historically marginalized Indigenous individuals should be prosecuted and settled. It is the first First Nations-led class action settlement in Canada's history. Even in rejecting the First FSA, the CHRT recognized that the FSA was "outstanding in many ways" and applauded the First Nations-led nature of the FSA.[106]

101. At every step, class counsel have ensured First Nations involvement and leadership. While class counsel have ultimately been guided by their professional responsibilities to safeguard the best interests of the class as a whole, class counsel have consistently ensured that First Nations and survivors' views, history, and experiences guide every aspect of the FSA. Class counsel have sought out, and materially benefitted from, the involvement of the First Nations survivors, especially the representative plaintiffs, the AFN, elders, and First Nations stakeholders in considering the best interest of the class. Throughout the negotiations, representative plaintiffs were invited to participate in meetings, and to share their experiences, their concerns and the objectives they sought to fulfill with this class action.

[106] *First Nations Child & Family Caring Society of Canada v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada*), 2022 CHRT 41 at para 1, BoA, Tab 11.

102. The implementation of the FSA will be the responsibility of a First Nations-led independent Settlement Implementation Committee for the next approximately 20 years.[107]

103. The First Nations-led nature of the FSA represents another important milestone toward reconciliation. The FSA builds upon lessons learned from the Indian Residential Schools Settlement Agreement and other Indigenous class action settlements, the Truth and Reconciliation Commission, and the Missing and Murdered Indigenous Women and Girls Inquiry, amongst others.

104. In that respect, the FSA not only reflects the views of First Nations communities and stakeholders across Canada; it also builds upon the unanimous support of the First Nations-in-Assembly.[108]

105. The implementation of the FSA includes unprecedented trauma-informed, culturally safe, and accessible navigational, health and cultural supports.[109]

D. Risks Assumed

106. At the time this case was commenced, and throughout, the risks assumed were substantial. Those risks fully support approving fees in the amount of $80 million.

[107] FSA at article 12, Exhibit K to the Sterns Affidavit, MR, Tab 9(K).
[108] FSA at recitals, articles 3.02, 6-9, Schedule I, Exhibit K to the Sterns Affidavit, MR, Tab 9(K).
[109] FSA at articles 3.02(1)(j), 9, Schedule I, Exhibit K to the Sterns Affidavit, MR, Tab 9(K). FSA at Schedule B, Exhibit K to the Sterns Affidavit, MR, Tab 9(K).

(i) The Law on Risk

107. The Court should not assess risk in hindsight and with 20/20 vision if and when a settlement has been reached:

> When assessing these risks involved in pursuing class action litigation, **the risks must be assessed as they existed when the litigation commenced and as the litigation continued**. They should not be assessed with the benefit of hindsight.[110] [emphasis added]

108. The primary risk for counsel in a class action is the "very real risk of losing some or all of the action", in which case class counsel could receive nothing.[111] Additionally, when class counsel devotes significant time to the case, they put other parts of their practice on hold, turning away work and putting the law firm at risk of a significant loss. This opportunity cost must also be considered.[112]

109. The Federal Court has also held that the following factors increase the risk:

(a) the inherently novelty and complexity of cases involving constitutional, Aboriginal, or Indigenous law;[113]

(b) the added complexity of derivative claims by family members;[114]

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[110] *Condon v Canada*, 2018 FC 522 at para 97, BoA, Tab 3.
[111] *McLean v Canada (Attorney General)*, 2019 FC 1077 at para 28, BoA, Tab 15. See also *MacDonald v BMO Trust Company*, 2021 ONSC 3726 at para 40, BoA, Tab 13.
[112] *McLean v Canada (Attorney General)*, 2019 FC 1077 at para 32, BoA, Tab 15.
[113] *McLean v Canada (Attorney General)*, 2019 FC 1077 at para 28, BoA, Tab 15; *Tataskweyak Cree Nation v Canada (Attorney General)*, 2021 FC 1442 at para 21, BoA, Tab 21.
[114] *McLean v Canada (Attorney General)*, 2019 FC 1077 at para 28, BoA, Tab 15.

