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I S S U E D	FEDERAL COURT COUR FÉDÉRALE December 05, 2022 05 décembre 2022
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Court File No.:

FEDERAL COURT

BETWEEN:

**KIASHKE ZAAGING ANISHINAABEK, EDMUND KING JR. AND
NATASHA MAXWELL**

Plaintiffs

and

**HIS MAJESTY THE KING
AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA**

Defendant

STATEMENT OF CLAIM

TO THE DEFENDANT:

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

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

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

Copies of the Federal Courts Rules, information concerning the local offices of the Court and other necessary information may be obtained on

request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

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

Date: December 5, 2022

Issued by:

(Registry Officer) Address:

Thomas D'Arcy McGee Building
90 Sparks Street, Main Floor
Ottawa, ON K1A 0H9

TO: **ATTORNEY GENERAL OF CANADA**
Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

DEFINED TERMS

“**Community Tri-partite Agreement**” means the agreement of a **First Nation Officer** community and Ontario and the **Crown** pursuant to the **FNIPP** or **FNIPFP** and the **OFNPA**;

“**Crown**” means His Majesty the King in right of Canada as defined under the *Crown Liability and Proceedings Act*, RSC, 1985, c C-50 and the agents of His Majesty in right of Canada, including the various federal departments responsible for the funding formulas, policies and practices at issue in this action relating to the **FNIPFP**, **FNIPP** and **OFNPA**;

“**Culturally Appropriate**” means the nature of **Prevention Services** and **Protection Services** as determined appropriate by **First Nation Officer** communities;

“**Department of Public Safety and Emergency Preparedness Act**” means SC 2005, c 10;

“**Equipment**” means all equipment required for **First Nation Officers** to provide **Prevention Services** and **Protection Services** to **Minimum Standards**;

“**First Nation**” means a community of Indigenous persons in Canada who are neither Inuit nor Metis and includes every person who is of is entitled to be registered under the **Indian Act**, or are recognized as citizens by their respective First Nation community;

“**First Nation Officers**” means on **Reserve** police officers appointed pursuant to s.54 of the **Police Services Act** and the **OFNPA**;

“**FNIPFP**” means the First Nations and Inuit Policing Facilities Program;

“**FNIPP**” means the First Nations and Inuit Policing Program;

“**Funding Policies**” means the **Crown’s** policies, including all policies of the **Crown** that prescribe funding for **Protection** and **Prevention Services** for **First Nation Officers** and **First Nation** communities to **Minimum Standards**;

“Impugned Conduct” means the totality of the **Crown’s** discriminatory conduct, programs, policies and administrative practices under the **FNIPFP, FNIPP** and **OFNPA**;

“Indian Act” means RSC, 1985, c I-5;

“Indian Status” means a person who has status under the **Indian Act**;

“Infrastructure” means all facilities required for **First Nation Officers** to reside on **Reserve** while on duty and to provide **Prevention Services** and **Protection Services** to **Minimum Standards**;

“Kiashe Zaaging Anishinaabek” means Gull Bay First Nation;

“Minimum Standards” means standards for **Prevention** and **Protection Services, Infrastructure, Equipment, Training** and **Oversight** as set out in the **Police Services Act** and as deemed necessary by **First Nation Officer** communities for officer and community safety and **Culturally Appropriate** and responsive **Prevention** and **Protection Services**;

“Minister of Indigenous Services” means the Member of federal Cabinet appointed by the Prime Minister of Canada to this role;

“Minister of Public Safety” means the Member of federal Cabinet appointed by the Prime Minister to this role;

“OFNPA” means the bilateral First Nations Community Policing Services Framework Agreement between the **Crown** and Ontario or the trilateral OFNPA agreement between the **Crown, Ontario** and **Kiashe Zaaging Anishinaabek**, as the context indicates;

“OPP” means the Ontario Provincial Police;

“Police Services Act” means RSO, c P-15;

“Prevention Services” means educational, relationship-building and safety programs services to be provided by **First Nation Officers** to their **First Nation** communities pursuant to the **FNIPP, FNIPFP** and **OFNPA**;

“Protection Services” means enforcement and peace-keeping services to be provided by **First Nation Officers** in their **First Nation** communities pursuant to the **FNIPP, FNIPFP** and **OFNPA**;

“Public Safety Canada” means the Department of Public Safety Canada;

“Reserve” means a tract of land, the legal title to which is vested in the **Crown** that has been set apart for the use and benefit of a band as defined in the **Indian Act**;

“Training” means certification and recertification to **Minimum Standards**;

“Oversight” means independent oversight of **First Nation Officers** to **Minimum Standards**;

“UNDRIP” means the United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295, October 2, 2007; and

“UNDRIP Act” means SC 2021, c 14.

RELIEF SOUGHT

1. The Plaintiffs claim:
 - a) A Declaration that the Crown breached its common law and fiduciary duties to the Plaintiffs;
 - b) A Declaration that the Crown breached subsection 15(1) of the *Charter of Rights and Freedoms* and that such breach was not justified under section 1 of the *Charter*;
 - c) Damages for breach of fiduciary duty, negligence and under section 24(1) of the *Charter* in the amount of \$10,000,000 or such other sum as the Court may award, including aggravated and punitive damages;
 - d) An Order requiring the Crown to measure and provide for substantive equity under subsection 15(1) of the *Charter*

pertaining to First Nations Officer complement for Kiashke Zaaging Anishinaabek, First Nations Officer Plaintiff remuneration, benefits, and pensions, and all necessary Infrastructure, Equipment, Training, Oversight, and Prevention and Protection Services for Kiashke Zaaging Anishinaabek, within eight (8) months of this Order;

- e) Costs of the action on a substantial indemnity basis or in an amount that provides full indemnity;
- f) Pre-judgement and post-judgement interest pursuant to the *Federal Courts Act*, RSC, 1985, c F-7; and
- g) Such further and other relief as this Court deems just and appropriate in the circumstances.

