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2022 BCHRT 116

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

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

BETWEEN:

RR

COMPLAINANT

AND:

Vancouver Aboriginal Child and Family Services Society

RESPONDENT

AND:

West Coast LEAF

INTERVENOR

REASONS FOR DECISION

Tribunal Member: Devyn Cousineau

Counsel for the Complainant:	Aleem Bharmal, QC, and Frances Rosner (in part)
Counsel for the Respondent:	Audrey G. Lieberman and Annie MacDonald (until Oct 26, 2020)
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	Kate Feeney and Raji Mangat (from Jan 4, 2021)
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I INTRODUCTION

[1] For generations, Canadian governments have interfered with the relationship between Indigenous caregivers and their children. Beginning in the 19th century, Indigenous children were forcibly removed from their communities and forced to attend residential "schools". As residential schools closed, child welfare authorities took over, removing Indigenous children at disproportionate rates in the Sixties and Millennium Scoops. Today, Indigenous children remain overrepresented and underserved in government care.

[2] And for generations, Indigenous communities have fought for their children. One manifestation of this resistance is the Vancouver Aboriginal Child and Family Service Society [**VACFSS**], the first urban Indigenous agency in Canada to assume full child protection responsibilities. VACFSS was founded by First Nations leaders to "stem the flow of Aboriginal children coming into government care" and offer an alternative to colonial child welfare. It envisions "restorative child welfare" grounded in the culture of the family being served, an awareness of colonial history, and a supportive relationship with families that results in positive change. Its roots in Vancouver's urban Indigenous community, and significant efforts to mitigate or eliminate the discriminatory impacts of child welfare, are important and recognized. At the same time, it remains bound to apply provincial child welfare legislation.

[3] RR, the woman at the centre of this complaint, is another story of Indigenous resistance. RR is a racialized Afro-Indigenous woman. She is the single mother of five children, one who passed away too soon and three who have complex needs. She has a low income and insecure housing. She is an inter-generational survivor of residential schools with disabilities stemming from trauma. She is resourceful, affectionate, a leader in her community, connected to her culture, and loves her children.

[4] In August 2016, VACFSS apprehended RR's four children. For nearly three years, VACFSS retained custody over the children and strictly regulated RR's access to them. RR says that VACFSS based its decisions about her ability to parent on stereotypes about Indigenous single mothers and assumptions about her mental health and addictions. She says that VACFSS

harmed her in ways specifically connected to her Indigeneity and mental health. She says that, instead of supporting her and accommodating her needs, VACFSS separated and disconnected her from her children. In this human rights complaint, RR alleges that VACFSS's conduct is discrimination based on her race, ancestry, colour, and mental disability, in violation of s. 8 of the *Human Rights Code.*[1]

[5] VACFSS denies discriminating. It says that it made all its decisions in the best interests of RR's children, and that RR's resistance to working collaboratively towards their return delayed and obstructed that process. As an organization rooted in the urban Indigenous community, it is well aware of the discriminatory impacts of colonial child welfare on Indigenous families and acts intentionally not to replicate those impacts.

[6] The intervenor West Coast LEAF aptly describes this as a complaint about "an Indigenous mother's experience of BC's child welfare system within the larger and continuing story of colonialism and the harms it has caused to Indigenous peoples, as well as the interconnected story of Indigenous resistance, reconnection, and self-determination in the face of the colonial project". Though it is an individual complaint brought by one strong Indigenous mother, it sheds light on the wider context of laws, policies, and practices which interact to create a system stacked against Indigenous families, especially single mothers living in poverty, with disabilities, and with children with disabilities.

[7] I heard this complaint over 21 days. I am grateful to Cecilia Pointe and Shane Pointe from the Musqueam First Nation for welcoming us to their territories and for starting each part of the hearing in a good way. For a number of unexpected reasons, including the onset of the COVID-19 global pandemic, issues with document disclosure, and a change in counsel for VACFSS late in the hearing, the hearing dates were spread over 17 months. I acknowledge the work of the parties and the intervenor to complete a difficult hearing under challenging circumstances.

[1] RR's complaint was filed before the *Code* was amended in 2021 to add "Indigenous identity" as a protected characteristic.

[8] For the reasons that follow, I find that VACFSS discriminated against RR. VACFSS's decisions to retain custody and restrict RR's access to her children were informed by stereotypes about her as an Indigenous mother with mental health issues, including trauma, and her conflict with the child welfare system. Because of RR's Indigeneity and trauma, she had a heightened need to be empowered and included in decisions respecting her children and to have complete, ongoing, and accurate information about their wellbeing. Instead, VACFSS responded to her with escalating assertions of power and control, reducing and suspending her access to the children, limiting her communication with their caregivers, and ultimately prolonging their time in care. I find that VACFSS did not have reasonable grounds to continue custody and that none of these adverse impacts can be justified as reasonably necessary to protect RR's children. I order VACFSS to pay RR $150,000 as compensation for injury to her dignity, feelings, and self-respect. Finally, I order VACFSS to pay $5,000 as costs for improper conduct because of its late disclosure of critical documents in the complaint, including disclosure after RR had finished presenting her case, and the conduct of former legal counsel in briefing a witness on the testimony and cross-examination of other witnesses who had testified before them.

[9] Before I begin, I caution the reader that this decision discusses self harm, abuse, and child apprehension.

II ISSUES

[10] The scope of this complaint was defined in an earlier decision: *RR v. Vancouver Aboriginal Child and Family Services Society (No. 2),* 2019 BCHRT 85. It concerns the period between April 2017 and December 2018, when RR's children were in the custody of VACFSS. It is about decisions made by VACFSS during this period to continue its custody over RR's children and to place limits on her access to them.

[11] In this complaint, RR must prove three things:

a. she is protected from discrimination based on her race, colour, ancestry, and mental disability. Race, colour, and ancestry combine to protect RR's Indigenous identity, and VACFSS does not dispute the protection of these grounds. VACFSS does dispute how mental disability is engaged.

b. she was adversely impacted in services offered by VACFSS. This is not in dispute. RR was adversely impacted by the separation from her children, as well as decisions to reduce or suspend access, supervise and restrict visit activities, and exclude her from important aspects of her children's lives.

c. her protected characteristics were a factor in the adverse impacts. This is the most contentious part of RR's case. She alleges that the connection arises in two ways: directly, by the operation of anti-Indigenous stereotype and prejudice, and indirectly, by failing to account for her needs as an Indigenous parent interacting with the child welfare system. VACFSS says that any connection arises from the ways that RR's protected characteristics actually impact her ability to safely parent her children.

Moore v. BC (Education), 2012 SCC 61 at para. 33; *Campbell v. Vancouver Police Department (No. 4),* 2019 BCHRT 275 [***Campbell (No. 4)***] at paras. 97-99

[12] Once RR proves the elements of her case – and I find that she has – then VACFSS can show it did not discriminate against her by proving three things:

a. it was acting for a purpose rationally connected to its function as a child protection agency. This is not in dispute. The purpose underlying all of VACFSS's decisions was to protect RR's children from harm and ensure their safety and wellbeing. This is its mandate under the governing legislation.

b. it was applying a standard adopted in good faith, in the belief it was necessary for the fulfillment of the purpose. This is also not in dispute.

c. the standard was reasonably necessary, in the sense that VACFSS could not meet its goal of protecting RR's children while accommodating RR, without incurring undue hardship. VACFSS says that it was compelled to act to protect RR's children and there were no less disruptive ways to do so. RR disputes that any of VACFSS's actions, and their impacts on her, were reasonably necessary.

British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), [1999] 3 SCR 868 [***Grismer***] at para. 20

[13] These issues determine whether or not VACFSS has discriminated against RR in violation of the *Human Rights Code.* Because I find that it has, I must then go on to decide the appropriate remedy. The most significant remedial issue is assessing the impact of the discrimination on RR's dignity, feelings, and self-respect.

III WITNESSES AND CREDIBILITY

[14] In an earlier decision, I ordered a publication ban in respect of information that could identify individuals who were involved in the events giving rise to this complaint: *RR v. Vancouver Aboriginal Child and Family Services Society (No. 3),* 2019 BCHRT 269. This order does not extend to witnesses who are not directly involved RR's case, including expert and policy witnesses.

[15] There were some conflicts in the evidence. Those conflicts centred on RR's conduct, including her demeanour during specific meetings and conversations, her behaviour during visits with the children, and the concerns that she voiced about the removal and ongoing apprehension of her children. Those conflicts have required me to make findings of credibility and decide which evidence to prefer.

[16] I start from the presumption that witnesses are telling the truth: *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 10. Where a witness' testimony conflicts with other evidence, I must assess the trustworthiness of their testimony "based on the veracity or sincerity of [the] witness and the accuracy of the evidence that the witness

provides": *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal refused, [2012] SCCA No. 392 (QL) at para. 186. In some cases, a witness' evidence may not be trustworthy because they have "made a conscious decision not to tell the truth": *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2019 BCSC 739 at para. 89. In other cases, a witness may testify honestly but their evidence may not be reliable because of their inability to accurately observe, recall, or recount the event: *R. v. H.C.*, 2009 ONCA 56 at para. 41; *Youyi* at paras. 89-90. In that case, the decision maker may not safely rely on their testimony where it conflicts with others who are better positioned to give accurate testimony.

[17] To assess the accuracy or trustworthiness of a witness's testimony, I consider factors like "the witness' ability and opportunity to observe events, the firmness of their memory, their objectivity, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his pre-trial evidence by the time of trial or their testimony at trial during direct and cross-examination, whether the witness' testimony seems implausible, and the demeanor of a witness generally": *Youyi* at para. 90.