(c) the possibility that important witnesses or records will not be available in a semi-historical case, or difficulty in finding witnesses and records;[115]

(d) uncertainty about class size,[116] as well as any arguments that could limit the class size and breadth of the proceedings;[117] and

(e) the absence of "any assurance that politically the case would settle".[118]

110. All of those factors apply in this case.

111. Finally, Canada argues that the level of risk was low because much of the parties' time was spent on negotiation towards a settlement, rather than litigation. Courts have rejected that argument:

(a) In *Parsons*, interveners argued that class counsel's fees should be reduced because they spent more than a year exclusively in negotiation, rather than litigation. The Court rejected that argument, concluding that:

> even though this litigation was conducted from the middle of 1998 forward as a negotiation toward a settlement, the risks assumed by class counsel were no less real at any point than if that time had been devoted to a disposition through a trial process.[119]
>
> [T]he time and resources committed to the negotiations by the class counsel meant that the risk was increasing rather than decreasing as the negotiations continued. As the parties moved toward a settlement, the negotiations became more difficult as the issues

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[115] *McLean v Canada (Attorney General)*, 2019 FC 1077 at para 28, BoA, Tab 15. *Tataskweyak Cree Nation v Canada (Attorney General)*, 2021 FC 1442 at para 21, BoA, Tab 21.
[116] *McLean v Canada (Attorney General)*, 2019 FC 1077 at para 28, BoA, Tab 15. *Tataskweyak Cree Nation v Canada (Attorney General)*, 2021 FC 1442 at para 21, BoA, Tab 21.
[117] *McLean v Canada (Attorney General)*, 2019 FC 1077 at para 28, BoA, Tab 15.
[118] *McLean v Canada (Attorney General)*, 2019 FC 1077 at para 31, BoA, Tab 15.
[119] *Parsons v Canadian Red Cross Society*, 2000 CanLII 22386 (Ont Sup Ct) at para 36, BoA, Tab 18.

> narrowed with the result that the risk of an insurmountable impasse increased rather than diminished.[120]
>
> [R]isk is not synonymous with acrimony in a negotiation process. Even if the tenor of the negotiations changed somewhat for the better after certain points of contention were resolved, there is nothing in the record which would indicate that these negotiations were anything less than hard fought to the end. As such, they were capable of being derailed at any point, regardless of the level of acrimony between the participants.[121]

(b) In *Manuge*, Canada argued that class counsel's time should be discounted for the period after Canada declined to appeal a decision, thereby conceding liability, and the parties were only negotiating a settlement. The Federal Court rejected that argument.[122]

(i) The Risks in these Class Proceedings

112. From the outset, these class actions were risky and unpredictable. The trajectory from the commencement of the Moushoom Action until after the execution of the FSA in 2023 was uncertain and involved complex litigation and negotiations. There was no predetermined "path" to follow for the litigation and negotiations, and class counsel were required to manage multiple setbacks on the path to settlement approval.

113. *First*, when the Moushoom Action was commenced in early 2019, the only given was the Merits Decision[123] relating to a portion of the class period and regarding a sub-group within the class. The CHRT Compensation Decision had not been rendered.

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[120] *Parsons v Canadian Red Cross Society*, 2000 CanLII 22386 (Ont Sup Ct) at para 38, BoA, Tab 18.
[121] *Parsons v Canadian Red Cross Society*, 2000 CanLII 22386 (Ont Sup Ct) at para 40, BoA, Tab 18.
[122] *Manuge v Canada*, 2013 FC 341 at paras 35-38, BoA, Tab 14.
[123] *First Nations Child and Family Caring Society of Canada v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2, BoA, Tab 4.

114. As detailed above, Canada opposed the request for compensation before the CHRT.[124] Canada continued its opposition to compensation after the CHRT awarded compensation to a subset of the class later in 2019 (after the Moushoom Action was commenced) and sought judicial review of the Compensation Decision.

