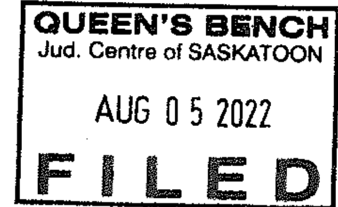

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COURT FILE NUMBER QBG 760-2022

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

JUDICIAL CENTRE SASKATOON

PLAINTIFF SAMARAH GENE GENAILLE

DEFENDANTS THE ATTORNEY GENERAL OF CANADA and HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF SASKATCHEWAN

Brought under *The Class Actions Act*, SS 2001, c C-12.01

NOTICE TO DEFENDANTS

1 The plaintiff may enter judgment in accordance with this Statement of Claim or the judgment that may be granted pursuant to *The Queen's Bench Rules* unless, in accordance with paragraph 2, you:

(a) serve a Statement of Defence on the plaintiff; and

(b) file a copy of it in the office of the local registrar of the Court for the judicial centre named above.

2 The Statement of Defence must be served and filed within the following period of days after you are served with the Statement of Claim (excluding the day of service):

(a) 20 days if you were served in Saskatchewan;

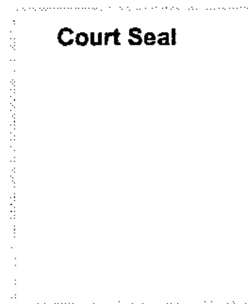
(b) 30 days if you were served elsewhere in Canada or in the United States of America;

(c) 40 days if you were served outside Canada and the United States of America.

3 In many cases a defendant may have the trial of the action held at a judicial centre other than the one at which the Statement of Claim is issued. Every defendant should consult a lawyer as to his or her rights.

4 This Statement of Claim is to be served within 6 months from the date on which it is issued.

5 This Statement of Claim is issued at the above-named judicial centre on the ___ day of July, 2022.



Local Registrar

STATEMENT OF CLAIM

THE PARTIES

A. The Representative Plaintiff

1. The plaintiff Samarah Gene Genaille is an "Indian" within the meaning of s. 91(24) of the *Constitution Act, 1867*. Samarah is a status Indian registered with Sturgeon Lake First Nation. She was born on March 9, 1998 in Saskatoon, and lived there all her life until she recently moved to Moose Jaw with her young family so she can attend a post-secondary business program at the Moose Jaw campus of Saskatchewan Polytechnic.

2. Samarah was apprehended from her family home when she was about 4 or 5 years old, by a Provincial child welfare agency in Saskatchewan. She was called into the principal's office while at school and told she was going to a new home. The officials did not explain to Samarah why she was being apprehended. She later learned from her mother that their family's landlord reported the family to Provincial child welfare authorities in retaliation when Samarah's mother refused to sleep with him.

3. For approximately four years until she was around 8 years old, Samarah lived in a very large foster home where a Caucasian foster mother, along with hired staff, fostered anywhere from 12-20 children at a time. Samarah describes the foster home as an "assembly line", where children were fed and attended to in massive groups without any individualized care and in a depersonalized environment. Due to the chaos of the situation, Samarah does not recall ever being brought to the doctor, dentist, or any other care provider for regular checkups. Dentists have recently told Samarah that, if she had received regular dental care as a child, she should have had braces installed at a young age.

4. Samarah's foster home included children of all ethnicities, including many Indigenous children. She was never given any information about her Indigenous culture, and was not even told that she was Indigenous. Samarah made friends with her foster siblings from time to time, but they were periodically removed without her being told, which was very distressing for her. One of Samarah's main memories of this time is the fact that she was put alone on a cab, twice a day, which would drive her to and from school as a kindergarten-age child. She was lonely and frightened.

5. Samarah was only allowed to visit her parents under direct supervision, in cold government buildings in downtown Saskatoon. Because they were always in the presence of a government employee, Samarah and her parents could not have normal family interactions during these visits. She mainly recalls them crying together during the visits until they ended.

6. While at the foster home, Samarah often tried to connect directly with her parents, including over the internet and on the phone. Eventually, her foster mother cut off both her phone time and her computer time.