THE ACTION IN A NUTSHELL

2. Since the inception of the FNIPP, FNIPFP and the OFNPA, the Crown has systematically discriminated against Ontario First Nations and their First Nation Officers upon race, ethnic origin and nationality.

3. This action concerns the Crown's discriminatory Funding Policies pursuant to which First Nation policing services have been systematically and deliberately underfunded, endangering First Nation Officer and First Nation community safety and resulting in a failure to provide for Culturally Appropriate and responsive Prevention and Protection Services to Minimum Standards.

4. From at least 1991, the Crown has known or ought to have known that its Funding Policies have been inadequate to provide for First Nation Officer and First Nation community safety and Culturally Appropriate and responsive policing services to First Nations in Ontario and that they are discriminatory.

5. This deliberate discrimination has and continues to harm Ontario First Nation Officers and First Nation communities who have been harmed by external police services throughout the colonial history of Canada.

6. The Royal Canadian Mounted Police (RCMP) were removed from provision of policing services to First Nations in Ontario in the 1960s due to the harm perpetuated upon First Nation communities and members. That removal led to the formation of the Department of Indian and Northern Affairs and Development (DIAND) Band Constable Program in 1968.

7. In 1971, DIAND adopted Circular 55, which allowed Band Constables to supplement RCMP or provincial police services provided to a First Nation and conveyed authority upon them to enforce laws beyond First Nation by-laws.

8. In 1975, DIAND created the Ontario Indian Special Constable Program (OICP) which allowed for appointment of First Nation Special Constables within existing police services such as the OPP. It commenced in Ontario in 1975 and continued until development of the OFNPA.

9. The first OFNPA was negotiated in 1989 which allowed for the appointment of fully authorized First Nation Officers. It also allowed for stand-alone First Nations police services.

10. From 1989-1992, a series of public inquiries and status reports outlined the failures of the Crown in the provision of policing services to First Nations, including through the OFNPA. The Ontario Attorney General's follow-up Osnaburgh-Windigo status report of 1990 and the subsequent Law Reform Commission of Canada report on First Nations policing highlighted the lack of cultural considerations, lack of community input, biased investigations, minimal crime prevention programming and crime protection services and continuing alienation of Indigenous people from the justice system.

11. In 1991, the Crown created the First Nation Policing Program (FNPP) and transferred First Nation policing responsibility from DIAND to the federal Solicitor General and its Aboriginal Policing Directorate. Its principles were reflective of Circular 55, in allowing for stand-alone self-administered First Nation police services or First Nation Officers through tri-partite agreement under the OFNPA.

12. The next OFNPA was executed in 1992 for the years 1991-1996, with seventy-four (74) Ontario First Nations participating thereunder by creation of stand-alone First Nation police services or appointment of First Nation Officers within individual First Nations.

13. By 2005, there were eight (8) OFNPA stand-alone First Nations policing services in Ontario with ninety-six percent (96%) of the First

Nation on Reserve population and all but seventeen (17) of one hundred and thirteen (113) First Nations using FNPP funded programs.

14. That number has remained fairly steady to present as has the chronic and known Crown underfunding of First Nation Officer remuneration, benefits and pensions and First Nation policing Infrastructure, Equipment, Training, Oversight and Prevention and Protection Services pursuant to the now FNIPP and FNIPFP programs, the OFNPA and Crown Funding Policies.

15. The known underfunding of First Nation Officers complement, remuneration, benefits and pensions and of First Nation Infrastructure, Equipment, Training, Oversight and Prevention and Protection Services puts the First Nation Officers at personal disadvantage and puts them and First Nation communities at constant safety risk.

16. The Crown has known since at least 1997 that it is independently obligated to provide for substantive equity in the provision of funding for First Nation policing services in Ontario and it has consistently failed to measure for or provide it.

17. The Crown's actions and omissions have infringed section 15(1) of the *Charter* rights of the Plaintiff First Nation Officers and breached the Crown's fiduciary and common law duties to them and to Kiashke Zaaging Anishinaabek, including the Crown's obligations under UNDRIP.

18, This action seeks damages and other relief against the Crown for the harm and damage caused to the Plaintiff First Nation Officers and Kiashke

Zaaging Anishinaabek by its negligence, equitable, legal and constitutional breaches.

THE PLAINTIFFS

18. Kiashke Zaaging Anishinaabek, also known as Gull Bay First Nation, is an Ojibway Nation and First Nation community located on the western shores of Lake Nipigon, Ontario and the surrounding territory. It is roughly two hundred and fifty (250) kilometers northeast of Thunder Bay, Ontario, off Highway 527.

19. Edmund King Jr. is a First Nations Officer in and a member of Kiashke Zaaging Anishinaabek.

20. Natasha Maxwell is a First Nations Sergeant and Supervisor in and a member of the Neyaashiinigmiing 27, an Ojibwe Nation and First Nation community also known as Chippewas of Nawash Unceded First Nation on the Bruce Peninsula, near the Town of Wiarton, Ontario.