115. At that time, Canada had contested the CHRT Complaint for about 12 years. When the judicial review application was dismissed, Canada appealed. Thus, the benefit of the Compensation Decision was always at risk.[125] On the other hand, if Canada had decided to follow the CHRT payout process, a risk of preferable procedure, competing claims and processes, protracted contested litigation, and non-payment existed for class counsel.

116. While politicians made some public statements about wishing to settle the Moushoom Action, Canada gave no such indication to the CHRT. As quoted above, Canada's own Parliamentary Budget Officer did not give much credence to these public statements.[126]

117. *Second*, while the CHRT awarded compensation to children removed from their homes, families *and communities* from 2006 to 2022, class counsel believed that children removed from their homes and families were entitled to compensation, even if they were placed in care somewhere else on-reserve. Class counsel also considered that children removed from their homes and families *since 1991* (15 additional years and tens of thousands of class members) were entitled to compensation, and decided to advance their claims despite the significant risk and no CHRT backing. Finally, class counsel advocated that the statutory

[124] Sterns Affidavit at paras 40-41, MR, Tab 9.
[125] Sterns Affidavit at paras 92-94, MR, Tab 9.
[126] Sterns Affidavit at para 93, MR, Tab 9.

maximum compensation that the CHRT was able to award – $40,000 – was insufficient to compensate the Removed Children who were most harmed by Canada's discrimination.

118. This advocacy took place despite previous experiences in Indigenous class actions, which as pointed out by the Parliamentary Budget Officer, faced significant risks and, therefore, "the amount of compensation, previous class action settlements regarding the removal of children from their homes, families and communities suggest that compensation for each removed child would not necessarily be any more than the $40,000 maximum awarded by the CHRT".[127]

119. Class counsel could have substantially reduced their risk by simply bringing an action overlapping with the Compensation Decision. However, doing so would deprive Xavier Moushoom, Zacheus Trout's late children, the late Jordan River Anderson, and tens of thousands of others access to justice. Class counsel took on the risk of representing a much greater class than the individuals eligible to benefit from the Compensation Decision.

120. This decision to undertake the additional risk has now resulted in over $13.75 billion in additional compensation to the class after lengthy and complex negotiations.

121. ***Third***, Canada always contested the Trout Action. The novel pre-Jordan's Principle essential services claims had never been advanced in Canada. The FSA represents the evolution and validation of these novel claims. The trial of the case would have been long and complex. Even with a settlement, developing the methodology geared toward compensation for this class involves a multi-disciplinary expert panel of some two dozen

[127] Sterns Affidavit at para 93, MR, Tab 9.

experts engaged,[128] in addition to the First Nations experts who have assisted the AFN on that front.

122. Class counsel have obtained the settlement of the Trout Action with no CHRT overlap for a budget in the FSA of approximately $3 billion. On its own, that would be one of the largest class action settlements in Canadian history.

123. ***Fourth***, the CHRT findings only overlapped with a part of the class in the Class Actions, as the CHRT expressly found that the CHRT's complaint concerning removed children was only substantiated as of 2006, and the Jordan's Principle complaint as of December 12, 2007 when Jordan's Principle was recognized by a resolution of the House of Commons.

124. The majority of the class did not have the benefit of the Merits Decision or the later Compensation Decision, the latter of which is to this date subject to an outstanding appeal if the FSA is not judicially approved.

125. ***Fifth***, given Canada's pre-conditions about long-term reform and finality from the CHRT, a genuine risk existed that the CHRT conditions would render the FSA impossible (which they almost did). This unique risk has not existed in any other class action settlement. Class actions typically only require the Court to be satisfied that a settlement is "fair and reasonable", not that it "fully satisfies" a tribunal decision that is under appeal.

[128] Sterns Affidavit at paras 51, 79(e), 87-88, MR, Tab 9.

126. In this case, because of Canada's conditions, the parties needed to obtain a ruling from the CHRT that its Compensation Decision was fully satisfied, in addition to asking the Federal Court to approve the settlement.[129]

127. The CHRT thus posed extreme risk to a resolution of these class proceedings. The CHRT is not governed by litigation norms of risk, but rather takes its own human rights lens to the issues, inquiring whether every aspect of its Compensation Decision was mirrored in the FSA as a starting point.[130] This added greatly to the risks of a global resolution, which at times seemed unattainable.