7. When Samarah was around 8 years old, she was removed from the foster home and placed in the care of her grandmother, where she lived for the rest of her minor years. Samarah's grandmother was a residential school survivor, and her parents are day school survivors. In retrospect, Samarah sees that her grandmother was herself grappling with the effects of residential school, which placed a large burden on her in raising Samarah. However, Samarah began to be exposed to her Cree heritage in this time by her grandparents, and learned to smudge, attended cultural events, and was around people speaking Cree.

8. Due to the intergenerational impacts of residential schools, day schools, and the child welfare system that she was involved in, Samarah had a very difficult time as a teenager. However, recently, she obtained her high school diploma and driver's licence, and is now in a post-secondary business program at Saskatchewan Polytechnic in Moose Jaw. She is recently married, has an infant son, and is in the process of adopting two of her nieces and one nephew. Samarah has a growing group of friends and a faith-based support network in Moose Jaw.

B. The Defendants

9. The defendant, the Attorney General of Canada ("**Canada**"), is the representative of Her Majesty the Queen in Right of Canada pursuant to s. 23(1) of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50.

10. Canada asserts jurisdiction over "Indians and lands reserved for the Indians" pursuant to s. 91(24) of the *Constitution Act, 1867*, 30 & 31 Vict, c 3 (UK). Canada's

jurisdiction under s. 91(24) includes legislative authority respecting all Indigenous peoples, including status and non-status Indian, Inuit, and Métis persons.

11. The defendant, Her Majesty the Queen in Right of the Province of Saskatchewan ("**Province**"), asserts general jurisdiction in relation to the delivery of child and family services in Saskatchewan pursuant to s. 92(13) of the *Constitution Act, 1867* and the common law doctrine of *parens patriae*.

STATEMENT OF FACTS

A. Overview

12. Canada and the Province have systemically discriminated against Indigenous children – in the provision of child and family services in Saskatchewan – because of their race, nationality, and ethnicity.

13. This systemic discrimination, which has occurred for decades and generations, has taken two forms: the underfunding of, or the failure to fund, child and family services for Indigenous children who reside off-reserve in Saskatchewan; and the failure to implement and comply with Jordan's Principle.

14. Canada and the Province have knowingly underfunded child and family services for Indigenous children who reside off-reserve in Saskatchewan. Since the late 1980s or early 1990s, Canada has expressly chosen not fund child and family services for Indigenous children and families residing off-reserve, having treated these children and families as already assimilated and, therefore, the responsibility of the Province.

15. The chronic underfunding has prevented child and family services agencies from providing adequate public services and products. These public services and products include the provision of adequate preventative care to Indigenous children and families. This has occurred despite the enhanced need for such services and products because of the cultural genocide that has been perpetrated on Canada's Indigenous peoples and the inter-generational trauma that it has caused and continues to cause.

16. Numerous independent reviews, parliamentary reports, and audits have identified the severe inadequacies of Canada and Saskatchewan's funding formulas, policies, and

practices *vis-à-vis* Indigenous children and families in Saskatchewan – and their devastating impacts and harms on these individuals.

17. The Province's funding formulas, policies, and practices mirror Canada's prior funding approach for First Nations children residing on-reserve, which the Canadian Human Rights Tribunal has already found to be discriminatory. While underfunding the delivery of preventative services to Indigenous children who reside off-reserve in Saskatchewan, the Province has fully funded costs associated with removing Indigenous children from their homes and placing them into out-of-home care. The net effect of this discriminatory approach is that Indigenous children who reside off-reserve often must be apprehended before they can access required services. This is the same "perverse incentive" that the Tribunal ordered Canada to remedy in relation to First Nations children living on-reserve.

18. Removing a child from his or her home must only be used as a last resort, if at all, because of the severe and long-lasting trauma that such removal causes to that child, and his or her family, and community. However, as a result of the "perverse incentive" that continues to persist, Indigenous children who reside off-reserve have been removed from their homes as a first resort, rather than a last resort. This accounts, in substantial part, for the egregious overrepresentation of Indigenous children in care in Saskatchewan. In 2019, 86% of the approximately 3,400 children in care in Saskatchewan were Indigenous, despite representing approximately 16% of all children in the province.