THE DEFENDANT

21. The Defendant is the Crown as represented by the Attorney General of Canada under s. 23(1) of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50.

FNIPFP SERVICES

22. Public Safety Canada and the Crown fund the First Nation and Inuit Policing Facilities Program upon approval of its budget by Cabinet

“to support better policing infrastructure for the people who live and work in Indigenous communities.”

23. Public Safety Canada states:

“The program provides funding to repair, renovate, or replace policing facilities owned by First Nation and Inuit communities. Costs under the FNIPFP are shared with provinces and territories in accordance with a 52% federal and 48% provincial/territorial cost-share ratio. ...

All Canadians have a right to receive well-funded, culturally sensitive, and respectful policing services.”

“Moving forward, Public Safety Canada will continue to engage with Indigenous organizations and communities, as well as provincial and territorial governments, to ensure that Indigenous communities across the country benefit from professional, dedicated, and culturally responsive policing.”

FNIPP SERVICES

24. Public Safety Canada and the Crown fund Prevention and Protection Services in First Nation communities under the First Nation and Inuit Policing Program.

25. Public Safety Canada states that it provides Prevention and Protection Services “that are professional, dedicated and responsive to First Nation and Inuit communities. Through the First Nations and Inuit

Policing Program (FNIPP), policing services are supported through tripartite policing agreements among the federal government, provincial or territorial governments, and First Nation or Inuit communities. Costs under the FNIPP are shared with provinces and territories in accordance with a 52% federal and 48% provincial/territorial cost-share ratio.”

26. It continues:

“All Canadians have a right to receive well-funded, culturally responsive, and respectful police services.”

OFNPA

27. The bilateral OFNPA framework agreement between Canada and Ontario states:

“The purpose of the Agreement is to fund the Ontario First Nation Police Agreement (OFNPA) in order to provide for the delivery of policing services, within the territory comprising the First Nation Communities, which are professional, dedicated and responsive to the needs and cultures of the Community.”

28. The current bilateral agreement for 2021-2023 provides only \$7,501,487.28 for two (2) years, for twenty (20) First Nation communities and seventy-eight (78) First Nation Officers.

29. There is no transparency of the Crown on setting the funding or on expenditures charged to the OFNPA by its Administrator, the OPP.

30. Given the gross underfunding of the OFNPA as set by the Crown, it is impossible to provide for the Eligible Costs in Schedule B to the OFNPA bilateral and trilateral agreements for First Nation Officers remuneration, benefits, pensions, professional training, technical needs, custodial, clerical and administrative employees, Infrastructure, Equipment, Training, Oversight, employee travel, prisoner transport, information and communications equipment, recruitment, construction of or rent for housing and police facilities, or insurance, legal and professional fees.

31. There are currently twenty (20) First Nation communities served under the OFNPA and FNIPP First Nations tri-partite community agreements thereunder. To date, only seven (7) out of the twenty (20) have signed off on service-level agreements (SLA) under the OFNPA due to disputes about chronic Crown inequitable and underfunding of Prevention and Protection Services required to meet community needs.

32. Article 2.1 of the Kiashke Zaaging Anishinaabek OFNPA tripartite community agreement entered into pursuant to the OFNPA bilateral agreement states:

33. “The purpose of this Agreement is to provide for the provision of policing services that are professional, effective, culturally appropriate and accountable to the First Nation community by First Nation Constables funded pursuant to the Contribution Agreement.”

34. Article 2.3 states the tri-partite agreement is not to prejudice implementation of the right to self-government of a First Nation community.

35. Article 5.2 states that Ontario is responsible per section 19 of the *Police Services Act* to ensure adequate and effective policing to Kiashke Zaaging Anishinaabek that is responsive to the culture and traditions of Kiashke Zaaging Anishinaabek and at a standard at least equivalent to that provided in non-Indigenous communities with regard to “police workload, population and location”.

36. Article 6.2 provides only three thousand (\$3000.00) dollars for a First Nation Officer Oversight body and all of its work, including development and enforcement of a Code of Conduct for First Nation Officers and creation and enforcement of all Oversight body governing policies and legal requirements.

37. Article 6.7 obligates Kiashke Zaaging Anishinaabek to provide a community policing facility and residences for First Nation Officers in the community that is satisfactory to the OPP in view of Minimum Standards.

38. Article 6.8 requires Kiashke Zaaging Anishinaabek to submit an Annual Performance Report to the Crown for assessment of its compliance with the FNIPP and OFNPA.

39. Article 7.1 empowers Kiashke Zaaging Anishinaabek First Nation to enforce all federal and provincial laws as well as local First Nation bylaws.

40. Article 7.2 requires Kiashke Zaaging Anishinaabek First Nation Officers to conduct their duties in accordance with s. 54 of the *Police Services Act* and Minimum Standards and the Kiashke Zaaging Anishinaabek Code of Conduct, if any.

41. Article 7.9 requires Kiashke Zaaging Anishinaabek to solely supervise and evaluate its First Nation Officers.

42. Notably, Kiashke Zaaging Anishinaabek and Neyaashiinigiing 27 are the sole employers of their First Nation Officers, must individually negotiate their OFNPA tri-partite agreements and are left solely responsible for all employment matters, including wrongful dismissal, human rights and arbitration proceedings and their results, without any Crown funding for same.