128. As evidenced by what occurred, the risks of obtaining these rulings were real: a $20 billion settlement was rejected and became null and void because some of its overlapping portions did not mirror the CHRT's specific orders.

129. Furthermore, as previously submitted, Canada's intention of achieving a global resolution included not only the Compensation Decision, but also the long-term reform aspect of the CHRT Proceeding, involving far more complex and sensitive child welfare issues beyond the normal reach of any class proceeding. As a result, class counsel had to heavily engage in the other aspect of the CHRT Proceeding to work towards an agreement in principle on long-term reform of Canada's First Nations Child and Family System by December 31, 2021 as well as the Compensation Decision and these class proceedings.[131]

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[129] *First Nations Child & Family Caring Society of Canada v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2022 CHRT 41 at para 121, BoA, Tab 11.
[130] *First Nations Child and Family Caring Society of Canada v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 at para 123, BoA, Tab 4.
[131] Corbiere Affidavit at paras 23-28, MR, Tab 8.

130. Although eventually the parties were able to reach agreements in principle both on the class proceedings, the Compensation Decision, and long-term reform by that date, these requirements introduced significant risk and complexity into the negotiations and the prospects of a settlement.[132]

131. *Sixth*, some First Nations stakeholders in this case, and indeed the CHRT, opposed any compromise,[133] which, as this Court has repeatedly stated, is the very foundation of any settlement.[134] This risk has not existed in prior class action settlements.

132. The inability to countenance compromise at all—coupled with class counsel's refusal to compromise the rights of class members not covered by the Compensation Decision to favour some class members over others—materially increased the risks posed to a negotiated resolution of the class actions.

133. These complex issues required capable counsel. The parties negotiated intensively, often on a daily basis, for years over complex and novel issues. The settlement negotiations were at a dead-end at least twice during the course of the proceedings. Teams of lawyers and parties attended dozens of meetings to fully debate the many barriers to a negotiated resolution.[135]

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[132] Corbiere Affidavit at para 27, MR, Tab 8.
[133] *First Nations Child and Family Caring Society of Canada v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 at paras 477-482, BoA, Tab 4.
[134] *Tataskweyak Cree Nation v Canada (Attorney General)*, 2021 FC 1442 at para 63, BoA, Tab 21; *McLean v Canada (Attorney General)*, 2019 FC 1077 at para 66, BoA, Tab 15.
[135] Sterns Affidavit at para 89, MR, Tab 9.

134. At no point until the signing of the FSA on April 19, 2023 was success a given; and even then the FSA was still subject to approval by the CHRT, which had already once rejected a $20 billion settlement.

135. *Seventh*, the AFN required of its own counsel a cap on legal fees to ensure that the amount of fees would not be perceived as unseemly. While under no obligation, Moushoom class counsel also agreed to the AFN's cap of $80 million.

136. This capped fee for a settlement before trial posed a risk, especially if the years devoted to intensive settlement discussions had been for naught if the parties did not reach settlement or if the settlement was again not approved by the CHRT or the Court. This cap meant class counsel could not seek additional fees regardless of how many more years of pre-trial negotiations and litigation followed.

137. The risk was all on counsel and it was risk undertaken at the outset of the litigation when class counsel were entering into the Consortium Agreement.

138. Furthermore, class counsel intentionally avoided any discussion of fees throughout the negotiations, and only engaged in fees discussions recently, after the FSA was signed.

