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Court File # T-1458-20

FEDERAL COURT

PROPOSED CLASS PROCEEDING

**NICHOLAS MARCUS THOMPSON, JENNIFER PHILLIPS, MICHELLE HERBERT,
KATHY SAMUEL, WAGNA CELIDON, DUANE GUY GUERRA, STUART PHILP,
SHALANE ROONEY, YONITA PARKES, DANIEL MALCOLM, ALAIN BABINEAU AND
BERNADETH BETCHI**

Plaintiffs

-and-

HER MAJESTY THE QUEEN

Defendant

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

FRESH AS AMENDED STATEMENT OF CLAIM

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 defense 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 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 Toronto (telephone 416-973-3356) or at any local office.

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

Date of Issuance: December 1, 2020

Amended on: May 7, 2021

Issued by:
180 Queen Street West
Suite 200
Toronto, Ontario
M5V 3L6

TO: Minister of Justice and Attorney General of Canada
c/o Deputy Attorney General of Canada
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AND TO: Minister of Justice and Attorney General of Canada
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AND TO: Paul Martin, Frederic Gilbert, Caroline Youdan
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CLAIM

PART 1-Relief Sought

1. The Plaintiffs claim on their own behalf and on behalf of Class Members (as described within):
 - (a) an order pursuant to Rules 334.16(1) and 334.17 of the Federal Courts Rules (the “Rules”) certifying this action as a class proceeding and providing any ancillary directions;
 - (b) an order appointing Nicholas Marcus Thompson, Jennifer Phillips, Michelle Herbert, Kathy Ann Samuel, Wagner Celidon, Duane Guy Guerra, Stuart Philp, Shalane Rooney, Yonita Parkes, Daniel Malcolm, Alain Babineau and Bernadeth Betchi as the Representative Plaintiffs under the *Federal Courts Rules*, SOR/98-106;
 - (c) a mandatory order to implement a Justice and Equity Promotional Plan for Black Public Service Employees, related to the hiring and promotion of Black employees in the Public Service of Canada;
 - (d) damages for the wrongful failure to hire and promote Black employees in the Public Service;
 - (e) a declaration that the Defendant, Her Majesty the Queen and its constituent entities set out in Schedule “A” hereto (“Canada”) breached her contractual and extra-contractual obligations including its duty of honesty and duty not to conceal, its duty of care, and its fiduciary duty to the Plaintiffs and to Class Members and is liable for its failure act in accordance with its legislative, regulatory, and administrative mandate in regard to hiring and promotions

based upon merit and instead adopted malleable, arbitrary and capricious subjective criteria;

- (f) a declaration that Canada breached its duties of honesty, good faith, and fair dealing owed to Class Members in its application of the legally mandated processes related to hiring and promotions and particularly that Canada failed to follow those processes and policies resulting in the practice of Black employee exclusion;
- (g) a declaration that Canada infringed the Plaintiffs and Class Members' rights and freedoms contrary to sections 15, 27, and 28 of the *Canadian Charter of Rights and Freedoms* ("**Charter**") as well as sections 10, 10.1 and 16 of the *Quebec Charter of Human Rights and Freedoms* ("**the Quebec Charter**");
- (h) damages for Canada's breaches of the *Quebec Charter*;
- (i) damages and other alternative relief pursuant to s.24(1) and s. 52 of the *Charter*;
- (j) an order for the aggregate assessment of monetary relief and its distribution to the Plaintiffs and the Class Members;
- (k) general pecuniary and non-pecuniary damages in the amount of \$2.5 billion (2 billion, 500 million dollars) for Canada's breaches of its contractual and extra-contractual obligations, breach of its duty of care, negligence, breach of its fiduciary duty to the Plaintiffs and Class Members, including all compensatory damages for lost income, opportunities, and lost pension values and other benefits;
- (l) damages to Plaintiffs and Class Members and particularly to Black women and Black members of other disadvantaged groups for breaches of sections 15, 27,

and 28 of the *Charter* arising from the discriminatory application of Canada's *Employment Equity Act* and statutory pension plans;

- (m) special damages and disgorgement in an amount to be determined prior to trial;
- (n) punitive, aggravated, and exemplary damages and damages for mental distress in the amount of \$250 million dollars;
- (o) an order pursuant to rule 334.26 of the *Federal Courts Rules* for the assessment of the individual damages of the Plaintiffs and Class Members;
- (p) damages pursuant to the *Family Law Act*, R.S.O. 1990 c. F-3 and comparable legislation in other Provinces and Territories;
- (q) recovery of healthcare costs incurred by the Ontario Health Insurance Plan and other Provincial and Territorial health insurers on behalf of the Plaintiffs and Class Members pursuant to the *Health Insurance Act*, RSO 1990, c H-6, and comparable legislation in other Provinces and Territories;
- (r) an order for the aggregate assessment of monetary relief and distribution, and/or a reference to assess same;
- (s) an order directing Canada to establish a fund to the benefit of the Plaintiffs and Class Members for counselling and therapy in relation to distress, humiliation, psychological damages, anguish, physical and mental health effects caused by the actions and failure to act on the part of Canada;
- (t) the costs of notice and of administering the plan of distribution of the recovery in this action plus applicable taxes, pursuant to Rule 334.38 of the *Federal Court Rules*, SOR/98-106, in addition to the costs for any public education and public relations expenses, undertaken in the course of advising the public and informing the public, in relation to the advancement of this action;

- (u) an order compelling Canada to disclose the names and last known contact details of the Plaintiffs and Class Members as defined in paragraphs 19 and 20 of this Statement of Claim for the purposes of giving Notice of this action to the Plaintiff and Class Members, to be provided to an agreed upon and/or Court approved third party claims' administrator;
- (v) pre-judgment and post-judgment interest pursuant to the *Federal Courts Act*, R.S.C. 1985, c.F-7;
- (w) the costs of the action on a substantial indemnity basis; and
- (x) such further and other Relief as this Honourable Court may deem just.

Overview

2. From the roots of Canada's colonial origins through its efforts to throw off the yoke of slavery and to stand up against the abhorrent practices of apartheid and racial genocide, Canada has purportedly committed itself to the virtue of eradicating and preventing racism and inequality as a matter of social policy, Canadian values, constitutional mandate and international law and convention. The multicultural character of Canada is enshrined in our Constitution and in our laws as a founding legal principle.

3. Canada has for over 50 years conducted, participated in and been provided with numerous commissions, reports, questionnaires, inquiries, investigations, and audits both nationally and internationally that have evidenced institutional and systemic barriers that have resulted in the widespread practice of Black employee exclusion.

4. The measures put in place by Canada to date to remedy systemic discrimination against Black Canadians have failed to redress these harms and have instead perpetuated

and exacerbated the systemic inequalities and racism faced by Black Canadians, particularly in the hiring and promotion practices within the Public Service. The evils of systemic discrimination permeate Canada's institutional structures and have kept Black Public Service Employees subjugated and ghettoized in the lowest ranks of the Public Service or have precluded their hiring from the outset.

5. There has been a *de facto* practice of Black employee exclusion from hiring and promotion throughout the Public Service because of the permeation of systemic discrimination through Canada's institutional structures.

6. Legislative action through Employment Equity statutes intended to redress systemic inequalities and through human rights statutes aimed at preventing individual discrimination based on race have merely masked the increasing disparity, exclusion and marginalization of Black Canadians from equal access to opportunities and benefits that have enabled other groups to share in the prosperity of Canadian social and economic life through meaningful employment in the Public Service free from discrimination.

7. Systemic barriers to equality have shown themselves to be particularly pernicious in the hiring and promotion practices of the Public Service and have resulted in manifest underrepresentation of Black employees, particularly at the upper levels of the Public Service. These have resulted in the insidious practice of Black employee exclusion.

8. Treasury Board 2019 select data indicates Black employees constituted only:

(a) 1.6% of the EX executive occupational group in the federal public service;

(b) 1.4% of the TR translation occupational group in the federal public

service;

- (c) 0.8% of the SV operational services group in the federal public service;
- (d) 1.1% of the TC technical services group in the federal public service;
- (e) 1.9% of the RE research occupational group in the federal public service;
and
- (f) 0.7% of the SO ships officers' occupational group in the federal public service.

9. Recent Treasury Board data indicates that Black employees earning \$100,000 or more make up less than 1% of all federal employees.

