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| F I L E D | FEDERAL COURT COUR FÉDÉRALE October 18, 2021 18 octobre 2021 |
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Court File No.

**FEDERAL COURT
PROPOSED CLASS PROCEEDING**

Between

**BRAELYN CATCHEWAY
An Infant, by her Litigation Guardian
TIMOTHY CATCHEWAY**

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

Brought pursuant to the *Federal Court Rules*, SOR/98-106

**STATEMENT OF CLAIM
(First Nations Schools)**

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

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

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

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

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

(Date)

Issued by: _____
(Registry Office)

Address of local office:
Pacific Centre
P.O. Box 10065
701 West Georgia Street
Vancouver, British Columbia
V7Y 1B6

TO: Her Majesty The Queen
Department of Justice Canada
900 – 840 Howe Street
Vancouver, British Columbia
V6Z 2S9

Nature of this Action

1. This action concerns the Defendant's failure to provide an appropriate and adequate level of education for Indigenous children living on reserves in Canada.
2. All Canadians have a right to a free and adequate basic education and to not be discriminated against on the basis of race or Indigenous status. The Defendant, Her Majesty the Queen ("Canada"), is solely responsible for protecting these rights and ensuring the provision of education to Indigenous children living on reserves across Canada. The sources of Canada's obligations include the Honour of the Crown, its fiduciary obligations to Indigenous peoples, the protections enshrined in the *Charter of Rights and Freedoms*, the *Quebec Charter*, the *Constitution Acts 1867 and 1982*, the United Nations Declaration of the Rights of Indigenous Peoples and the UN Convention on the Rights of the Child, and statutory schemes including the *Indian Act*.
3. There are over 500 schools in Canada located on reserves ("reserve schools"). Most children who live on reserves are educated in reserve schools. This is the only segment of Canadian society that is unable to access contemporary levels of education for their children.
4. Since at least 1951, the federal government has had the authority to operate schools on reserves under the *Indian Act* and predecessor and successor statutes. Canada has taken an oversight approach to the operation and management of Indigenous education, whereby the Department of Indian Affairs and Northern Development and its successor ministries¹ ("DIAND") have funded educational services and provided general frameworks but have not operated educational services directly. Indigenous communities have been tasked with the implementation of the education programs at reserve schools. Canada has exerted indirect control over the design and operation the education programs at reserve schools by virtue of the fact that it has been the sole or primary source of funding for reserve schools.
5. Canada determines funding formulas and funding administration for reserve schools. The stated objective is to provide education at reserve schools that is comparable to the education provided at provincial schools. Canada's funding formulas are loosely premised on the costs of

¹ Including, but not limited to, Aboriginal Affairs and Northern Development Canada ("AANDC"), Indigenous and Northern Affairs Canada ("INAC"), Crown-Indigenous Relations and Northern Affairs Canada ("CIRNAC"), and Indigenous Services Canada ("ISC").

operating schools managed by provincial governments in urban communities. This system is operationally flawed. The formulas do not incorporate cost data from reserve schools, fail to account for the cost drivers of small schools in remote communities, have been arbitrarily capped at times, do not factor in student assessments and curriculum development, and do not include costs for modern school resources such as computers, libraries, information technologies, kitchens, and sports equipment and sport facilities.

6. The funding formulas are fundamentally flawed with respect to staffing costs at reserve schools. Reserve schools struggle to retain teachers who are willing to live in the remote communities where the reserve schools are situated. The operationally flawed funding formulas compound this problem with the result that reserve schools cannot retain certified teachers in the long term, and students are educated by a rotating cast of teachers. The result is that reserve schools do not receive sufficient funding to provide basic elementary and secondary education to their students. In addition, the funding formulas have not until recently included the provision of education on Indigenous language and culture.

7. Further, reserve schools are dependent on Canada for infrastructure maintenance and for one-time and time-limited project costs. Canada's operational structure for approval and delivery of funds for these expenses is unjustifiably cumbersome and inefficient. Reserve schools that require infrastructure repairs and renovations must wait for years for the funds needed to maintain the schools. As a result, students attending reserve schools encounter barriers to receiving education including, but not limited to, inadequate plumbing, sewage, electrical and roofing, no clean drinking water, no playground or field, no kitchen, moldy classrooms, no internet, no computers, and no printers.

8. As a consequence of Canada's operational failure to provide adequate and timely funding for the education of Indigenous elementary and secondary students on reserves, the plaintiff and Class Members have been denied their right to an education. They have suffered serious consequences, which place further barriers in the paths of Indigenous Canadians and contribute to their generational disenfranchisement. Through this lawsuit, the plaintiff and Class Members seek to hold Canada accountable for its wrongdoing and to obtain compensation.

The Plaintiff and the Class

9. The Plaintiff, Braelyn Catcheway, was born on May 29, 2006. Braelyn is an Indian as defined by the *Indian Act*, RSC 1985, c I-5 and is a member of the Peguis First Nation. This action is brought on her behalf by Litigation Guardian, Timothy Catcheway. Timothy Catcheway is Braelyn's father.