19. The incentivized removal of off-reserve Indigenous children from their homes, families, and communities has caused enduring trauma to those children, their families and caregivers, and their communities.

20. Second, despite Canada and the Province having declared their commitment to implement and comply with Jordan's Principle, both have failed to meet that commitment. Jordan's Principle is a legal requirement intended to safeguard Indigenous children's substantive equality rights that are guaranteed by the *Canadian Charter of Rights and Freedoms*. It requires that all Indigenous children receive the public services and products they need, when they need them, and in a

manner that is consistent with substantive equality and reflective of their cultural needs.

21. Indeed, the genesis of Jordan's Principle arose from governmental practices of denying, delaying, or disrupting services and products to Indigenous children due to, among other reasons, disputes over jurisdiction and fiscal responsibility within government departments or as between Canada and the provinces or territories. Canada and the Province nonetheless continue to breach Jordan's Principle by denying crucial services and products to Indigenous children in Saskatchewan.

22. This action seeks individual compensation for: (i) Indigenous children who did not reside on a reserve in Saskatchewan and who were victims of this systemic discrimination between January 1, 1992 and the date of the certification of this action as a class proceeding ("**Class Period**"); and (ii) the parents, grandparents, and caregivers of those children.

B. Protection and Prevention Services

23. Governments and non-Indigenous social workers tend to define or divide child and family services into two main areas of concern: prevention and protection. They further divide prevention services into three main categories: primary, secondary, and tertiary.

24. Primary prevention services are aimed at the community as a whole. They include the ongoing promotion of public awareness and education about a healthy family and how to prevent or respond to child maltreatment. Secondary prevention services are triggered when concerns begin to arise and early intervention could help avoid a crisis. Tertiary prevention services target specific families when a crisis or risks to a child have been identified. Tertiary prevention services are designed to be "least disruptive measures" that try to mitigate the risks of separating a child from his or her family, rather than separating a child from his or her family.

25. 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 and family service 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".

26. Indigenous perspectives on child and family services tend to reject the compartmentalization of "prevention" and "protection" services, and any arbitrary distinction between "levels" of prevention support. Such compartmentalization focuses child and family services only on physical safety, at the cost of relational, cultural, spiritual, and emotional safety.

27. When assessment of the well-being and safety of children is not considered through a holistic approach, it allows for continued harm to be perpetrated on Indigenous children and youth and their families. Indigenous child and family service providers have led the development of lifelong, needs-based, and culturally appropriate wraparound services that prevent poor outcomes (i.e., poverty, homelessness, family violence, mental illness, and drug abuse) and protect children and families from the ongoing harms associated with colonization.

C. Indigenous Child and Family Services in Saskatchewan

28. Starting in the 19th century, Indigenous children across Canada, including those residing in Saskatchewan, were systematically separated from their families and placed in Indian Residential Schools and Day Schools. Among other things, these schools were used as "care providers" for Indigenous children who, according to Indian Agents, were allegedly being neglected or otherwise in need of child and family services.

29. In 1951, the introduction of s. 88 to the *Indian Act* made "all laws of general application from time to time in force in any province applicable to and in respect of Indians in the province". The Province asserted its authority, and began to apprehend children living on-reserve and off-reserve, which resulted in an increase in children placed in care.

30. Before the introduction of s. 88, Indigenous children accounted for less than 1% of children in care in Saskatchewan. By the mid 1970s, these numbers rose to approximately 63%. During this period, the Adopt Indian and Métis ("**AIM**") program was created to increase the number of adoptions of Indigenous children in

Saskatchewan into non-Indigenous families. AIM allowed for the adoption of Indigenous children to take place outside of the provincial adoption system. This program was initially funded by the federal Department of Health and Welfare.

31. In the intervening years, various agreements and funding arrangements have been entered into and rescinded between Canada and the Province dealing with the delivery of child and family services. Until the late 1980s/early 1990s, funding for on- and off-reserve child and family services for Indigenous children and families was provided by Canada. Thereafter, Canada entered into agreements with each province, including the Province of Saskatchewan, under which each province would fund child and family services for off-reserve Indigenous children and families.