10. Within the Public Service, the mandate of constitutional equality as a Canadian social value has been systematically denied to Black Canadians, particularly through denial of opportunities for hiring and promotion based on racial exclusion.

11. The Prime Minister of Canada publicly admitted to Canadians the fact that anti-Black racism, systemic discrimination and the pain and damage it causes – are real. In his speech to Parliament on June 2, 2020, he recognized the importance of justice, equality and accountability and solemnly pledged to “eliminate systemic barriers that perpetuate injustice, notably in employment”. The Prime Minister tacitly acknowledged the destructive social and economic effects wrought on society -- promising to help eradicate racism in Canada, stating in part:

“Because here are the facts in Canada.

Anti-Black racism is real.

Unconscious bias is real

Systemic Discrimination is real.

For millions of Canadians, it is their daily, lived reality.

The pain and damage it causes is real, too.”[...]

(Speech of Prime Minister Justin Trudeau to Parliament, June 2, 2020)

12. On June 12, 2020 the RCMP Commissioner also admitted in a public statement the fact that “systemic racism” exists within the RCMP – as reflected in the institutional structures that reflect the inequities that persist in society. The Commissioner stated in part:

“[...] I do know that systemic racism is part of every institution, the RCMP included. Throughout our history and today, we have not always treated racialized and Indigenous people fairly.

Systemic racism isn’t about the behaviour of a single individual or the actions of one person. It’s in the institutional structures that reflect the inequities that persist in our society. And it shows up in policies, processes or practices that may appear neutral on the surface, but disadvantage racialized people or groups.”[...]

13. Despite numerous studies, reports, commissions, and recommendations to address the horriblesystemic inequities faced by Black employees in the Public Service, the reality of equal opportunity remains elusive to Black Canadians both in unionized and non-unionized workplaces throughout the Public Service.

14. Labour Collective Agreements, Human Rights Codes and Tribunals and

Employment Equity Laws and Commissions have failed to break the yoke of systemic racism for Black Canadians or to overcome decades of marginalization and the pervasive systemic practice of Black employee exclusion throughout the Public Service.

15. Canada's employment equity, labour, and human rights laws and institutions have served to perpetuate and exacerbate rather than eradicate the practice of Black employee exclusion. They have increased systemic racism in a way that has deprived Black employees of opportunities and benefits afforded to others based on their race and despite their merit and willingness to contribute to Canadian society through public service.

16. From the late 1960's onward, the policies followed by Canada to seek employment equity and freedom from discrimination have failed Black employees in the Public Service due to an institutional framework built on systemic racism and racial inequality. Reliance on the *Employment Equity Act* and related measures as a means to achieve equal opportunity and benefit of the law relative to the hiring and promotion of Black employees in the Public Service has subjected the Plaintiffs and Class Members to persistent discriminatory, humiliating and injurious treatment, demeaning their dignity and self-respect. The Plaintiffs and Class Members have persistently been subject to the systemic and pervasive and unlawful practice of Black employee exclusion.

17. The Plaintiffs and Class Members have suffered significant economic harm and lasting psychological damage from Canada's practice of Black employee exclusion. These harms include anxiety, shame, grief, loss of dignity and significant financial losses.

18. A mandatory Court order to implement the requested Justice and Equity Promotional Plan is required in order to end the practice of Black employee exclusion and

to secure equality under the law and equal benefit of the law for Black employees of the Public Service.

Class Definition

19. The Class in the within action includes all Black individuals who at any time during Class Period from 1970 to present worked for Canada as part of the Public Service as defined in Schedule “A” and who were denied hiring or promotional opportunities by virtue of their race.

20. The Class also includes all individuals who, by reason of a relationship with a Class Member, are entitled to assert a claim pursuant to the *Family Law Act*, RSO 1990 c F.3, and equivalent or comparable legislation in other provinces and territories ("Family Members").

The Black Experience in Canada: The Personal Voice of Systemic Discrimination

21. For close to 400 years, Black Canadians have faced and continue to face prejudice, inequalities, tangible, and invisible systemic barriers to full and equal participation in Canadian society. This dates back to the enslavement of African people in Canada as property and not as people.

22. Between 1629 and 1834, there were more than 4,000 enslaved people of African descent in Canada. Children, women, and men were reduced to property that could be bought and sold, exploited for their labour, and subjected to physical, sexual, and psychological trauma, which has left its mark on all future generations.

23. Despite these challenges, Black people fought for the right to fight for Canada. They fought equally and bravely in all wars making the ultimate sacrifice for love of

country. This is so even where it meant exclusion from White only army units and fighting in Black only units of the Canadian Armed Forces.

24. After 1970, a new multiculturalism policy and *Immigration Act* ushered in a wave of new Black immigrants to build on this rich cultural past and to help shape a new Canadian Multicultural Mosaic as part of the Trudeau legacy.

25. However, despite overcoming many challenges and a rich history of building and contributing to Canada, Black Canadians in the Public Service continue to experience the legacy of practices and policies institutionalized many generations ago including the practice of Black employee exclusion.

26. These practices and policies consist of institutional patterns of behaviour that are part of the social and administrative structures of the state and/or the Public Service. They create and perpetuate a position of relative disadvantage for Black employees and privilege for other groups and individuals on account of their group identity. These experiences are perpetuated by the past and continued practice of Black employee exclusion from and within the Public Service as well as by structural and institutional systemic racism.

27. Among the Plaintiffs and Class Members, there is a shared experience which is reflected by the following comments by Plaintiff Nicholas Marcus Thompson:

Arriving on my first day of Civil Service work, I was filled with ideas of excellence, intellectual adventure and unending possibilities. I was soon to experience disappointment in all three categories.

With my skin colour, I felt the sting of exclusion and limits at every level: work assignments, responsibility, and advancement.

There were no Black role models in the top echelon of the Civil Service to

encourage me in my work. Black employees were ghettoized in the lower ranks. Occasionally a Black person was advanced to the middle ranks but rarely higher.

Merit was not a guiding principle for project assignment or advancement. Prejudice and its handmaiden, indifference, made the world polite, cool and lonely to the point of permanent exclusion.

That is Canadian-style systemic racism. I felt the sting but no one noticed my cry. Worse, no one cared to help relieve the pain and the structures and systems in place exacerbated rather than solved these problems. The pain soon became permanent. It fostered resentment, then anger and then resignation to a lower status. Rage is not part of the Canadian way. There was no meaningful outlet and I was confined to accept my place in the lower ranks for life. It echoed a darker past without the markets, the cash and the servitude. Always polite but always racist.

It is time to break these psychological 'iron shackles' and free 'merit' now, imprisoned, as it is in Canada, as an unusable quality for a Black person in the Canada Civil Service.

Merit based advancement without limits is a proven booster for the economy and a human rights triumph beyond the human rights legal words, slogans and high brow constitutional phrases, for us, lying on dusty shelves because of underuse and indifference.

Feel our pain, release us to the sunshine of merit fields, let us join the Canadian experiment and make it better.

**THE EXPERIENCE OF THE REPRESENTATIVE PLAINTIFFS
EXEMPLIFIES THE HARMS DONE TO PLAINTIFFS AND CLASS
MEMBERS AND MANDATES THIS CLASS ACTION**

Jennifer Phillips

28. Jennifer Phillips has been employed by the Canada Revenue Agency for over 30 years. From the start of her career, she was belittled and made to feel worthless relative to her non-Black colleagues.

29. Jennifer Phillips worked diligently throughout her career and despite her desire to move beyond her position of Collections Officer she was only promoted once in 30 years. She watched as fellow non-Black colleagues, some of whom she had trained, climbed the

ranks, and enjoyed the benefits of a system designed to lift them up while holding her down.

30. Jennifer Phillips was throughout her employment subjected to injurious conduct by Canada.

31. Jennifer Phillips was subjected to persistent acts of discrimination on the basis of her race and observed the same of other Black colleagues, including the following:

- a. explicit and demeaning comments made about their race, national or ethnic origin, religion and/or colour;
- b. attitudes and comments dismissing their ability to carry out their duties because of their race and ethnicity;
- c. non-Black employees of equivalent rank/experience receiving greater accommodation on sick leave, vacation requests, shift changes and transfer requests;
- d. non-Black employees of equivalent rank/experience were assigned to more complex files and tasks and received better career training, education, counselling and mentorship, received more positive performance reviews and were more likely to be considered for promotion.