CROWN and OPP RELATIONSHIP with KIASKE ZAAGING ANISHINAABEK

43. The harmful, colonial relationship between the Crown and OPP and Kiashke Zaaging Anishinaabek continues due to the Crown development and implementation of the FNIPP, FNIPFP and OFNPA, the Crown chronic, known underfunding of same, and the continuing unaddressed anti-Indigenous racism and discrimination of the Crown in this regard which goes unaddressed.

44. The Crown directs that OPP act as colonial Administrator of the inequitable OFNPA funding designated by the Crown through the FNIPP and FNIPFP, without transparency or accountability to the First Nation

communities. Requests for expenditure policy and transparency are routinely ignored as are requests for funding needed to meet Minimum Standards of Prevention and Protection Services and other eligible expenditures under the OFNPA necessary to provide effective First Nation Officer complement and safety and policing services to Minimum Standards in the community.

45. The Crown fails to hold itself or the OPP to account for these failures and to ensure the realization of its stated goals of the FNIPP and FNIPFP programs through substantively equitable funding and transparency, leaving First Nation Officers and their communities at perpetual safety risk.

46. Kiashke Zaaging Anishinabek First Nation Officers have no housing or police station, no cell service or satellite phones, and operate solo without back-up at all times and without any possibility of meeting Minimum Standards for Prevention and Protection Services given the known inequitable funding of the FNIPP, FNIPFP and OFNPA.

47. Kiashke Zaaging Anishinabek has raised complaint repeatedly to the Crown and OPP regarding anti-Indigenous racism and discrimination in funding and of OPP officers toward First Nation community members. The OPP have at times refused to provide primary or back-up policing services to the community altogether, given the distance from the OPP station in Armstrong, Ontario to Kiashke Zaaging Anishinaabek and the community's advocacy, leaving it largely a lawless enclave. The OPP in Armstrong, ON are at least forty-five (45) minutes away from Kiashke

Zaaging Anishinaabek, if they are to arrive at all to provide primary service or back-up.

48. While the Crown recently announced over forty million (\$40,000,000.00) dollars for the tragic results of similar colonial policing of James Smith Cree Nation by the RCMP who were about the same distance away from that community, the answer to officer and community safety and wellness is for the Crown to abide by its equity obligations under the *Charter* and legal obligations under UNDRIP and the common law in the first place.

CROWN FUNDING POLICIES ARE HARMFUL AND DISCRIMINATORY

49. The design and implementation of the Crown Funding Policies were and continue to be harmful to the Plaintiff First Nation Officers and Kiashke Zaaging Anishinaabek as they do not provide for the remuneration, benefits, pensions, Infrastructure, Equipment, Training, Oversight and Minimum Standards Prevention and Protection Services needs of the First Nation Officers and the communities they serve. The Crown Funding Policies in fact prevent the provision of effective, safe and Culturally Appropriate First Nation policing services.

50. The Crown Funding Policies were and continue to be discriminatory because they fail to provide substantive equity in remuneration, benefits, pensions, Infrastructure, Equipment, Training and Oversight for First Nation Officers operating under the OFNPA and fail to

provide Minimum Standards Prevention and Protection Services to First Nation communities in line with the stated goals of the FNIPP, FNIPFP and OFNPA.

51. The harmful and discriminatory Crown Funding Policies result in an insufficient First Nation Officer complement, substantially less remuneration, benefits and pensions for First Nation Officers than their fellow OPP officers, and wholly inadequate Infrastructure, Equipment, Training, Oversight and Minimum Standards Prevention and Protection Services for First Nation communities, leaving First Nation Officers and Communities in constant safety jeopardy and without the resources to do the job they are legally obligated to by the OFNPA and to perform.

52. The harmful and discriminatory Crown Funding Policies also ignore the Crown's substantive equity obligations under the *Charter* and UNDRIP which go beyond the standards of OPP services to account for First Nation actual community needs, cultural appropriateness and responsiveness, remoteness, and fulfillment of self-determination and self-governance goals.

53. The Crown has known or ought to have known that its Funding Policies were and continue to be harmful and discriminatory to First Nation Officers and First Nation communities.

54. Numerous Crown and external reports, including that of the Crown Auditor General, have reached these conclusions on multiple occasions. The Crown continues to deliberately and knowingly underfund

the FNIPP, FNIPFP and OFNPA regardless of its own and other reliable evidence of its legal and constitutional failures.

CHRA COMPLAINT SUSTAINED

55. In *Gilbert Dominique (from Pekuakamiulnuatsh) and Canadian Human Rights Commission v. Public Safety Canada*, 2022 CHRT 4, the Canadian Human Rights Tribunal assessed the complaint of race, nationality and ethnic origin discrimination in relation to the underfunding provided for by the FNIPP program, in the context of Indigenous social, political and legal history rife with colonial policing violence and anti-Indigenous stereotypes and prejudices arising from colonialism, including the residential school system.

56. The successful complaint decision, which was not appealed by the Crown, alleged that the community of Mashteuiatsh and its members were treated adversely by Public Safety Canada and the Crown through its FNIPP program. The complainant and community successfully argued that the inadequacy of FNIPP funding provided for its First Nation Officers and community police service and the short duration of tri-partite funding agreements resulted in deficient levels of support to First Nation Officers and policing services to First Nation community members.