139. *Eighth*, class counsel faced a unique risk in the class actions – a new government might completely change course, end all negotiations, or even impose a legislated end to the case. The course of the negotiations ran through one federal election. Such a risk does not factor

into most private law class actions. However, given the monumental amounts at stake in this matter, it was a risk that class counsel had to account for.[136]

E. Importance of the Litigation to the Plaintiffs and the Class

140. As acknowledged by the CHRT in its most recent decision, the settlement of this litigation is a historic step towards reconciliation.[137]

141. The class consists of some of the most vulnerable members of society, who have, through no fault of their own, been subjected to separation of their family units or lack of essential services available to non-First Nations Canadians. The settlement of this litigation will permit these First Nations children and families who were subject to discrimination to commence healing.

142. The FSA provides that Canada will recommend that the Prime Minister deliver an apology to the members of the class for the historic discrimination they have faced. The apology on behalf of Canada is representative of the deeper importance of this settlement beyond the monetary compensation and other benefits achieved for the class.

143. Whereas many class actions are instituted on behalf of individuals who have sustained modest financial losses for whom the outcome of the case will not have a meaningful impact, the present class action seeks to redress significant harm; it provides, in some cases, life-changing compensation.

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[136] Sterns Affidavit at para 109, MR, Tab 9.
[137] 2023 CHRT 44 at para 1, BoA, Tab 12.

F. An Arbitrary Multiplier Approach is Inappropriate

144. Canada has standing to object to the fees requested on this motion under article 17.01 of the FSA, but its standing ought to be viewed as analogous to that of any other good faith objector in a class action fee approval context.

145. Canada's right to object or its contractual obligation under the FSA to pay legal fees does not change the applicable test regarding fees. The starting point is the presumed reasonableness of the amount that class counsel agreed to cap their fees at. This cap prevents class counsel from seeking a higher fee on this motion despite the extraordinary results achieved, the complexities successfully navigated, and the risks undertaken.

146. Canada is expected to ask the Court to independently assess fees based on a multiplier on class counsel's docketed time. This should be rejected for at least two reasons:

(a) Any multiplier Canada that seeks will likely be substantially lower than multipliers applied by this Court in recent, smaller, less complex Indigenous settlements; and

(b) Canada's multiplier and other arguments do not displace the presumed validity of the fees requested.

147. If Canada's approach is to view fees through the lens of a lower-end multiplier after the fact, class counsel submit that such a multiplier is not fair or reasonable in the circumstances.

148. A fee "multiplier" approach that Canada seeks to apply is a disincentive to efficient and effective advocacy.[138] If a fee multiplier were the default, this would simply incentivize class counsel to run up as many billable hours as possible on a file, rather than focusing on delivering value to the class. The focus should be on the results delivered to the class. As this Court has stated:

> This multiplier approach has been criticized for, inter alia, encouraging inefficiency and duplication and discouraging early settlement … Courts have indicated that "**the application of a multiplier … is unacceptably subjective if not completely arbitrary**". [emphasis added][139]

149. This arbitrariness becomes further accentuated considering the efficiency with which class counsel conducted these difficult proceedings. Despite the risk of parallel filings by other parties in provincial superior courts, class counsel insisted on handling this case with the utmost integrity and deliberately did not file actions in provincial jurisdictions merely to "claim turf". Class counsel only filed the case in the Federal Court, due to the belief that this case needed to avoid distracting and inappropriate carriage battles, or parallel litigation that could be avoided. Such parallel actions would have inevitably added to inefficiencies and the work required, which would ironically result in an increase in fees based on any arbitrary multiplier that Canada proposes.[140]

150. That arbitrariness and inefficiency is precisely what the Court has warned against.

151. Furthermore, the multiplier approach disregards the reality that in this case one of the class counsel firms, Nahwegahbow Corbiere, was counsel for the AFN in the CHRT Complaint

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[138] *A.B. c. Clercs de Saint-Viateur du Canada*, 2023 QCCA 527 at para 65, BoA, Tab 1.
[139] *Condon v Canada*, 2018 FC 522 at para 86, BoA, Tab 3.
[140] Sterns Affidavit at para 115, MR, Tab 9.

since 2007 and litigated that case for many years prior to these proceedings, thus bringing valuable litigation knowledge and expertise from a First Nations perspective to these class proceedings.[141] Applying any arbitrary multiplier in effect penalizes class counsel for the resulting efficiencies that materially benefitted the class.