A. Witnesses for RR

[18] RR testified over several days. At the end of VACFSS's case – over one year after she originally testified – RR was recalled to testify about new documents and evidence that had been disclosed during the hearing. Her evidence remained consistent throughout the lengthy time of her testimony and was unshaken in cross-examination. She had a clear memory of many of the events in this complaint and openly acknowledged when she could not remember or was unsure of something. She was careful to say when her testimony was based on assumptions rather than specific recollections, and was able to acknowledge difficult or unflattering aspects of her own behaviour and interactions with her children. She was not argumentative in cross-examination and was willing to agree to reasonable things. Her evidence about certain meetings with VACFSS was consistent with that given by her other witnesses. She was understandably emotional during parts of her evidence but, overall, I was struck by how calm she remained throughout a long and difficult hearing, including while learning new and disturbing information about her children's lives in government care. This stood in stark

contrast to the claim by some of VACFSS's witnesses that RR was incapable of self-regulation for "more than a few minutes". My own observation was to the contrary. On the whole, I have found RR's evidence to be trustworthy and have relied on it.

[19] RR also called four witnesses who supported her in meetings and other interactions with VACFSS. They are:

a. **The Youth Worker**. The Youth Worker has worked in Vancouver's Downtown Eastside for 20 years. He has an educational background in child and youth counseling. He works in a local community centre, supporting youth and their families, including those involved with child protection. At RR's request, he attended two meetings with VACFSS and testified about those meetings. He is non-Indigenous.

b. **The Support Worker.** The Support Worker is a long time front line worker in the Downtown Eastside. She is a First Nations woman, and a survivor of residential schools, the Sixties Scoop, and Indian day schools. She is a respected community member, who works extensively to support and uplift First Nations women, including in high level policy positions and with the National Inquiry into Missing and Murdered Indigenous Women and Girls. The Support Worker has known RR and her mother for years. She testified about meetings that she attended with VACFSS, at RR's request, as well as an access visit which she supervised.

c. **The Mental Health Advocate**. The Mental Health Advocate has worked with women in the Downtown Eastside for nearly 20 years. She met RR through that work and, at her request, attended a number of meetings with VACFSS. She testified about those meetings. She is non-Indigenous.

d. **The Family Support Worker**. The Family Support Worker works for the Vancouver Native Health Society. She has known RR for at least eight years and supports her in a number of ways, including attending meetings with VACFSS. She testified about those meetings. She is Indigenous.

All of these support witnesses gave evidence that was straightforward, consistent internally and with other evidence before me, and unshaken in cross-examination. They acknowledged if they could not recall something. I have accepted their evidence.

[20] Finally, RR called **Dr. Mary Ellen Turpel-Lafond.** Among many other achievements, including work as a provincial court judge and a professor of law, Dr. Turpel-Lafond was BC's first Representative for Children and Youth. She was qualified as an expert to testify about the social and historical background of First Nations people interacting with the child welfare system. She authored an expert report dated November 27, 2019, and supplemented the report with oral evidence given on February 20, 2020. I have relied on this evidence to situate this complaint in its social and historical context.

B. Witnesses for VACFSS

[21] VACFSS called 11 witnesses. Two witnesses gave general evidence about the history and operations of VACFSS and its unique role in child protection:

a. **Bernadette Spence.** Ms. Spence is Chief Executive Officer of VACFSS. She is Cree from Northern Manitoba and speaks Cree as her first language. She is a survivor of residential school and day schools. Ms. Spence has a Master's degree in social work and a long and distinguished career working with various organizations and communities in areas of child protection, abuse, and addiction. She testified about VACFSS's history and evolution to a fully delegated child welfare agency. She was not directly involved in RR's case.

b. **Dr. Carolyn Oliver.** Dr. Oliver holds a PhD in social work and is the Policy Research and Development Coordinator at VACFSS. She testified about the *CFCSA*, and VACFSS's role in child protection. She was not directly involved in RR's case.

This evidence was helpful and uncontested. I have relied on it to understand VACFSS's mandate and operations.

[22] Next, VACFSS called two witnesses employed by other agencies who were directly involved in some of the relevant events in this complaint:

a. **The Doctor.** The Doctor is a general practitioner with decades of experience. He knows RR through his practice at a clinic in the Downtown Eastside. He completed the medical portion of RR's application for benefits as a person with a disability, and testified about that application. He is non-Indigenous.

b. **The Hollyburn Supervisor.** The Hollyburn Supervisor works for Hollyburn Family Services, a third party agency which was contracted to provide a staffed care home for two of RR's children. She has a background in child psychology, psychology, and child and youth care. She was primarily responsible for opening and staffing the home for the children. She is non-Indigenous.

I found both of these witnesses to be forthright, consistent, and unshaken in cross-examination. I have relied on their evidence.

[23] Next, VACFSS called **the Consultant.** She works with VACFSS as a Practice Development Consultant in the child protection program, consulting on complex and high risk cases, training new staff, liaising with community, and undertaking investigations. She testified about her role in authoring a "File Documentation Review" summarizing RR's history with child protection and identifying patterns and areas of concern. She is non-Indigenous. Aside from the conclusions that she drew in her review (which I discuss below), the Consultant's evidence was not contentious, and I have accepted it.

[24] The remainder of VACFSS's witnesses were employed by VACFSS at the relevant time and directly involved in making decisions about RR's access to her children.

[25] **The Associate Practice Manager** is First Nations and has worked for over 25 years in Indigenous communities doing child protection**.** At the relevant time, she was seconded to VACFSS from the Ministry of Child and Family Development as an associate child protection

manager. She worked on RR's file from April 2016 until April 2018. I found her evidence to be forthright, helpful, reasonable, and measured. I have relied on it.

[26] I have reached a different conclusion about evidence given by **the Practice Manager.** The Practice Manager is First Nations and has worked in child welfare for over 30 years. She has a Master's degree in clinical social work, and is a PhD candidate in cognitive neurology. She was involved in overseeing RR's file and making critical access decisions between September and December 2017. She continued to supervise social workers working with RR in 2018. For a number of reasons, I have found much of her evidence to be unreliable.

[27] Overall, the Practice Manager's testimony was driven to paint RR in a negative light. To that end, she testified confidently about incidents which she was not present for, and I have found did not happen. For example, she testified about RR's conduct during supervised visits that she was not present to witness. She testified that, on nearly every access visit, RR would lift her children's clothing to check for abuse. RR denies doing this and nothing in the supervised visit reports support the assertion; I find it did not happen. Likewise, she testified that RR continuously told her children they were being poisoned and drugged by caregivers and speculated that this could have been the reason the children did not eat certain food prepared by the caregivers. Again, RR denies doing this and there was no evidence to suggest she did.

[28] The Practice Manager also consistently interpreted information about RR in a negative light, casting doubt on the objectivity of her perception and evidence. For example, she was asked about a note in a supervision report that said "Girls seem well rested and happy today, not too much bickering. [Children] did not hold back with showing love to mom or even anger for that matter". The Practice Manager testified that this note did not reflect positively on RR, explaining "I'd be concerned about why the children are showing anger to their mother when they're only with her for such a short period of time" and that "one would think they might enjoy themselves". I found this to be an unfair characterisation of this note, which described interactions over an eight hour visit period, with children who were exhibiting much more dysregulated behaviour in their foster placement than with their mother. The Practice Manager also testified that the supervised visit reports disclosed concerns that RR "had been drinking a

fair bit". This is simply not true. In over 200 pages of supervised visit reports, there is no report of RR being intoxicated or impaired in a visit. The only mention of potential alcohol came in two reports which speculated about whether RR had been drinking the night before: in one report, the supervisor speculated that RR "looked hung over", and in another the supervisor said RR had low energy and she was "unsure whether or not she smelled alcohol residue on [RR's] clothes". In my view, this speaks to the Practice Manager's propensity to exaggerate and – knowingly or unknowingly – misrepresent facts related to RR's conduct.

[29] The Practice Manager sought to rely on her own typewritten notes of certain meetings and encounters with RR. It is apparent that these notes were not made contemporaneously with the events they describe; some of the dates are inconsistent with dates which the parties agree meetings took place. As with her oral testimony, the Practice Manager's notes also set out inaccurate information about RR's conduct and interactions, much of it based on hearsay and which I have found unsupported by other evidence before me. I have not found the notes a reliable source of information, other than as to the state of the Practice Manager's mind in her dealings with RR.

[30] As the Practice Manager's testimony progressed, she became more and more critical of RR, to the point that she described RR as "terrorizing the girls" psychologically in her supervised visits – an accusation I find entirely unsupported and contradicted by the evidence before me. She testified that RR "yells and rants and rages" and said that VACFS "couldn't keep her regulated to have conversations with her". I do not find this characterization of RR plausible in light of the testimony of the support people that she brought to witness her meetings with VACFSS. Overall, it was clear throughout the Practice Manager's testimony that she thought very poorly of RR. This opinion tainted her evidence to the point I have found much of it unreliable.

[31] Finally, VACFSS called four social workers who were involved in and making decisions about RR's access and rights regarding her children. As a general observation, I acknowledge, and accept, that each of these social workers took their obligations seriously and endeavoured to act in the best interests of the children. I do not find that any of their evidence was

deliberately untruthful or misleading. However, I do find that many of their decisions and actions were tainted by preconceived notions and opinions about RR, inherited from other social workers and other records relating to RR, as well as their own personal challenges in working effectively with her. This has undermined the reliability of some of their evidence and the objectivity of their decision-making regarding RR.