57. The Tribunal rejected the argument that the FNIPP tri-partite funding agreements structure and terms negated the Crown's responsibility for the measurement and provision of substantively equitable funding of police services in the First Nation community. It held

that the FNIPP as a Crown program gives rise to obligations of substantive equity despite the shared funding arrangements that are common to all public services agreements with First Nation communities, and despite the Crown not providing direct policing services on the ground, for the Crown chose to occupy and utilize its jurisdiction under subsection 91(24) of the *Constitution Act, 1867*.

58. The Tribunal held the Crown chose to create and implement a program for policing services in First Nation communities and cannot then do so in a discriminatory manner, citing *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC). The Supreme Court of Canada held in *Eldridge* that the Crown cannot avoid its *Charter* obligations by entering into commercial or private agreements.

59. The Tribunal specifically held that inequitable and inadequate funding under the FNIPP precluded the provision of the minimum level of policing services as provided for in provincial policing legislation. In holding the inadequate funding precluded the purposes of the FNIPP program from being met, the Tribunal stated:

60. “The three main objectives of the Policy are: 1) to enhance public safety and personal security; 2) to increase responsibility and accountability; and 3) to build a new partnership with First Nations communities” and that the guiding principles of the FNIPP program include “access to policing services that are appropriate to the needs and equal in quality and quantity to those available to surrounding communities with similar conditions. ... In addition, services should be

provided by an adequate number of police officers with similar cultural and linguistic backgrounds to the communities involved to ensure effective and culturally appropriate services.”

61. The Tribunal also specifically held that FNIPP “goes beyond the mere notion of funding since Public Safety Canada and the Crown also monitor the FNIPP program, provide related assistance to First Nations utilizing the FNIPP program and require First Nation accountability for funds it received under the tri-partite agreement.”

62. The Tribunal outlined how the inequity arises from Treasury Board transfer policy under the *Financial Administration Act*, RSC, c F-11, which controls the terms and conditions and duration of funding agreements utilizing funding envelopes for the FNIPP program as determined by Cabinet. FNIPP funds come out of the consolidated revenue fund of the Crown which is budgeted by Cabinet with Parliamentary approval with a specific budget line for the FNIPP program. That number is fixed and in no way tied to the actual needs of First Nation Officers or First Nation communities or the goals of the FNIPP program. Funding proposals go to the Minister of Public Safety Canada for approval to obtain allotment from the Treasury Board out of the FNIPP budget allotment, after the Crown arbitrarily sets its budget and its allotment of fifty-two percent (52 %), which in turn sets the provincial budget and allotment of forty-eight percent (48%) of the total funding for the First Nation policing in a province.

63. The Tribunal concludes that implementation of the FNIPP by the inequitable funding itself, the limited duration of funding agreements and the level of services then able to be provided are discriminatory upon the basis of race, nationality and ethnic origin, in failing to meet the actual needs of the First Nation Officers and First Nation communities.

64. “In the Commission’s view, the structure of the FNPP necessarily results in a denial of service, as it is impossible for the complainant to receive basic policing services, as basic services are effectively excluded from the funding formula. The funding becomes arbitrary and inadequate. The situation reinforces the dependency of First Nations on the Crown, the federal government.”

UNDRIP ACT

65. The *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, recognizes the Crown’s self-determination, self-government and equity obligations to Kiashke Zaaging Anishinaabek under the FNIPP, FNIPFP and OFNPA.

66. It specifically recognizes UNDRIP as the framework for reconciliation upon principles of justice, human rights, non-discrimination and good faith; as minimum standards for the well-being of Indigenous peoples; that its implementation is a Truth and Reconciliation Commission Call to Action and a Murdered and Missing Indigenous Women and Girls Inquiry Call for Justice; that Indigenous peoples have experienced historic injustice due to colonization; that the implementation

of UNDRIP must include concrete measures to address injustices and to combat racism and discrimination including systemic discrimination; that the Crown is to advance relations with Indigenous peoples based on good faith and principles of equality, non-discrimination and respect for human rights; that the Crown is to respect and promote inherent rights including legal systems; that the Crown must recognize and implement the inherent right to self-determination, including self-government; that the Crown is committed to effective legislative, policy and administrative measures to achieve all of the UNDRIP objectives; that the Declaration is affirmed as a source for the interpretation of Canadian law; that s. 35 of the *Constitution Act, 1982* rights include these principles and that such rights are capable of growth and not frozen in time, and; that there is an urgent need to respect and promote UNDRIP rights in agreements with First Nations and with Indigenous peoples.

67. Subsection 4(1)(a) of the *UNDRIP Act* states:

“The purposes of this Act are to affirm the Declaration as a universal international human rights instrument with application in Canadian law.”

68. Section 5 of the *UNDRIP Act* states:

“The Government of Canada must ... take all measures necessary to ensure that the laws of Canada are consistent with the Declaration.”

UNDRIP

69. Article 1 states: “Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.”

70. Article 2 states: “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.”

71. Article 3 states: “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.”

72. Article 4 states: “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy of self-government in matters relating to their internal affairs, as well as ways and means for financing their autonomous functions.”

73. Article 7 states: “Indigenous individuals have the right to life, physical and mental integrity, liberty and security of the person. 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.”

74. Article 18 states: “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures , as well as to maintain and develop their own indigenous decision-making institutions.”

75. Article 19 states the Crown “shall consult and cooperate in good faith with the indigenous peoples concerns through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”

76. Article 20 states: “Indigenous peoples have the right to maintain and develop their own political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.”