152. Moushoom class counsel decided not to seek to enforce a preclusion order that the Court had rendered, as it considered it important to work together with the AFN and AFN class counsel to advance the interests of the class. Similarly, the AFN and AFN class counsel decided not to engage in a "carriage battle", which would have also made for larger incurred fees, but would have distracted class counsel from the important work required to properly represent the hundreds of thousands of members of the Class.[142]

153. In addition to disregarding the AFN's agreement on appropriate fees, Canada's position also disregards recent decisions of the Federal Court in class actions instituted on behalf of First Nations against Canada. The following chart provides examples of the multiplier applied in some of the recent settlements in Canada, all of them involving far smaller results and far less complexity than this case:

Case	Multiplier
Tataskweyak Cree Nation v Canada (Attorney General), 2021 FC 1442	7.95
Tk'emlúps te Secwépemc First Nation v Canada, 2023 FC 357	4.13
McLean v Canada (Attorney General), 2019 FC 1077	5.24

[141] Corbiere Affidavit at paras 21-22, MR, Tab 8.
[142] Sterns Affidavit at para 14, MR, Tab 9.

154. The recent decision of *Tataskweyak* is a good indicator of the reasonableness and fairness of class counsel's requested fees of $80 million. *Tataskweyak* related to water advisories on some First Nations reserves. The action was commenced in November 2019[143] (after the Moushoom Class Action was filed). *Tataskweyak* was certified on consent for settlement purposes in 2021[144] and its settlement was also approved in 2021 (two years before the FSA was executed).

155. The Federal Court approved legal fees of $53 million that class counsel and the plaintiff First Nations had agreed upon, and which Canada agreed to pay. The lawyers in *Tataskweyak* had spent approximately $6.5 million of time (in the Federal Court and in a parallel provincial action in the Court of King's Bench in Manitoba, where they had done much legal work fighting a carriage battle[145]) to obtain the settlement (almost a third of what class counsel have spent in these class actions). The $53 million therefore represented approximately 8 times the time spent by counsel in that case.[146]

156. Here, Canada proposes that class counsel receive a multiplier far less than what class counsel received in *Tataskweyak* and the other cases above, despite the following:

(a) The docketed fees incurred in this case are about three times larger than those incurred in *Tataskweyak*;

[143] *Tataskweyak Cree Nation v Canada (Attorney General)*, 2021 FC 1415 at para 2, BoA, Tab 25.
[144] *Tataskweyak Cree Nation v Canada (Attorney General)*, 2021 FC 1415 at para 5, BoA, Tab 25.
[145] *Tataskweyak Cree Nation et al. v. Canada (A.G.)*, 2021 MBQB 153, BoA, Tab 22.
[146] *Tataskweyak Cree Nation v Canada (Attorney General)*, 2021 FC 1442 at ORDER, BoA, Tab 21.

(b) The compensation under the FSA is more than 16 times larger than the individual payout settlement funds in *Tataskweyak*[147] (The Trout Action alone provides more than double the compensation to children and family members than the value of the settlement in *Tataskweyaki*);

(c) There were elevated risks in this case, as submitted above, few of which existed in *Tataskweyak*; and

(d) The FSA represents a far more complex agreement including nine classes of individuals for whom the FSA provides compensation.

157. Class counsel entered into the Consortium Agreement in good faith and took all the risks that a contingency agreement and a fee cap entailed. Class counsel handled the class actions effectively and always with a view to the best interest of the class members, and had every right to expect that they would be paid in accordance with the capped fee agreement that was negotiated years earlier. Indeed, but for the cap, class counsel would seek a far higher fee given the results achieved and risks assumed.[148]

158. Counsel must have predictability—they cannot agree to take on risky, complex, time-consuming cases without being able to assess what they will be paid if the case is successful. Nor should a reasonable cap on fees, insisted on by the AFN based on its informed assessment of a proper balance between fairness and the desire to incentivize experienced counsel in similar First Nations claims, be easily disregarded.