32. In 1990, the Federation of Saskatchewan Indian Nations (as it was then, now the Federation of Sovereign Indigenous Nations, "**FSIN**") developed the *Indian Child Welfare and Family Support Act* ("**ICWFSA**"). The ICWFSA included general standards for First Nations child welfare agencies and a provision allowing individual agencies to develop their own standards. Though the Province did not pass the ICWFSA, it did officially recognize it as consistent with provincial legislation and therefore equivalent to ministerial policies and standards.

33. The Province now has its own child and family services legislation, *The Child and Family Services Act*, SS 1989-90, c C-7.2, which is intended to prevent and respond to child maltreatment and promote family wellness.

34. In 1994, the Province amended *The Child and Family Services Act* to allow the Minister to enter into agreements with a band or any other legal entity, in accordance with the regulations, for the provision of services or the administration of any part of the Act. Other than band notification of court appearance or placement decisions related to children from the band, the Province has yet to further develop special considerations in *The Child and Family Services Act* for Indigenous children.

35. A number of high-profile incidents involving Indigenous children have occurred in Saskatchewan. One such incident occurred in the fall of 2002 when a 20-month-old boy was seriously abused soon after having been returned home from foster care. Known as the "Baby Andy" case, the incident highlighted various negative issues

with the provincial child welfare system, particularly the parallel system of federally funded on-reserve First Nations Child and Family Service Agencies.

36. The reports and reviews which emanated from this tragic case found, among other things, funding discrepancies between the Ministry and on-reserve mandated agencies, and the need for integrated co-ordination of services in the future.

37. The FSIN signed a Memorandum of Understanding with the Province allowing for the development of First Nations Child and Family Service ("**FNCFS**") Agencies. Canada's Indigenous and Northern Affairs Canada (now named Crown- Indigenous Relations and Northern Affairs Canada) and the Saskatchewan Ministry of Child and Family Services subsequently developed "models of delegated authority for child welfare", formalizing the existence of FNCFS agencies in Saskatchewan through delegation agreements. The first of such agreements was signed in 1993 between the Saskatchewan Department of Child and Family Services and the Touchwood Child and Family Services. Other First Nations signed similar agreements with the Province in order to form FNCFS agencies.

38. Today, 17 FNCFS Agencies possess delegated authority to provide child protection services to children and families on-reserve.

39. Indigenous Services Canada allocates funding to FNCFS Agencies and the Ministry of Social Services ("**MSS**") for child welfare services provided to status Indians living on-reserve. The Province, through MSS, funds and delivers Indigenous child welfare services in Saskatchewan for children who are status Indians and living off-reserve, and non-status Indians, Metis, and Inuit children, irrespective of residence.

40. At all material times, the defendants were aware of the chronic problems that existed in the under-provision of child and family services, including insufficient prevention services, to Indigenous children, especially those who resided off-reserve. Over the course of the Class Period, numerous independent reviews, parliamentary reports, and audits identified certain of these deficiencies and described their devastating impact on Indigenous children and families.

41. The Royal Commission on Aboriginal Peoples (1996) and, subsequently, the Report of the Truth and Reconciliation Commission of Canada (2015) each called on the

defendants to adequately fund child and family services and fully implement certain principles and equality protections, a concept which has become known as Jordan's Principle.

42. The Truth and Reconciliation Commission found, 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 child welfare system has simply continued the assimilation that the Residential Schools system started; and

   e. First Nations children are still being taken away from their parents because of their parents' socioeconomic circumstances.

43. On November 9, 2009, Saskatchewan Social Services Minister Donna Harpauer announced that the Province intended to undertake a comprehensive review of the child welfare system in Saskatchewan, and appointed a panel to study the issue.

44. The terms of reference of the Panel Report required the panel to "examine the significant over-representation of First Nations and Métis children and youth in care and address how this disparity could be overcome."

45. In November 2010, the panel issued a report entitled *Saskatchewan Child Welfare Review Panel Report: For the Good of Our Children and Youth. A New Vision, A New Direction* (the "**Panel Report**").