32. Jennifer Phillips sought to work through her union and through the Employment Equity process in an effort to redress the systemic discrimination and denial of promotions to her and to other Black employees. Ultimately, efforts were taken to write to the CRA Commissioner and to work through the National Employment Equity and Diversity Committee whose membership comprised one person who was Black. These efforts were completely fruitless in resolving Jennifer Phillips' issues and concerns and she suffered stress, anxiety, depression, difficulty maintaining relationships and social phobia.

Nicholas Marcus Thompson

33. Nicholas Marcus Thompson is employed as a Collections Contact Officer at

Canada Revenue Agency. CRA employs over 40,000 persons across Canada. Nicholas Marcus Thompson worked as a union representative to address issues of systemic racism and Black employee exclusion at CRA. Despite these efforts, CRA failed to hire or promote Black employees at all, or in a manner proportional to their percentage of the Public Service and to the population at large. Nicholas Marcus Thompson has repeatedly been denied promotions as a consequence of his race and due to his advocacy on behalf of other Black employees.

34. The practice of Black employee exclusion is manifest in the upper ranks of the CRA where Black employees remain largely invisible:

- (a) At the Board of management level, which oversees the CRA, there are no Black appointees.
- (b) At the Commissioners level there are no Black Employees.
- (c) At the Assistant Commissioner level, there is no Black employee.
- (d) At the Director level, there are 2 Black employees out of approximately 70 across the country.
- (e) At the Assistant Director level, there is 1 Black employee out of over 150 executives.

35. Nicholas Marcus Thompson was made a target for his efforts to assist other Black employees and to improve hiring and promotion practices at CRA. Nicholas Marcus Thompson experienced physical and emotional distress and was frequently demeaned and deprived of further promotional opportunities due to his efforts.

Kathy Ann Samuel

36. Kathy Ann Samuel is employed by the Public Service in the Department of Public Prosecutions (“Public Prosecutions”) as a Legal Assistant where she has worked for over 19 years. During this time, she only received one promotion, which was short-term acting for 8 months.

37. Kathy Ann Samuel feels defeated and has stopped applying for promotions:

What is the point, you only get disappointed, frustrated and further traumatized. My morale and spirit is at an all time low. I have no confidence in the process. I work for Justice on behalf of the Federal Government and yet justice remains denied for Black employees.

38. Kathy Ann Samuel has witnessed Black lawyers and support staff become frustrated and disillusioned by management at Public Prosecutions. These Black employees have been the victims of the practice of Black employee exclusion due to systemic racism.

Michelle Herbert

39. Michelle Herbert works as a Payment Service Officer at a call-centre for Employment and Social Development Canada (“ESDC”). She has been employed with the Public Service for 6 years. Michelle Herbert was overlooked for promotions and pay raises in 2016, 2018 and 2019 as a direct consequence of the practice of Black employee exclusion and systemic racism.

40. Ironically, the mission of ESDC is “to build a stronger and more inclusive Canada, to support Canadians in helping them live productive and rewarding lives and improving Canadians’ quality of life.” ESDC has repeatedly failed in that mission to Michelle Herbert.

Wagna Celidon

41. Wagna Celidon worked for Correctional Service Canada (“CSC”) for 28 years. In her last roles she served as a Data Quality and Training Officer. She was repeatedly denied and passed over for various positions that she was exceedingly qualified for. Positions were given to non-Black employees despite Wagna Celidon’s greater qualifications and merit.

42. The systemic racism and institutional discrimination that Wagna Celidon faced led her doctor as well as her therapist to recommend that, to avoid further damage to her health, she immediately leave CSC, even with only one year left to qualify for a full unreduced pension.

43. This difficult decision has caused her a financial loss of approximately \$300 per month, forcing her to seek a part-time job to compensate for it.

44. This failure to promote had an impact on her mental and physical health and ultimately, she was forced to take early retirement at age 48 because “I had had enough, I experienced a career filled with disappointment, unfair treatment and rampant institutional systemic discrimination.”

Duane Guy Guerra

45. Duane Guy Guerra has been a full-time employee of the Department of National Defense (“DND”) as a Heavy Equipment Technician VHE 10 for 21 years since 1999.

46. Duane Guy Guerra is also an active member of the Canadian Armed Forces (“CAF”) where

he serves as a corporal.

47. Duane Guy Guerra is part of the 32 Service Battalion operating out of the Denison Armory in Toronto, Ontario. Duane Guy Guerra joined the CAF in June 2015 and has been a part-time member ever since. Duane Guy Guerra has participated in six national emergencies over this time and was part of a NATO exercise in 2018.

48. Duane Guy Guerra is currently preparing to deploy on another NATO peacekeeping mission to Europe starting in January of 2021.

49. Like many other Black Public Service employees, Duane Guy Guerra began his employment with the Public Service and in particular with DND, with great hope and enthusiasm. This was however short-lived. He stated:

My first time being a victim of disguised discrimination was an internal job competition in which I was the winner of the competition, and management chose to run the competition three times until they achieved their desired result. In the end I was still the highest scoring candidate. However HR explained to me that management reserves the right to choose the candidate that was the “best fit,” which was a new employee who also happened to be Caucasian and had less than two years’ experience with the department.

50. In 2007, Duane Guy Guerra was awarded a 9-month contract to work overseas with a defense contractor. This position would have paid a minimum of \$90,000 for time spent abroad. The management team had agreed to allow Duane Guy Guerra a leave of absence. The deployment was discussed with his family. He had their full support. Three days prior to his deployment he was called into the Commanding Officer’s chambers, along with his supervisors and the union president:

I assumed it was to sign the final documentation, but instead the Commanding Officer slid a piece of paper to the union president and stated that they had an “operational requirement” for

me to remain with the unit not allowing me to take advantage of this once in a lifetime opportunity.

In my 20 years of experience and the experiences of other members whom I have represented as chief steward, during these investigations and grievances supported and filed by members of Local 625 in other sections and departments, the problem of institutional systemic racial discrimination remains a serious hindrance to the progress and positive development of this federal organization. My dreams and aspirations which I spent my life preparing for were never able to materialize and grow in a toxic unsupportive environment.

Stuart Philp

51. Stuart Philp has been a regular member of the Royal Canadian Mounted Police (“RCMP”) for over 18 years joining in 2002. On joining the RCMP, he attended the RCMP Training program where he experienced the following:

A short time into my training, while in the cadet lounge, one of the other cadets grabbed me by my lips and told me I was the darkest skinned Black person they had ever met. A few days later, I brought this to the attention of my facilitators. A short time after that I was told that I was overly sensitive...

52. After completing Training, Stuart Philp was sent to Burnaby, British Columbia where there were no Black supervisors in any of the units. During his tenure in British Columbia, he worked General Duty Patrol, Investigative Support and eventually Major Crimes. During his years in the investigative units, he was the only Black member. Senior ranks at the detachment were all held by non-visible minorities.

53. The rank structure for regular members of the RCMP has over a dozen levels. Despite his hardwork and commitment to take professional development courses, Stuart Philp still remains a Corporal, one level above the lowest rank of a Constable.

54. Stuart Philp returned to Ontario in the fall of 2007 and was seconded to the Toronto

Police Service until 2011. He was assigned to the Toronto West Detachment where there was one Black

Sergeant and two Black Corporals. Again, senior ranks at the detachment were all held by non-visible minorities.

55. There are no Black members reflected in the ranks of Chief Superintendent, Assistant and Deputy Commissioners.

56. The Commanding Officers of the RCMP in Canadian Provinces and Territories are White men and women, as are the Director General of National Headquarters and the Commanding Officer of National Division. Black Inspectors in other provinces have remained at the rank of Inspector for extended periods while newly promoted White inspectors rapidly climb the career ladder. Black RCMP members are repeatedly overlooked for promotions as part of an ongoing practice of Black employee exclusion.

Shalane Rooney

57. Shalane Rooney began working at Statistics Canada in 2010. In an office of approximately 300 there were only 2 Black employees none of whom held management positions. Shalane Rooney was forced to endure highly racial comments from other employees. Shalane Rooney been denied promotions and raises over the course of her tenure as part of the practice of Black employee exclusion. She has been subject to systemic discrimination and racial comments as follows:

Comments regarding my hair, my skin being too fair to have two black parents confirming with me if it is ok to say the “N” word, to discussing racial slurs. The workplace became a place I dreaded in fear of having awkward conversations with co-workers.