10. Braelyn attends the Peguis Central School in Peguis First Nation, Manitoba. She is currently in grade 10 and has completed grades 1-9 at the Peguis Central School, beginning in 2011. Braelyn lives on lands subject to the *Indian Act*.

11. While attending the Peguis Central School, Braelyn has experienced limited access to educational supports or support from guidance counsellors and mental health workers. She is frequently in classes with over 20 students who are taught by a rotating cast of teachers.

12. Braelyn brings this action on own behalf and on behalf of a proposed class of all Indigenous persons who attended reserve schools.

13. As a result of the Defendant's wrongdoing, the Plaintiff and other Class Members suffered loss and damage including the denial of an adequate education, and related loss of income, and psychological and cultural losses arising from that primary wrongdoing.

Canada's Legal Obligations to the Plaintiff and Class Members in the Provision of Education on Reserves

14. Canada has exclusive jurisdiction and responsibility in respect of Indigenous persons under the *Constitution Act, 1867*, 30 & 31 Vict, c 3, s 91(24). At all material times, Canada was responsible for the administration of the *Indian Act* and its predecessor statutes and was legal responsibility for the provision of on-reserve education, including under the *Indian Act*, ss 114-122.

15. Further, Canada is bound to respect and protect the rights enshrined in the *Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, including the *Canadian Charter of Rights and Freedoms*, and the *Quebec Charter*, CQLR c C-12, in carrying out its statutory duties and its administrative functions, and to fulfil its obligations in compliance with the burden placed upon it by the Honour of the Crown.

Canada's Failure to Meet Its Obligations

16. Since at least 1984, numerous government and independent reviews from bodies including the Senate of Canada, the Assembly of First Nations, the Auditor General of Canada, the Office of the Parliamentary Budget Officer, the First Nations Education Council, academics and advocacy organizations, and DIAND itself have repeatedly found that Canada has underfunded Indigenous on-reserve education and that the level of education falls well below that offered at provincial schools.

17. Deficiencies in the operational methodologies by which DIAND determines and implements funding for on-reserve education include, but are not limited to:

- a. DIAND does not collect any or sufficient data on the costs of operating provincial schools. As a result, it is unable to accurately determine whether funding is appropriate;
- b. DIAND has not defined its role and responsibilities through internal policy or regulation, leaving no mechanism to address deficiencies in the funding system;
- c. DIAND has not completed school evaluations on a significant number of reserve school, thereby preventing it from evaluating instructional quality and standards, and from determining whether school objectives are being achieved;
- d. DIAND does not track which schools have been evaluated and which schools have not;
- e. DIAND provides more funds per student to Indigenous students attending provincial schools than Indigenous students attending reserve schools;
- f. DIAND has chronically failed to accommodate the cost of modern school resources such as computers, libraries, information technologies, kitchens, and sports equipment and sport facilities;
- g. DIAND failed to adequately consult with the Indigenous communities and organizations that were tasked with administration of reserve schools as to their needs for the operation of the reserve schools;
- h. students transferring from reserve schools to provincial schools suffer academic penalty. The students do not perform at their current grade level and are generally placed in a lower grade in the provincial school thereby extending their time in school and adding a further drain on funding;

- i. funds are often move by Bands from other priority areas, such as housing and drinking water, to address educational underfunding and meet the standards placed on reserve schools;
- j. before 2016, there were no funds for courses in Indigenous language and cultural education. Students suffered loss of language, culture and religion; and
- k. from the early 1990s until 2016, DIAND implemented a 2% cap on annual funding increases. During this time, the Indigenous population rose by approximately 29% while inflation was approximately 2% annually. Consequently, the amount of funding per student fell over this time when education costs, such as teacher salaries, were rising.

18. Canada's failure to use formulas that would provide sufficient and timely funding for Indigenous education on reserves is particularly troublesome viewed in the historical context of Indigenous education in Canada. As a result of the Indian Residential Schools program, there has long been an education gap between Indigenous and non-Indigenous Canadians. The inadequacy of reserve schools has perpetuated that education gap.

19. Students attending reserve schools do not receive a basic education and must often re-do their education in provincial schools or cannot compete with other Canadians for employment opportunities. They suffer a loss of income and earnings potential. Further, students who attended reserve schools before 2016 suffered a loss of language, culture and religion.

20. As a consequence of Canada's failure to provide adequate Indigenous on-reserve education, the Plaintiff and Class Members have suffered loss and damages including, but limited to:

- a. Denial of education;
- b. Loss of earnings;
- c. Loss of culture, language and religion;
- d. Loss of dignity;
- e. Psychological distress.

Negligence and Proceedings Against the Federal Crown

21. The Plaintiff and Class Members plead and rely on the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 and its predecessor legislation.