46. Among other things, the Panel Report noted that fiscal arrangements "were made without adequate or equitable funding arrangements for First Nations Child and Family Services Agencies. The result has been a lack of capacity on the part of delegated First Nations Child Welfare agencies to deliver appropriate culturally

based services that can effectively respond to community needs. Higher numbers of families and children have come into the child welfare system as a result."

47. The Panel Report noted that "prevention and support services are generally reserved for those families who have met a 'threshold' for intervention. In other words, families in Saskatchewan are often not able to get help through the child welfare system until issues become crises."

48. One participant in the Panel Report process was quoted as follows:

> "Social Services says, 'Well you have to sign her over to the system before we will help her.' It's an awful dilemma to put a grandmother in or to put an auntie in."

49. In the cover letter to the Panel Report as submitted to the Minister, the panel stated that it had been "impressed by the strong desire for change, and the extent to which most stakeholders agreed with one another on both the major issues in the system and the way forward."

50. In his 2016 annual report to the Legislature issued pursuant to section 39 of *The Advocate for Children and Youth Act*, SS 2012, c A-5.4, the Saskatchewan Advocate for Children and Youth Corey O'Soup noted, among other things, that "[w]e must move to a prevention model that prioritizes providing families with the necessary supports to keep their children in their care. Not only do children deserve this, but they have the right to this."

51. In August 2017, the Saskatchewan First Nations Family and Community Institute, after an extensive engagement project, released *Voices for Reform: Options for Change to Saskatchewan First Nations Child Welfare*, highlighting ongoing gaps in Indigenous child welfare services in Saskatchewan and making a number of proposals for reform.

52. In January 2018, an emergency national meeting was hosted by then-Minister of Indigenous Services Canada, Jane Philpott, to discuss the child welfare crisis. At the outset of the meeting, Minister Philpott acknowledged, in her welcome speech:

> We are acutely aware that there are concerns about funding – that it is insufficient, inflexible and incentivizes apprehension. Many have talked to me about how current funding policies don't permit

> financial support for kinship care. Simply put, funding based on the number of children in care is apprehension-focused and not prevention-focused. The underfunding of prevention services while fully funding maintenance and apprehension expenses creates a perverse incentive.

53. In the 2021 Annual Report to the Legislature, Saskatchewan Advocate for Children and Youth Dr. Lisa Broda again highlighted Indigenous overrepresentation in child protection and justice systems in Saskatchewan, as well as the alarming statistics regarding deaths and critical injuries/incidents of Indigenous children and youth:

> It is well-known that Indigenous children are over-represented in both the child protection and justice systems in Saskatchewan and across Canada. Year after year, the deaths and injuries we review are a stark reminder of this dark reality. In 2021, 22 of the 24 deaths (92%) and 23 of the 29 critical injuries/incidents (79%) that came to our attention involved Indigenous children and youth.

D. The Canadian Human Rights Tribunal Complaint

54. In February 2007, the First Nations Child and Family Caring Society of Canada and the Assembly of First Nations filed a complaint with the Canadian Human Rights Commission, pursuant to s. 5 of the *Canadian Human Rights Act,* RSC 1985, c H-6 (the "**Complaint**").

55. The Complaint alleged that Canada discriminates in providing child and family services to First Nations children on-reserve and in the Yukon under on the basis of race and national or ethnic origin by providing inequitable and insufficient funding. On October 14, 2008, the Commission referred the Complaint to the Canadian Human Rights Tribunal ("**CHRT**") for inquiry.

56. In January 2016, the CHRT found the Complaint to be substantiated and that Canada had engaged in systemic discrimination, contrary to s. 5 of the *Canadian Human Rights Act*, in denying equal child and family services to First Nations children and families living on-reserve and in the Yukon, or in differentiating adversely in the provision of those child and family services.

57. The CHRT also found that First Nations children and families living on-reserve and in the Yukon suffered harm in Canada's provision of child and family services because of the children's and families' race or national or ethnic origin, and that this harm

perpetuated the historical disadvantage and trauma suffered by Indigenous people, in particular as a result of the Residential School system.

58. The CHRT also found the practice of underfunding prevention and least disruptive measures, while fully reimbursing the cost of children when apprehended, 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.