Yonita Parkes

58. Yonita Parkes began her employment with Immigration, Refugees, and Citizenship Canada (“IRCC”) in 2017. Immediately she witnessed that there is a clustering of Black employees in low-level positions.

59. As a consequence of the treatment, she received from a series of co-workers related to her race, she made a formal complaint. The result was “all three individuals were laterally shuffled out of my unit rather than being held accountable for their behaviour.”

60. Yonita Parkes became ostracized as a victim of Black employee exclusion while those who displayed racist attitudes and comments were enabled to move on within the Public Service. Internal Complaint systems were incapable of addressing the harms to Yonita Parkes in the same way that they have proven unable to address the problems related to race experienced by Black employees throughout the Public Service.

61. Rather than addressing the issues of Systemic discrimination the actions of Canada were to transfer the problem employees to another unit without any recognition of the damages they had caused. In short, complaints are dismissed, and by reporting forms of institutional systemic racism and discrimination the victim becomes permanently victimized by the system.

Daniel Malcolm

62. Daniel Malcolm has been employed at Canada Revenue Agency for almost 27 years. Presently he serves as an excluded manager at the MG-06 level, unrepresented by a labour union. He was recently permanently appointed to the MG-06 level after acting in the

position continuously from May 2014 to September 2018 and again from June 2019 to April 2020, a total of approximately 5.5 years. His acting assignments were always based on meeting criteria set by management to pull candidates from qualified pools. In September of 2018, his acting assignment was terminated and given to another individual without a staffing process. This was against the CRA policy but designed for the Manager to choose the person he desired rather than Daniel Malcolm whose experience of acting in the position made him the most qualified. In fact, the qualified pool, of which Daniel Malcolm was part was ignored completely:

As a Black person, I felt that this action was racially motivated against me. As my performance reviews were above average, management did not provide a reasonable explanation for this action. As an excluded manager, I was not entitled to union representation. Therefore, I did not seek recourse. I also felt that recourse would have jeopardized any opportunities for future promotions.

In 2019, management made several promotions at the MG-06 level from a qualified pool that I was in. Despite being as qualified or more qualified than most candidates in the pool I was overlooked for appointment based on the criteria that management set to appoint the people they wanted to appoint. There are not many Black people at the MG-06 level or higher in the CRA in the GTA (about two of us in the GTA, and possibly in the country). Black people are frequently overlooked when management sets criteria to make appointments from pools to favor those they want to appoint. This results in Black employee exclusion based on systemic discrimination.

For my entire career at the agency, as a Black man I have had to keep my head down, and not speak out against injustices, for me to get ahead. I have seen how other black employees are easily blacklisted when they speak out. This has affected me mentally. Our identities are not valued and our skin color is the key factor in treating us differently.

Alain Babineau

63. Alain Babineau is a 28-year veteran of the RCMP from January 1989 to September 2016.

Following his tenure with the RCMP he obtained a JD in law. Throughout his career, Alain Babineau protected three Prime Ministers of Canada, Jean Chrétien, Stephen Harper, and

Justin Trudeau in the Prime Minister's Security Detail unit of the RCMP.

64. In 1981, Alain Babineau first applied to the RCMP. During his recruiting interview held in Riviere du Loup, Quebec, he was asked by an RCMP recruiting officer: "What are you going to do if you get called a "Nigger"? Alain Babineau was then denied employment with the Force. Alain Babineau's experience denied him the financial stability and benefits of full-time employment with the RCMP.

65. In 1984, Alain Babineau re-applied with the RCMP. Alain Babineau learned that the recruiting officer from 1981, had "racially profiled" him as a drug pusher in his small Quebec hometown and filed a false report on his character. Based on that false report, Alain Babineau was once again rejected by the RCMP.

66. Frustrated and beaten, Alain Babineau turned to the Canadian Human Rights Commission for help in 1985. This was a futile experience. Alain Babineau went on to study Criminology and was hired by the OPP in 1988. While serving with the OPP and 2 years after filing the human rights complaint against the RCMP, the RCMP offered him a position which he accepted. This was 8 years after his initial application.

67. In early 1989, Alain Babineau went on to the RCMP Depot in Regina Saskatchewan for basic training. During his stay at Depot, he remembers seeing only approximately 4 Black individuals in any of the RCMP troops that went through training there. There were no Black instructors or managers. Upon graduating from the RCMP Academy, Alain Babineau worked for 10 years on narcotics investigations in Toronto. Alain Babineau was repeatedly denied opportunities for promotion over the course of his career with the RCMP:

There has always been during my career this underlying reflection that I was not engaged because of my abilities or my knowledge, even if I already had a baccalaureate at the time. In Toronto, the head of the drug section, instead of calling me by my name, often called me "Black man". He was a man of another generation and for him, I was a "novelty" ... But at some point, it becomes intolerable! It's not my name. This is the type of micro-aggression we endured as Black Officers, but we shut our mouths and endure, on the belief that we can help to bring about change.

68. Alain Babineau was required to give up his career with the RCMP to pursue other alternatives that afforded him greater opportunity for advancement. He will suffer pension losses as a consequence. Alain Babineau retired in 2016 and then completed two law degrees at McGill Faculty of Law.

69. Possession of social capital is essential to success and advancement in the RCMP. The practice of Black employee exclusion has resulted in an insufficient critical mass of Black employees in leadership positions and has denied Black RCMP members opportunities that are more readily available to others in the ranks.

70. In 2017 there were approximately 300 Black Mounties or less than 2 per cent of over 18,000 sworn members. Resistance to diversity and inclusion is strongest among the non-commissioned officers' ranks of the RCMP from which future Officers are drawn, particularly relative to decisions on hiring and promotion.

71. RCMP employment equity efforts were superficial, inconsistent, and focused mostly at the entry level. They failed to deal expressly with the unique challenges faced by Black employees in hiring and promotion. These efforts contributed to the practice of Black employee exclusion in the RCMP. They also deprived Alain Babineau and others of meaningful opportunities for promotion within the ranks of the RCMP.

Bernadeth Betchi

72. Bernadeth Betchi worked approximately 10 years with the CRA from 2009 to 2019 where she was moved from team to team, was bridged in as a term position continually while her white counterparts were receiving higher paying and secure permanent positions. She holds a Masters Degree in Women's and Gender Studies focusing on the Black motherhood experience, mental health, and reproductive rights in the global north. She is also a professor of Communications and Human Rights at Algonquin College in Ottawa.

73. In 2018, after having her second child and after having completed a Masters Degree in Women and Gender Studies, Bernadeth Betchi was offered a part-time position at CRA in the International and Large Business Compliance and Criminal Investigations Branch.

74. She was hired to oversee the Gender Based Analysis (GBA+) portfolio in that division. Even with a Masters and years of experience, Bernadeth Betchi continued to be treated as a second class worker by CRA. She experienced stress, anxiety, trauma and burn-out as a direct consequence of the way she was treated at CRA. She also discovered that her compensation at CRA was significantly less than other non-Black employees in comparable positions, particularly given her education:

My experience at the Canada Revenue Agency was emotionally and physically draining. I moved from team to team, was bridged in as a term while my white counterparts were all given permanent and interesting (higher positions) right from the get-go. Every time I would discuss any type of advancement opportunities, I would reiterate my skills, express my enthusiasm, I was never given clear answers. It was clear that they wanted to keep me in the same box and had no intentions of helping me move forward in my career.

75. In 2019, Bernadeth Betchi received an offer to work at the Canadian Human Rights Commission ("CHRC"). She accepted a lower-level position in order to take the opportunity

to work in the human rights field and for the mandate of the Commission. On September 16, 2020, Bernadeth Betchi was required to take a leave of absence from the Commission for the following reasons:

My decision to take some time away is due, in large part, to the stress of a poisoned work environment. I have been pushing, physically and mentally, since I first made an official request to be considered for an EC06 opportunity back in May 2020. Despite my new Manager's lack of insight into my work history at the Commission or elsewhere and without any conversations with me the Manager denied my request for the opportunity to serve in a position I was more than qualified for and thus refused re-Classification of my appointment.

As a result of the workplace environment, I have developed a high level of anxiety. I feared for my health as well as the safety of my pregnancy if I continued working in that toxic environment.