77. Article 21 states: “Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.”

78. Article 22 states the Crown “shall take measures, in conjunction with indigenous peoples, to ensure indigenous women and children enjoy

the full protection and guarantees against all forms of violence and discrimination.”

79. Article 34 states: “Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.”

80. Article 38 states that the Crown “in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.”

81. Article 39 states: “Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.”

82. Article 40 states: “Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerns and international human rights.”

83. Finally, Article 43 states: “The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.”

84. The Crown Funding Policies, the FNIPP, FNIPFP and OFNPA fail to meet these obligations to First Nation Officers and First Nation communities as they relate to the provision of adequate, effective and Culturally Appropriate policing services.

THE CROWN OWED FIDUCIARY and COMMON LAW DUTIES to EDMUND, NATASHA and KIASHKE ZAAGING ANISHINAABEK

The Honour of the Crown and Fiduciary Obligations

85. The Honour of the Crown is always at stake in its dealings with Indigenous people. The Crown duties toward First Nation Officers and First Nation communities is derived from the general Honour of the Crown obligations affirmed in s. 35 of the *Constitution Act, 1982*, the *UNDRIP Act* and UNDRIP itself, which require the Crown to always act honourably and with utmost good faith and integrity in the exercise of its discretionary powers towards the Plaintiffs.

86. The Honour of the Crown gives rise to fiduciary obligations in its control and discretion over First Nation policing services.

87. The Crown has exclusive jurisdiction and significant discretionary control over the provision of policing services by First Nation Officers and to First Nation communities by subsection 91(24) of the *Constitution Act, 1867* and its FNIPP, FNIPFP and OFNPA programs and its Funding Policies.

88. The Crown's exclusive constitutional and common law jurisdiction in relation to Indigenous people is further supported by its

obligations under s. 35(1) of the *Constitution Act, 1982* to recognize and affirm the rights of “Aboriginal” people.

89. The Crown has assumed and maintains discretionary control over First Nation Officers and First Nation communities, requiring it to act in the best interests of First Nation Officers and First Nation community members.

90. The FNIPP and FNIPFP programs, the related bilateral Crown-Ontario OFNPA and the related tri-partite OFNPAs thereunder are directed, undertaken and controlled by the Crown under the explicit assertion that the Crown intends to act in the best interests of the First Nation Officers and First Nation communities, for their respective safety and well-being.

91. The Crown has discretionary control over the FNIPP, FNIPFP, and OFNPA agreements thereunder, through its Funding Policies and administrative directives, including its approved budget. The FNIPP, FNIPFP and OFNPA have a direct impact on the Plaintiffs and their need to be safe and provide effective, safe and Culturally Appropriate and responsive policing services to First Nation communities.

92. The legal and substantial policing practice interests of First Nation Officers and First Nation communities will continue to be adversely impacted by the Crown’s discretion and control over the FNIPP, FNIPFP and OFNPA.

93. The shared interests of First Nation Officers and First Nation communities in officer and community safety will continue to be adversely

impacted by the Crown's discretion and control over the FNIPP, FNIPFP and OFNPA, resulting in harm up to and including avoidable deaths, and continuing colonial violence and arbitrary control precluding protection of First Nation Officers and First communities and fulfillment of their rights to self-determination and self-governance as protected by section 35 of the *Constitution Act, 1982*, the *UNDRIP Act* and UNDRIP.

Common Law Duty of Care

94. The Crown has full control over the provision of policing resources to First Nation Officers and policing services to First Nation communities by virtue of its exclusive jurisdiction over them pursuant to subsection 91(24) of the *Constitution Act, 1867*.

95. The Crown provides these services pursuant to Funding Policies which the Crown established and operated and continues to establish and operate.

96. The Crown's duty of care includes the duty to adequately and equitably fund substantively equitable First Nation Officer complement, remuneration, benefits and pensions, and necessary Infrastructure, Equipment, Training and Oversight and Minimum Standards Prevention and Protection Services to ensure First Nation Officer and First Nation community safety.

97. The Crown's duty of care to First Nation Officers and First Nation communities includes the duty to ensure substantive equality for them in Funding Policies and related programs and agreements, to allow for

Culturally Appropriate and responsive police services and to avoid delays, disruption, gaps and denial of First Nation policing services created under the FNIPP, FNIPFP and OFNPA, and in those still needed OPP services given the discrimination in its Funding Policies and FNIPP, FNIPFP and OFNPA programs and policies.

98. The Crown has known from the inception of the FNIPP, FNIPFP and OFNPA, or ought to have known, that its Funding Policies are insufficient to provide for adequate and substantively equitable First Nation Officer complement, remuneration, benefits and pensions, and Infrastructure, Equipment, Training, Oversight and Prevention and Protection Services that are Culturally Appropriate and responsive.

99. The Crown knew or ought to have known the adverse impacts to First Nation Officers and First Nation communities, especially in view of the history of police relations in First Nation communities, as documented in the Royal Commission on Aboriginal Peoples, the Truth and Reconciliation Commission Report and Calls to Action, the Murdered and Missing Indigenous Women and Girls Report and Calls to Justice, and its own and external reports on the FNIPP funding and effectiveness.

