Tribunal File No: 16765

IN THE MATTER OF THE *HUMAN RIGHTS CODE,*
RSBC 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

BETWEEN:

R.R.

COMPLAINANT

AND:

VANCOUVER ABORIGINAL
CHILD AND FAMILY SERVICES SOCIETY

RESPONDENT

AND:

WEST COAST LEAF

INTERVENOR

WRITTEN SUBMISSIONS OF THE INTERVENOR, WEST COAST LEAF

I. Introduction

1. The Complainant R.R. is an Indigenous mother, an intergenerational survivor of residential schooling, and a person with mental health disabilities.[1] Since 2004, child welfare agencies have repeatedly apprehended R.R.'s children from her care and then subsequently returned them to her care.[2] Between August 2016 and about September 2019, R.R.'s children were in the temporary custody of the Respondent Vancouver Aboriginal Child and Family Services Society ("the Society").[3]

2. R.R. says that the Society discriminated against her in connection with decisions it made about the custody and care of her children. She says that the Society's decisions were based, in part, on stereotypical and prejudicial assumptions about her ability to care for her children in light of her Indigeneity and mental health.[4]

3. On August 25, 2017, R.R. brought a complaint against the Society alleging discrimination on the basis of race, ancestry, colour, and mental disability, in violation of s.8 of the *Human Rights Code* ("the *Code*") ("the Complaint").[5]

4. In *R.R. v Vancouver Aboriginal Child and Family Services Society (No. 2)*, 2019 BCHRT 85 ("*R.R. No. 2*"), the British Columbia Human Rights Tribunal ("the Tribunal") identified the scope of the Complaint as concerning the Society's assessment of R.R.'s ability to parent[6] and its consequent decisions to continue to deny R.R. custody of her children, and place various restrictions on her access to

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[1] *R.R. v Vancouver Aboriginal Child and Family Services Society (No. 2)*, 2019 BCHRT 85 ("*R.R. No. 2*") at para. 1.
[2] *Ibid.*
[3] *Ibid.*
[4] *R.R. No. 2, supra* note 1, at para. 6.
[5] *Ibid*.
[6] *Ibid* at para. 13.

them, from April 2017 to December 12, 2018.[7] The Tribunal has identified the two main issues in this Complaint as:[8]

a. Whether R.R.'s Indigeneity and/or disability was a factor in the decisions which the Society made in respect of her access to her children; and

b. If so, then whether the Society's decisions were nonetheless justified.

5. West Coast LEAF was granted leave to intervene in the Complaint to make submissions with respect to the matters described below:[9]

- Systemic discrimination against Indigenous families and, in particular, Indigenous mothers with disabilities in the child welfare system, including the broader colonial context in which interactions between Indigenous mothers and the child welfare system occur;

- The protection from systemic discrimination under the *Code* and evidentiary burdens in claims raising systemic factors, including the need for social context to inform the Tribunal's understanding of the issues raised in the complaint; and

- The need for an interpretation of sections 2 and 3 of the *Child, Family and Community Services Act*, RSBC 1996, c. 46 ("*CFCSA*") as well as "best interests of the child" under that *Act* that conforms with international legal principles, including BC's adoption of the *United Nations Declaration on the Rights of Indigenous Peoples*.[10]

[7] *R.R. No. 2, supra* note 1 at para. 13.
[8] *R.R. v. Vancouver Aboriginal Child and Family Services Society (No. 4)*, 2020 BCHRT 22 ("*R.R. No. 4*") at para. 13.
[9] See Letter from Member Cousineau dated July 22, 2021.
[10] *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c. 44.

6. The Tribunal has recognized in this case and others that in order to deliver culturally competent services to Indigenous people, it must understand the social and colonial context in which cases involving Indigenous parties arise.[11] The Complaint is an important opportunity to situate an Indigenous mother's experiences of BC's child welfare system within the larger and continuing story of colonialism and the harms it has caused to Indigenous peoples, as well as the interconnected story of Indigenous resistance, reconnection, and self-determination in the face of the colonial project.

7. West Coast LEAF would like to acknowledge that it makes its submissions as a settler organization participating in a colonial human rights process.[12] R.R. has sought justice through a legal system which was imposed on Indigenous peoples.[13] It has been a drawn out and difficult process which has required R.R. to share private, sensitive, and stigmatizing details from her life and the lives of her children. In the event that R.R. is successful in establishing discrimination under the *Code*, the available remedies reflect a colonial model of justice and rights.[14] However, R.R.'s engagement with the human rights process can also be understood as an act of resistance which, regardless of outcome, is part of a long march toward reclaiming Indigenous self-determination.[15]

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[11] *R.R. No. 2*, *supra* note 1, at para. 79; *R.R. No. 4*, *supra* note 8, at para. 18; *Campbell v Vancouver Police Board*, 2019 BCHRT 12, at para. 18; *Campbell v Vancouver Police Board No. 4*, 2019 BCHRT 12 (*Campbell No. 4*) at paras. 38 and 107.

[12] West Coast LEAF takes inspiration for this acknowledgement from the submissions of Deborah Campbell after the hearing of *Campbell v. Vancouver Police Board*, which were excerpted in *Campbell No. 4*, *supra* note 11, at para. 5.

[13] *Campbell No. 4*, *supra* note 11, at para. 5, citing *R. v. Holmes*, 2018 ABQB 916, at paras. 2-8.

[14] *Campbell No. 4*, *supra* note 11, at para. 5.

[15] For a discussion of the value of engaging with the colonial child welfare system in light of the ultimate goal of exclusive Indigenous jurisdiction over child welfare, see Ardeth Walkem, *Wrapping Our Ways Around Them: Indigenous Communities and the CFCSA Guidebook, Second Edition* (2021) ("the WoW Guidebook") at p. 8.

II. The Social and Colonial Context of BC's Child Welfare System

8. Consideration of systemic discrimination against Indigenous families in BC's child welfare system cannot take place unless it is situated within the child welfare system's broader social and colonial context. This is because there is a "direct line" between Indigenous peoples' historic and ongoing experiences of colonialism and the presence of systemic racism and discrimination against Indigenous peoples in public services.[16]

9. Earlier in this proceeding, this Tribunal took notice of the "notorious" overrepresentation of Indigenous children in care, as well as the residential school legacy in today's child welfare system.[17] Taking this notice as a starting point, and with reference to Dr. Mary Ellen Turpel-Lafond's expert testimony during the hearing of this Complaint,[18] West Coast LEAF will review the social and colonial context of child welfare in British Columbia below.[19]

A. The History of Indigenous Child Welfare

10. Since time immemorial, Indigenous peoples have maintained distinct approaches to raising healthy and thriving children, including laws, practices, and values with respect to protecting children from harm and neglect. Indigenous peoples have the

[16] Mary-Ellen Turpel-Lafond, "In Plain Sight: Addressing Indigenous-specific Racism and Discrimination in B.C. Health Care," (2021) ("In Plain Sight"), at p. 6-7.
[17] *R.R. No. 2*, *supra* note 1, at para. 79.
[18] Dr. Turpel-Lafond's expert testimony took place on February 20, 2020 ("Dr. Turpel-Lafond Evidence").
[19] In the submissions that follow, West Coast LEAF uses the term "children" to refer to both children and youth under the age of 19.

right to self-determination and self-government, which includes jurisdiction over child welfare.[20]

11. The continuing story of colonialism in Canada has been a story of theft from Indigenous peoples: theft of land, theft of resources, theft of cultures, languages and social organizations, and theft of children.[21] These thefts are interconnected, as Indigenous children represent the future of Indigenous nationhood, self-determination, and jurisdiction over land and resources. As articulated by the Truth and Reconciliation Commission in *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) ["the TRC Report"], if every Indigenous person had been "absorbed into the body politic," "there would be no *reserves*, no Treaties, and no Aboriginal rights."[22]

12. The establishment of the residential school system in the 1880s was an early manifestation of Canada's assimilationist (and genocidal) vision for Indigenous peoples. It was an educational system in name only, as its primary goal was to break the link between Indigenous children and their cultures and identities.[23] As described by the TRC Report:

> For children, life in these schools was lonely and alien. Buildings were poorly located, poorly built, and poorly maintained. The staff was limited in numbers, often poorly trained, and not adequately supervised. Many schools were poorly heated and poorly ventilated, and the diet was meagre and of poor quality. Discipline was harsh, and daily life was highly regimented. Aboriginal languages and cultures were denigrated and suppressed. The educational goals of the schools were limited and confused, and usually reflected a low regard for the intellectual capabilities of Aboriginal people. For the students, education and

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[20] The WoW Guidebook, *supra* note 15, at p. 8. See also the preamble to *An Act respecting First Nations, Inuit and Metis children, youth and families*, S.C. 2019, c. 24 ("the Federal Act").

[21] Ardeth Walkem, "Calling Forth Our Future: Options for the Exercise of Indigenous Peoples' Authority in Child Welfare," (2002) ("Calling Forth Our Future"), at p. 9.

[22] The TRC Report, at 3.

[23] *Ibid* at p. 2.

> technical training too often gave way to the drudgery of doing the chores necessary to make the schools self-sustaining. Child neglect was institutionalized, and the lack of supervision created situations where students were prey to sexual and physical abusers.[24]

13. Thousands of Indigenous children died at residential schools and their bodies were rarely returned home.[25] The long-standing accounts of survivors were underscored in 2021 by the discovery of the remains of thousands of Indigenous children at former residential schools across Canada.[26]

14. Dr. Turpel-Lafond testified, with reference to the TRC Report, that where the residential school system ended, the child welfare system took over. As summarized by the TRC Report:

> From the 1940s onwards, residential schools increasingly served as orphanages and child-welfare facilities. By 1960, the federal government estimated that 50% of the children in residential schools were there for child-welfare reasons. What has come to be referred to as the "Sixties Scoop"—the dramatic increase in the apprehension of Aboriginal children from the 1960s onwards—was in some measure simply a transferring of children from one form of institution, the residential school, to another, the child-welfare agency. The schools were not funded or staffed to function as child welfare institutions. They failed to provide their students with the appropriate level of personal and emotional care children need during their childhood and adolescence. This failure applied to all students, but was of particular significance in the case of the growing number of social-welfare placements in the schools. Some children had to stay in the schools year-round because it was thought there was no safe home to which they could return. The residential school environment was not a safer or more loving haven. These children spent their entire childhoods in an institution.
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> The closure of residential schools, which commenced in earnest in 1970, was accompanied by a significant increase in the number of children being taken into

[24] The TRC Report, *supra* note 22 at p. 3-4.
[25] *Ibid* at p. 90-92 and 99-101.
[26] Antonio Voce, Leyland Cecco, and Chris Michael, "'Cultural Genocide': the shameful history of Canada's residential schools- mapped," *The Guardian* (06 September 2021), online at: https://www.theguardian.com/world/ng-interactive/2021/sep/06/canada-residential-schools-indigenous-children-cultural-genocide-map.