[32] The social workers are:

a. **Social Worker L.** Social Worker L was involved in the decision to apprehend RR's children in August 2016. She worked with RR as the family service social worker until about September 2016 and then became the child services social worker for the children. She was the worker for the two middle children until October 2017, for the Baby until mid 2018, and for the Teenager until July 2020. She is non-Indigenous. Though Social Worker L clearly viewed critical events from a different perspective than RR, I found her evidence to be reasonable and measured. Areas where her evidence differed from RR's can be best understood as a matter of perspective and did not diminish the reliability of her evidence.

b. **Social Worker A.** At the time of the hearing, Social Worker A had been a social worker for about seven years. She joined VACFSS as a child protection worker in 2016. She was RR's social worker from about November 2016 until June 2017. She is non-Indigenous. I have found her evidence to be reasonable, and in my view the conflicts with her evidence derive from the witness's different perspectives.

c. **Social Worker S.** Social Worker S has a master's degree in education. She worked as a family services social worker at VACFSS between June 2015 and May 2018. She was the family services social worker on RR's file from mid-August 2017 until May 2018. She is non-Indigenous. Like the Practice Manager, I found that the evidence of Social Worker S was often driven to paint RR in a negative light. She had a poor view of RR before even meeting her and was inclined to interpret any

of her behaviour negatively. Though it is apparent she cared for the children, her testimony repeatedly came back to criticisms – some which I have found to be unfounded or unfair – of RR. I set out some of those criticisms below. This animus tainted much of Social Worker S's testimony and undermined its reliability.

d. **Social Worker B.** Social Worker B was the child protection social worker for the two middle children beginning in June 2018. She is non-Indigenous. Though she also had a preconceived perception of RR before working with her, I found her evidence to be frank and reliable. By the time she was involved in the file, the parties were entrenched in an adversarial relationship and that conflict poisoned her own relationship with RR. Where her evidence differed from RR's, the difference is explained as a matter of perspective.

[33] In the following sections, I set out my findings about the facts giving rise to this complaint. I begin by explaining the child welfare system in which the complaint arises, including its specific application to Indigenous parents.

IV CHILD WELFARE LEGISLATION: SOCIAL CONTEXT AND THE ROLE OF VACFSS

A. Historical and social context

[34] The *Child, Family and Community Service Act* [***CFCSA***] governs child protection in BC. The *CFCSA* applies equally to all children and families in the province.[2] However, its impacts on Indigenous people are unique and cannot be separated from the Canadian colonial project founded on the denial of Indigenous title and laws, and deliberate efforts to assimilate and eradicate Indigenous culture, tradition, language, and people. The historic and current context of Indigenous people within Canada's child welfare systems – which is undisputed – is critical to situating the events giving rise to this complaint.

[2] The events in this complaint pre-dated new federal legislation which came into effect on January 1, 2020: *An Act Respecting First Nations, Inuit and Métis Children, Youth and Families.*

[35] In 2015, the Truth and Reconciliation Commission of Canada concluded that "Canada's child welfare system has simply continued the assimilation that the residential school system started": Truth and Reconciliation Commission, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) [**TRC Report**] at p. 138. The history of Indigenous Peoples' involvement with child welfare has its origins in Canada's genocidal policy of "killing the Indian in the child" by removing children from their families and communities, and forcing them to attend residential "schools", where they suffered physical, sexual, and psychological abuse. Beginning in the 1940s, the schools increasingly served as orphanages and child welfare institutions housing children who were deemed unable to return to their home communities. As schools closed, child welfare authorities stepped in to take Indigenous children in a movement now known as the "Sixties Scoop". This process was in many ways "simply a transferring of children from one form of institution, the residential school, to another, the child-welfare agency": TRC report p. 68.

[36] This is not simply a historic reality. The process of removing Indigenous children from their families has continued to this day, with its most recent (and current) wave being called the "Millennium Scoop": see eg. *Stonechild v. Canada,* 2022 FC 914 at para. 10. In 2019, the National Commission of Inquiry into Missing and Murdered Indigenous Women and Girls identified modern child welfare as one of the systems responsible for "systematically [stripping] away the identities of Indigenous women and children": *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019) [***Reclaiming Power***], Volume 1a at p. 104. Provincial child protection legislation, like the *CFCSA,* has been developed and imposed without the input or approval of First Nations or Indigenous people. The system continues to disproportionately impact Indigenous people. Dr. Turpel-Lafond explained that First Nations people continue to be:

> more likely to be thought of to be harming their children, more likely to have their children removed, their children are more likely to stay in care for a longer period of time than any other group of children in British Columbia, and their children are less likely to find a permanent placement. They're most likely to spend their entire life in care and not receive an adoption or a permanent placement.

> See also: Ardith Walkem, *Wrapping Our Ways Around Them: Indigenous Communities and the CFCSA Guidebook, Second Edition* (2021) [***Wrapping Our Ways***] at p. 9; Grand Chief Ed John, *Indigenous Resilience, Connectedness and Reunification – From Root Causes to Root Solutions: A Report on Indigenous Child Welfare in British Columbia* (12 November 2016) [**Grand Chief Ed John Report**] at pp. 11-12

These patterns are reflected in the data about child and youth in government care. Between 2019 and 2021, Indigenous children comprised 66-67% of the children in care in BC, despite representing less than 10% of BC's child population. In 2020, Indigenous children were significantly more likely than non-Indigenous children to enter care because of "neglect", a concept strongly associated with poverty (74.5% compared to 65%). As of March 2019, the family preservation rate – representing the percentage of children in need of protection who were *not* admitted into care – was 84.8% for Indigenous children and 92.8% for non-Indigenous children.

[37] The reasons for this disproportionate impact are complex, but there is no dispute that they arise in connection with the ongoing legacy of residential schools – and resulting intergenerational trauma – as well as the many systemic forces that continue to marginalize and discriminate against Indigenous people and communities. The Truth and Reconciliation Commission summarized it this way:

> Today, the effects of the residential school experience and the Sixties Scoop have adversely affected parenting skills and the success of many Aboriginal families. These factors, combined with prejudicial attitudes towards Aboriginal parenting skills and a tendency to see Aboriginal poverty as a symptom of neglect, rather than as a consequence of failed government policies, have resulted in grossly disproportionate rates of child apprehension among Aboriginal people. [TRC Report at p. 138]

The Ontario Human Rights Commission more recently described the role that anti-Indigenous racism plays in child welfare. In its 2018 report investigating the overrepresentation of Indigenous and Black children in Ontario's child welfare system, the Commission observed:

> Race or Indigenous identity may influence individual decision-making by child welfare workers. Workers may perceive a case differently based on the family's race or ancestry, resulting in assessing risk differently or

> taking a more extreme action (such as apprehending a racialized child). Child welfare workers, who are often White, may be less likely to relate to Indigenous or racialized clients, see their situations as nuanced, or give them the benefit of the doubt. They may hold negative stereotypes about Indigenous and Black families. They may privilege White, middle-class communication patterns, hold racialized families to changing expectations, and be more likely to negatively interpret the frustration and anger of these families as "a lack of compliance." The OHRC is concerned that where these attitudes and behaviours exist, they could lead to decisions that adversely affect Indigenous and Black children and their families.
>
> Ontario Human Rights Commission, "Interrupted childhoods: Over-representation of Indigenous and Black children in Ontario child welfare" (2018) [**Interrupted Childhoods**] at pp 26-27 (citations omitted)

[38] None of this is controversial. The unique context of Indigenous people in child welfare is expressly recognized in the *CFCSA* and by the creation of delegated Indigenous agencies like VACFSS. More recently, however, First Nations, Métis and Inuit people across Canada led the path for the federal government to enact *An Act respecting First Nations, Inuit and Métis children, youth and families*, which came into force on January 1, 2020. For the first time, this legislation recognizes the inherent right of Indigenous peoples to pass their own laws, have their own systems of administration, and decide their own disputes over family and children. It re-defines the best interests of the Indigenous child, grounded in the rights affirmed in the UN Declaration on the Rights of Indigenous People, the UN Convention on the Rights of the Child, and the International Convention on the Elimination of All Forms of Racial Discrimination. It recognizes the rights of Indigenous Peoples to pass language, culture, and identity to children and to stop the forceful removal of their children. It prioritizes prevention and support to a family over removal of their child, and says that a child should not be apprehended just because of their socio-economic conditions. It creates a reverse onus which requires child welfare agencies to demonstrate their efforts to work with family and constantly reassess conditions to keep children connected to family. On the whole, this legislation offers a hopeful alternative to the colonial child welfare system which has created the conditions for "mass human rights violations" for far too long: Dr. Turpel-Lafond.

[39] At the time of the events giving rise to this complaint, however, the *CFCSA* continued to apply to RR and her children.

B. *CFCSA* framework*:* Removal of Indigenous children is a last resort

[40] The *CFCSA* makes the safety and well-being of children paramount: s. 2. The "guiding principles" of the Act include the recognition that children are entitled to be protected from "abuse, neglect and harm or threat of harm" and – at the same time – that the family is the preferred environment for children. The Act recognizes the specific needs of Indigenous children to remain connected to their communities, traditions, customs, and language: ss. 2(b.1) and (f), 3(b) and (c.1), 4(2). The impact of residential schools must be considered when working with Indigenous children, families, and communities: s. 3(c.1).

[41] Responsibility for child protection rests with the Director of Child Protection. The Director, in turn, delegates child protection services to child protection social workers. Dr. Turpel-Lafond describes it as a "command and control system". The Director has a very wide discretion to make decisions about the safety and wellbeing of children. Social workers are, in turn, delegated with some of the most extensive powers in our society, including the power to "knock on your door and remove your children based on an [often anonymous] allegation". It is a system with "few easy" checks and balances, and in which accountability is mainly adjudicated through courts. Decisions by or on behalf of the Director are "not easily reviewed".

[42] The Director's authority to remove a child without a court order is established in s. 30 of the *CFCSA,* which provides:

> 30(1) A director may, without a court order, remove a child if the director has reasonable grounds to believe that the child needs protection and that
>
> (a) the child's health or safety is in immediate danger, or
>
> (b) no other less disruptive measure that is available is adequate to protect the child.

[43] Section 36, which applies when a child is subject to an interim supervision order, is to similar effect. Where circumstances change or new information emerges that a child is no longer in need of protection, or if less disruptive means of protecting the child become available, the children should be returned: s. 33.