The Crown Breached These Duties to the Plaintiffs

100. The Crown breached its fiduciary duties and common law duty of care to Edmund King Jr., Natasha Maxwell and Kiashke Zaaging Anishinaabek by:

- a) Creating and implementing Funding Policies that caused inadequate and inequitable First Nation Officer complement, remuneration, benefits and pensions, and Infrastructure, Equipment, Training, Oversight and Prevention and Protection Services for them and their First Nation communities;
- b) Failing to ensure that appropriate Prevention and Protection Services for First Nations were delivered in Ontario that ensured First Nation Officer and First Nation community safety;
- c) By discriminating between First Nation and non-Indigenous people and communities in the delivery of Prevention and Protection Services in a manner that disadvantaged First Nation Officers and First Nations in Ontario; and by
- d) Providing inadequate levels of funding for the provision of First Nation Officer complement, remuneration, benefits and pensions, and Infrastructure, Equipment, Training, Oversight and Prevention and Protection services in First Nations in Ontario, thereby making provincial policing standards under the *Police Services Act* and substantively equitable policing services unavailable to them.

101. The Crown dishonourably exercised its powers and discretion over First Nation Officers and First Nation communities in Ontario and harmed the uniquely vulnerable First Nation Officers and First Nation communities and their members whom the Crown is duty bound to help.

102. The Crown's breach of duty is particularly dishonourable due to the harm caused by the Crown to First Nations and their members historically through its residential schools and police removal directives for children and threat directives for their families, its failures to protect First Nation communities and their members as noted in the Royal Commission on Aboriginal People, the Truth and Reconciliation Commission and the Murdered and Missing Indigenous Women and Girls Inquiry, its undertaking to support First Nations community members and communities as a whole, and its adoption of UNDRIP in whole, to protect First Nation self-determination, self-governance, individual and communal equity rights and cultural patrimony.

103. Instead, the Crown decided and continues to decide that it would like to save money for performing other government functions that it considers more important than its constitutional, legal and common law obligations to First Nation Officers and First Nation communities and their respective safety.

104. Notably, the current development of federal policing legislation by the Ministers of Public Safety and Indigenous Services, to recognize First Nation policing under the FNIPP, FNIPFP and OFNPA as an essential service, does not commit to substantive equity in its Funding Policies for the FNIPP, FNIPFP and OFNPA. Further, there is no evidence of the Crown undertaking any efforts with its provincial counterparts to ensure same. It is simply another Crown initiative to impose standards without the necessary resources to meet those standards, while denying its

constitutional, legal and equitable obligations to First Nation Officers and First Nation communities.

THE CROWN OWED SUBSTANTIVE EQUITY TO EDMUND AND NATASHA

The Charter Equality Obligations of the Crown

105. Subsection 15(1) of the *Charter* provides that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on, *inter alia*, race, nationality or ethnic origin.

106. The Crown's conduct violated and continues to violate subsection 15(1) of the *Charter* by discriminating against the Plaintiff First Nation Officers based upon race, nationality and ethnic origin.

107. The policing services provided by and funded by the Crown ought to be provided upon First Nation Officer and First Nation community needs.

108. The race, nationality and ethnic origin of the First Nation Officers and First Nation community members is the very reason why substantive equity under subsection 15(1) of the *Charter* is required to prevent ongoing discrimination and harm to First Nation Officers and First Nation communities.

109. The FNIPP, FNIPFP and OFNPA include a commitment to provide for First Nation Officers and Prevention and Protection Services to First Nation communities to the standards of the *Police Services Act* of

Ontario and beyond, which requires substantively equitable funding responsive to the First Nation Officer and First Nation community needs.

110. The well-known historical disadvantage in social, economic, cultural, policing enforcement and incarceration context of First Nation community members in which this action arises aggravates the Crown's unconstitutional conduct toward First Nations Officers and First Nation communities by adding to those known historical disadvantages suffered through residential school police removals and removal enforcement, similar 60s Scoop policies and other colonial policing violence and disadvantages documented in the Royal Commission on Aboriginal Peoples, the Truth and Reconciliation Commission, the Murdered and Missing Indigenous Women and Girls Inquiry and other related reports and reviews.

111. The discriminatory impact on the First Nation Officers and First Nation communities was and is apparent to the Crown. It knowingly or recklessly differentiated adversely in the provision of First Nation Officer complement, remuneration, benefits and pensions, and the Infrastructure, Equipment, Training, Oversight and Prevention and Protection Services due to them and their First Nation communities as compared to policing services provided for by the OPP and beyond to the point of substantive equity.

112. Edmund King Jr. and Natasha Maxwell were denied substantively equal First Nation Officer complement, remuneration, benefits, pensions, Infrastructure, Equipment, Training and Oversight and

the ability to provide Prevention and Protection Services to their communities' Minimum Standards because of their Indigeneity, inclusive of race, nationality and ethnic origin.

113. There is no pressing and substantial policy objective to justify the Crown's conduct, Funding Policies, actions and omissions.

114. The purpose of the FNIPP, FNIPFP and OFNPA were and are to make available substantively equal policing resources to First Nation Officers and Prevention and Protection Services to First Nation communities through First Nation Officers. That purpose is fulfilled by the Crown meeting its obligations under subsection 15(1) of the *Charter* and not by infringing it repeatedly and knowingly.

115. The Crown conduct was and is contrary to the objectives of the FNIPP, FNIPFP and OFNPA because it caused and continues to create and implement Funding Policies in ways that it knew or ought to have known would hinder the FNIPP, FNIPFP and OFNPA, perpetuating historic disadvantages suffered by the First Nation Officers and First Nation communities in Ontario.