The unfair and opaque hiring practices and promotion processes, the inappropriate and demeaning comments made to me by my Director and Manager, and the complete invalidation from senior management on what is happening at the Commission and my experience are all contributing factors to my very difficult decision to take the leave of absence.

76. As a consequence of the experience of her mistreatment and Black employee exclusion, Bernadeth Betchi lost faith in the Commission's ability to execute its mandate, seeing as it could not even promote equity within its own teams.

77. Bernadeth Betchi's experience within the CHRC is not an isolated situation. Black employees came and went before her. Many were at the Commission for many years and experienced the same institutional racism and systemic discrimination which Bernadeth Betchi experienced and witnessed firsthand.

78. At the CHRC Black employees directly approached upper management to raise their concerns pertaining to the Commission's practices that foster institutional, interpersonal, and systemic discrimination. These concerns were dismissed by the CHRC without meaningful action ever being taken to address them.

79. At the CHRC there is currently a lack of representation at all levels. Black employees are chronically underrepresented in management positions.

80. Bernadeth Betchi pleads that “the present institutional structures of the Public Service have already started killing our souls, contributing to the deterioration of our physical and mental well- being.”

81. Prior to working at the CHRC, Bernadeth Betchi worked at the Prime Minister’s Office, as Sophie Grégoire Trudeau's Communications Assistant.

Defendants

82. The Defendant, Her Majesty the Queen in Right of Canada is referred to as “Canada” in the within action and comprises those entities referred to in Schedule A of this Claim along with all successor and predecessor entities, agents and servants of the Crown, for whose actions Canada is directly and indirectly responsible.

Promises Unfulfilled for Black Employees

83. The *Canadian Bill of Rights* was passed in 1960 and recognized individual rights and freedoms, including the right to employment without regard to race, national origin, colour, religion, or sex.

84. In 1970, Canada became a signatory to the *International Convention on the Elimination of All Forms of Racial Discrimination*. As part of its international obligations Canada is required to report on progress in improving the situation of racialized minorities,

particularly in the workplace. In 1976, Canada became a further signatory to the International Convention on Civil and Political Rights.

85. In 1982, the *Charter of Rights and Freedoms* entrenched in the Canadian constitution the framework for Justice and Equality for Black employees. Despite this, on September 24, 2020, over half a century later, Prime Minister Justin Trudeau acknowledged that Systemic racism and discrimination is still a problem in Canada.

86. Under the United Nations (“UN”) General Assembly’s “International Decade for People of African Descent” (resolution 68/237), Canada affirmed the adoption of special measures, such as affirmative action, where appropriate, as essential to alleviating and remedying disparities in the enjoyment of human rights and fundamental freedoms affecting people of African descent, protecting them from discrimination and overcoming persistent or structural disparities and de facto inequalities resulting from historical circumstances.

87. Fulfillment of this resolution requires Canada to develop national plans of action to promote diversity, equality, social justice, equality of opportunity and the participation of all. By means of, *inter alia*, affirmative, or positive actions and strategies, these plans should aim at creating conditions for all to participate effectively in decision-making and to realize civil, cultural, economic, political, and social rights in all spheres of life on the basis of non-discrimination.

88. Canada has been taken to task by the UN for its failure to live up to its obligations under the terms of the *Convention* and particularly for its failure to adopt Employment

Equity practices that are sufficiently particular and directed to address the plight of specific community groups including Black Canadians and of practices such as Black employee exclusion.

CANADA'S APPLICATION OF THE EMPLOYMENT EQUITY ACT IS IN VIOLATION OF CHARTER EQUALITY RIGHTS OF BLACK EMPLOYEES

89. Section 5 of the *Employment Equity Act* provides as follows:

5 Every employer shall implement employment equity by

(a) identifying and eliminating employment barriers against persons in designated groups that result from the employer's employment systems, policies and practices that are not authorized by law; and

(b) instituting such positive policies and practices and making such reasonable accommodations as will ensure that persons in designated groups achieve a degree of representation in each occupational group in the employer's workforce that reflects their representation in

(i) the Canadian workforce, or

(ii) those segments of the Canadian workforce that are identifiable by qualification, eligibility or geography and from which the employer may reasonably be expected to draw employees.

90. The *Employment Equity Act* provides a legislative framework and mandate that requires the removal of barriers for the hiring and promotion of visible minorities in the public service and which requires Canada to undertake a regular and comprehensive assessment of candidates and employees including visible minorities to determine how the workplace can be better structured in a manner that properly reflects the diversity of Canada.

91. The *Employment Equity Act* establishes various categories including women, people with disabilities, aboriginal peoples, and visible minorities whose conditions it seeks to ameliorate as part of the employment process.

92. The *Employment Equity Act* has failed in its goals and mandate to Black

Employees. In particular, the Act fails to break down the category of visible minorities and thus ignores the unique, invisible, and systemic racism faced by Black employees relative to other disadvantaged groups that are covered by the categories established by the Act. The failure by Canada, until recently, to disaggregate data relative specifically to Black employees and their unique needs and challenges has perpetuated the underrepresentation of Black employees, particularly at the upper levels of the Public Service. Canada has been aware of these failures for many years and has failed to act. These failures have perpetuated the practice of Black employee exclusion.

93. In this respect the *Employment Equity Act* fails in its mandate to reflect the diversity of the Black community within the Public Service in a manner that respects and accords with proportional representation of the Black community as part of Canadian society and as members of the Public Service.

94. Canada's practice of Black employee exclusion has thwarted efforts under employment equity and human rights laws to remedy the systemic racism and discrimination experienced by Black employees. Black employees have thus been denied equal benefit, and opportunity of the law in hiring and promotion within the Public Service.

95. The practice of Black employee exclusion has increased the stigma and vulnerability of the Plaintiffs and Class Members within the Public Service and society at large, leaving them to feel dehumanized, worthless, and excluded from the Canadian multicultural mosaic.

96. With respect to decisions on hiring and promotions, such practices are governed by

enabling legislation for the Public Service. Such decisions are not subject to collective agreement grievance and arbitration clauses or related dispute resolution mechanisms.

97. A class action is the most appropriate procedural mechanism to address the systemic practice of Black employee exclusion in hiring and promotion practices throughout the Public Service having regard to the broad spectrum of public service entities and the diverse labour relations practices throughout the Public Service of Canada. It is also the most appropriate mechanism due to the historic and institutional systemic barriers faced by Black employees even among bodies such as the Canadian Human Rights Commission which is empowered to address individual claims of discrimination and harassment, as evidenced by the experience of Bernadeth Betchi and others that highlight the practice of Black employee exclusion within the Canadian Human Rights Commission.

Canada's Practice of the Black Employee Exclusion Violates Section 15 of the Charter

98. Section 15 of the *Charter* provides that:

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

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

99. Canada has improperly applied its obligations under the *Employment Equity Act*, including under s.5 and has accordingly denied Black employees membership in and promotion within the Public Service based on their race due to the widespread practice of Black employee exclusion.

100. Canada has failed to establish or meet required goals for the hiring and promotion of Black employees within the Public Service at all levels, in a manner proportional to their numbers within the Public Service or the population at large.

101. Recent 2019 Treasury Board demographic data also indicates Black employees face real hiring barriers within the federal public service.

102. Out of selected 2019 total departmental employee populations – there were only:

- (i) 88 total Black employees (or .8%) of the 11,181 total Fisheries & Oceans Employees;
- (ii) 410 total Black employees (or 1.7%) of the 23,116 total National Defence Civilian Employees;
- (iii) 116 total Black employees (or 1.6%) of the 7,271 total RCMP Civilian Employees;
- (iv) (iv) 75 total Black employees (or 1.8%) of the 4,095 total Natural Resources Canada Employees; and
- (v) 0 Black employees (or 0%) of the 65 total Veterans Review Appeal Board Staff.

103. Canada has also failed to hire and promote Black employees in a manner and to a degree consistent with the hiring and promotion of other visible minorities within the Public Service. Canada's hiring and promotion of Black employees has also been grossly disproportional to the hiring and promoting of other White employees within the Public Service.

104. By its actions, Canada has treated Black employees in an adverse differential manner and has drawn distinctions between Black employees and other Public Service

employees in the hiring and promotion of Black employees, the compensation paid to Black employees and in the pension and benefits, made available to Black employees, in a manner that has imposed a burden and disadvantage on the identified class of Black employees, which was not imposed on others and certainly not on White employees.