[44] This framework, and the scheme of the *CFCSA* as a whole, reinforces that the removal of children is the most extreme intervention in a family's life and should be a last resort: *TL v. British Columbia (Attorney General),* 2021 BCSC 2437 at para. 27. The Provincial Court explains:

> That less disruptive measures must be considered before a removal is the legislative recognition that a child's emotional and psychological well-being, especially a child's significant attachments to parents or other adults, must be of paramount consideration and second only to the need to protect the child's health or safety from immediate danger. A removal is traumatizing for a child. The additional consequences of being separated from a parent, even one who is struggling with substance use or other mental health challenges, causes even more trauma and loss to a child.
>
> *British Columbia (Child, Family and Community Service) v. DR*, 2021 BCPC 152 at para. 70

[45] The *CFCSA* recognizes that "responsibility for the protection of children rests primarily with the parents" and prioritizes keeping children with their families: s. 2(b). For example, one of the Act's guiding principles is that "a family is the preferred environment for the care and upbringing of children" and that "if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided". From a parent's perspective, the state removal of their child "constitutes a serious interference with [their] psychological integrity": *New Brunswick (Minister of Health and Community Services) v. G(J)*, [1999] 3 SCR 46 [***G(J)***] at para. 61.

[46] The removal of Indigenous children from their families and communities is especially extreme. The *CFCSA* recognizes the rights of Indigenous children to "belong to their Indigenous communities" and to be connected to their "traditions, customs, and language". These rights, and the *CFCSA* as a whole, must be interpreted consistently with Canada's international legal

obligations, particularly those set out in the *Convention on the Rights of the Child* and the *UN Declaration on the Rights of Indigenous People* [**UNDRIP**]: *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2016 CHRT 2 [***2016 Caring Society***] at paras. 431-434.[3]

[47] Under the *Convention on the Rights of the Child,* Indigenous children have the right to preserve their identity, including family relations, and to enjoy their own culture: Articles 8 and 30. Canada is obliged to support parents and caregivers in their child-rearing responsibilities: Article 18. UNDRIP affirms the rights of Indigenous peoples to "preserve and pass on collective cultural identity to children": Article 2. It expressly prohibits the forcible removal or assimilation of Indigenous children to another group: Article 7 and 8. Indigenous people have the right to "revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures": Article 13. Collectively, these international treaties affirm the rights of Indigenous children to maintain their unique cultural identity as Indigenous peoples, be heard in matters that impact them, and be raised with, and protected according to, the laws of their Indigenous culture: *Wrapping Our Ways* at p. 141. As West Coast LEAF points out, the treaties "make it clear that rights, rather than legislative entitlements, are at stake in child welfare services and decisions". As such, the government, child protection authorities, and decision makers like this Tribunal have positive obligations to ensure the rights of Indigenous children and caregivers in the child welfare system, as well as the collective rights of Indigenous communities.

[48] In Canada, Dr. Turpel-Lafond explains that removing a child is inconsistent with many First Nations child welfare practices, which focus on supporting the entire family. This would include focusing resources and energy on alleviating factors like poverty which may be the basis

[3] As VACFSS points out, BC passed the *Declaration on the Rights of Indigenous People's Act* in 2019, after the period of this complaint was ended. The Declaration Act establishes the framework, and the provincial government's intention, to implement UNDRIP in BC. However, the legal principles which support interpreting domestic law in a manner consistent with Canada's international legal obligations apply quite apart from the passage of legislation like the *Declaration Act*, and I do not understand VACFSS to argue otherwise.

for the protection concern, or on taking the entire family into the care of an extended family or Elders in the community.

C. The role of VACFSS

[49] VACFSS is, in large part, an Indigenous response to the systemic failings of the child welfare system. It evolved from a society founded in 1989 by a group of First Nations leaders who recognized the need for crisis support services for families involved with child welfare. For years it worked as an advocacy agency whose aim was to "stem the flow of Aboriginal children coming into government care": VACFSS, "Honouring our Diversity: Bringing Aboriginal Child Rights to Life within Urban Child Welfare Policy and Practice" (2012) at p. 4. From its inception, VACFSS has recognized the harm inflicted by colonial practices in the name of child protection. In 2007, after the United Nations adopted UNDRIP, VACFSS became the first urban Aboriginal agency in Canada to assume full child protection responsibilities. This means that VACFSS became responsible to apply and enforce the *CFCSA* to protect Indigenous children within Vancouver. In doing so, VACFSS has been deliberate at every stage of its development to avoid – as much as possible – replicating colonial practices.

[50] VACFSS operates under a delegation agreement with the Minister of Child and Family Development [**Ministry, or MCFD**]. That agreement acknowledges the "unique historically based" issues facing Indigenous people as well as VACFSS's assertions that some Ministry practices harm Indigenous people and are reflected in disproportionate numbers of Indigenous children in care. The agreement recognizes VACFSS's unique role as an agency representing the urban Indigenous population in Vancouver, a population with its own distinct needs. VACFSS's mission, guiding principles, and purpose all stem from its deep recognition of the colonial roots of child welfare and the harm that it has inflicted on Indigenous people. As Ms. Spence explained, the aim was to "establish an agency that recognized the impact of the child welfare system and other colonial processes in working with families" and to "ensure that we did not replicate the system and the service structure as it existed in the [Ministry of Child and Family Services]". VACFSS endeavours to do this through a holistic and restorative approach to service delivery which recognizes the unique needs and context of Indigenous people as well as the

“abuse that came from the child welfare system and the residential school system where spirituality and cultural connection was denied”. It works in partnership with community and prioritizes family preservation. Its Board of Directors is comprised entirely of accomplished Indigenous people with a commitment to the urban Indigenous community. All of its staff – Indigenous and non-Indigenous – receive regular immersive training, participate in ceremony, and are expected to have a degree of cultural awareness and competency in the execution of their duties.

[51] VACFSS’s child protection program is governed by the *CFCSA* and guided by its “Keeping Our Children Safe” policy manual. The purpose of that policy is to guide “restorative child welfare practice”, defined as comprising four elements:

> 1. Grounded in intergenerational Aboriginal knowledge systems, worldview, and the culture of the family being served
> 2. Framed within an awareness of and engagement with colonial history
> 3. Departs from the … approaches of mainstream social work, in favour of … strengths-based, graduated and supportive client engagement, and
> 4. Results in measurable positive change for the family or families served.

Other relevant policies support inclusive foster care, which keeps children connected to their family, community, and culture, as well as keeping children connected to their Nations and lands.

[52] This is, undoubtedly, a challenging mandate. The families that VACFSS works with come from many different Nations and cultural groups from across Canada. Vancouver is a hub for the Indigenous diaspora, especially for Indigenous people from Western Canada. VACFSS manages many of the most complex child protection files in the province and, according to Dr. Turpel-Lafond, is often operating without the tools and resources needed to support Indigenous families.

[53] VACFSS also faces constraints from the fact that its operations continue to be governed by the *CFCSA*. It is funded entirely by the province and remains accountable to the Ministry and Director of Child Protection to administer its services in accordance with the legislation. Dr. Turpel-Lafond testified that there is no reliable data about whether outcomes for children and families are different when services are delivered through VACFSS as opposed to the Ministry. Notwithstanding the significance of having child protection services delivered by Indigenous people who bring a deeper understanding of specific issues, ultimately, as Dr. Turpel-Lafond explained: “they’re still applying the same child welfare law” – a law developed and imposed without the input or approval of Indigenous people.

[54] I highlight more of Dr. Turpel-Lafond’s testimony and the social context evidence about the application of child protection services to First Nations people throughout these reasons.

[55] I turn now to the facts giving rise to RR’s complaint.

V FACTS GIVING RISE TO THE COMPLAINT

A. RR

[56] RR is from a First Nation whose homelands are on the Prairies. Her biological father is Black, and she identifies as Afro-Indigenous. She grew up in the Pacific Northwest, raised by her mother and stepfather, who are both multigenerational survivors of residential school. Her first interaction with the child welfare system came when she was apprehended at five years old. She left home at 14 and spent her teen years in unsafe circumstances. She found ways to cope, including drugs and alcohol.

[57] One constant in RR’s life has been the importance of her culture. Smudging, in particular, is a sacred practice in her family. She was taught to smudge when she was feeling upset or having a hard time. For RR, smudging is a time to talk and pray to the Creator. She passes these teachings to her children and, now as an adult with her own family, continues the practice of smudging in the morning. By doing this, she explains, “we wake up and can have a good day and … do positive things, … see positive things, … walk in a good way, … [and] walk

softly." RR credits connection to her culture, her community, and the support of Elders as the forces that have kept her strong in the face of adversity, and kept her fighting for herself and her children.

[58] RR had her first child in 2003, when she was 20 years old. According to Ministry records, the first child protection concern was reported only six days after the birth. The concern related to violent behaviour of the father, RR's living conditions, and her history with drugs and alcohol. The social worker talked to RR's doctor who said he had "no concerns". Nevertheless, this began RR's interactions with the child welfare system as a parent. In the following months, RR contacted the Ministry to ask for respite. She was a young, single mother living in poverty and also caring for her sister's child. Each of these contacts with the Ministry, as it turns out, would become part of the history later used to justify social workers' assessment of risk respecting her children. I return to this below. RR's first child, who I will call the **Teenager,** was apprehended when she was nine months old. RR regained guardianship six months later, though the early years of the Teenager's life were difficult and continued to be the subject of Ministry attention and concern.

[59] RR had her second child, "**A**", in 2009 and a third child, "**B**", in 2011. I will call these two children together the **Middle Children.** Their fathers were not supportive. B's father was abusive. RR continued to parent her children alone. In 2013, all three of her children were apprehended.

[60] RR attended drug and alcohol counseling as well as support services for Indigenous women impacted by violence. In a letter of support related to these services, the writer observed that RR "has been very proactive in cultural learning and is re-establishing her identity as a First Nation's [*sic*] person. She takes an active approach to improve her situation and works at it. We have seen positive changes in [RR's] recovery and believe she will continue on this life journey". RR regained custody of her daughters in 2013 and describes this period as a relatively happy one: "I had a lot of supports services, I was dedicated to making change, which I had done and will continue to be doing moving forward".