59. The CHRT concluded that human rights principles, both domestically and internationally, required Canada to consider the distinct needs and circumstances of First Nations children and families living on-reserve in order to ensure substantive equality in the provision of child and family services. Among other things, Canada was ordered to undertake a cost analysis of the First Nations Child and Family Services Program relating to on-reserve individuals, and to fund prevention/least disruptive measures based on actual costs.

E. Jordan's Principle

60. Jordan's Principle requires that all Indigenous children 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 Jordan's Principle arose from governmental practices of denying, delaying or disrupting the services of Indigenous children due to, among other reasons, jurisdictional payment disputes within the federal government or between the federal government and provinces or territories.

61. Jordan's Principle is a child-first legal rule that guides the provision of public services and products to Indigenous children. It incorporates the Crown's longstanding obligations to treat Indigenous children without discrimination, and with a view to safeguarding their substantive equality. In 2017 CHRT 35, the CHRT confirmed that Jordan's Principle applies equally to First Nations children who reside on- and off-reserve.

62. Yet Canada and the Province continue to violate Jordan's Principle by playing jurisdictional football – at the expense of Indigenous children and youth – who are denied timely access to the services and products to which they are entitled.

F. The Class Members

63. The plaintiff brings this action on behalf of three proposed classes who were harmed by Canada and the Province during the Class Period:

    a. all status Indians residing off-reserve and all non-status Indians, Inuit, and Métis persons (irrespective of residency on- or off-reserve) who were taken into care in Saskatchewan (the "**Underfunding Class**" or "**Underfunding Class Members**", to be further defined in the plaintiff's application for certification);

    b. all status Indians residing off-reserve and all non-status Indians, Inuit, and Métis persons (irrespective of residency on- or off-reserve) who were denied a public service or product, or whose receipt of a public service or product was delayed or disrupted, in Saskatchewan, on grounds including but not limited to: lack of funding or lack of jurisdiction, or a jurisdictional dispute with another level or government or governmental department (the "**Essential Services Class**" or "**Essential Services Class Members**", to be further defined in the plaintiff's application for certification), except as recognized under 2020 CHRT 20; and

    c. the parents, grandparents, and caregivers of members of the above classes (the "**Family Class**" or "**Family Class Members**", to be further defined in the plaintiff's application for certification).

64. The classes defined above are collectively referred to as the "**Class**" or "**Class Members**". The plaintiff and other Class Members are members of "Aboriginal peoples of Canada" within the meaning of s. 35(1) of the *Constitution Act, 1982.* The Indigenous peoples of which the plaintiff and other Class Members are members have exercised laws, customs and traditions integral to their distinctive societies – including in relation to child and family services, such as parenting, childcare, and customary adoption – since time immemorial. These inherent Aboriginal and treaty rights are recognized and affirmed by s. 35(1) of the *Constitution Act, 1982.*

LEGAL BASIS

A. The Defendants' duties to Class Members

65. Canada was, at all material times, responsible for the management, operation, administration, and funding of Indigenous Services Canada and Indigenous and Northern Affairs Canada, and all other predecessor and successor departments responsible for the development of policies, procedures, programs, operations, and management relating to the provision of Indigenous child and family services, including the funding arrangements reached with MSS and its predecessor and successor departments.

66. The Province was, at all material times, responsible for the management, operation, administration, and funding of MSS, and all predecessor departments responsible for the development of policies, procedures, programs, operations, and management relating to the provision of Indigenous child and family services in Saskatchewan, including the funding arrangements reached with Indigenous Services Canada and Indigenous and Northern Affairs Canada, and all other predecessor and successor departments.

67. Canada and the Province each owed a special duty of care, honesty, loyalty and good faith to status and non-Indians, Inuit and Métis children and youth, including a duty to act in their best interests in relation to the delivery of child and family services. Canada and the Province also had a duty to act in the best interests of the parents, grandparents, and caregivers of those children and youth.

68. In all of their dealings with Indigenous peoples, Canada and the Province are required to act honourably, in accordance with their historical and future fiduciary relationship with Indigenous peoples.