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[147] *Tataskweyak Cree Nation v Canada (Attorney General)*, 2021 FC 1442 at para 40, BoA, Tab 21.
[148] Corbiere Affidavit at para 19, MR, Tab 8.

G. Amount of Professional Time Incurred by Class Counsel

159. Canada does not take issue with class counsel's amount of professional time incurred.

160. Although class counsel rely on the Consortium Agreement and not their billable hours for the amount of fees that they are seeking, by the time of the approval of the claims process, class counsel expect to have docketed time worth approximately **$18.5 million** (excluding disbursements and taxes), as follows:

(a) To August 31, 2023, class counsel have docketed $16.2 million;

(b) Between September 1, 2023 and October 23, 2023, class counsel conservatively estimate that they will docket time worth an additional $1.3 million, resulting in a combined total of $17.5 million; and

(c) Between October 23, 2023 and the approval of the claims process, class counsel conservatively estimate that they will docket time worth an additional $1 million, resulting in a combined total of $18.5 million.[149]

161. As of August 31, 2023, the cost of disbursements carried by class counsel was approximately $600,000, before taxes.[150]

[149] Sterns Affidavit at paras 111-112, MR, Tab 9.
[150] Sterns Affidavit at para 111, MR, Tab 9.

H. Conclusion

162. Legal fees need to recognize the work done, results achieved, risks undertaken, and to encourage experienced and capable counsel to continue taking cases of this nature and prosecuting them with the level of care and professionalism required.

163. The test that the Court should apply is the same regardless of whether it is the class who pays or if the defendant has agreed to pay legal fees. The presumption is that the agreed upon amount is valid, and Canada has not rebutted that presumption.

164. The requested fees of $80 million are a reasonable and fair amount to cover legal work by five firms in the class actions.

PART IV – ORDERS SOUGHT

165. Class counsel respectfully seek an order approving legal fees in the amount of $80 million, plus disbursements and taxes pursuant to Article 17 of the FSA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

SOTOS LLP

Per: KUGLER KANDESTIN LLP

Per: MILLER TITERLE + CO.

Per: NAHWEGAHBOW, CORBIERE

Per: FASKEN MARTINEAU DUMOULIN

SCHEDULE "A" – LIST OF AUTHORITIES

Tab	Cases
1.	*A.B. c. Clercs de Saint-Viateur du Canada*, 2023 QCCA 527
2.	*Canada (Attorney General) v. First Nations Child and Family Caring Society*, 2021 FC 969
3.	*Condon v. Canada*, 2018 FC 522
4.	*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2
5.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39
6.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 7
7.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 15
8.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 20
9.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 36
10.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2021 CHRT 6
11.	*First Nations Child & Family Caring Society of Canada v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada*), 2022 CHRT 41

12.	*First Nations Child & Family Caring Society of Canada v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada*), 2023 CHRT 44
13.	*MacDonald et al v. BMO Trust Company et al*, 2021 ONSC 3726
14.	*Manuge v. Canada*, 2013 FC 341
15.	*McLean v. Canada*, 2019 FC 1077
16.	*Merlo v. Canada*, 2017 FC 533
17.	*Moushoom v. Canada (Attorney General)*, 2022 FC 1212
18.	*Parsons v. Canadian Red Cross Society*, 2000 CanLII 22386 (Ont Sup Ct)
19.	*Riddle v. Canada*, 2018 FC 641
20.	*Smith Estate v. National Money Mart Co*, 2011 ONCA 233
21.	*Tataskweyak Cree Nation v. Canada (Attorney General)*, 2021 FC 1442
22.	*Tataskweyak Cree Nation et al. v. Canada (A.G.)*, 2021 MBQB 153
23.	*Tk'emlúps te Secwépemc First Nation v. Canada*, 2023 FC 357
24.	*Lin v Airbnb*, 2021 FC 1260
25.	*Tataskweyak Cree Nation v Canada (Attorney General)*, 2021 FC 1415

SCHEDULE "B" – RELEVANT STATUTES

N/A