[61] In 2014, RR's son was born. In the early months of his life, RR continued to be actively engaged in programing and accessing support services. When RR became concerned about his breathing, she took him to a number of different health professionals, including the emergency room, only to be told that there was nothing to worry about. At five months old, the boy died in his sleep of multiple viral infections. RR's Middle Children were present in the home when she found him and witnessed the immediate trauma of their brother's death. A social worker attended the scene and immediately questioned RR's sobriety and her role in her son's death. Though RR said she had not been drinking, and would subsequently be absolved of any responsibility, this lingering suspicion cast a shadow on her records with child welfare authorities, which continued into the events that are the subject of this complaint. I return to this below.

[62] RR was distraught and in shock. At the suggestion of the social worker, the children went to stay with a friend. Later, RR entered into a voluntary care agreement whereby all of her children were removed and placed in foster care. In hindsight, she reflected that this was the worst possible outcome because not only did she lose one child, but she simultaneously lost her other children who would have given her strength to move through the trauma. Instead, she was left alone and entered into a deep darkness. She did not see her children for months. She was suicidal and drinking dangerously. She entered into an abusive relationship and became homeless.

[63] After several very difficult months, RR began reaching out for supports. In a letter dated January 7, 2016, RR's counselor wrote:

> I have been meeting with [RR] since November 24'Th, 2015. [RR] has displayed ongoing commitment to her recovery by meeting with me on a weekly basis, as well as attending the Healthy Relationship group and the Seeking Safety group which I am facilitating …
>
> [RR] is committed to her recovery beyond any of my expectations. She has been advocating and maintaining daily structure in her life by attending support groups and expanding her support systems which she is utilizing. In addition to her attendance to the groups at [this program], she has also completed her Grief and Loss Group at [another program].

…

> Through my meetings with this client, my conclusion is that [RR] does not have any struggle with staying free of alcohol or drug use; instead, her struggle is in dealing with the trauma of losing her son, and later being further traumatized by MCFD's action by unjustly keeping her children away from their mother. MCFD's action so far has not only caused a great harm to this mother, but also to her children. [as written]

It was during this time that RR was introduced to the Associate Practice Manager at VACFSS. With her support, RR's child protection file was transferred from MCFD to VACFSS in April 2016.

B. Apprehension (August 2016)

[64] Also in April 2016, RR had another baby girl, who I will call the **Baby**. The following month, all of her children were returned to her care. RR has many happy memories from this time. She had secured supportive housing, which she credits with stabilizing her life and allowing her children to return to her. She was also approved for social assistance as a person with a disability, which granted her slightly more money each month. She had completed a parenting program and arranged therapy twice a week for the Middle Children. She was breastfeeding the Baby and making dinners to eat with her girls. She was gardening. One of her favourite activities with her kids was to attend Pow Wow Night at the local Aboriginal Friendship Centre. Friends and family from her Nation and other prairie Nations gather on this night, drumming, dancing, speaking their languages, and truth telling. The older girls teach the younger girls to dance – something that RR's daughters all love to this day.

[65] However, RR's relationship with her oldest child, now a teenager, was a challenging one. They experienced a lot of conflict and RR struggled to assert herself in the parental role. She turned to VACFSS for support and reported that the Teenager was behaving violently, including by smashing things, flipping tables and chairs, and hitting her. She suggested the Teenager access counseling. The social worker proposed parent-teen mediation instead, but RR did not have anyone to care for the other children while she attended the sessions. On August 4, 2016, the Teenager reported to VACFSS that RR had physically assaulted her. RR denies this and says

that she was wresting a broom from the Teenager's hands. The Teenager would later retract her allegation.

[66] This report triggered VACFSS to investigate, including by interviewing the two Middle Children – then five and seven years old. In these interviews, the children said that they were scared at home, that RR had locked them in their rooms with bungee cords, had pinched and slapped them, and that A had once become so hungry that she ate drywall. In her interview, the Teenager said the children were not abused. She agreed – as RR does – that the children would be put in their rooms, and the door secured with a bungee cord, but only for time-outs lasting for a period of minutes corresponding with their age. Later, a doctor made note of marks appearing to be cigarette burns on each of the Middle Children. In fact, the mark on A was a birth mark. The mark on B was made by a cigarette, which RR and B say grazed B accidentally as she ran past RR's lit cigarette.

[67] RR agreed that her conflict with the Teenager included verbal and physical fights, which she said were initiated by the Teenager. This was consistent with her efforts to seek support in that relationship. She, however, denied any abuse toward the Middle Children. After their investigation, the police did not lay any charges in relation to these claims. RR's disagreement with her children's original allegations, and refusal to accept the child protection concerns prompting the removal, would become an ongoing issue of concern for VACFSS.

[68] Section 13 of the *CFCSA* sets out the circumstances where a child needs protection. Though not stated explicitly, I understand that VACFSS assessed that the following circumstances applied:

> (a) if the child has been, or is likely to be, physically harmed by the child's parent;
>
> e) if the child is emotionally harmed by
>
> > i. the parent's conduct, or
> >
> > ii. living in a situation where there is domestic violence by or towards a person with whom the child resides;

[69] On August 9, 2016, VACFSS met with RR at the community centre where the Middle Children were attending a day camp. There she was told that all of the children would be removed from her care, including the Baby, who was still breastfeeding. After one final feed, the three youngest children left with the social workers, with the Teenager to follow the next month. The three youngest children would not be returned to RR for nearly three years.

[70] The children were taken to different homes. The Baby and the Teenager were placed in separate foster homes outside Vancouver. The Middle Children stayed together and lived with an Indigenous foster parent in Vancouver. Over the following months and years, they would exhibit complex and high needs and engage in behaviours that their caregivers would find challenging.

[71] On August 10, 2016, VACFSS attended court at a first appearance. At that time, it applied for an interim custody order for the children, which RR opposed. The parties would be involved in the court process, through mediation and eventually a trial, over the next two and a half years. Throughout most of that period, the children were in VACFSS's care under an interim custody order entered into by consent of the parties. They were returned following an agreement reached by consent in mediation. In the result, the court has never made any findings about whether RR's children were in need of protection, or any decisions about the custody of the children: see discussion in *BB v British Columbia (Director of Child, Family and Community Services),* 2005 BCCA 46. I return to the significance of the court proceedings in my analysis below.

[72] After the apprehension, VACFSS began gathering information from various sources about RR's parenting. The social workers testified that they approach this work with an eye to identifying "patterns" and areas of risk for the children. One of the records that they collected was RR's application for benefits as a person with disability [**PWD application]**, dated March 2016.

C. Application for benefits as a person with disability

[73] In March 2016, RR's only income was $185 per month in social assistance. She sought support from the Doctor to apply for benefits as a person with disability [**PWD**], which would give her slightly more money each month. She had applied for these benefits previously and been denied.

[74] The Doctor has been completing PWD applications for his clients for 30 years. In 2015, he had known RR for a number of years and could see that she needed more support. She was living in poverty, depressed and traumatized from the death of her son, anxious about her involvement with child welfare, and actively working to have her children returned to her. In order to ensure RR could qualify for PWD benefits, the Doctor explains that he needed to establish that she could not independently do the activities of daily living. He interprets this broadly. Any person who is living in poverty, with post traumatic stress disorder and intergenerational trauma, will have good days and bad days. The information he sets out in the PWD application form is a description of their worst day. His hope and expectation for RR was that, with some more money, she could have more good days. He views his role to help advocate for that outcome.

[75] To that end, the Doctor listed a number of diagnoses in RR's PWD application, including anxiety, depression, post traumatic stress, fetal alcohol syndrome, asthma, and left ankle pain. He reported that RR was unable to do activities of daily living, manage her own affairs, or care for herself. He said she could not organize herself to do shopping. He said she needed a one-on-one support worker, ongoing intensive psychological counselling, and a trauma counsellor. He said that she could barely walk one or two blocks, could not do much lifting or be seated for extended periods, and had cognitive difficulties. This description of RR, he explains, was very much intended to capture her "worst day" and ensure she would qualify for PWD benefits.

[76] The Doctor gave RR the completed application and told her that he had filled it out in a way that would guarantee she received the benefits. RR submitted it without reading it, and was found eligible for PWD benefits.

[77] In his testimony, the Doctor estimated that he had completed 200-300 PWD applications over his career, mostly for women with involvement in the child welfare system. He said he understood that the information he set out in the application was only for the purpose of social assistance benefits, and had never heard of the information being used for child protection purposes. He was shocked ("a mild term") when he learned that social workers had relied on the information he set out in RR's application to assess child protection concerns. He says he had no cause to be concerned or make a report about RR's parenting. The only need he saw was for RR to have a bit more money to support herself and her children. The Doctor is emphatic that the information in the application should not be interpreted as any indication of RR's parenting capacity – a point he later made in a letter dated April 13, 2017:

> Please be advised that this application was done in 2015 – it was an application for disability and does not reflect her ability to parent in 2015 or at this present time. It is not a 'parental capacity' assessment.

It does not appear that VACFSS ever received this letter.

[78] Nevertheless, parts of this application, including the recommendation that RR receive "ongoing intensive psychological counselling and a trauma counselor", would form part of VACFSS's assessment of RR's ability to safely parent her children and the necessary steps she would be required to take before her children could be returned to her.

D. Coroner's report

[79] On August 25, 2016 – 17 months after his death – the Coroner released their report about RR's son. They concluded the boy was a "well-nourished and well-developed infant" and that the cause of death was a number of viruses. The death was classified as "natural". This report offered some comfort to RR, who hoped that the suspicion about any role she may have played in the death would now be laid to rest. It was not.

[80] When VACFSS received the Coroner's Report, the social workers took it to the BC Children's Hospital for interpretation, particularly because of notes made by MCFD social workers questioning whether RR had been drinking the night of the boy's death. That

consultation corroborated what the report said: that there was no evidence to suggest that RR was responsible in any way for the death. Nevertheless, in reunification and vulnerability assessments completed in October 2016, Social Worker L identified that "parent/caregiver action or inaction resulted in death of a child due to abuse or neglect", explaining that "his mother had been drinking the night before he died and they were cosleeping together on the couch".