105. This historical disadvantage of vulnerable Black employees widens with the passage of time

creating a perpetual retirement pension differential compared with other plan members, not subject to anti-Black racism or discrimination as set out in this claim. No mechanism exists in the statutory public pension plans to replace, replicate, or retroactively restore lost accrued benefit values.

106. To the extent that Canada's practice of Black employee exclusion including in its application of the *Employment Equity Act* fails to incorporate mechanisms of inclusion, individual assessment, and accommodation to specifically address all barriers, including institutional, structural, invisible, and systemic barriers to the inclusion of Black employees within the Public Service. Canada's policies and their application to Black employees has been discriminatory and has exacerbated their exclusion and marginalization from the Public Service workforce in a way that has undermined the substantive equality of Black employees based on their race.

107. Accrued benefits provided under federal statutory pension plans to Black employees, and related benefits, such as supplementary death benefit, are salary or pay based depending on the scheme provisions, together with service. Black employees are adversely affected by virtue of lower pay, and denial of promotional opportunities as a direct result of systemic racial barriers and the practice of Black employee exclusion. This

perpetuates and widens their economic disadvantage throughout their working and retirement lifetime.

108. Though seemingly neutral, these statutory pension plans; including the *Public Service Superannuation Act*, the *Royal Canadian Mounted Police Superannuation Act*, and the *Canadian Forces Superannuation Act* provide *reduced* pension benefits to lower paid Black employees, denied the promotional and advancement opportunities other plan members enjoy. These distinctions are directly related to systemic racial barriers that reduce access to promotional opportunities, and the practice of Black employee exclusion. These accrued pension losses aren't amendable to "buy-back" either. Black employees must work longer to partly off-set these lifetime impacts or take on additional part-time work elsewhere.

109. The statutory pension benefits including; a pension transfer, a commuted value, a deferred or immediate annuity and future indexation are *lower* for Black employees, whether they remain or leave their employment. The disadvantage is embedded into both the actuarial and statutory based pension valuations through "salary" and "pay", in the respective federal statutory pension plans. Even the supplementary death benefit under Part II of the PSSA, a form of life insurance, is based on a formula double the member's salary. They will thus acquire less insurance too.

110. Black employees face a "triple whammy". They suffer (i) foreseeable unrecoverable salary and benefit reductions and losses (ii) *concurrent* accrued lifetime pension and benefit valuation reductions and continuing economic disadvantage (iii) lower survivor pension benefits consequent to the above (iv) public pensions and social benefits –

including the Canada Pension Plan, will also be reduced as a result of lower cumulative average monthly pensionable earnings. These are the result of systemic racial discrimination emanating from the practice of Black employee exclusion. The impact is even greater on Black employees who find themselves a member of another disadvantaged group, including Black women, Black people with disabilities and Black LGBTQ2S+ individuals.

111. Canada's actions have contributed to and perpetuated the historical disadvantage of Black employees in the Public Service. There was an implied undertaking on the part of Canada to act in the best interests of Black employees, who were dependent upon, vulnerable and at the mercy of Canada in this regard.

112. Canada has undermined and denied access to employment and promotions for Black employees in the Public Service and impaired their retirement security, in a manner contrary to s. 15 of the *Charter*, based on its practice of Black employee exclusion and the imposition of institutional, structural, invisible, and systemic barriers.

113. A mandatory order from this Court is required to eliminate Canada's practice of Black employee exclusion and in order to implement a proper Justice and Equity Promotional Plan for Black Public Service Employees, which is required to move Canada toward inclusion of Black employees within the Public Service in a manner that breaks down institutional, structural, invisible and systemic barriers in a manner consistent with s.15 of the *Charter*.

114. Damages should be awarded pursuant to section 24 of the *Charter* and section 49 of the *Québec Charter* to redress the harms of Canada's practice of Black employee

exclusion and its impact on all Plaintiffs and Class Members.

CANADA HAS BEEN NEGLIGENT IN ITS TREATMENT AND EXCLUSION OF BLACKEMPLOYEES

115. Canada owes Black employees a duty of care. This duty entails an obligation to promote Blackemployees based on merit, talent, and ability as is the case for any other employee.

116. This duty confers upon Canada an obligation to break down the barriers to the full participationof Black employees in the Public Service and not to conduct itself through acts or practices that discriminate against Black employees.

117. Canada and the constituent parts of the Public Service, has repeatedly breached its duty of care to the Plaintiffs and to Class Members which has resulted in foreseeable harm. Canada has systemically discriminated against Black employees by the imposition of its practice of Black employee exclusion which has thwarted Canada's legal obligations with respect to the application of lawful policies, practices and procedures relating to the hiring and promotion of BlackEmployees and to the achievement of true equality and employment equity.

118. At all material times, Canada had a responsibility to the Plaintiffs and to Class Members to create and maintain a workplace free from discrimination and harassment on the basis of race. In particular, Canada was legally precluded from implementing the practice of Black employee exclusion, which has had the effect of demeaning and discriminating against the Plaintiffs and Class Members for years. Whether pursuant to a common law duty of care or the duty not to cause harm to others articulated by art. 1457 of

the Civil Code of Quebec (previously art. 1053 of the Civil Code of Lower Canada), Canada has clearly breached its duty causing damage to the Plaintiffs and Class Members for which Canada is both vicariously and directly liable on its own behalf and on behalf of its employees, servants and agents, including pursuant to sections 2, 3 and 36 of the Crown Liability and Proceedings Act, and other related ancillary laws.

119. Since Canada employed all Plaintiffs and Class Members, the relationship between Canada and the Plaintiffs and Class Members was sufficiently direct and proximate so as to give rise to a duty of care. At the very least, this duty obliged Canada to refrain from engaging in discriminatory exclusion practices based on race.

120. The Plaintiffs and Class Members suffered physical, financial, and psychological harm as a direct result of Canada's implementation of its practice of Black employee exclusion. This harm was a wholly foreseeable consequence of Canada's actions.

121. Canada and its Public Service and broader public service entities repeatedly breached their obligations, to Plaintiffs and to Class Members and in so doing caused them significant injury for which the Plaintiffs and Class Members are entitled to be compensated.

Breach of Fiduciary Duty

122. The relationship between the Plaintiffs and Class Members and Canada was one of trust, reliance and dependency. At all material times, Canada had significant control, and discretion over the Plaintiffs and Class Members. The Plaintiffs and Class Members were by virtue of the nature of their work subject to constant contact with, supervision by and direction from Canada.

123. In the maintenance of the public trust in the delivery of public services, Canada has a unique and special obligation to the public which is legal and fiduciary in nature. Having regard to the PublicService obligations and duties performed by the Plaintiffs and Class Members, the relationship between Canada and the Plaintiffs and Class Members went well beyond the kind that normally arises between an employer and its employees. As a result, Canada owes the Plaintiffs and Class Members a fiduciary duty.

124. The existence of this fiduciary duty gave rise to a reasonable expectation on the part of the Plaintiffs and Class Members that Canada would act in their best interest, ensuring that they were treated respectfully, fairly, and equally. At the very least, the Plaintiffs and the Class Members could reasonably expect that Canada would not actively employ barriers and practices to exclude, harm and denigrate them.

125. To the extent that the Plaintiffs and Class Members relied on Canada to fulfil its fiduciary obligations, this reliance was misplaced to the detriment of the Plaintiffs and Class Members. Far from acting in the best interests of the Plaintiffs and Class Members, Canada's implementation of its practice of Black employee exclusion, resulted in a flagrant breach of Canada's fiduciary duty to the Plaintiffs and the Class Members. It also caused significant harm to the Plaintiffs and Class Members.

Breach of the *Charter* and the Quebec Charter

Wrongful Failure to Promote and Denial of Promotions

126. Canada breached the actual and implied employment obligations that it owed to the Plaintiffs and Class Members when it implemented its practice of Black employee exclusion

and denied hiring and promotions to Black employees on the basis of their race. Such practices often resulted in the forced resignation or termination of the Plaintiffs and Class Members and/or the denial of hiring and promotions.

127. This breach resulted in, among other things, a glass ceiling at the bottom for Black employees.

128. In relation to the systemic discriminatory conduct of the Public Service and the wrongful failure to promote, the Plaintiffs and Class Members plead that the race of Plaintiffs and Class Members was a cause and/or materially contributing factor in decisions by Canada not to promote the Plaintiffs and Class Members in that the Plaintiffs and Class Members are:

- (a) Members of a disadvantaged group covered by s.15 of the *Charter*;
- (b) qualified for the jobs for which they applied; and
- (c) qualified for the jobs for which they should have been hired and/or promoted.