> care by child-welfare agencies. By the end of the 1970s, the transfer of children from residential schools was nearly complete in southern Canada, and the impact of the Sixties Scoop was in evidence across the country. In 1977, Aboriginal children accounted for 44% of the children in care in Alberta, 51% of the children in care in Saskatchewan, and 60% of the children in care in Manitoba. In those residences that remained in operation, the percentage of social-welfare cases remained high.[27]

15. The legacies of this system of coercion, control and assimilation are present today. The National Commission of Inquiry into Missing and Murdered Indigenous Women and Girls recently concluded that the residential school system, the Sixties Scoop, and today's child welfare system are each part of "generations of oppressive government policy" which has perpetuated the genocide of Indigenous women, girls and 2SLGBTQQUIA people.[28]

B. Indigenous Children in Today's Child Welfare System

16. Today, despite decades of Indigenous advocacy and resistance,[29] commission and inquiry reports,[30] watchdog reports,[31] court and tribunal rulings,[32] legislative

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[27] TRC Report, *supra* note 22, at p. 68 to 69.
[28] National Inquiry into Missing and Murdered Indigenous Women and Girls, "Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls," vol 1X (2019) ("the MMIWG Report"), at p. 104.
[29] For an overview of Indigenous child welfare activism from 1969 to the 1990s, see Calling Forth Our Future, *supra* note 21, at p. 15-20.
[30] The Report of the Royal Commission on Aboriginal Peoples (1996); the TRC Report, *supra* note 22; and the MMIWG Report, *supra* note 28.
[31] In the BC context, see, for example, the Honourable Ted Hughes, "BC Children and Youth Review: an Independent Review of BC's Child Protection System," ("the Hughes Report") and Grand Chief Ed John, "Indigenous Resilience, Connectedness, and Reunification: from Root Causes to Root Solutions," ("the Grand Chief Ed John Report").
[32] *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 ("*First Nations Caring Society*") and *Brown v. Canada (Attorney General)*, 2017 ONSC 251.

reforms,[33] political promises,[34] and ministry goal setting,[35] the overrepresentation of Indigenous children in child welfare systems across Canada endures. As a result, child welfare in Canada today has been called "the Millennium Scoop."[36]

17. It is estimated that there are more Indigenous children in state care today than during the height of the residential school era.[37] Moreover, 20% of Indigenous children will come into contact with the child welfare system at some point during their childhoods.[38]

18. In British Columbia, Dr. Turpel-Lafond testified that Indigenous families are more likely to be investigated for child protection concerns, are more likely to be found to be harming their children, and are more likely to have their children removed. Indigenous children in care are more likely to stay in care for longer periods of time and are less likely to exit care to a permanent placement (in other words, they are more likely to age out of care).

19. Publicly available data from the Ministry of Children and Family Development ("MCFD") shows that Indigenous children made up 66% of children in BC's care in

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[33] In the BC context, see, e.g., Child, Family and Community Service Amendment Act, 2018 ("Bill 26").
[34] In the BC context, see, e.g., Katie Hyslop, "Will Mitzi Dean Bring Change to Often Troubled Children's Ministry?" *The Tyee* (30 November 2020), online at: https://thetyee.ca/News/2020/11/30/Mitzi-Dean-Bring-Change-Children-Ministry/
[35] In the BC context, see, e.g., Ministry of Children and Family Development, "2019/20 to 2021/22 Service Plan."
[36] The WoW Guidebook, *supra* note 15, at 6-17.
[37] Ontario Human Rights Commission, "Interrupted Childhoods: Over-representation of Indigenous and Black Children in Ontario child welfare" (2018) ("Interrupted Childhoods"), citing Cindy Blackstock, "First Nations Child and Family Services: Restoring Peace and Harmony in First Nations Communities" in Kathleen Kufeldt & Brad McKenzie, eds, *Child Welfare: Connecting Research, Policy and Practice* (Waterloo: Wilfred Laurier University Press, 2003) 331.
[38] Aboriginal Children in Care Working Group, "Aboriginal Children in Care: Report to Canada's Premiers" (Ottawa, Ontario: Council of the Federation Secretariat, 2015) at 7.

2019, despite representing less 10% of BC's child population.[39] Moreover, Indigenous children were in care at a rate of 43.8 per 1,000 population, as compared to 2.6 per 1,000 population for non-Indigenous children.[40] In other words, Indigenous children were about 17 times more likely to be in care.

20. While the rate of Indigenous children in BC's care dropped between 2002 and 2019 (from 64 per 1,000 population to 43.8 per 1,000 population, or an approximately 32% drop), the rate of non-Indigenous children in care dropped more significantly (from 6.6 per 1,000 population to 2.6 per 1,000 population, or a 61% drop).[41]

21. Of particular note, Indigenous children are significantly more likely than their non-Indigenous counterparts to enter care because of "neglect," a concept that is strongly associated with poverty.[42] In 2020, 74.5% of Indigenous children in care were deemed in need of protection because of "neglect," as compared to 65% of non-Indigenous children.[43]

22. Once Indigenous children are deemed in need of protection, they experience worse outcomes than their non-Indigenous counterparts:

    a. As of March 31, 2019, the percentage of Indigenous children in need of protection who were *not* admitted into care (what MCFD calls the "Family Preservation Rate") was 84.8%, as compared to 92.8% of non-Indigenous children in need of protection.[44]

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[39] "Children and Youth in Care (CYIC): 4.14 Rate of CYIC per 1,000 Population," online at: https://mcfd.gov.bc.ca/reporting/services/child-protection/permanency-for-children-and-youth/performance-indicators/children-in-care.
[40] *Ibid.*
[41] *Ibid.*
[42] Grand Chief Ed John Report, *supra* note 31, at 32.
[43] "Permanency for Children &Youth in Care: Case Data and Trends: Reasons for CYIC by Court Order for Protection," online at: https://mcfd.gov.bc.ca/reporting/services/child-protection/permanency-for-children-and-youth/case-data-and-trends.
[44] "Services to Children in Need of Protection: Rate of Family Preservation," online at: https://mcfd.gov.bc.ca/reporting/services/child-protection/services-to-children-in-need-of-protection/performance-indicators.

b. Between April 2018 and March 2019, 21.2% of Indigenous children who left care went back into care within 12 months, as compared to 16.6% of non-Indigenous children.[45]

c. Between April 2018 and March 2019, 17.5% of Indigenous children exited to permanency (defined as family reunification, adoption, or permanent transfer of custody under the CFCSA) as compared to 24.5% of non-Indigenous children.[46] The implication of the permanency rate is the corresponding rate of children who become continuing wards of the province under Continuing Custody Orders.[47]

23. Grand Chief Ed John reported that close to 60% of Indigenous children will age out of care.[48]

24. The statistics on the overrepresentation of Indigenous children in BC's care must be considered in light of their implications. Excessive (and vastly disproportionate) rates of Indigenous children, families and communities experience the immediate and long-term harms associated with state removal of children.

25. As explained by Dr. Turpel-Lafond, immediate harms to Indigenous children in care include disconnection from culture and community, as well as high rates of neglect, abuse, suicide, and self-harm (Indigenous children in care experience higher rates of

[45] "Children and Youth in Care: 5.06 CYIC Recurrence of Maltreatment," online at: https://mcfd.gov.bc.ca/reporting/services/child-protection/permanency-for-children-and-youth/performance-indicators/children-in-care.
[46] "Children and Youth in Care: 5.01 CYIC Who Exited to Permanency," online at: (https://mcfd.gov.bc.ca/reporting/services/child-protection/permanency-for-children-and-youth/performance-indicators/children-in-care.
[47] *Ibid*.
[48] Grand Chief Ed John Report, *supra* note 31, at p. 12.

suicide and self-harm than non-Indigenous children in care).[49] A notable stressor for children is seeing their parents in distress and in conflict with child welfare actors.[50]

26. With respect to the long-term impacts experienced by Indigenous children in care, Dr. Turpel-Lafond described poor educational outcomes as well as increased and earlier involvement with the criminal justice system.[51] Echoing Dr. Turpel-Lafond's evidence, the Ontario Human Rights Commission has likewise observed that:

> While removing children from their families to protect them may be necessary in some cases, there are many negative and long-term effects associated with being placed in care. These include higher rates of youth homelessness, lower levels of post-secondary education, low income, high unemployment, and increased prevalence of chronic health problems for children. Compared to youth from the general population, youth from the child welfare system are also at much greater risk for becoming involved with the juvenile criminal justice system, a process referred to as the "child-welfare-to-prison pipeline." Because of racial disparities in the child welfare system, Indigenous and Black children may be disproportionately likely to experience these negative effects.
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> The Law Society of Ontario's The Action Group on Access to Justice (TAG) is working across sectors with Indigenous and non-Indigenous advocates and academics to look at the over-representation of Indigenous children and youth in the child welfare system. Consultation participants identified many serious and negative effects that being taken into care can have on Indigenous children and youth. These include:
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> - Long-term unresolved trauma
> - Permanent mistrust of institutions when one has spent one's childhood in a series of foster homes
> - Deep feelings of cultural disconnection and loss of identity because of a lack of Indigenous cultural education, particularly if children are placed in non-Indigenous homes, which most are.[52]

[49] Dr. Turpel-Lafond Testimony.
[50] *Ibid.*
[51] *Ibid.*
[52] Interrupted Childhoods, *supra* note 37 at 27-28.

27. The WoW Guidebook suggests that judicial notice can and should be taken of the long-term impacts of spending time in care.[53] Considering these impacts could reorient judicial analysis away from a narrow focus on the child's immediate situation and toward a holistic view of their short- *and* long-term interests.[54]

C. Understanding the Residential School Legacy

28. The problem of the overrepresentation of Indigenous children in BC's child welfare system is often contextualized by reference to the residential school legacy. The residential school legacy can in turn be understood in two interconnected ways: through the negative effects of the residential school experience on survivors and their descendants, and through the continuity of the colonial project and anti-Indigenous racism from residential schools to the modern child welfare system. As summarized by the TRC Report:

> Today, the effects of the residential school experience and the Sixties Scoop have adversely affected parenting skills and the success of many Aboriginal families. <u>These factors, combined with prejudicial attitudes toward Aboriginal parenting skills and a tendency to see Aboriginal poverty as a symptom of neglect, rather than as a consequence of failed government policies,</u> have resulted in grossly disproportionate rates of child apprehension among Aboriginal people.[55]

29. The residential school experience is one of many collective traumas (or "shocks") inflicted upon Indigenous people during Canada's continuing colonial story.[56] The cumulative effects of these collective traumas have had intergenerational impacts on Indigenous individuals and communities, resulting in "significant educational, income, health and social disparities" between Indigenous peoples and non-

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[53] The WoW Guidebook, *supra* note 15, at 83 to 84.
[54] *Ibid*.
[55] The TRC Report, *supra* note 22, at 138.
[56] *First Nations Caring Society*, *supra* note 32, at paras. 415-417; Dr. Turpel-Lafond Testimony.