[81] And so, notwithstanding that all the VACFSS social workers testified that they did not harbour any suspicions about RR's responsibility for her son's death, suspicions would continue to creep into various records and to hover over RR throughout the period of this complaint.

E. Fall 2016

[82] After their removal, RR had access to her three youngest girls as follows:

a. eight hours on Saturday;

b. eight hours on Sunday; and

c. two hours on Tuesdays for Pow Wow Night.

All of their visits were supervised.

[83] From the beginning, there were two issues where VACFSS and RR conflicted: consents for mental health supports for the Middle Children, and consents to collect collateral information about RR from other organizations. RR's resistance to signing these consents became a sticking point and a basis for VACFSS's conclusion that she was resistant to working collaboratively and addressing the underlying child protection concerns.

1. Consents for mental health

[84] Both RR and the social workers recognized that the Middle Children needed support for their mental health. RR wanted the girls to continue with the therapy they had been doing while in her care, but the social workers determined that would not be appropriate because the

therapy would be taking place in the same building as the alleged abuse, and they were concerned about the counsellor's willingness to "share child protection information with the Ministry". VACFSS's view is that "RR was not in the best position to recommend appropriate treatment for the mental health needs of the children". Rather, the social workers wanted the girls to undergo individualized mental health assessments, which had been recommended by the doctor who examined them immediately after the removal, and to provide services based on those assessments. Their understanding, however, was that they did not have authority to consent to those services absent an order for guardianship. They understood that they required RR's consent. In her closing submissions, RR takes issue with this interpretation of VACFSS's authority under s. 32(2) of the *CFCSA,* and argues that the social workers could have provided mental health services to the children without RR's consent. I do not need to resolve the extent of the social workers' powers to provide necessary mental health supports while the children were under removal status. It is clear that – rightly or wrongly – the social workers understood that they required RR's consent.

[85] RR understood that the social workers were asking her to agree to sign guardianship papers and "forfeit" her rights. She would not agree with that and was preparing to contest the removal through the courts. She offered to attend any appointments with the children and sign necessary consents at the appointments. She was unwilling to give VACFSS what she perceived as complete power over the children and wanted to be an active participant in decision making about their mental health. She explains that she wanted to be a part of "every milestone" and "every single medical appointment". It is unclear why VACFSS was not amenable to this approach.

[86] There was some suggestion in the hearing that RR was exaggerating the implications of signing "consents". However, she is right that VACFSS was seeking guardianship over the children rather than merely consents to specific treatment – which RR had agreed to provide. Social Worker L testified that RR was told numerous times that they required an interim custody order in order to access the services, and this was VACFSS's explanation later when RR challenged its delay in providing mental health supports for the children. This supports RR's

interpretation that she was being asked to give up her custody of the children, which she was not prepared to do voluntarily, even on a temporary basis.

[87] At the same time as she was resistant to agreeing to an interim custody order, RR was actively advocating for her children's mental health. Throughout the fall of 2016, she continued to ask the same questions about her children's health care and to insist on being included in appointments and decision making. She complained to the Ministry's Quality Assurance Branch that VACFSS had failed to appropriately address the Middle Children's mental health needs. That Branch eventually concluded that any delay in the children receiving services was attributable to RR's refusal to consent to an interim custody order.

[88] The social workers viewed RR's refusal to "sign consents" as unreasonable. In an email dated January 11, 2017, it was identified as a "significant child protection concern".

[89] On January 18, 2017, following a mediation in the court process, RR consented to an interim custody order. From that point onward, VACFSS had the authority it required to obtain mental health services for the children without involving RR. It would be several more months until these services began.

2. Collateral information

[90] Also in the fall of 2016, VACFSS was seeking RR's consent to collect collateral information about her from the organizations she was involved with. RR would not consent. She was concerned about the implications of allowing the social workers unfettered access to her personal information. Instead, she proposed to give them letters affirming her participation in certain programs, or to meet with service providers alongside the social workers. During this period, RR was attending drug and alcohol counselling, working with Elders, and was active in a local community organization. She completed a four-week Indigenous-based program for parenting and, in January 2017, completed a trauma workshop.

[91] Again, this refusal to consent to VACFSS's collection of information became a sticking point and delayed the return of RR's children. It deepened the social workers' assessment that RR was uncooperative and unwilling or unable to address the child protection concerns.

[92] The theme regarding both of these issues, and all of the parties' interactions, was distrust. RR – for reasons related to her own experience as a child in the child welfare system as well as a parent interacting with the system for 13 years – was profoundly distrustful of the social workers and of VACFSS as an organization. This is not unusual for Indigenous parents, for whom distrust of the child welfare system may be "a normal, appropriate and rational response to historical and ongoing systemic racism, and may reflect inter-generational trauma experienced by the Indigenous communities": *Wrapping Our Ways* at p. 128.

[93] Though she was always distrustful of VACFSS and the child welfare system, RR identifies one event in particular as the moment when she lost any hope that VACFSS intended to support reuniting her with her children.

F. "180 degree turn"

[94] Throughout the fall of 2016, RR was meeting almost daily with the Associate Planning Manager. By November, the police investigation into the abuse allegations had concluded, and the Coroner's Report had absolved RR of any responsibility in her son's death. RR understood that the child protection concerns had been resolved. Around this time, the Associate Planning Manager met with RR in her home. They discussed that the house was in order, and there were beds and food for the children. The Associate Practice Manager assured RR that she was on track and could look forward to the return of her children before Christmas.

[95] After meeting with RR, the Associate Practice Manager returned to the office and met with the team. In that meeting, the team determined that it was too early to support a return plan for RR's children. While it agrees that the initial protection concerns relating to the allegations from the children had been addressed, VACFSS says that the social workers had become aware of the "presenting behaviour" of the Middle Children. The team identified ongoing risk factors, namely: there was an "open protection investigation" (it is unclear what

this refers to), the "counselling needs" of RR and the children had not been addressed, and the social workers had been unable to collect collateral information about RR's programming to inform their decisions. The Associate Practice Manager explains – and it is clear – that RR's resistance to working collaboratively with VACFSS was the primary impediment to returning the children.

[96] That same day, RR came into the VACFSS office. There, she was told that the children would not be home by Christmas after all. RR says that this about-face "re-traumatized" her. This was the moment, she says, when she "stepped back". She felt that VACFSS was not, in fact, working to have her kids returned to her. That was an outcome that could only be achieved through the court.

G. Expectations for RR

[97] In the meantime, RR was still trying to understand and complete the steps that VACFSS wanted her to take to return the children. The family plan dated October 29, 2016, said that RR was expected to attend a parenting skills program, counseling, parent/child family counseling, engage with her family preservation counselor, and to attend a residential drug and alcohol treatment centre. Throughout her involvement with VACFSS, RR continued to seek counseling, take courses, and do programming. Some of the options that it appears VACFSS was proposing proved difficult to access. On December 5, 2016, one of RR's supports emailed VACFSS:

> [RR] is in my office with me and we are discussing some of the requirements she is supposed to meet to resolve VACFSS's concerns. One of the programs you've requested she attend is a 'disciplinary parenting program'. [RR] has looked high and low, she has been searching as far as Surrey and is unable to find such a specific program. Could you please provide a list to [RR] of courses that you find that she can attend that fit your criteria with start times in the next 6 weeks (most courses would likely be starting the first two weeks of January) so that she will have time to complete the course within the next 3 months. If you cannot find such a program (as we struggled to find something), then can you provide an alternate suggestion to alleviate VACFSS's concerns.

It is unclear whether VACFSS ever responded to this question. From the social workers' perspective, the fact that the children had been removed again was proof that the programming and supports that RR had been accessing on her own were not sufficient.

[98] Eventually, VACFSS's expectations would crystalize around two requirements: that RR attend a residential trauma treatment facility and complete a parental capacity assessment. I return to these below.

[99] In December 2016, VACFSS reduced the access visits between RR and the Baby, and cancelled the Baby's attendance at the Pow Wow nights. RR complained about the reduction in access and raised concerns that the Baby's cultural rights were not being protected. The parties met on December 30 to discuss some of these issues. They agreed the Baby could attend Pow Wow night twice a month. They also discussed the need to create a family plan to address VACFSS's child protection concerns, described in Social Worker A's notes as: "trauma treatment; family violence program; parenting". During that meeting, RR continued to express confusion about VACFSS's expectations of her access visits and asked that those expectations be put in writing.

[100] Beginning in January 2017, VACFSS asked that the visit supervisors provide written reports about the details of each of RR's visits with the children. All of those reports, amounting to 227 pages, were admitted into evidence and I have reviewed them.[4] None of the authors of those reports testified, and the parties invite me to reach dramatically different conclusions about the information the reports contain. Most significantly, the social workers relied in part on these reports to conclude that the visits were going very poorly, and the children were "coming to various forms of harm on visits". These assessments – which I find to be exaggerated and largely unsupported in the supervised visit reports – shaped VACFSS's approach to RR over the two years that followed, which are the years at issue in this complaint.

[4] A small number of the reports related to visits only between VACFSS's therapeutic access worker and the children, while RR's access to the children were suspended.

H. January – May 2017

[101] All of RR's visits with the children were very closely supervised; she says the supervisor was almost always within "arm's reach". RR experienced this as intrusive and uncomfortable, but there is no question that she cooperated and facilitated the supervision. In the hearing, she pointed to the intensity of the supervision, and the detail of the reports, to defend against allegations that she was harming or manipulating the children during their time together.

[102] In early 2017, RR was still having eight-hour visits with the Middle Children, and often the Baby, on Saturdays and Sundays. She developed a routine of picking them up and taking them to the grocery store to shop for food together. They would then spend time at her house or out in the community, which was always her preference. RR says she would sometimes lay down with the Baby and snuggle with her children. She just wanted them in her arms, loving and hugging them. At the same time, she emulated the type of time she would spend with the children if they were in her care. At her house, they would eat, watch movies, nap, the kids would play – essentially, they would have a typical family day.