B. Common Law Duty and Systemic Negligence

69. At all material times during the Class Period, the defendants owed a common law duty of care to the plaintiff and other Class Members to take steps to: (i) sufficiently fund Indigenous child and family services and the operational and other costs of child and family service agencies, including by ensuring that reasonable and appropriate levels preventative care and other child and family services, were made available

and provided to Class Members; and (ii) comply with Jordan's Principle. These duties went unmet.

70. The policies and funding formulas (including lack of funding or no funding) employed by the defendants during the Class Period operated to systematically deny Indigenous children in Saskatchewan from accessing the public services and products they needed when they needed them in a manner that was consistent with substantive equality and reflective of their cultural needs.

71. The defendants breached these duties and caused corresponding harm to the plaintiff and other Class Members.

C. Breach of the *Charter of Rights and Freedoms*

72. Section 15(1) of the *Charter* states:

> 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.

73. The plaintiff and the other Class Members have been discriminated against solely because of their status as Indigenous children who do not reside on-reserve, or alternatively their residence on-reserve but lack of Indian status. During the Class Period, the defendants breached the s. 15(1) rights of the plaintiff and the other Class Members under the *Charter* as set out in the whole of this claim by, *inter alia*:

   a. failing to fund or failing to sufficiently fund Indigenous child and family services, including the operational and other costs of child and family service agencies, to ensure that reasonable and appropriate preventative and other child and family services were made available and provided to the plaintiff and other Class Members; and

   b. breaching Jordan's Principle.

74. The defendants' breaches of the plaintiff and other Class Members' s. 15(1) *Charter* rights, as set out above and in the whole of this claim, were not "prescribed by law" and cannot be justified in a free and democratic society.

75. This ongoing discrimination is now taking place against the backdrop of Canada's adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* into legislation, Canada and the Province's public commitments to the Truth and Reconciliation Commission's *Calls to Action*, and Canada's *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*.

76. The defendants' misconduct and their breaches of the s. 15(1) rights of the plaintiff and other Class Members warrant an award of damages under s. 24(1) of the *Charter*. Such damages would, in these circumstances, serve to compensate the plaintiff and other Class Members for their losses, vindicate their rights, and deter future misconduct by the defendants.

D. Restitution

77. At all material times during the Class Period, Canada failed to fund child and family services in Saskatchewan for status Indians residing off-reserve and for all non-status Indians, Inuit, and Métis persons, irrespective of residency on- or off-reserve. And, at all material times during the Class Period, the Province failed to sufficiently fund child and family services in Saskatchewan, including preventative services, for Indigenous children, youth, and families.

78. At all material times during the Class Period, the defendants also failed to comply with Jordan's Principle in Saskatchewan, on grounds including but not limited to lack of funding or lack of jurisdiction, or a jurisdictional dispute with another level or government or governmental department.

79. As a consequence of the defendants' discriminatory conduct and the discriminatory conduct of their respective servants as set out in the whole of this claim, the defendants were enriched and received financial benefit and gain by spending less on the provision of child and family services, including preventative services, and by spending less on the provision of essential products and services than they would have spent had they not engaged in the discriminatory conduct. The plaintiff and other Class Members suffered a corresponding deprivation by not receiving sufficiently funded preventative and other child welfare services and by not receiving the products and services to which they were entitled.

80. Further, the Province has diverted special allowance payments into its general revenue when those benefits were intended to be special allowances for off-reserve Indigenous children in care. Those payments, known as special allowances, are provided by Canada to the Province pursuant to the *Children's Special Allowances Act*, SC 1992, c 48, Sch.

81. The purpose of the special allowance is to provide children in care with the same benefit that all other children receive through the Canada Child Benefit and the Child Disability Benefit. The Province's actions are contrary to s. 3(2) of the *Children's Special Allowances Act*, which directs that special allowances "shall be applied exclusively toward the care, maintenance, education, training or advancement of the child in respect of whom it is paid." The plaintiff and other Class Members suffered a corresponding deprivation by not receiving this special allowance.