Indigenous people in Canada.[57] Specific adverse outcomes include higher rates of poverty, health problems, disability, substance use, suicide, and experiences of abuse and violence.[58]

30. A particular impact of the residential school experience was that it impeded the intergenerational transmission of positive Indigenous parenting practices, while also exposing survivors to negative, abusive, and culturally unsafe parenting models.[59] This continues to have effects on the parenting of and by survivors' descendants.[60]

31. In the context of the child welfare system, the intergenerational effects of the residential school experience mean that Indigenous peoples may enter the child welfare system with both a higher level of need *and* highly specific needs. In *First Nations Caring Society*, the Canadian Human Rights Tribunal observed:

> The history of Residential Schools and the intergenerational trauma it has caused is another reason - on top of some of the other underlying risk factors affecting Aboriginal children and families such as poverty and poor infrastructure - that exemplify the additional need of First Nations people to receive adequate child and family services, including least disruptive measures and, especially, services that are culturally appropriate.[61]

32. The residential school legacy can equally be understood in terms of the continuation of prejudicial attitudes toward Indigenous peoples and parenting practices, and how they intersect with the larger colonial project.[62] As succinctly stated by the TRC

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[57] The TRC Report, *supra* note 22 at 135; *First Nations Caring Society*, *supra* note 32, at paras. 419-420.
[58] *First Nations Caring Society*, *supra* note 32 at paras. 415 to 421.
[59] The TRC Report, *supra* note 22, at p. 138, *First Nations Caring Society*, *supra* note 32, at para. 419.
[60] *Ibid*
[61] *First Nations Caring Society*, *supra* note 32, at para. 422.
[62] The TRC Report, *supra* note 22, at p. 138.

Report, "Canada's child-welfare system has simply continued the assimilation that the residential school system started."[63]

33. As quoted in the MMIWG Report, Cindy Blackstock observed of the linkages between colonialism, anti-Indigenous racism, and the child welfare system:

> It's really the whole roots of colonialism, where you create this dichotomy between the savage, that being Indigenous peoples, and the civilized, that being the colonial forces…if you're savage, you can't look after the land, and so the civilized have to take over. And if you're a savage, you can't look after your children, and the civilized have to look after them.[64]

34. As more recently described by Dr. Turpel-Lafond in "In Plain Sight: Addressing Indigenous-specific Racism and Discrimination in B.C. Health Care":

> The cultivation of racist beliefs that Indigenous peoples were weak, dying off, incapable and primitive enabled the state to enact policies to segregate, assimilate and govern all aspects of the lives of the Indigenous peoples and expropriate their lands. These beliefs, embedded in laws and policies for more than a century, have shaped and continue to permeate public services such as health, education, justice and child welfare. A lack of readily available accurate factual information, knowledge and understanding about this history contributes to ongoing negative attitudes and social inequities. In fact, this broad-based ignorance about racism and the history of Indigenous peoples in Canada is one of the ways that racism is held in place, as there is very little in our educational systems and in the media to contradict these beliefs. As a result, racist assumptions endure about the true reasons for substantive inequality for Indigenous peoples. The system enjoys "privilege" because those in it have no compelling reason to examine or reflect on the assumptions they carry, as those

[63] The TRC Report, *supra* note 22 at p. 138.
[64] The MMIWG Report, supra note 28, at p. 339.

assumptions are considered inherent characteristics of those profiled based on racial and other forms of discrimination.[65]

35. The effects of the residential school experience have long been accepted by settler institutions.[66] However, as suggested by Dr. Turpel-Lafond in "In Plain Sight," understanding the residential school legacy in terms of ongoing systemic racism and discrimination against Indigenous peoples requires settler institutions (including the legal system) to engage in a more difficult but necessary reckoning.

36. When considering these dual aspects of the residential school legacy, it is important to be alert to how they overlap and interact. First, a narrow consideration of the intergenerational effects of residential schools may obscure the presence of racism and/or racial discrimination. For example, as described above, neglect is a common reason that Indigenous children enter the child welfare system and is strongly associated with poverty, which in turn is associated with the intergenerational effects of residential schools. However, poverty and race intersect. Research shows that racial disparities exist between Indigenous and white children living in poverty with respect to child welfare involvement.[67] Second, a narrow consideration of the intergenerational effects of residential schools may pathologize parents and/or "position Indigenous peoples and communities as inherently sick and damaged and naturalize Euro-Canadian notions of family."[68]

D. Indigenous Activism and Resistance

[65] In Plain Sight, *supra* note 16, at p. 6 to 7.
[66] In *R. v. Ipeelee*, 2012 SCC 13, at para. 60, the Supreme Court of Canada said that all courts and tribunals must take judicial notice of these effects.
[67] Interrupted Childhoods, *supra* note 37, at p. 7.
[68] Holly A McKenzie et al, "Disrupting the Continuities Among Residential Schools, the Sixties Scoop, and Child Welfare: An Analysis of Colonial and Neocolonial Discourses," (2016) 7:2 *International Indigenous Policy Journal* 1, at 1.

37. When discussing the residential school legacy, it is also important to note that Indigenous activism and resistance with respect to today's child welfare system continue a long history of activism and resistance with respect to residential schools and the Sixties Scoop.

38. The TRC Report extensively documented Indigenous resistance during the residential school era, observing:

> Parents and children developed a variety of strategies to resist residential schooling. Parents might refuse to enrol students, refuse to return runaways, or they might refuse to return students to school at the end of the summer holidays. They also called on the government to increase school funding; to establish day schools in their home communities; and to improve the quality of education, food, and clothing. In taking such measures, they often put themselves at risk of legal reprisals. Almost invariably, the system declined to accept the validity of parental and student criticisms. Parental influences were judged by school and government officials to be negative and backward. The schools also suspected parents of encouraging their children in acts of disobedience. Once parents came to be viewed as the 'enemy,' their criticisms, no matter how valid, could be discounted.
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> …
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> In an effort to bring their own residential schooling to an end, some students attempted to burn their schools down. There were at least thirty-seven such attempts, two of which ended in student and staff deaths. For students, the most effective form of resistance was to run away. The principal of the Shingwauk Home in Sault Ste. Marie, Ontario, school in the 1870s, E. F. Wilson, devoted a chapter of his memoirs to the topic of "Runaway Boys." It included the story of three boys who tried to make their way home by boat. They were found alive more than ten days later, stranded on an island in the North Channel of Lake Huron.[69]

39. In 1969, the Canadian government's introduction of the White Paper mobilized Indigenous peoples in a grassroots political movement against Canada's assimilationist efforts.[70] This movement, against the backdrop of the Sixties Scoop,

[69] The TRC Report, *supra* note 22, at p. 114 and 177-118.
[70] Calling Forth Our Future, *supra* note 21, at p. 15.

took up and amplified calls for the resumption of exclusive Indigenous jurisdiction over child welfare.[71]

40. While a detailed discussion of Indigenous resistance and activism since 1969 is beyond the scope of these submissions,[72] it is important to note that Indigenous Nations, communities, organizations, and individuals have never ceased to raise concerns about colonial child welfare interventions, pressing at once for reforms and the resumption of exclusive Indigenous jurisdiction over child welfare. This advocacy recently culminated in Canada's enactment of *An Act respecting First Nations, Inuit and Metis children, youth and families*, which was co-developed with Indigenous nations and communities. The *Act* recognizes Indigenous jurisdiction over child welfare, creates a process for Indigenous nations and communities to take back jurisdiction over child welfare, and establishes national child welfare standards.

41. Individual Indigenous parents who challenge child welfare agencies or workers take on significant risk in doing so. Being assessed as "antagonistic" commonly has an adverse impact on the parent's legal position and/or is used as a justification to diminish, disqualify, or diminish their input.[73]

E. Systemic Discrimination Against Indigenous Families in BC's Child Welfare System

42. Discrimination against Indigenous peoples in the child welfare system can be understood in terms of systems and structures which do not meet Indigenous peoples' particular needs, as well in terms of the prevalence of prejudice and stereotypes at the level of individual and discretionary decision-making. These types

[71] Calling Forth Our Future, *supra* note 21, at p. 15.
[72] Calling Forth our Future contains a review of Indigenous child welfare activism from 1969 to the 1990s at p. 15 to 20.
[73] The WoW Guidebook, *supra* note 15, at p. 127 to 129.

of discrimination may intersect in some cases. Together or separately, they have the ultimate effect of perpetuating the inequality of Indigenous peoples.[74]

i. Preliminary Note on Power in the Child Welfare System

43. Systemic discrimination against Indigenous peoples in the child welfare system takes place in the context of enormous power differentials between child welfare workers and parents.

44. The legal system has long recognized the operation of power in the child welfare system. More than two decades ago, Justice L'Heureux-Dube observed in her concurring reasons in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46 (at para. 114) that:

> As well as affecting women in particular, issues of fairness in child protection hearings also have particular importance for the interests of women and men who are members of other disadvantaged and vulnerable groups, particularly visible minorities, Aboriginal people, and the disabled. As noted by the United States Supreme Court in *Santosky v. Kramer*, 455 U.S. 745 (1982), at p. 763:
>
> > Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups. . . such proceedings are often vulnerable to judgments based on cultural or class bias.
>
> Similarly, Professors Cossman and Rogerson note that "The parents in child protection cases are typically the most disadvantaged and vulnerable within the family law system . . . .": "Case Study in the Provision of Legal Aid: Family Law", in *Report of the Ontario Legal Aid Review: A Blueprint of Publicly Funded Legal Services* (1997), 773, at p. 787.[75]

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[74] *Campbell No. 4*, *supra* note 11, at paras. 97-99.

[75] In 2000, Justice L'Heureux-Dube cited this paragraph when writing for the majority in *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48, at para. 72.

45. More recently, in *Kawartha-Haliburton Children's Aid Society v. M.W.*, 2019 ONCA 316 ("M.W."), the Ontario Court of Appeal (ONCA) called on courts to be "especially mindful of the reality and material circumstances of those subject to child protection proceedings."[76] Citing Justice L'Heureux-Dube's observation above with approval,[77] the ONCA observed (at para. 69):

> Poverty and other forms of marginalization form part of the experience of many parents involved in child protection proceedings. If we do not face up to this reality we risk forgetting the hard-learned lessons of the past by exacerbating pre-existing inequities and harms. The miscarriages of justice outlined in the *Report of the Motherisk Commission* (2018: Ontario Ministry of the Attorney General) speak, by way of example, to the significant imbalance between parents and Children's Aid Societies, noting that parents, even when represented by counsel, were "simply overpowered" (at p. 121). Fairness in the child protection context demands recognition of these dynamics.[78]

46. The power dynamics in the child welfare system extend beyond those between child welfare workers and parents. Third party professionals, including doctors, psychologists, and counsellors, have dual roles within the child welfare system. While they provide services and support to parents and children, they also advise child welfare workers and are potential witnesses in the child protection proceeding.[79] Such professionals are "often seen as better qualified than the mother herself to describe her life, her challenges, her ability to parent and the needs of her children."[80]

47. Dr. Turpel-Lafond spoke at length about BC's "extremely powerful," "command-and-control-style" child welfare system (summarized at paras. 122 to 125 of R.R.'s Final

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[76] *M.W.*, at para. 68.
[77] *Ibid*.
[78] *Ibid* at para. 69.
[79] Judith Mosoff, Isabel Grant, Susan B. Boyd, and Ruben Lindy, "Intersecting Challenges: Mothers and Child Protection Law in BC," (2017) 50 UBC L Rev 435 ("Mosoff et al.") at p. 446.
[80] *Ibid*.

Submissions). Of particular note, Dr. Turpel-Lafond said that practice decisions, including the decision to return a child, are in the "zone of personal discretion" and that child welfare workers may have the widest scope of discretion of any statutory decision-maker in BC.