[103] Some of this caused the social workers concern. Their consistent feedback to RR was that the visits had to be "child centred" and "child focused". In notes of a meeting dated February 24, Social Worker A recorded that she had told RR about the following concerns arising from the supervision reports:

> not napping while she is having a visit, not having people on her visits unless pre-approved by the director, not running errands while having a visit as they are suppose [*sic*] to [be] focused on the children, also discussed concerns [about] appropriate conversations to have that are child friendly and it not being the supervisors responsibility to do child minding or play with the children, let [RR] know that the expectation is that she is playing w/ the children and engaging w/ them
>
> …. talked to [RR] again about not cosleeping w/ [Baby] or sleeping at all on visits, [RR] didn't see why this was a concern.

This is consistent with the type of feedback and concerns that the social workers would repeat about RR's supervised visits throughout the period of the complaint. Overall, VACFSS says that

the supervised visit reports raised "ongoing concerns about RR's preparation, attention and focus on the children during her visits."

[104] On March 1, 2017, in response to RR's request, Social Worker A set out the expectations for the supervised visits in writing:

> – No napping during visits.
>
> – We would like to see you engage with your children in a child focused way throughout the entirety of the visit (ie. playing with them, not running errands while the children are with you on visits, more child focused/specific activities). It is not the supervisor's role to play with the children while you do other tasks within the home.
>
> – No discussing adult issues with your children, no projection of adult issues/fears on the children (i.e. "do you know what they are saying about you now, they are saying you're a thief") …
>
> …
>
> – Please do not have your children provide care for their younger sibling during the visit…
>
> – … no one is to be on your visits unless pre-approved by the Director in advance.
>
> – If your mother attends visits, please make sure all conversations and interactions she has with the children are done in front of the supervisor…
>
> – Please ensure all of your interactions and conversations with the children are done in front of the supervisor; the supervisor needs to be able to see all interactions between adults and children.
>
> – Please make sure [Baby] naps in the crib, unless she falls asleep in the stroller when you are out; no co-sleeping with [Baby].

[105] RR interpreted VACFSS's instructions to mean she could not cook, clean, do dishes, fall asleep, grocery shop, use public transit, or talk to the supervisor about her concerns or any feedback. She felt that the social workers' expectations were unrealistic over an eight-hour day: "I think they wanted me to… sit on the ground for… eight hours and… play dolls or just be on the ground with them for eight hours. And then having the supervisor hover on top of us and

writing and taking notes”. In their testimony, the social workers agreed that they expected that access visits would be “more than a normal day emotionally” in order to “supercharge” the attachment between mother and child.

[106] Over the months, the social workers’ concerns crystalized into two main issues: RR discussing “adult topics” in front of or with the children; and RR failing to engage the children in a “child focused way”. Later, they would also be concerned that the children often became very dysregulated after seeing their mother. I return to all of this below.

[107] In May 2017, RR secured permanent housing in a four-bedroom suite. She was very excited at the prospect of bringing her children home into safe, permanent housing. She says that, when she told VACFSS, the social workers “basically shut it down”. She was told that the children would not be returning to her care anytime soon. Because the housing was contingent on her children living with her, the opportunity was lost.

[108] On May 18, 2017, RR participated in an integrated case management meeting at the VACFSS office. She brought a number of support people with her. Social Worker L explained that the purpose of the meeting was to talk about how things were going and how to work collaboratively to address the child protection concerns. The notes of this meeting reflect that VACFSS expected RR to do two things: participate in one-on-one trauma counseling and undergo a parental capacity assessment. During the meeting, RR agreed to: allow the social worker to speak to her trauma counselor; sign the consents which VACFSS had been seeking in order to speak to collateral organizations; undergo a parental capacity assessment by a mutually agreeable person; and consider residential trauma treatment on Vancouver Island. Residential trauma treatment is something that the social workers had been encouraging for a while, but which RR resisted because she did not want to leave her children and her community for treatment. After this meeting, RR felt encouraged that they were moving in the right direction and expected that her children would be returning soon. They did not.

I. Child's self harm and suspension of access (May 2017)

[109] In May 2017, RR's daughter A attempted suicide in her foster home. She was eight years old. She told her foster parent and doctor that she thought it would bring her back to her mother faster.

[110] When she heard, RR rushed to the hospital with her cousin – her sweat sister – to be with her daughter. She wanted to wrap her community around her child, and to have her family, including her mother, come and support her and A. Instead, she was told not to involve her mother or anyone else, and not to blow it out of proportion. In the foster parent's report, written afterward, they noted that the doctor "didn't want [A] to feel like this was a party (since several family members and friends showed up with balloons and gifts over the course of the evening) and get a bunch of positive attention from this incident and for it to become a recurrent thing". RR could only recall her cousin attending, and not other family members or friends. They did a ceremony and smudge with A, and left A with her own smudge kit.

[111] RR testified that this suicide attempt "broke me". She posted a picture of herself with A on her Facebook page, asking for friends and family to pray for her daughter and for support in her upcoming meeting with VACFSSS.

[112] For its part, VACFSS says that A's suicide attempt was "indicative of highly concerning behaviour which indicated that the children came into care with serious emotional and behavioural dysregulation that required specialized parent child intervention".

[113] On May 30, 2017, RR met with VACFSS, again accompanied by her own supports, including the Youth Worker. The Youth Worker would later record his impressions of this meeting in a letter to VACFSS, which was consistent with his testimony in this hearing. He explains that he had been invited by RR to attend the meeting but that he saw his role to focus on protecting the best interests of the children. In this particular meeting, he expected the parties to focus on A's wellbeing. Instead, he says, it was immediately apparent that the parties were "locked in conflict" and that A was the victim.

[114] During the meeting, the social workers were very focused on RR's Facebook post, which they viewed as a violation of A's privacy. RR agreed not to post her children's private information on social media again – a promise it appears she has kept. RR, on the other hand, was very focused on how to ensure the health and safety of her children in care. Around this time, she filed another complaint with the Quality Assurance Branch, again alleging that VACFSS "had not adequately assessed and addressed [A's] mental wellness".

[115] Social Worker A later described RR as "highly escalating" during this meeting. The VACFSS participants continued to take the position that any delay in supporting A's mental health was because of RR's refusal to sign "consents". The Youth Worker says that, throughout this meeting, instead of "embracing" RR, he observed that the VACFSS participants were "going after her". His impression was that the VACFSS staff appeared to be taking RR's advocacy for her children personally and that its response was to escalate its control over her and her children. He later wrote:

> The complicating factor is that RR is feeling overpowered by VACFSS and without a voice in matters pertaining to her children. She is compensating for this power imbalance by being a strong advocate for her and her children's rights, while VACFSS' reaction is to try to muzzle her by leveraging her access to supervised visits with her children. VACFSS has expressed that they do not like the fact that she speaks to her children about her plight against VACFSS during the supervised visits.

This assessment is consistent with my own conclusions in this decision.

[116] On May 31, VACFSS decided to suspend the children's access to RR. In her notes following an internal team meeting, Social Worker A wrote:

> [RR's] access is suspended as [RR] has posted [A's] confidential information on public sharing post, was unable to put [A's] needs before her own needs/ causes ie fighting the system, not working collaboratively w/ the director, bringing up issues which have been addressed in admin review … access also suspended due to visits reports + [RR] not following visit parameters.

VACFSS told the Middle Children's elementary school to call 911 if RR or other family members showed up at the school.

[117] Social Worker L says that RR had threatened, during a phone call, to make a public announcement at Pow Wow Night that A had attempted suicide in foster care. She says this was another reason that access was suspended. RR was not asked about this, and I am not prepared to make a finding that she made such a threat. Ultimately, there is no evidence that RR ever did anything like this or otherwise failed to follow VACFSS's direction not to publicize information about the suicide attempt.

[118] In the meantime, RR continued to seek strength and healing through her activism and connection with other parents in similar situations. She appeared on a radio talk show talking about child welfare, and joined a Facebook group of parents dissatisfied with the child welfare system. VACFSS interpreted some of RR's activism as a direct threat to its operations and the safety of people accessing its services. In May, it locked down its office in response to a concern that RR was planning a "rally". In her testimony, the Practice Manager questioned why RR felt she "needed to share her story everywhere". RR explains that she found the connection and outlet to be healing.

[119] On June 1, 2017, the parties met again. RR agreed (again) to undergo a parental capacity assessment with a mutually agreeable assessor. It was important to her that any assessor be aware of issues facing Indigenous parents living in poverty within the context of colonialism, and that Indigenous parents "may parent differently than a person of privilege". This is a legitimate concern. There has been widespread criticism about the propensity for parental capacity assessments to impose non-Indigenous parenting standards on Indigenous parents, particularly mothers, to their detriment: see e.g *Wrapping Our Ways* at pp. 132-133; Peter Choate and Gabrielle Lindstrome, "*Parenting Capacity Assessment as a Colonial Strategy*," (2018) 37 Canadian Family Law Quarterly 42 [**Choate & Lindstrome**]. I return to this below.

[120] It appears that, following this meeting, VACFSS re-considered its decision to suspend access. The children had another visit with RR on June 3. There was then a gap in visits between June 18 and July 15, 2017, and Pow Wow visits were stopped for some time. The reason for these gaps is not apparent, but it corresponded with the Middle Children's transition from the foster home into a staffed home.

J. The Middle Children move to Hollyburn staffed home (July 2017)

[121] In the meantime, A's suicide attempt had verified what her foster parent had been saying for months: the children's needs were beyond what she could address. By then, VACFSS was in the process of setting up a specialized facility to care for the Middle Children. It contracted with Hollyburn Family Services for this purpose. The Hollyburn Supervisor was primarily responsible for setting up the facility, including hiring staff, and working with VACFSS to transition the children. Though the Middle Children had been telling RR for months that they would be moving, it appears that VACFSS did not tell RR that this was happening and did not consult with her about the girls' placement. In fact, RR would be expressly prohibited from attending the facility or interacting with any of the staff throughout the two years that the Middle Children lived there. This was a change from her previous relationships with her children's foster parents, in which she was permitted to communicate with them about the girls, and did.