129. The Plaintiffs and Class Members were equally qualified relative to the persons who obtained the desired positions. The persons who received these positions were treated more favourably than the Plaintiffs and Class Members who applied, for reasons other than merit, talent, skill, and ability.

130. The practice of Black employee exclusion created a stark distinction solely based on race between Class Members and Public Service employees who applied for and received positions and promotions sought by the Plaintiffs and Class Members. This distinction has resulted in enormous prejudice to Plaintiffs and Class Members and has sent the inescapable

message that Black employees are not fit for Public Service in Canada.

131. The practice of Black employee exclusion has perpetuated the invisible, institutional and systemic biases and attitudes that Black people are less worthy than others of legal and other protections and that they are incapable of safely, competently and effectively performing the same functions as other individuals employed by Canada, particularly at the higher levels of the Public Service.

132. By engaging in the practice of Black employee exclusion, Canada has infringed the rights of the Plaintiffs and Class members under s. 15 of the *Charter*.

133. Given the nature of the harm suffered by Plaintiffs and Class Members and the flagrant nature of Canada's actions, a just remedy for this violation requires an award of damages under s. 24(1). Damages should compensate Plaintiffs' and Class Members' personal loss, including the permanent psychological harm they have suffered. Damages should also vindicate Class Members' rights and would serve the important public purpose of deterring comparable government action in the future.

134. In carrying out the practice of Black employee exclusion, Canada denied the Plaintiffs and Class Members full recognition of their human rights and freedoms based on their race and defied basic *Charter* values. Canada further terminated the employment of Plaintiffs and Class Members or denied them promotion on this same basis. The practice of Black employee exclusion implemented throughout the Public Service represents a pernicious form of systemic discrimination against all Black employees and Class Members that violate the *Charter* rights of Class Members.

DAMAGES

135. The Plaintiffs and Class Members claim pecuniary and non-pecuniary damages for injuries stemming from the implementation of the practice of Black employee exclusion and for the denial of hiring and-promotions to Black Employees:

- (a) economic and financial losses as a result of the denial of hiring and promotions;
- (b) losses due to any impact on pension and/or benefit amounts and/or entitlements;
- (c) loss of professional opportunities and career limitations including lost opportunities for training and education;
- (d) losses due to premature retirement;
- (e) exceptional losses stemming from the intersectionality of race and gender;
- (f) emotional and psychological harm and distress;
- (g) harm to dignity and self-respect; and
- (n) such further and other pecuniary and non-pecuniary damages as the Plaintiffs and Class Members may advise prior to trial in this matter.

136. The Plaintiffs and Class Members seek remedies under s. 24(1) of the *Charter*.

Provincial Health Insurers

137. As a consequence of the conduct of Canada, the Ontario Health Insurance Plan (“OHIP”) and comparable provincial and territorial health insurers have incurred expenses with respect to the medical treatment of the Plaintiffs and Class Members, for which they

are entitled to be compensated by virtue of their subrogated and direct rights of action in respect of all past and future insured services. This action is maintained on behalf of the Ministry, OHIP and all other provincial and territorial health insurers.

138. The Plaintiffs and Class Members plead and rely upon the legislation set out in Schedule “B” attached hereto, as amended, and other legislation that may be included prior to the trial of this action.

Aggravated and Punitive Damages

139. The Plaintiffs and Class Members seek aggravated, exemplary, and punitive damages as Canada’s actions as described above are oppressive and offensive to the decency and sensibilities of the Court and Canadian society.

140. Canada’s conduct was deliberate and reckless, or Canada was willfully blind as to the inevitable outcomes from the practice of black employee exclusion. By virtue of Canada’s conduct, an award of punitive, exemplary, and aggravated damages is essential to deter and to denounce Canada’s outrageous conduct. An award of aggravated damages and damages for mental distress is also required to fully compensate the plaintiffs and Class Members for the egregious misconduct of Canada in the circumstances of this claim.

141. As a result of wrongdoing of Canada and the Public Service, their management and their employees, agents and servants, Family Members have also sustained and will continue to sustain injury, loss, and damages, including but not limited to:

- (a) actual expenses reasonably incurred for the benefit of the Plaintiffs and Class Members;
- (b) travel expenses incurred while visiting the Plaintiffs and Class Members during medical procedures and/or counselling and/or recovery; and

(c) loss of income and/or the value of services provided by Family Members of the Plaintiffs and Class Members, where such services, including nursing and housekeeping have been provided.

142. Family Members of the Plaintiffs and Class Members seek compensation for the costs set out above as well as compensation for loss of support, guidance, care, and companionship that they might reasonably have expected to receive from the Plaintiffs and Class Members.

Honorarium

143. The Representative Plaintiffs seek an honorarium for their roles in advancing this historic action on behalf of all Class Members.

Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.

Martin Luther King Jr.

Place of Trial

The Plaintiffs and Class Members propose that this action be tried in the City of Toronto, Ontario.

May 7,
2021

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SCHEDULE “A”

Schedule I, *FAA*

1. Department for Women and Gender Equality
2. Department of Agriculture and Agri-Food
3. Department of Canadian Heritage
4. Department of Citizenship and Immigration
5. Department of Crown-Indigenous Relations and Northern Affairs
6. Department of Employment and Social Development
7. Department of Finance
8. Department of Fisheries and Oceans
9. Department of Foreign Affairs, Trade and Development
10. Department of Health
11. Department of Indigenous Services
12. Department of Industry
13. Department of Justice
14. Department of National Defence
15. Department of Natural Resources
16. Department of Public Safety and Emergency Preparedness
17. Department of Public Works and Government Services
18. Department of the Environment
19. Department of Transport

20. Treasury Board
21. Department of Veterans Affairs
22. Department of Western Economic Diversification

Schedule IV, FAA

23. Administrative Tribunals Support Service of Canada
24. Atlantic Canada Opportunities Agency
25. Canada Border Services Agency
26. Canada Emission Reduction Incentives Agency
27. Canada School of Public Service
28. Canadian Accessibility Standards Development Organization
29. Canadian Dairy Commission
30. Canadian Grain Commission
31. Canadian Human Rights Commission
32. Canadian Northern Economic Development Agency
33. Canadian Radio-television and Telecommunications Commission
34. Canadian Space Agency
35. Canadian Transportation Accident Investigation and Safety Board
36. Canadian Transportation Agency
37. Civilian Review and Complaints Commission for the Royal Canadian Mounted Police
38. Copyright Board
39. Correctional Service of Canada
40. Courts Administration Service
41. Economic Development Agency of Canada for the Regions of Quebec
42. Energy Supplies Allocation Board
43. Federal Economic Development Agency for Southern Ontario
44. Immigration and Refugee Board
45. Impact Assessment Agency of Canada

46. International Joint Commission (Canadian Section)
47. Law Commission of Canada
48. Library and Archives of Canada
49. Military Grievances External Review Committee
50. Military Police Complaints Commission
51. National Farm Products Council
52. Office of Infrastructure of Canada
53. Office of the Chief Electoral Officer
54. Office of the Commissioner for Federal Judicial Affairs
55. Office of the Commissioner of Lobbying
56. Office of the Commissioner of Official Languages
57. Office of the Director of Public Prosecutions
58. Office of the Governor General's Secretary
59. Office of the Public Sector Integrity Commissioner
60. Office of the Superintendent of Bankruptcy
61. Offices of the Information and Privacy Commissioners of Canada
62. Parole Board of Canada
63. Patented Medicine Prices Review Board
64. Privy Council Office
65. Public Health Agency of Canada
66. Public Service Commission
67. Royal Canadian Mounted Police
68. Royal Canadian Mounted Police External Review Committee
69. Secretariat of the National Security and Intelligence Committee of Parliamentarians
70. Shared Services Canada
71. Staff of the Supreme Court
72. Statistics Canada
73. Veterans Review and Appeal Board