48. In the context of these lopsided power dynamics, some Indigenous parents may feel overwhelmed or defeated, while others may engage in power struggles with child welfare workers which they cannot win. Dr. Turpel-Lafond observed that parents who challenge or become upset with child welfare workers are often "severely punished."

ii. Systemic and Structural Issues in the Child Welfare System

49. As discussed above, Indigenous people may enter the child welfare system with both a higher level of need and highly specific needs. Of note, Dr. Turpel-Lafond testified that the Society, which serves the urban Indigenous population in the Vancouver region, handles some of the most complex cases in BC's child welfare system.

50. Child welfare agencies are obligated to meet or accommodate Indigenous people's particular needs.[81] It is important to question whether a colonial child welfare system can ever meet the particular needs of Indigenous families. However, assuming that BC's child welfare system is capable of meeting Indigenous peoples' needs, it has struggled to do so. This may be inferred by the gross overrepresentation of Indigenous children in care, as well as their poor outcomes after entering care. It is also evidenced by the reams of reports by the Representative for Children and Youth about the experiences of Indigenous children in BC's child welfare system, many of which discuss systemic failures in the child welfare system.[82]

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[81] *First Nations Caring Society*, *supra* note 32, at para. 422

[82] See, e.g., the appendices to Dr. Turpel-Lafond's Expert Report, as well as the recently published Skye's Legacy: A focus on belonging.

51. It is beyond the scope of these submissions to outline the various ways in which the child welfare system may not meet the particular needs of Indigenous parents and children. We will focus our submissions on concerns of particular relevance to the issues arising in the Complaint.

A Eurocentric approach to child welfare

52. The *CFCSA* regime is rooted in colonial and Eurocentric approaches to child welfare and has never been properly reviewed by First Nations.[83] These roots are reflected in a myopic emphasis on protecting children from real or perceived harm over other considerations, including cultural continuity and the value of children maintaining relationships with their parents and community.[84] The singular object of securing children's safety (in the narrow sense of the term) has in turn justified the development of BC's risk-adverse, command-and-control-style system.[85] This approach is often at cross-purposes with securing the overall well-being and safety of Indigenous children and families as understood from the perspective of Indigenous communities.

53. For example, with respect to the best interests of the child test under the *CFCSA*, the WoW Guidebook observes:

> When the standard of the "best interests of the child" is applied, Indigenous Peoples have reason for caution. Common sense assumptions about what is in the best interests of a child, or what is required to keep a child safe, have been used to remove Indigenous children and keep them from their families and communities. Past considerations of the BIOIC[86] have led to decisions about immediate protection of an Indigenous child that severed the child's connection to their culture, extended family and community, and led to long term damage and disconnection.

[83] Dr. Turpel-Lafond Testimony.
[84] *Ibid.*
[85] *Ibid.*
[86] BIOIC = Best interests of the Indigenous child.

> The BIOIC should never be interpreted or understood as requiring a choice between protecting a child or preserving their Indigenous culture. Instead, the rights of Indigenous children and communities should be read as mutually reinforcing and supportive. Strengthening Indigenous children and families strengthens Indigenous Nations, and vice versa.[87]

54. By way of comparison, Indigenous approaches to child welfare tend to be more collaborative and emphasize prevention and cultural continuity,[88] including through the distribution of responsibility for children amongst extended family and community.[89] In discussing Indigenous approaches, Dr. Turpel-Lafond said:

> So, in some First Nations child welfare systems that are more designed by First Nations they have resources like, they'll take the entire family into care. They don't remove a child, they'll take mom and the child into a home where they're cared for by an extended family. Those are some practices that are more traditional FN practices. The provincial system is more – you take the child out.

55. Dr. Turpel-Lafond testified that the Society, while managed by a community board, is still very much a colonial institution. Namely, it was created and is ultimately controlled by MCFD, it is entirely funded by the province, and it does not represent the Musqueam, Squamish and Tsleil-Waututh Nations of its territory. Moreover, the Society's approach to child welfare work is constrained by the legislative regime and the "very dominant system" within which it operates. Elsewhere, it has been observed that child welfare workers at Delegated Aboriginal Agencies ("DAAs") are often primarily non-Indigenous.[90] Regardless, systemic constraints limit workers' ability to exercise their discretion in a manner that is consistent with Indigenous worldviews and values.[91]

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[87] The WoW Guidebook, *supra* note 15, at 69.
[88] Dr. Turpel-Lafond Testimony
[89] The WoW Guidebook, *supra* note 15 at p. 57.
[90] British Columbia, Representative for Children and Youth (RCY), "Delegated Aboriginal Agencies How resourcing affects service delivery" (Victoria: RCY, 2017) at p. 48.
[91] *Ibid* at p. 42-48.

56. Despite the above observations, the current child welfare model is not pre-ordained by the *CFCSA*, especially where the interpretation of the *CFCSA* incorporates Indigenous laws and perspectives, as well as international law principles (see the section below). The best interests of the child test, for example, can be interpreted *in practice* (as opposed to just on paper) to recognize that maintaining a child's Indigenous identity and cultural connections is in their best interests.

Inadequate resources

57. BC's child welfare system is not designed or funded to provide the level of services and supports, as well as the types of services and supports, that would meet the particular needs of Indigenous families, including a broad range of preventative services, least intrusive measures, culturally appropriate services, and material supports.

58. Dr. Turpel-Lafond testified that the child welfare system generally, and VACFSS in particular, are "bereft of resources for parents."[92] While child welfare workers will identity what a parent needs to do in order to address the child protection concern(s), it is largely up to the parent to locate, secure, and navigate services and supports in the community.[93] The child welfare system notably does not provide material supports to parents which would address child protection concerns, such as income supports and safe and affordable housing.[94] Meanwhile, in the context of the ever-shrinking welfare state, it is increasingly difficult to secure these supports at all.

59. In its Pathways Report, West Coast LEAF documented barriers to accessing culturally appropriate, quality, and timely services in the community, including mental health and substance use services.[95] Often, these services are either not available,

[92] Dr. Turpel-Lafond Testimony.
[93] Dr. Turpel-Lafond Testimony.
[94] Mosoff et al., *supra* note 79, at 446.
[95] West Coast LEAF, "Pathways in a Forest: Indigenous Guidance on Prevention-Based Child Welfare" (2019) ("Pathways Report"), at p. 29.

overtaxed, or too far away.[96] Moreover, there is often a disparity between the services recommended or mandated by child welfare workers and those which the parents view as suitable or helpful.[97]

60. With respect to services for Indigenous children in care, a particular issue in the Complaint has been the experiences of two of R.R.'s children in contracted residential services. Contracted residential services are residential services which are contracted out to third party service providers and include staffed and group homes.[98] Dr. Turpel-Lafond testified that the group home experience is "not a positive experience" and that group homes tend to have unqualified and low skilled staff.[99]

61. In 2019, the Auditor General conducted an audit of contracted residential services in BC's child welfare system. It found that while contracted residential services house some of the most vulnerable children in the child welfare system (i.e., children who are assessed as having high or complex needs which cannot be met in the foster care system), MCFD was not effectively overseeing these resources.[100] In particular, it did not have a strategy for the use of contracted residential services, it struggled to match the needs of children to contracted residential services, and it did not know about the quality of care in contracted residential services.[101] Even though DAAs draw on the same pool of contracted residential services,[102] MCFD did not partner with DAAs to develop the resources and ensure they provide culturally appropriate care to Indigenous children.[103] The result was an increase in risks to children living in contracted residential services (47% of whom are Indigenous).[104]

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[96] *Ibid* at p. 30.
[97] *Ibid*
[98] The Office of the Auditor General of British Columbia, 2019. "Oversight of Contracted Residential Services for Children and Youth in Care," ("the Audit Report") at p. 8.
[99] Dr. Turpel-Lafond Testimony.
[100] The Audit Report, *supra* note 98, at p. 7-8.
[101] *Ibid*.
[102] The Audit Report, *supra* note 98, at p. 26.
[103] *Ibid*, at p. 7-8.
[104] *Ibid.*

A lack of cultural and culturally appropriate services

62. It is indisputable that Indigenous families have a particular need for, and a right to, culturally appropriate child welfare services. For Indigenous children in care, this includes services which preserve their distinct Indigenous identity and cultural and community connections. However, Dr. Turpel-Lafond testified that one of the most "prevailing and overwhelming" complaints by Indigenous children in care is feeling disconnected from their language, culture, and community. Moreover, Dr. Turpel-Lafond testified about the problem of pan-Indigenous approaches in the child welfare system generally and at VACFSS specifically.

63. Dr. Turpel-Lafond's evidence in this regard reinforces the following observations from the WoW Guidebook:

> All too often, considerations of a child's Indigenous identity or cultural heritage are treated as a procedural hoop (considered and either dismissed or met with simplistic actions), rather than guiding decisions about a child's plan of care. The lifelong importance of Indigenous culture may be improperly weighed against an assessment of a child's permanency and attachment needs, and so dismissed.
>
> Efforts to maintain a child's Indigenous cultural heritage are often generic, reflecting a failure to understand the child's unique cultural identity. Courts have found acceptable efforts to preserve the Indigenous identity of a child in care as including: attending powwows or cultural activities; internet searches; age-appropriate reading materials; having Indigenous artwork or artifacts in the foster home, or providing a child with Indigenous foods.
>
> Pan-Indigenous daycares, play groups or cultural events should not be read as sufficient to fulfill legal requirements to maintain a child's Indigenous heritage because they do not achieve the benefits that flow from the involvement of the Indigenous child's community and do not protect a child's unique Indigenous identity: "[A] full understanding of one's culture comes through a day to day exposure to it."
>
> > …fostering an Aboriginal identity can be a lifelong process. A person learns from what is passed down from generation to generation orally, and

> through sharing experiences through relatives, friends and community, as well as from geography, language, and other social facts. Within this process, the individual identity is "inseparable" from the collective identity of Aboriginal people. For Aboriginal people, early childhood attachment is to relatives and the community. In western cultures, however, early attachment focuses on the nuclear family.[105]

> Indigenous identity and heritage are a sense of belonging with cultural, social and historical roots, reflecting membership and affiliations with a particular historic cultural and linguistic group. Maintaining a child's access to, or involvement with, their Indigenous identity and heritage cannot be achieved through general measures. Maintaining a child's Indigenous identity and heritage require concrete efforts to maintain or establish relationships to their particular Indigenous cultural community (for example, a Nlaka'pamux child would require connections to the Nlaka'pamux people).[106]

64. The obligation of child welfare agencies to provide culturally appropriate services must extend in some cases to the third-party service providers with whom they work. In particular, where a child welfare agency or worker contracts with a third-party service provider, they should ensure that the service provider is culturally competent and is providing culturally competent services.

65. A particular issue in the child welfare system is the use of risk assessment tools, including Parental Capacity Assessments, which many experts (including Dr. Turpel-Lafond in her testimony) have identified as culturally inappropriate for Indigenous peoples. As summarized by the WoW Guidebook:

> A wide range of people can prepare a report, including social workers, psychologists and counsellors. There is no specific training that an assessor is required to take that would enable them to make assessments in an Indigenous family law context and to properly assess Indigenous Peoples' parenting or the cultural needs of Indigenous children. The cost of preparing parental capacity assessment reports is significant and represents a structural barrier for many Indigenous parents who cannot pay for the reports.