116. The Crown's conduct was and is contrary to its constitutional, fiduciary, legal and common law obligations to First Nation Officers and First Nation communities and was and is therefore outside of a range of reasonable alternatives available to the Crown.

117. The Crown's conduct did and continues to have a disproportionate effect on the equality rights of First Nation Officers and First Nation communities, which are uniquely vulnerable as a result of

historic disadvantages perpetuated by the Crown upon them, including but not limited to those created by residential schools, the 60s Scoop and other program and policing failures as noted in the Royal Commission on Aboriginal Peoples, the Truth and Reconciliation Commission and the Murdered and Missing Indigenous Women and Girls Inquiry.

118. First Nation Officers and First Nation communities were and continue to be denied substantive equity in First Nation Officer complement, remuneration, benefits and pensions, Infrastructure, Equipment, Training, Oversight and Prevention and Protection Services to Minimum Standards, as an essential public service and as necessary for individual and community safety which is at continued heightened risk.

DAMAGES

119. As a result of the Crown's past and ongoing breaches of its duties, as described herein, the Plaintiff First Nation Officers and Kiashke Zaaging Anishinaabek community have and are suffering injury and damages, including but not limited to the following:

- a) The Crown conduct denied and continues to deny the First Nation Officers and Kiashke Zaaging Anishinaabek non-discriminatory First Nation Officer complement, remuneration, benefits and pensions, Infrastructure, Equipment, Training, Oversight and Prevention and Protection Services to Minimum Standards necessary for personal and community safety, well-being and dignity;

- b) The Crown conduct adds to the historic disadvantages experienced by the First Nation Officers and Kiashke Zaaging Anishinaabek arising from the colonial violence and practices of the Crown and external policing agencies and services and negatively impacts their self-determination, self-government and cultural identity;
- c) The Crown conduct has and continues to create physical, mental, emotional, spiritual, cultural and economic pain and suffering of the First Nation Officers and Kiashke Zaaging Anishinaabek;
- d) The First Nation Officers and Kiashke Zaaging Anishinaabek have and continue to suffer financial losses and discriminatory impacts on their physical, mental, emotional, spiritual, cultural and self-determination well-being, including high risk to personal and community safety; and
- e) The First Nation Officers and Kiashke Zaaging Anishinaabek lost and continue to lose the opportunity for provision of essential and effective Prevention and Protection Services and have routinely paid out of pocket for same.

120. The First Nation Officers and Kiashke Zaaging Anishinaabek have and continue to suffer loss and damage, including special damages.

121. They suffered damages by the Crown's conduct which prevented provision of substantively equivalent Prevention and Protection Services and a substantively equivalent workplace to provide for same.

122. These damages in turn caused further historical disadvantage to the First Nations Officers and Kiashke Zaaging Anishinaabek in relation to culture, self-determination, self-government, First Nations Officer and First Nation community safety and First Nation Officer and community member physical, mental, emotional, spiritual, and cultural well-being.

123. An award of subsection 24(1) *Charter* damages is appropriate and necessary in this case to compensate First Nation Officers and Kiashke Zaaging Anishinaabek for the losses and harms they have suffered and to vindicate their rights to substantive equality and self-determination under the *Charter, Constitution Act, 1982*, the *UNDRIP Act* and UNDRIP itself while deterring future discriminatory conduct and funding of First Nation policing services by the Crown.

124. The Crown has acted with gross indifference to the foreseeable injuries to the First Nation Officer Plaintiffs and Kiashke Zaaging Anishinaabek and continues to do so.

125. It has caused and continues to cause grave and enduring harm and suffering to the First Nation Officers and Kiashke Zaaging Anishinaabek who already suffer from historical disadvantage in policing services failures through residential schools policy, 60s Scoop policy and other policing failures as noted in the Royal Commission on Aboriginal Peoples, the Truth and Reconciliation Commission, the Murdered and Missing Indigenous Women and Girls Inquiry and other reports of Crown itself and external bodies.

126. The Crown knew or ought to have known that its conduct would perpetuate and exacerbate those harms to First Nation Officers and Kiashke Zaaging Anishinaabek.

127. The Crown is liable for aggravated and punitive damages.

STATUTES PLEADED

The Plaintiffs plead and rely upon the following statutes and authorities:

- a) *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*; being Schedule B to the *Canada Act 1982* (UK), 1982, c 11;
- b) *Constitution Act, 1867*, 30 & 31 Victoria, c 3 (UK);
- c) *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11;
- d) *Crown Liability and Proceedings Act*, RSC 1985, c C-50;
- e) *Department of Crown-Indigenous Relations and Northern Affairs Act*, SC 2019, c 29, s 337;
- f) *Department of Indigenous Services Act*, SC 2019, c 29, s 336;
- g) *Department of Public Safety and Emergency Preparedness Act*, SC 2005, c 10
- h) *Federal Courts Act*, RSC 1985, c F-7;
- i) *Federal Court Rules*, SOR/98-106;
- j) *Indian Act*, RSC 1985, c I-5;
- k) *Interpretation Act*, RSC 1985, c I-21;
- l) *Police Services Act*, RSO 1990, c P.15;

- m) *United Nations Declaration on the Rights of Indigenous People*,
13 September 2007, A/RES/61/295; and
- n) *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c 14; and
- o) All other comparable and relevant Acts and regulations in
Canada.

PLACE OF TRIAL

The Plaintiffs propose that this action be tried at Ottawa.

December 5, 2022

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