22. At all material times, Canada had a duty to the Plaintiff and Class Members to ensure that education provided at reserve schools was comparable to the education provided at provincial schools. As described above, Canada breached that duty. The breach of duty caused loss and damage to the Plaintiff and Class Members as described in this claim.

Fiduciary Duty and Honour of the Crown

23. In its dealings with Indigenous Canadians, Canada is bound by the Honour of the Crown to respect and protect Aboriginal rights and persons. The Honour of the Crown is engaged in situations involving reconciliation of aboriginal rights with Crown sovereignty and its purpose is reconciliation of pre-existing aboriginal societies with the assertion of Crown sovereignty. Canada's actions and decisions concerning the education of indigenous youth must be made in accordance with the Honour of the Crown which requires Canada to ensure that Indigenous Canadians living on reserve have access to an education comparable to that of students in provincial schools.

24. Further, the Honour of the Crown and Canada's discretionary control over Indigenous on-reserve education imposes a fiduciary obligation on Canada to ensure that Indigenous Canadians living on reserve have access to an education comparable to that of students in provincial schools (analogous to the approach required for minority language education under the *Charter of Rights and Freedoms*, s 23 and set out in *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13). This duty further requires Canada to have funded educational programs at all times in a manner that protects, supports, and enforces aboriginal culture and identity.

25. Canada has failed to respect the Honour of the Crown and has breached its fiduciary duties to the Plaintiff and Class Members. The Plaintiff and Class Members have suffered loss and damage as set out above. They are entitled to compensation for Canada's wrongdoing.

Charter of Rights and Freedoms, section 15

26. Canada has infringed the right of the Plaintiff and Class Members to equality contained in the *Charter*, section 15. By failing to ensure the provision to Indigenous on-reserve students of an education comparable to that of students in provincial schools, Canada has deprived the Plaintiff and Class Members of their constitutional rights to equality.

27. In particular, Canada has breached the *Charter* rights of the Plaintiff and Class Members on the basis of race and Aboriginality-residence (*Corbiere v Canada*, [1999] 2 SCR 203) in their treatment relative to non-Indigenous students in provincial schools. The funding mechanisms employed by Canada created distinctions based on enumerated or analogous grounds, which are discriminatory, and which compound the pre-existing disadvantage and vulnerability of aboriginal children living on reserve. There is no rational basis for the unequal treatment, and there are no ameliorative effects. The affected interest is a core human right, enshrined in the *UN Convention on the Rights of the Child*, including, among others, articles 28 and 29, and the *UN Declaration on the Rights of Indigenous Peoples*, including, among others, articles 14, 15 and 21.

28. Further, given Canada's historical approach to the residential school system, Canada has a heightened obligation under s. 15 to ensure that Indigenous children have access to a comparable education systems.

29. This infringement has caused the Plaintiff and Class Members loss and damage, both moral and pecuniary as set out above, and offends the principles of fundamental justice, because it is arbitrary, overbroad and disproportionate. The breaches of section 15 are not saved by section 1.

30. As a result of Canada's wrongdoing, the Plaintiff and Class Members are entitled to *Charter* damages under section 24(1) for the infringement of their section 15 rights (*Ward v Vancouver (City)*, 2010 SCC 27).

Punitive and Exemplary Damages

31. Canada's misconduct, as described above, departed to a marked degree from ordinary standards of decent behaviour. Canada's actions offend the moral standards of the community and

warrant the condemnation of the Court such that an award of punitive and exemplary damages should be made.

RELIEF SOUGHT

The Plaintiff therefore claims:

- a. An order certifying this action as a class proceeding and appointing Tim Catcheway as representative plaintiff under the *Federal Court Rules*, SOR/98-106;
- b. A declaration that the Defendant has breached its common law and fiduciary duties to the Plaintiff and Class Members in its provision of Indigenous on-reserve education;
- c. A declaration that the Defendant has failed to fulfil its obligations to the Plaintiff and Class Members under the Honour of the Crown in its provision of Indigenous on-reserve education;
- d. A declaration that the Defendant has breached Plaintiff and Class Members' rights under the *Charter of Rights and Freedoms*, s 15 in its provision of Indigenous on-reserve education;
- e. Damages from the Defendant for negligence and for breach of fiduciary duty in its provision of Indigenous on-reserve education;
- f. Damages from the Defendant under the *Charter*, section 24(1) for breaches of s 15 in its provision of Indigenous on-reserve education;
- g. Punitive damages from the Defendant pursuant to the *Quebec Charter* and the *Civil Code of Quebec*, CQLR c C-1991 for Class Members resident in Quebec;
- h. Exemplary and punitive damages from the Defendant;
- i. The costs of notice and administration of the plan of distribution;
- j. Pre-judgment and post-judgment interest;
- k. Such further relief as this Honourable Court may order.

Place of Trial

The Plaintiff proposes that this action be tried at the City of Vancouver in the Province of British Columbia.

Date: October 18, 2021

A handwritten signature in blue ink that reads "David Klein". The signature is written in a cursive style with a large initial 'D'.

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