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[105] A. Smith, "Aboriginal Adoptions in Saskatchewan and British Columbia: An Evolution to Save or Lose Our Children" (2009) 29 Can J.F.L. 297 [Smith], at 309-310.
[106] The WoW Guidebook, *supra* note 15, at p. 93 to 94.

> Indigenous parents are at a significant disadvantage by not having a report prepared that fully and adequately reflects the needs, heritage and culture of Indigenous parents and children. Indigenous identity is most often ignored, minimized or completely misunderstood.
>
> The methodology used in parenting capacity assessments is often based on a Euro-centric interpretation of family which fails to take into account Indigenous cultural definitions. Elements of these assessments do not consider standards or practices within Indigenous communities and do not consider the socio-political realities parents face such as poverty, poor access to services and the impacts of inter-generational trauma.[107]

66. In "Parenting Capacity Assessment as Colonial Strategy," Peter Choate and Gabrielle Lindstrome suggest that the current methodology for conducting a parenting capacity assessment is so deficient with respect to Indigenous parents that parenting capacity assessments of Indigenous parents are invalid and do not meet the test for admissibility under the *R. v. Mohan* test.[108]

iii. Prejudice and Stereotypes in the Child Welfare System

67. The prevalence of prejudice and stereotypes about Indigenous peoples throughout Canadian society is beyond reasonable dispute and is properly the subject of judicial notice.[109]

68. Recently, in *R. v. Barton*, 2019 SCC 33, the Supreme Court of Canada discussed "widespread" anti-Indigenous racism in the criminal justice system and the corresponding obligation of courts to take ameliorative action against such racism (at paras. 198-200):

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[107] The WoW Guidebook, *supra* note 15, at p. 132.
[108] Peter Choate and Gabrielle Lindstrome, "Parenting Capacity Assessment as a Colonial Strategy," (2018) 37 Canadian Family Law Quarterly 42.
[109] *R. v. Le*, 2019 SCC 34, at para. 83; *R. v. Spence*, 2005 SCC 71; *R. v. Williams,* 1998 CanLII 782 (SCC); *R v Barton*, 2019 SCC 33.

> Trials do not take place in a historical, cultural, or social vacuum. Indigenous persons have suffered a long history of colonialism, the effects of which continue to be felt. There is no denying that Indigenous people — and in particular Indigenous women, girls, and sex workers — have endured serious injustices, including high rates of sexual violence against women. The ongoing work of the National Inquiry into Missing and Murdered Indigenous Women and Girls is just one reminder of that painful reality (see Interim Report, *Our Women and Girls Are Sacred* (2017)).
>
> Furthermore, this Court has acknowledged on several occasions the detrimental effects of widespread racism against Indigenous people within our criminal justice system (see, e.g., *Williams*, at paras. 54 and 58; *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688, at para. 65; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at paras. 59-60 and 67; *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165, at para. 57). For example, in *Williams*, this Court recognized that Indigenous people are the target of hurtful biases, stereotypes, and assumptions, including stereotypes about credibility, worthiness, and criminal propensity, to name just a few (para. 28). Moreover, in *Ewert*, this Court stressed that "discrimination experienced by Indigenous persons, whether as a result of overtly racist attitudes or culturally inappropriate practices, extends to all parts of the criminal justice system, including the prison system" (para. 57). In short, when it comes to truth and reconciliation from a criminal justice system perspective, much-needed work remains to be done.
>
> With this in mind, in my view, our criminal justice system and all participants within it should take reasonable steps to address systemic biases, prejudices, and stereotypes against Indigenous persons — and in particular Indigenous women and sex workers — head-on. Turning a blind eye to these biases, prejudices, and stereotypes is not an answer...

69. Although the presence of systemic racism and discrimination against Indigenous peoples in the child welfare system has received less judicial attention (most provincial court decisions under the *CFCSA* tend to ignore or disregard the child welfare system's social and colonial context[110]), Justice Moldaver's analysis in *Barton* can easily be extended to child welfare system. In *Campbell No. 4*, this

[110] Mosoff et al, *supra* note 79.

Tribunal cited with approval the Ontario Human Rights Tribunal's observation that prejudice and stereotypes "are part of our historical and social fabric, and are imbued in all of us through our social interactions, the education system, the media and entertainment industries, and other means." Like the police officers in *Campbell No. 4*, child welfare workers "are drawn from this same social fabric" and are equally susceptible to conscious and unconscious biases.[111]

70. Anti-Indigenous racism intersects with other axes of marginalization in the child welfare system to compound an Indigenous parent's vulnerability to state surveillance and intervention.[112] It is important to note that R.R.'s identities reflect a common constellation of protected characteristics in the child welfare system: Indigeneity, sex (in particular, single motherhood), and mental health disability.[113] A 2017 review of Continuing Custody Order decisions in BC found that a large majority involved single mothers, 23% involved a primary parent who was Indigenous (which the authors said was likely an undercount), 91% involved a primary parent with a mental health or substance-use related disability, and poverty was pervasive in all of the cases. [114]

71. Each of Indigeneity, sex, and mental health disability can be considered as its own risk class within the child welfare system, especially where it intersects with poverty.[115] However, it is important to recall that where these characteristics overlap, they cannot easily be separated out and parsed.[116]

72. As discussed above, the perception of Indigenous peoples as "weak, dying off, incapable and primitive" has long supported the colonial project.[117] Where

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[111] *Campbell No. 4*, *supra* note 11, at para. 131.
[112] For a recent discussion of intersectionality in human rights analysis, see *Campbell No. 4*, *supra* note 11, at para. 12.
[113] Pathways Report, *supra* note 95; Dr. Turpel-Lafond Testimony.
[114] Mosoff et al., *supra* note 79, at 451 to 455.
[115] Pathways Report, *supra* note 95.
[116] Campbell No. 4, *supra* note 11, at para. 12.
[117] In Plain Sight, *supra* note 16, at p. 6 to 7.

Indigenous people are seen as unable to care for their children, they can equally be seen as unable to care for their land. Particular stereotypes include that Indigenous peoples "are suspicious, not credible, prone to criminality, uncivilized, drunk, lacking a coherent social and moral order, and 'belonging' in prison."[118]

73. Moreover, as discussed above, Indigenous families are often measured against colonial and Eurocentric conceptions of good parenting and best interests of children. Indigenous peoples have maintained distinct parenting approaches despite hundreds of years of colonial interference. However, child welfare workers may not recognize or properly contextualize cultural difference when assessing for risk. For example, risk assessments that narrowly focus on primary caregivers "may miss fundamental realities of what family is and where child-rearing responsibility lies in Indigenous communities."[119]

74. When the Ontario Human Rights Commission ("OHRC") conducted a consultation on racial profiling in Ontario in 2016, it heard from many Indigenous and Black participants about their experiences and perceptions of systemic racial discrimination in Ontario's child welfare system. In particular, the OHRC wrote:

> We heard concerns about racial profiling in the child welfare sector, particularly affecting Black and Indigenous families. We heard that systemic racism was perceived to be embedded in this system, and that racial profiling that may take place in this sector targets mothers for over-scrutiny most often.
>
> We heard concerns that racialized and Indigenous parents are disproportionately subjected to surveillance and scrutiny, which contributes to families being

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[118] *Campbell No. 4*, *supra* note 11 at 127, citing *R v. Williams,* 1998 CanLII 782 (SCC), 1998 1 SCR 1128 at para. 58; *McKay v. Toronto Police Services Board,* 2011 HRTO 499 at para. 129."

[119] Johanna Caldwell & Vandna Sinha, "(Re) Conceptualizing Neglect: Considering the Overrepresentation of Indigenous Children in Child Welfare Systems in Canada" (2020) 13:2. Child Indicators Research 481 at 502.

reported to children's aid societies (CASs). We also heard that once a referral to child welfare authorities takes place, families are more likely to have prolonged child welfare involvement, and be more at risk of having their children apprehended. Consultation participants suggested these experiences arise in part from referrers' and child welfare authorities' incorrect assumptions about risk based on race and related grounds, and intersections between these grounds and poverty.[120]

75. Following this consultation, the OHRC conducted a public interest inquiry into the overrepresentation of Indigenous and Black children in Ontario's child welfare system. In "Childhoods Interrupted," the OHRC observed that conscious and unconscious racial bias may affect individual decision-making by child welfare workers as follows:

> Workers may perceive a case differently based on the family's race or ancestry, resulting in assessing risk differently or taking a more extreme action (such as apprehending a racialized child). Child welfare workers, who are often White, may be less likely to relate to Indigenous or racialized clients, see their situations as nuanced, or give them the benefit of the doubt. They may hold negative stereotypes about Indigenous and Black families. They may privilege White, middle-class communication patterns, hold racialized families to changing expectations, and be more likely to negatively interpret the frustration and anger of these families as "a lack of compliance." The OHRC is concerned that where these attitudes and behaviours exist, they could lead to decisions that adversely affect Indigenous and Black children and their families.[121]

76. The OHRC's concern about racialized backlash against Indigenous and Black parents who are not viewed as "compliant" reflects Dr. Turpel-Lafond's testimony and the WoW Guidebook's observations. More generally, it reflects what was

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[120] Ontario Human Rights Commission, "Under Suspicion: Concerns about child welfare" (Ontario: 2017).
[121] Interrupted Childhoods, *supra* note 37, at p. 26-27.

described by the Ontario Human Rights Tribunal in *Abbot v. Toronto Police Services Board,* 2010 HRTO 1314 ("*Abbot*"), as a "manifestation of racism whereby a White person in a position of authority has an expectation of docility and compliance from a racialized person, and imposes harsh consequences if that docility and compliance is not provided."[122]

77. In the WoW Guidebook, Ardeth Walkem described several common examples of conscious and unconscious biases about Indigenous peoples and their ability to parent in BC's child welfare system:

- Children or their families may be found to not be "Indigenous enough"—because of a mixed heritage or a perceived disconnect with their cultural roots—and so not entitled to benefit from provisions of child welfare laws that protect Indigenous culture or identity;

- Responsibility for care of Indigenous children in Indigenous cultures is often distributed or shared across households. The failure to recognize the role of extended families or community members in Indigenous parenting can lead to a finding that a child has been abandoned or neglected if left in temporary or distributed care;

- Indigenous parenting styles allow for a greater degree of autonomy or exploration. Discipline that is less obvious—such as teaching or storytelling—may be judged "too permissive" or as poor or neglectful parenting;

- Real or perceived disabilities of Indigenous children or parents (such as fetal alcohol syndrome (FAS)/fetal alcohol exposure (FAE)) may be used to disqualify Indigenous family or community members from caring for a child; or

- Some child welfare concerns may reflect socio-economic conditions such as overcrowding in a home, lack of seasonally appropriate clothes or not participating in school or community activities.[123]

[122] *Abbot* at para. 46(f), cited with approval in *Campbell No. 4*, supra note 11, at para. 138.
[123] The WoW Guidebook, *supra* note 15, at p. 109 to 110.