82. There was no juristic reason for the defendants' enrichment or the corresponding deprivation to plaintiff and other Class Members. The defendants have been unjustly enriched at the expense of the plaintiff and other Class Members, and are required to make restitution to them for their wrongful gains.

E. Damages

83. As a result of the defendants' breaches, acts, and omissions – including breaches of the honour of the Crown, constitutional duties, common law duties, and the *Canadian Charter of Rights and Freedoms* – the plaintiff and other Class Members suffered injuries and damages, including:

   a. Class Members were denied non-discriminatory child and family services;

   b. the Underfunding Class Members were removed from their homes and communities to be placed in care, with resulting, foreseeable harms and losses;

   c. the Underfunding Class Members and the Essential Services Class Members suffered physical, emotional, spiritual, and mental pain and disabilities;

   d. the Underfunding Class Members and the Essential Services Class Members suffered sexual, physical, and emotional abuse while in out-of-home care;

e. the Underfunding Class Members and the Essential Services Class Members lost the opportunity to access essential public services and products in a timely manner;

f. the Essential Services Class Members had to fund out of pocket substitutes, where available, for public services and products delayed or improperly denied by the defendants; and

g. Family Class Members suffered loss of guidance, care and companionship, family bonds, language, culture, community ties, and resultant psychological trauma.

84. The high-handed way that the defendants have conducted their affairs warrants the condemnation of this Court. The defendants, including their agents, had complete knowledge of the fact and effects of their negligent and discriminatory conduct with respect to the provision of child and family services to the Class Members. They proceeded with callous indifference to the foreseeable injuries that the Class Members would, and did, suffer. The defendants knew, or ought to have known, that their conduct would perpetuate and exacerbate the harm and suffering caused by Indian Residential Schools, Day Schools, and the Sixties Scoop.

F. Legislation

85. The plaintiff pleads and relies on various statutes, regulations and international instruments, including:

a. *An Act Respecting First Nations, Inuit and Métis children, youth and families,* SC 2019, c 24;

b. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11;

c. *The Child and Family Services Act*, SS 1989-90, c C-7.2;

d. *The Class Actions Act*, SS 2001, c C-12.01;

e. *Constitution Act, 1867*, 30 & 31 Victoria, c 3 (UK);

f. *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982 c 11;

g. *Convention on the Rights of the Child,* 20 November 1989, 1577 UNTS 3;

h. *Pre-judgment Interest Act*, SS 1984-85-86, c P-22.2;

i. *Crown Liability and Proceedings Act*, RSC 1985, c C-50;

j. *The Proceedings Against the Crown Act*, 2019, SS 2019, c P-27.01;

k. *Department of Indigenous Services Act,* SC 2019, c 29, s 336;

l. *The Health Administration Act,* RSS 1978, c H-0.0001;

m. *Indian Act,* RSC 1985, c I-5;

n. *International Convention on the Elimination of All Forms of Racial Discrimination*, 26 October 1966, 660 UNTS 195;

o. *The Limitations Act,* SS 2004, c L-16.1;

p. *United Nations Declaration on the Rights of Indigenous Peoples Act,* SC 2021, c 14; and

q. all other comparable and relevant acts and regulations and their predecessors and successors.

REMEDY SOUGHT

86. The plaintiff claims as follows on their own behalf, and on behalf of other Class Members:

a. an order certifying this action as a class proceeding and appointing Samarah Gene Genaille as representative plaintiff for the Class;

b. general and aggregate damages for breach of the honour of the Crown, negligence, and under s. 24(1) of the *Charter*;

c. a declaration that the defendants breached their common law and constitutional duties to the plaintiff and other Class Members;

d. a declaration that the defendants breached the rights of the plaintiff and other Class Members under s. 15(1) of the *Charter*, without justification;

e. a declaration that the defendants breached Jordan's Principle;

f. a declaration that the defendants were unjustly enriched;

g. special damages;

h. punitive damages;

i. restitution by the defendants of their wrongful gains;

j. damages equal to the costs of administering notice and the plan of distribution;

k. pre-judgment and post-judgment interest;

l. costs; and

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

DATED at Saskatoon, Saskatchewan, this 3rd day of August, 2022.

Maxime Faille, counsel for the plaintiff

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