Schedule V, *FAA*

- 74. Canada Revenue Agency
- 75. Canadian Energy Regulator
- 76. Canadian Food Inspection Agency
- 77. Canadian High Arctic Research Station
- 78. Canadian Institutes of Health Research
- 79. Canadian Nuclear Safety Commission
- 80. Canadian Security Intelligence Service
- 81. Communications Security Establishment
- 82. Financial Consumer Agency of Canada
- 83. Financial Transactions and Reports Analysis Centre of Canada
- 84. Indian Oil and Gas Canada
- 85. National Capital Commission
- 86. National Film Board
- 87. National Research Council of Canada
- 88. National Security and Intelligence Review Agency Secretariat
- 89. Natural Sciences and Engineering Research Council
- 90. Northern Pipeline Agency
- 91. Office of the Auditor General of Canada
- 92. Office of the Correctional Investigator of Canada
- 93. Office of the Intelligence Commissioner
- 94. Office of the Superintendent of Financial Institutions
- 95. Parks Canada Agency
- 96. Social Sciences and Humanities Research Council
- 97. Staff of the Non-Public Funds, Canadian Forces
- 98. Statistics Survey Operations

----- and -----

The Canadian Armed Forces, including the (a) regular force, the reserve force, and the special force, (b) the sea, land and air elements referred to, respectively, as the Royal Canadian Navy, the Canadian

Army, and the Royal Canadian Air Force, and (c) all officers, non-commissioned members and cadets of the elements referred to in subsection 17(1)

Schedule “B”

PART 2. SELECTED LEGISLATION AS AMENDED PERTAINING TO THE PLAINTIFFS

Canada Revenue Agency Act, S.C. 1999, c.17

Canadian Forces Superannuation Act, R.S.C. 1985, c.C-17, as amended

Canadian Forces Superannuation Act Regulations, as amended

Canadian Human Rights Act, R.S.C., 1985, c. H-6

Corrections and Conditional Release Act, R.S.C., 1985, c. N-5

Crown Liability and Proceeding Act, R.S.C. 1985, c. C-50, s. 23

Customs Act, R.S.C., 1985, c. 1 (2nd Supp.)

Department of Citizenship and Immigration Act, S.C. 1994, c. 31

Department of Employment and Social Development Act, S.C. 2005, c. 34

Department of Employment and Social Development Act, S.C. 2005, c. 34

Department of Justice Act, R.S.C., 1985, c. J-2

Director of Public Prosecutions Act, S.C. 2006, c. 9, s. 121

Government Corporations Operation Act, R.S.C., 1985, c. G-4

Immigration and Refugee Protection Act, S.C. 2001, c. 27

National Defence Act, R.S.C., 1985, c. N-5

Public Services Employment Act, S.C. 2003, c.22, ss.12, 13

Public Service Superannuation Act, R.S.C. 1985, c. P-36, as amended

Public Service Superannuation Act Regulations, as amended

Royal Canadian Mounted Police Act, R.S.C., 1985, c. R-10

Royal Canadian Mounted Police Superannuation Act, R.S.C. 1985, c. R-11 as amended

Royal Canadian Mounted Police Superannuation Act Regulations, as amended

Statistics Act, R.S.C., 1985, c. S-19

Including other legislation, regulations and/or law which may be included prior to trial.

SCHEDULE “C”

SELECTED HUMAN RIGHTS AND RELATED LEGISLATION

A. FEDERAL

The Plaintiffs and Class Members plead and rely upon the following federal statutes, as amended:

Bill of Rights Appendix IV Protection of Civil Rights 1947
Bill of Human Rights Appendix III 1949
Bill of Rights Appendix V Human Rights and Fundamental Freedoms 1958
Bill of Rights Appendix IV 1960
British North American Act Amendment Appendix I 1948
Canadian Bill of Rights 1960
Canada Evidence Act
Charter of Rights Amendment 1988
Citizenship Act 1946
Divorce Act 1968
Emergencies Act 1988
Fair Employment Practices Act 1953
Female Employees Equal Pay Act 1956
Human Rights Act 1976-77
Human Rights Act 1977
Human Rights Act 2002
Human Rights Act Amendment 1996
Inquiries Act 1927
Inquiries Act 1985
National Emergency Powers Act 1945
National Emergency Powers Act Amendment 1946
Official Secrets Act 1939
Official Secrets Act 1985
Protection of Privacy Act 1974
Temporary Immigration Security Act 1976
War Measures Act 1914

B. PROVINCIAL AND TERRITORIAL

The Plaintiffs and Class Members plead and rely upon the following provincial and territorial statutes, as amended:

Alberta Accurate News and Information Act 1937
Alberta Bank Employees Civil Rights Act 1937
Alberta Bill of Rights 1946
Alberta Communal Property Act 1947
Alberta Human Rights Act 1966

Alberta Human Rights Act Amendment 1971
Alberta Labour Act Amendment 1957
Alberta Land Sales Prohibition Act 1942
Alberta Sexual Sterilization Act 1928
British Columbia Civil Rights Protection Act 1981
British Columbia Equal Pay Act 1953
British Columbia Fair Employment Practices Act 1956
British Columbia Fair Employment Practices Act Amendment 1964
British Columbia Heroin Treatment Act 1978
British Columbia Human Rights Act 1969
British Columbia Human Rights Act Amendment 1995
British Columbia Human Rights Code 1973
British Columbia Human Rights Act 1984
British Columbia Public Accommodation Practices Act 1961
British Columbia Social Assistance Act 1945
British Columbia Unemployment Relief Act 1931
British Columbia Unemployment Relief Act 1932
Manitoba Equal Pay Act 1956
Manitoba Fair Accommodation Practices Act 1960
Manitoba Fair Employment Practices Act 1953
Manitoba Human Rights Act 1970
Manitoba Human Rights Code 1987
New Brunswick Fair Accommodation Practices Act 1959
New Brunswick Fair Employment Practices Act 1956
New Brunswick Female Employment Remuneration Act 1961
New Brunswick Human Rights Act 1967
New Brunswick Human Rights Act 1973
Newfoundland Anti-Discrimination Act 1979
Newfoundland Emergency Measures Act Amendment 1974
Newfoundland Human Rights Code 1969
Newfoundland Human Rights Code 1988
Newfoundland Human Rights Code 1990
Newfoundland Human Rights Code Amendment 1974
Newfoundland Human Rights Code Amendment 1981
Newfoundland Human Rights Code Amendment 1983
Newfoundland Human Rights Code Amendment 1984
Newfoundland Labour Relations Amendment Act 1959
Newfoundland List of Human Rights Code Amendments
Newfoundland Terms of Union with Canada 1948
Northwest Territories Fair Practices Ordinance 1966
Nova Scotia Equal Pay Act 1956
Nova Scotia Fair Accommodation Practices Act 1959
Nova Scotia Fair Employment Practices Act 1955
Nova Scotia Human Rights Act 1963
Nova Scotia Human Rights Act 1991
Ontario Age Discrimination Act 1966

Ontario Community Halls Act
Ontario Fair Accommodation Practices Act 1954
Ontario Fair Employment Practices Act 1951
Ontario Female Employees Fair Remuneration Act 1951
Ontario Human Rights Code 1962
Ontario Human Rights Code 1981
Ontario Human Rights Code 1990
Ontario Insurance Act
Ontario Labour Relations Act 1950
Ontario Racial Discrimination Act 1944
Ontario Women's Equal Employment Act 1970
PEI Equal Pay Act 1959
PEI Human Rights Act 1968
Quebec Charter of Human Rights and Freedoms 1975
Quebec Discrimination in Employment Act 1964
Quebec Legal Capacity of Married Women Act 1964
Quebec Padlock Act (Communist Propaganda) 1937
Quebec Police Act 1972
Quebec Protection of Children Act 1974
Quebec Protection of Handicapped Persons Act 1976
Quebec Youth Protection Act 1972
Quebec Bill 78 (student demonstrations) 2012
Saskatchewan Bill of Rights Act 1947
Saskatchewan Equal Pay Act 1952
Saskatchewan Fair Accommodation Practices Act 1956
Saskatchewan Human Rights Commission Act 1972
Saskatchewan Human Rights Code 1979
Yukon Human Rights Act 1987

C. MUNICIPAL

The Plaintiffs and Class Members plead and rely upon the following municipal legislation:

Vancouver Bylaw 4429

NICHOLAS MARCUS THOMPSON, JENNIFER PHILLIPS et al

-and- HER MAJESTY THE QUEEN

Plaintiffs

Defendant

FRESH AS AMENDED STATEMENT OF
CLAIM

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