78. As recognized by Justice L'Heureux-Dube in *G.(J.)*, the child welfare system overwhelmingly implicates single mothers. Poor single mothers have been generally described as a risk class "who can legitimately be intruded upon, scrutinized indefinitely and held to account for their daily activities."[124] This reflects a colonial and Eurocentric ideology of motherhood which expects mothers to be selflessly available to their children while also maintaining a high level of personal responsibility and autonomy.[125] In the context of a shrinking welfare state, single mothers who may need state support to meet their children's needs will often struggle to meet these expectations.[126] However, rather than understand single mothers' circumstances (such as experiences of poverty and domestic violence) as connected to systemic inequalities, the child welfare system has often characterized them as poor "lifestyle choices."[127]

79. Parents with a mental health diagnosis are also significantly overrepresented in the child welfare system. In addressing the experiences of a mother with a mental health disability in BC's child welfare system in *K.W. v British Columbia (Ministry of Children and Family Development)*, 2021 BCHRT 43 (*K.W.*), , this Tribunal observed (at para. 88) that:

> Society continues to hold pervasive and damaging stereotypes about people with mental illness. These stereotypes manifest in self, social, and structural stigma which harms people with mental illness. I considered some of these forces in *Customer v. A Restaurant and a manager*, 2018 BCHRT 138:
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> > People living with mental illness notoriously experience stigma from their wider community: *Saadati v. Moorhead*, 2017 SCC 28 at para. 21; *Battlefords and District Co-operative Ltd. v. Gibbs*, 1996 CanLII 187 (SCC), [1996] 3 SCR 566 at para. 31. Its effect is to "unjustly and unnecessarily [impede] their participation … in civil society": *Saadati* at para. 21. Unlike other

[124] Mosoff et al, supra note 79, at 438.
[125] *Ibid* at 437 to 438.
[126] *Ibid*.
[127] *Ibid* at 459.

> types of disability, mental illnesses "often become a master status; that is, a person's identity is engulfed by their illness, which dictates how they are perceived and treated by society": [James D. Livingston, "Mental Illness- Related Structural Stigma: The Downward Spiral of Systemic Exclusion Final Report" (Mental Health Commission of Canada, October 2013)] at p. 8. Stereotype and stigma can lead to profiling people based on preconceived ideas about their character, with the effect that they are treated with suspicion, marginalized, or altogether excluded from significant areas of public life: Ontario Human Rights Commission, "Policy on preventing discrimination based on mental health disabilities and addictions" (2014) [**OHRC Policy**] at p. 27.
>
> A common stereotype about people with a mental illness is that they pose a danger to others: *Davis v. Sandringham Care Centre and another*, 2015 BCHRT 148; OHRC Policy at pp. 13-15 and 27-28. For example, in *Petterson and Poirier v. Gorcak (No. 3)*, 2009 BCHRT 439, the Tribunal held that a housing provider acted upon "a stereotypical view that some mentally ill persons … are unpredictable, dangerous and a threat to the safety of others": at para. 476… [at paras. 36-37]

80. Women with mental health disabilities are often constructed as needy, dependent, selfish, and/or self-absorbed, as well as unable to put their children's needs ahead of their own.[128]

81. In addition to the stereotypes described above, a medical model of disability also operates to disadvantage parents with mental health disabilities. Rather than consider what supports parents with mental health disabilities may need in order to parent effectively, child welfare workers too often assume that these parents lack the capacity to parent.[129]

[128] *Ibid* at 464 to 467.
[129] *Ibid* at 461.

82. Parents and children with disabilities are often positioned in opposition within the child welfare system.[130] In these cases, there may be a particular concern around the ability of parents with disabilities to meet the enhanced needs of children with disabilities, the assumption being that children with disabilities require "above-average" parenting.[131] For mothers, there is a particular significance and stigma in cases where a child's disabilities are linked to their mother's actions, such as with respect to fetal alcohol spectrum disorder ("FASD"), reactive attachment disorder, and abstinence syndrome.[132]

83. Indigenous mothers who have a mental health disability or are perceived as having a mental health disability may experience various intersecting stereotypes. Some examples include:

    d. A convergence of negative stereotypes about Indigenous women with negative stereotypes about women with mental health disabilities.

    e. The application of the colonial and Eurocentric ideology of motherhood to cultural differences in an Indigenous mother's parenting, or such that the Indigenous mother's difficult circumstances are viewed as poor lifestyle choices rather than connected to the intergenerational effects of residential schools.

    f. A medical model of disability which pathologizes an Indigenous mother rather than contextualizes her disability, uses the recognition of her intergenerational trauma as a ground to justify child welfare interventions, and/or does not consider distributed parenting practices in Indigenous communities.

[130] *Ibid* at 469 to 471.
[131] *Ibid* at 472.
[132] *Ibid* at 471.

g. A medical model of disability which pathologizes Indigenous children with disabilities and/or privileges an Indigenous child's disability-related needs over their needs for cultural and community connections.

III. Protection from Systemic Discrimination under the *Code*

84. The *Code* does not expressly define "systemic discrimination."[133] Nevertheless, this Tribunal and courts in British Columbia and across Canada have long recognized that human rights protections are essential to uprooting the enduring and endemic harms of systemic or institutional discrimination. Long after individual "bad apples" have moved on (or are moved along), discriminatory policies, practices, procedures and attitudes remain, often hidden in plain sight.

85. Notwithstanding efforts to foster a more equitable and just society, seemingly benign policies, practices and procedures, and decisions made pursuant to them, frequently operate at an interstitial level, such that the full scale of their impacts may not be immediately apparent. This is especially so where adverse impacts on an individual or a group are inextricably bound up with harms that may be sourced in the operation of a system, sector or institution itself. In such cases, it can be difficult – if not impossible – to draw a bright line around where an individual's experience of discrimination ends and a systemic one begins. This challenge is all the greater where disadvantage is experienced along multiple and overlapping characteristics, as in this Complaint.

[133] Section 3 sets out the purposes of the *Code*. Despite there being no specific reference to "systemic" discrimination, the *Code* is broadly aimed at the prevention of discrimination, the identification and elimination of "persistent patterns of inequality associated with discrimination," as well as the provision of a means of redress for those who have experienced discrimination. Moreover, section 37 grants this Tribunal broad remedial jurisdiction, including the power to make orders with systemic impact to address patterns or practices contravening the *Code*.

86. Systemic discrimination is not a new concept; it has existed likely as long as we have had systems of governance and regulation. The law recognizes the existence of systemic discrimination, even as it is has struggled to fully understand its scope, the elements of its proof, or how it may be effectively redressed. While imperfect, human rights law has proven the most fertile ground for unpacking discrimination that is alleged to exist at a systemic or institutional level.[134]

87. In the course of adjudicating human rights claims, decision-makers ascribe legal significance to the facts before them. Discrimination claims, in particular, call for close examination of circumstances that touch the very core of individual and group identity, dignity and worth.

88. Discrimination claims come in all shapes and sizes and are frequently highly fact and context specific.[135]

89. Some forms of discrimination may be readily apparent on the face of a policy, practice or standard. In such circumstances, stereotypes, prejudices and biases concerning characteristics protected by the *Code* may overtly serve to deny someone services altogether or to offer them inferior services, to withhold from them benefits available to other people, or to impose on them additional burdens or requirements that have not been imposed on others.[136]

90. Discrimination may also occur in more indirect and less overt ways, such as where a facially neutral policy, practice or standard adversely or disproportionately affects

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[134] See, e.g., *Canadian National Railway Co. v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 ("*Action Travail*"); *British Columbia v Crockford*, 2006 BCCA 360 ("*Crockford*"); *Radek v Henderson Development (Canada) and Securiguard Services (No. 3)*, 2005 BCHRT 302 ("*Radek No. 3*").
[135] See *RR No. 2 supra* note 1 at paras. 66-70 discussing cases where the Tribunal has dismissed complaints involving the exercise of authority under the *CFCSA*.
[136] See, e.g. *K.W.*, a human rights complaint framed by the complainant as an instance of "direct discrimination" alleging that MCFD's assessment of her parenting abilities was based on stereotypes about people with mental illness.

individuals or groups on the basis of *Code*-protected characteristics.[137] In such situations, the complainant will likely need to go beyond the four corners of the law, policy or standard to identify how its seemingly neutral application has or may have disproportionate or distinctly disadvantageous results in application and in connection with a protected characteristic under human rights law.

91. Systemic discrimination has proven challenging to define.[138] On the one hand, it is frequently described in the same breath as adverse effects or adverse impact discrimination[139] but the two are often distinguishable as a matter of scale. A successful adverse effect discrimination claim can arise from a standalone law, policy or standard that does itself indirectly what it ought not do directly.[140] Systemic discrimination is not typically sourced in a singular policy, law or practice, but rather is seen to arise from the operation of, or as a result of, a set of interlocking or nested policies, practices and procedures that underlie a particular system or institution.

92. In *Action Travail*, the Supreme Court of Canada first defined systemic discrimination in the context of human rights law as:

> … practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics … It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of

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[137] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Centre)*, 2015 SCC 39 at para. 32 [*Bombardier*]; *Fraser v Canada (Attorney General)*, 2020 SCC 28 ("*Fraser*") at paras. 30-31.
[138] See, e.g., *Brome v Ontario (Human Rights Commission)* (1999), 171 DLR (4th) 538 (Ont. Div. Ct.) at paras. 46-47, cited with approval in *Crockford* (Levine J., concurring).
[139] See, e.g., *Fraser supra* note 137 at para. 29.
[140] *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 ("*Meiorin*") (Application of an aerobic capacity test for forest firefighters found to unfairly exclude women from employment).

> innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.
>
> That is why it is important to look at the results of a system …[141]

93. Systemic discrimination has been defined as "a complex underlying social process, which is revealed by incidents, acts and consequences and is recognized by its impact on specific classes of people."[142] It has been recognized as including direct and adverse impact discrimination, as well as "entrenched and long held discriminatory attitudes and beliefs."[143] While it may seem intuitive that systemic discrimination is something quite separate and apart from individual discrimination, in practical terms, individual and systemic discrimination have a perversely symbiotic relationship. Systemic discrimination overlaps with other forms of discrimination, such that policies that disregard or remain silent about the actual characteristics or circumstances of particular groups may be operationalized by individuals who hold prejudiced and biased attitudes, creating a space wherein discretionary decisions are made that may compound the harshness of "value neutral" policy.[144] Moreover, institutions in which policies, practices and standards are not regularly reviewed may calcify into a status quo environment that perpetuates disadvantage by rubberstamping decisions without regard for actual characteristics and need.

94. Whether the circumstances alleged in any particular complaint rise to a level of legally cognizable discrimination is a question of significance not only to the individuals before the Tribunal, but to society at large. The *Code* is aimed at fostering a substantively more equitable society; it does so by responding to unique

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[141] *Action Travail* at 1138-39, cited with approval in *Fraser* at para. 39
[142] *Brome v Ontario (Human Rights Commission)* (1999), 171 DLR (4th) 538 (Ont. Div. Ct.) at para. 46, cited with approval in *Crockford* (Levine J., concurring).
[143] Ibid., at para. 47.
[144] *Brar and others v BC Veterinary Medical Association and Osborne*, 2015 BCHRT 151 at para. 740.

and specific historical, cultural, or social contexts that continue to bar full and free participation in all areas of social and economic life.[145]

95. While discrimination can take many forms, there is a common two-stage analysis that applies to all types of discrimination claims. First, the complainant bears the burden of proving *prima facie* discrimination on a balance of probabilities. Second, the evidentiary burden shifts to the respondent to show a *bona fide* and reasonable justification for the discriminatory treatment of the complainant.[146] To prove discrimination, the complainant must show that:
    a. They have one or more characteristics protected by the Code;
    b. They experienced an adverse impact in respect of a sphere to which the Code applies; and
    c. The protected characteristics were a factor in the adverse impact they experienced.

    Each of these three elements must be proven on a balance of probabilities, including that it is more likely than not that the protected characteristics were a factor in the harm suffered.[147]

96. Once a complainant has established these elements of the test, the respondent may prove that its conduct was justified. Discrimination will be found to occur where the respondent's conduct has not been justified. Complainants are not held to a standard of proving a "causal connection" between protected characteristics and the adverse treatment they experience.[148] Complainants need only establish that there is a "connection" there, or that the protected characteristic is a "factor" in their treatment. The Supreme Court of Canada confirmed the approach previously set out

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[145] See, *Simpson v City of Langley*, 2020 BCHRT 92 at paras. 46-48, citing to *Oger v Whatcott (No. 7)*, 2019 BCHRT 58 at paras 124-125.
[146] *Moore v British Columbia (Education)*, 2012 SCC 61 at para. 33.
[147] *Bombardier*, *supra* note 137 at para. 56; see also *Vancouver Area Network of Drug Users v Downtown Vancouver Business Improvement Association*, 2018 BCCA 132 at paras. 82-83, leave to appeal to SCC dismissed.
[148] *Bombardier*, *supra* note at 137 para 49.

in *Moore* and *Bombardier* in *Stewart v Elk Valley Coal Corp*, 2017 SCC 30, and further clarified that the protected characteristic need only be "*a* factor" with no qualification as to the weight of that factor. Complainants also need not prove a discriminatory intention, or stereotypes or arbitrariness in decision-making.[149]

97. Notwithstanding the flexibility of this approach, the connection between a complainant's protected characteristics and the harm they've experienced is not always obvious. The Supreme Court of Canada has cautioned that proof of connection should not become too heavy a burden for complainants to meet.

98. While proof of intention is not necessary to make out a claim of *prima facie* discrimination, such proof would clearly establish the requisite connection.

99. Connection may also be proven by looking to the effect of the adverse treatment on the complainant. If the adverse treatment is disproportionately impacting members of a protected group or class, such that there is a greater impact on members of those groups, or that the harms are more acute as experienced by that group, that can support a finding that the protected characteristic was a factor in the harms experienced by the complainant. For instance, in *Meoirin,* an aerobic capacity test for forest firefighters was set such that significantly more women than men were unable to pass, thus establishing a connection between their sex and the barrier posed to their ability to pursue that career.

100. Apart from a disproportionate or quantitative impact on a particular group, connection may also be shown by a differential or qualitatively different impact on people with characteristics protected by the *Code*. In the context of a discrimination analysis under the *Canadian Charter of Rights and Freedoms*, for instance, equity-seeking groups have had success in proving discrimination on the basis that the impugned scheme or state action exacerbated conditions of disadvantage by

[149] See *Campbell No 4* for a recent application of the test.

worsening their circumstances. See, for instance, *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 and *BCCLA and JHSC v Canada*, 2018 BCSC 62.

101. Complainants seeking to establish *prima facie* discrimination may rely on a combination of individual and systemic evidence, meaning that evidence of a complainant's own experience may be supported and contextualized by evidence that speaks to system-wide or institutional factors. For instance, in establishing that certain conditions of confinement exacerbate disabling mental health impairments, a complainant may offer evidence of their own health as well as evidence of social context.[150]

102. The requisite connection may also be established by drawing inferences from notorious social facts. The link between the complainant's protected characteristics and the adverse impact they experience can be deeply entrenched and may not lend itself easily to proof. For instance, in the context of racial profiling, courts have long recognized that the existence and extent of racial bias may not be amenable to proof by traditional means. In *R v Parks*, the Ontario Court of Appeal acknowledged that, "the existence and extent of … racial bias are not issues which can be established in the manner normally associated with the proof of adjudicative facts."[151] The link between Indigenous identity and systemic marginalization has been judicially noticed in the context of the criminal justice system and law enforcement. In *R v Ipeelee*,

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[150] In *Moore*, *supra* note 146 at paras. 58-60, the Supreme Court of Canada was critical of the BC Human Rights Tribunal's bifurcation of the complaint into consideration of an individual discrimination claim and separately a systemic discrimination claim. Nevertheless, the Court confirmed that the Tribunal could consider systemic evidence in order to determine whether the individual complainant (Jeffrey Moore) had suffered discrimination.

[151] *R v Parks* (1993), 15 O.R. (3d) 324 (ONCA), cited in *R v Williams*, [1998] 1 SCR 1128 at para. 35. See also *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, where the Court accepts that "there will frequently be instances in which a court may appropriately take judicial notice, of some or all of the facts necessary to underpin a discrimination claim, and in which the court should engage in a process of logical reasoning from those facts…" (para. 77)

2012 SCC 13, the Supreme Court of Canada was critical of the hesitancy that courts have sometimes expressed at taking judicial notice of the systemic and background factors affecting Indigenous people in Canadian society.

103. In making out *prima facie* discrimination, complainants must offer proof beyond their own belief that discrimination occurred. Moreover, social context evidence of discrimination against a group will not likely – on its own – establish the requisite connection between the discriminatory harms alleged and the protected characteristics of the complainant.[152]

104. Discrimination today is arguably more subtle, as it is often sourced in organizational and institutional norms. Social context is often essential for a full appreciation of the scope and nature of claims of discrimination, especially where the claimant's experience is shaped by multiple, overlapping and compounding characteristics of disadvantage.

105. Evidence of social context, such as that outlined in the previous sections of these submissions, is often essential for decision-makers adjudicating complex claims of *prima facie* discrimination in which both individual and systemic elements are at play. Social context evidence is indispensable in illuminating the full factual matrix before the Tribunal, offering the decision-maker a widened aperture from which to understand and assess the complaint and the complainant's perspective and lived experience.[153]

106. Social context evidence may provide the missing link between individual and systemic discrimination, offering a window into experiences that are often far removed from those of the decision-maker yet essential to understand in

[152] *Bombardier*, *supra* note 137 at para. 88; *Campbell No.* 4, *supra* note 11 at para. 19.
[153] In *R v S(RD)*, [1997] 3 SCR 484 at para. 43, social science expert evidence was useful for adducing relevant social conditions that in turn provided context for the decision-makers to meaningfully interpreting and applying the law.

adjudicating the claims.[154] It can also assist the decision-maker by exposing stereotypes and assumptions,[155] by providing necessary background context to issues requiring resolution,[156] and by assisting in assessing credibility or demeanour.

107. On this latter point, social context evidence can provide a critical lens in understanding why a complainant might undertake a particular course of action that may appear inconsistent, illogical or unbelievable to the outside observer – even a relatively well-informed observer. In *PN v FR and another (No. 2)*, 2015 BCHRT 60, expert evidence of the circumstances of young Filipino mothers working abroad allowed the Tribunal to appreciate that the complainant's experience reflected patterns of labour exploitation and abuse of domestic caregivers from the Philippines.

108. Social context evidence can also allow for a deeper understanding of the dynamics of interactions among individuals and between individuals and representatives of systems of power. In such circumstances, it will be necessary for the decision-maker to look behind the stated reasons for discretionary decisions to unmask any assumptions or stereotypes at play.[157]

109. While social context evidence can serve many proper purposes in human rights proceedings, what evidence will be necessary to prove *prima facie* discrimination (individual or systemic) will need to be determined on a case-by-case basis.[158]

IV. International Law and the Interpretation of Sections 2 to 4 of the *CFCSA*

[154] See, e.g*., Balikama obo Others v Khaira Enterprises and Others*, 2014 BCHRT 107 at paras. 587; *Radek No 3.*
[155] *Willick v Willick*, [1994] 3 SCR 670 at 703.
[156] *R v. Spence*, 2005 SCC 1 at para. 57.
[157] *Peel Law Association et al. v Pieters et al*., 2013 ONCA 396 at para. 120.
[158] *Radek No. 3*, *supra* note 134 at paras. 509-523.

110. A proper interpretation and application of sections 2, 3, and 4 of the *CFCSA* must respect and conform with Canada's international legal obligations, including those enunciated in the *United Nations Convention on the Rights of the Child* ("*CRC*") and the *United Nations Declaration on the Rights of Indigenous Peoples* ("*UNDRIP"*). These submissions will focus on the *CRC* and *UNDRIP*, as they were identified as most relevant to the interpretation of the *CFCSA* by the WoW Guidebook.[159]

111. Sections 2 to 4 of the *CFCSA* read:[160]

Guiding principles

2 This Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations and in accordance with the following principles:

(a) children are entitled to be protected from abuse, neglect and harm or threat of harm;

(b) a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;

(b.1) Indigenous families and Indigenous communities share responsibility for the upbringing and well-being of Indigenous children;

(c) if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;

(d) the child's views should be taken into account when decisions relating to a child are made;

(e) kinship ties and a child's attachment to the extended family should be preserved if possible;

(f) Indigenous children are entitled to

[159] The WoW Guidebook, *supra* note 15, at p. 141 to 142.
[160] Note: subsections 2(b.1) and 3(c.1) were added in May of 2018 as a result of the Bill 26- *2018 Child, Family and Community Service Amendment Act*. At the same time, subsections 2(f) and 4(2) were repealed and replaced with updated language.

(i)learn about and practise their Indigenous traditions, customs and languages, and

(ii)belong to their Indigenous communities;

(g) decisions relating to children should be made and implemented in a timely manner.

Service delivery principles

3 The following principles apply to the provision of services under this Act:

(a) families and children should be informed of the services available to them and encouraged to participate in decisions that affect them;

(b) Indigenous people should be involved in the planning and delivery of services to Indigenous families and their children;

(c) services should be planned and provided in ways that are sensitive to the needs and the cultural, racial and religious heritage of those receiving the services;

(c.1) the impact of residential schools on Indigenous children, families and communities should be considered in the planning and delivery of services to Indigenous children and families;

(d) services should be integrated, wherever possible and appropriate, with services provided by government ministries, community agencies and Community Living British Columbia established under the *Community Living Authority Act*;

(e) the community should be involved, wherever possible and appropriate, in the planning and delivery of services, including preventive and support services to families and children.

Best interests of child

4 (1)Where there is a reference in this Act to the best interests of a child, all relevant factors must be considered in determining the child's best interests, including for example:

(a) the child's safety;

(b) the child's physical and emotional needs and level of development;

(c) the importance of continuity in the child's care;

(d) the quality of the relationship the child has with a parent or other person and the effect of maintaining that relationship;

(e) the child's cultural, racial, linguistic and religious heritage;

(f) the child's views;

(g) the effect on the child if there is delay in making a decision.

(2) If the child is an Indigenous child, in addition to the relevant factors that must be considered under subsection (1), the following factors must be considered in determining the child's best interests:

(a) the importance of the child being able to learn about and practise the child's Indigenous traditions, customs and language;

(b) the importance of the child belonging to the child's Indigenous community.

112. The *CRC* recognizes the human rights of children, as well as their special vulnerability and corresponding need for protection. It is the most rapidly ratified core human rights treaty in history and has been endorsed by nearly every country around the world.[161] When Canada ratified the *CRC* in 1991, it made a Statement of Understanding "expressing its view that, in assessing what measures are appropriate to implementing the rights recognized in the *CRC*, the rights of Aboriginal children to enjoy their own culture, to profess and practice their own religion and to use their own language must not be denied."[162]

113. *UNDRIP* protects the collective rights of Indigenous peoples while also safeguarding their individual rights. When *UNDRIP* was adopted by the United Nations in 1997, Canada was among only 4 countries that voted against it (the other dissenting countries were the United States, Australia, and New Zealand).[163] All of

[161] "Frequently Asked Questions on the Convention of the Rights of the Child," online at: https://www.unicef.org/child-rights-convention/frequently-asked-questions.
[162] *First Nations Caring Society*, *supra* note X, at para. 448.
[163] CBC, "Canada votes 'no' as UN native rights declaration passes," CBC (13 September 2007), online at: https://www.cbc.ca/news/canada/canada-votes-no-as-un-native-rights-declaration-passes-1.632160.

the dissenting countries later reversed their positions and Canada endorsed *UNDRIP* without qualification in 2016.[164]

114. Both the Truth and Reconciliation Commission and the National Inquiry into Missing and Murdered Indigenous Women and Girls called on Canada and provincial governments to fully and effectively implement *UNDRIP*.[165] Subsequently, BC passed legislation to implement *UNDRIP* provincially in November 2019[166] and Canada passed legislation to implement *UNDRIP* federally in June 2021.[167]

115. Where a government has incorporated an international instrument into domestic law through legislation, it is bound by that legislation. However, even in the absence of legislation which incorporates an international instrument, the legal principles within that instrument remain relevant to interpreting the scope and content of domestic law provisions.[168]

116. In the case of the *CRC*, it has not been expressly incorporated into domestic law by Canada or a provincial government. However, starting in 1999 with *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the Supreme Court of Canada has used the *CRC* on numerous occasions as an interpretive aid

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[164] "Implementing the United Nations Declaration on the Rights of Indigenous Peoples in Canada," Government of Canada page online at: https://www.justice.gc.ca/eng/declaration/index.html

[165] *Ibid*

[166] *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.

[167] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

[168] *First Nations Caring Society*, *supra* note X, at para. 434, citing *Canada (Human Rights Commission) v. Taylor*, 1990 CanLII 26 (SCC), [1990] 3 SCR 892 at p. 920; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC), [1995] 1 SCR 315 at pp. 149-150; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at paras 26-27; and, *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 at paras 154-160.

for both the *Charter* and ordinary statutes, including Manitoba's child welfare statute in *Winnipeg Child and Family Services* v. *K.L.W.*, [2000] 2 S.C.R. 519.[169]

117. Despite legislation by BC and Canada to implement *UNDRIP*, neither statute directly implements *UNDRIP* into domestic law. Instead, they establish a process to make their respective laws consistent with *UNDRIP*. For example, Section 3 of BC's *United Nations Declaration on the Rights of Indigenous Peoples Act* reads:

> In consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration.

118. However, like the *CRC*, *UNDRIP* can and should be an interpretive aid for BC's provincial laws, including the *CFCSA*. BC's legislative commitment to implementing *UNDRIP* only underscores the interpretive weight that should be afforded to *UNDRIP*.

119. In *First Nations Caring Society*, the intervenor Amnesty International made submissions on the relevance of a number of international human rights treaties, including the *CRC* and *UNDRIP*, to the issues in the proceeding. After a discussion of the expanding relevance of international law to interpreting the scope and content of domestic law provisions,[170] as well as Canada's active promotion of international human rights law,[171] the Canadian Human Rights Tribunal held that international human rights principles support a substantive understanding of equality and that *specific positive measures are often required to achieve substantive equality*.[172] Moreover, the Tribunal said that international human rights principles "reinforce the need for due attention to be paid to the unique situation and needs of children and First

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[169] Jean-Francois Noel for the Department of Justice, "The Convention on the Rights of the Child," online at: https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/crc-crde/conv2a.html#ftnref16.
[170] *First Nations Caring Society*, supra note 32, at paras. 431 to 434.
[171] *Ibid* at para. 435.
[172] *Ibid* at para. 453.

Nations people, especially the combination of those two vulnerable groups: First Nations children."[173] Ultimately, the Tribunal used this analysis to support its conclusion that Canada has a duty to accommodate the particular needs of Indigenous families.

120. In light of the above, it should be presumed that ss. 2, 3, and 4 of the *CFCSA* are consistent with the *CRC* and *UNDRIP* and that an interpretation of these provisions which produces compliance with the *CRC* and *UNDRIP* is preferred over one that does not.[174]

121. The *CRC* provisions which are most relevant to the interpretation of the *CFCSA* with respect to Indigenous child welfare include:

> ***Article 2***
>
> 1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
>
> ***Article 3***
>
> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> ***Article 5***
>
> State Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

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[173] *First Nations Caring Society*, *supra* note 32, at para. 453.
[174] The WoW Guidebook, *supra* note 15 at 140, citing Sullivan, R. "Statutory Interpretation" (2007) 2nd ed Toronto: Irwin Law [Sullivan], at 241.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 18

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

   ...

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

122. *UNDRIP* provisions which are most relevant to the interpretation of the *CFCSA* with respect to Indigenous child welfare include:

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.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

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.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:
    a. Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
    …
    d. Any form of forced assimilation or integration;

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

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.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

123. As described in the WoW Guidebook, the CRC and UNDRIP collectively articulate the rights of Indigenous children to:

- Maintain their unique cultural identity as Indigenous Peoples;
- Be heard in matters that impact them; and
- Be raised with, and protected according to, the laws of their Indigenous culture.[175]

124. The WoW Guidebook also observes that under the CRC and UNDRIP, Indigenous peoples must be meaningfully involved in making decisions which will affect Indigenous children, including through the resumption of Indigenous jurisdiction over child welfare, a reconsideration of laws which were developed without Indigenous participation, and the ongoing participation and direction of Indigenous peoples in the ways those laws are carried out.[176]

125. As an interpretive aid to the CFCSA, the CRC and UNDRIP notably inject a human rights framework into legislation which was not expressly drafted in a rights-based way. They make it clear that rights, rather than legislative entitlements, are at stake in child welfare services and decisions. Moreover, they support a positive state obligation to ensure the individual rights of Indigenous children and parents in the child welfare system, as well as the collective rights of Indigenous communities.

[175] The WoW Guidebook, supra note 15, at 141.
[176] *Ibid* at 142.

Meeting this obligation may require specific and proactive measures on the part of both child welfare agencies and child welfare workers.

126. When interpreting sections 2 to 4 of the CFCSA specifically, the CRC and UNDRIP can play a key role in informing the content and scope of the best interests of the child analysis, as well as child welfare agencies' obligations when delivering services to Indigenous families. To the extent that sections 2 to 4 already reflect international law obligations (especially after the 2018 amendments), the CRC and UNDRIP compel child welfare agencies and workers to ensure that what is on paper translates into practice. As described in the sections above, a particular issue in the child welfare system has been the lack of implementation of legislative requirements. This may be because child welfare agencies and workers have not interpreted their obligations under the legislation to amount to a positive duty to accommodate Indigenous peoples' particular needs (as suggested by international legal principles).

127. Consider, for example, the application of ss. 2 to 4 of the *CFCSA* to concerns of "neglect" in an Indigenous family:

a. While the CRC upholds the primacy of the concept of best interests of the child, the best interests of the child under the *CRC* must be interpreted in light of other *CRC* provisions and *UNDRIP* which recognize an Indigenous child's rights to maintain their identity and culture. This suggests that when considering the best interests of an Indigenous child under the CFCSA, there must be a holistic assessment of all of the child's circumstances which gives meaningful significance to the child's identity and connections to family, culture, and community.

b. The best interests of the child test must also be interpreted in light of Indigenous laws and worldviews, which, for example, shift the emphasis of the analysis away from an individualistic and Eurocentric focus on the nuclear family to the role of the child's extended family and community in caring for the child.

c. Where there remains a child protection concern, the state has a positive duty to provide a broad range of preventative (and culturally appropriate) services to the family. This includes taking specific and proactive measures to realize the CFCSA's guiding and service delivery principles, including:

> 2(c) if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;
>
> 3(b) Indigenous people should be involved in the planning and delivery of services to Indigenous families and their children;
>
> 3(c) services should be planned and provided in ways that are sensitive to the needs and the cultural, racial and religious heritage of those receiving the services; and
>
> (e) the community should be involved, wherever possible and appropriate, in the planning and delivery of services, including preventive and support services to families and children.

d. Since neglect is strongly associated with poverty, the direct provision of services and material supports will often be the best way of addressing the family's needs. However, where that is not possible (including because of external constraints), specific and proactive assistance with accessing resources in the community may be necessary. Parents and the family's community should be directly and meaningfully involved in service planning.

e. Where the state takes a child into care, the state has a positive obligation to ensure that the child receives culturally appropriate services and maintains their identity and connections to family, culture, and community. This includes taking specific and proactive measures to realize the CFCSA's guiding and service delivery principles, including:

> 2(b.1) Indigenous families and Indigenous communities share responsibility for the upbringing and well-being of Indigenous children;
>
> 2(d) the child's views should be taken into account when decisions relating to a child are made;

2e) kinship ties and a child's attachment to the extended family should be preserved if possible;

2(f) Indigenous children are entitled to

(i)learn about and practise their Indigenous traditions, customs and languages, and

(ii)belong to their Indigenous communities;

3(b) Indigenous people should be involved in the planning and delivery of services to Indigenous families and their children;

3(c) services should be planned and provided in ways that are sensitive to the needs and the cultural, racial and religious heritage of those receiving the services; and

3(e) the community should be involved, wherever possible and appropriate, in the planning and delivery of services, including preventive and support services to families and children.

f. The positive obligations of child welfare agencies and workers also require them to proactively ensure, to the extent possible, that third party professionals and contractors are providing culturally appropriate services.

g. Throughout their engagement with an Indigenous family, child welfare workers must maintain collaborative relationships and ensure the meaningful participation of the parents and the family's community in decisions affecting the child. This includes taking specific and proactive measures to realize the CFCSA's guiding and service delivery principles, including:

2(b.1) Indigenous families and Indigenous communities share responsibility for the upbringing and well-being of Indigenous children;

3(b) Indigenous people should be involved in the planning and delivery of services to Indigenous families and their children;

3(e) the community should be involved, wherever possible and appropriate, in the planning and delivery of services, including preventive and support services to families and children.

h. Indigenous communities may require financial support in order to meaningfully participate in the child welfare system. However, even where a child welfare agency faces external constraints with respect to funding, workers can still engage in proactive outreach and involve the community as much as possible within the planning process.

V. Conclusion

128. Systemic discrimination against Indigenous families is an ongoing concern in BC's child welfare system. However, to date, it has received little judicial attention. Applying a human rights lens to experiences which often take place in the shadows has the potential to identify and root out systems and structures, as well as prejudicial beliefs, which perpetuate the overrepresentation of Indigenous children in the child welfare system.

129. ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7TH DAY OF DECEMBER, 2021.

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