[122] I pause here to note that RR proposed on a number of occasions that she be allowed to live with the children in a supervised setting, in which she could be coached on the parenting issues that VACFSS wanted her to address. Dr. Turpel-Lafond testified that this is a feature of some First Nations child welfare systems, which take the entire family into care: "they don't remove a child; they take the mom and the child into a home where they're cared [for] by an extended family". This is also reflected in Grand Chief Ed John's 2016 letter to MCFD:

> The late Tl'azt'en warrior Chief, Harry Pierre, of the Carrier Sekani Tribal Council put in words a sentiment I heard reflected back to me often during my time in Indigenous communities when parents, families, and communities talked about their deepest hope and responsibility to our children. Chief Pierre stated, "In our time, the helpers would come to help the mother and father ... they would remind the parents of their responsibility. Raising a child is very sacred and very powerful ..." [Grand Chief Ed John Report at p. 6]

However, VACFSS told RR this was not possible. Child protection under the *CFCSA,* Dr. Turpel-Lafond explains, is to "take the child out". The impact is – as it was in this case – "dramatically traumatic".

[123] Social Worker B testified that generally VACFSS tries to practice "inclusive fostering" where parents are integrated with caregivers to give the child more wraparound support, and that it is "ideal" for caregivers and parents to interact. But she says that was not possible with RR because her vocal concerns about the children's wellbeing impeded their ability to feel safe with their caregivers, social workers, and teachers.

[124] VACFSS prepared referral documents for Hollyburn, setting out background information about the children. Aside from noting that RR gave the children strong connection to their culture, there is nothing positive written about her or her relationship with the kids. Instead, the caregivers were warned:

> please note that mother [RR] has been known to make false allegations against caregiver and all encounters between caregiver and mother should be journaled by the caregiver. Communication should only be done through text message or email so it can be documented as mother [RR] at times twists words.

None of the witnesses could explain what "false allegations" RR had made against the girls' caregivers. The Associate Practice Manager could only recall one example of RR being concerned about the prospect of a man caring for the children. They addressed the concern by ensuring that the children stayed with women. There is another note of a phone call where RR reportedly alleged that a husband of a VACFSS employee was sexually assaulting women in the community. RR was not asked about this in her evidence, and so I make no finding about whether she said it or what the implications were. Regardless, the only information that Hollyburn would ever receive about RR was negative. The Hollyburn Supervisor recalls they were warned not to have direct contact with RR and to use the social workers as the intermediary. Later communications between VACFSS and Hollyburn reveal that the staff had the impression that RR was aggressive, dangerous, and to be avoided.

[125] The Middle Children moved into the Hollyburn home on July 4, 2017, after a two-week transition period. There was no cultural orientation or plan, aside from having one Indigenous staff person. The Hollyburn Supervisor recalls that the girls were very dysregulated when they first arrived. She describes the first few months of their stay as dynamic, hectic, busy, and a

“gong show”. The place was “rocking and rolling” and they were in “crisis every day”. There was a high volume of staff turnover; the Hollyburn Supervisor estimated that between 12 and 18 staff were hired but did not last long. It took until later in the fall for the team to stabilize. The Hollyburn records reveal that, during this period, there were a number of critical incidents in which the girls were violent towards each other or towards staff. On July 17, A again attempted serious self harm. This time, RR was not told.

[126] The children’s extreme behaviour is significant because VACFSS would ultimately conclude that their visits with RR were the catalyst and respond by reducing their access to her. In her testimony, Social Worker S downplayed the significance of staff turnover and the transition into a staffed facility on the children’s behaviour. She testified that she did not believe it was a factor impacting the children’s behaviour. Though it may have been difficult, she viewed staff turnover as a necessary part of the process to ensure an appropriate and experienced staff. In my view, this is consistent with VACFSS’s approach of downplaying or ignoring significant issues impacting the girls’ wellbeing as a consequence of their being in care while at the same time focusing on RR’s behaviour to conclude that she was the real threat.

[127] Social Worker S explains that the children’s behaviour was a “big concern” at this time. On August 14, 2017, the Hollyburn Supervisor emailed the social worker to report:

> Weekend/Tuesday visits with Mom appear to be a catalyst for outbursts and extreme behaviours when they return. We have seen escalations weekly, culminating this past weekend with excessive violence towards the staff, outbursts and ransacking the apartments. Staff were kicked, bitten, hair pulled and punched in the nose (resulting in a bloody nose). These escalations are seemingly not triggered by any specific events in the house but appear to be the result of the visit with their mother. When they return back to Program they are usually escalated and over excited, and are already in the Red [zone – dysregulated]. Notably, the evenings that the girls do not see their mother are calm and they are for the most part behaved and very lovely.

In her testimony, the Hollyburn Supervisor explained that much of this email was not based on her direct observations but on reports from staff. She agrees that the connection between the

girls' behaviour and their visits with RR were speculative and that not all of their escalations were directly connected to their visits.

[128] In the meantime, the social workers continued to interpret the supervision reports negatively. One example of this is a report dated July 23, 2017. That day, RR took the girls to a cultural event and then took them home on the SkyTrain. The visit supervisor recorded the following incident:

> [The Middle Children] were sitting in the seat behind me, [RR, and the Baby] as we needed to [have] more space as baby was in her stroller.
>
> We were traveling 3 stations away. [The Middle Children] were sitting together at the beginning of the trip and at the first stop [A] moved to the next seat so her and her sister had window seats and were playing/talking with their dolls. Our stop came up and mom and I stood up and told the girls that it was our stop. Mom was caring for the Baby and stroller and I turned and looked and saw a man sitting next to [A]. She was standing up and the man placed his right hand between the backpack she was wearing and onto her lower back/bum area. He appeared to be attempting to guide her so that she has to pass over his lap/legs in order to exist the seat area.
>
> I said, "Did he touch you"?
>
> She replied yes …
>
> … We immediately reported the incident to Sky train staff and they called the Transit Police which took over the investigation…

The supervisor reported that "Mom was amazing during the events that had taken place". She explained:

> Mom displays helicopter parenting style. She likes to keep all the children very close to her at all times. The girls asked if they could sit by themselves and Mom hesitantly said yes. The children were within arm's length from both Mom and me at all times.

[129] Both Social Worker S and the Practice Manager testified about their interpretation of this report. Asked to agree that RR had reacted appropriately in the circumstances, Social Worker S testified:

> I would disagree … it was an example of perhaps [RR] struggling to manage her three children and their diverse needs… The children at this point would have been likely six and eight, wanting to sit by themselves. But with a supervisor and [RR], this was the kind of concerns … we had ongoing concerns with the supervisor. So I remember discussing about this event – two adults. Why on earth were the children sitting by themselves on a public Skytrain?

The Practice Manager went even farther:

> … When one looks more closely at that incident … what in fact happened is mom was engrossed in a conversation with the care provider sitting quite a distance from the children on the bus. Her daughter managed to stand up on the seat and the transit lurched, the child began to fall and a gentleman nearby steadied the child from falling entirely …

Asked about the note that said that RR was within arms-length at all times, the Practice Manager responded with skepticism: "Then how is a stranger able to touch the child?".

[130] In my view, both of these interpretations of the report are unfair to RR. The person who had been hired to supervise the visit praised RR's conduct, but VACFSS still found ways to criticize her. This testimony of Social Worker S and the Practice Manager is indicative of the extent to which both of them were – consciously or subconsciously – predisposed to cast RR in a negative light as a parent even in the face of a report to the contrary.

[131] Another example arises from the Practice Manager's evidence that there were multiple "reports" of the Baby "standing up in a highchair despite being a very young toddler", and that this raised concerns about the children's safety in RR's care. In fact, there was only one report of such an incident, as follows:

> When we arrived, Mom asked the girls what they wanted to eat. She made some egg sandwiches. Then put uncle buck on the TV and laid down the mattress that was on the floor. [The Middle Children] laid down with her. While they were laying on the mattress, [the Baby] was sitting in her high chair and decided to stand up. [The supervisor] said "oh my goodness!" and jumped up from seat to grab her. [RR] said "what!" as she sat up from the mattress on the floor, and grabbed her. She said "wow you move fast".

While I accept that it may be dangerous for a toddler to fall from their highchair, I find it is an exaggeration to suggest that this incident supports a conclusion that RR's children were unsafe during their visits.

[132] Aside from these isolated incidences involving the children's safety, VACFSS's primary concern during the supervised visits was the type of conversations that RR was having with or near the children about their situation. There is no question that, throughout the supervision reports, there are themes of RR asking the visit supervisors for information, lamenting the lack of communication between her and the caregivers, and expressing to the supervisor that she feels VACFSS and the caregivers were working against, rather than with, her. She also communicates to the children that she wants them to come home with her but that those decisions are being made by the social workers. She stresses that they have to behave so that they can come back to her. In her testimony, RR was adamant that she wanted her girls to know how much she wanted them home with her. She wanted them to know how hard she was fighting for them and that she was doing everything in her power to be reunited with them. She felt she was speaking the truth when she communicated that the decisions were not hers but lay with the social workers. Finally, she did find ways to ask the girls about their home lives – a practice that VACFSS came to view as "mini interrogations" but reads in the supervision reports as a parent exercising curiosity and care about their child's wellbeing.

[133] The social workers' view was that RR should be bringing her questions, concerns, and complaints directly to them without involving the children or the visit supervisor. They explain, and I accept, that children in care experience trauma from their divided loyalty to their parent and the social workers or other people involved in their care. They were concerned that RR was fanning the flames of the children's discontent, making them feel unsafe, and undermining their trust in the other adults in their lives. Fundamentally, the social workers wanted RR to trust that they were caring for her children, and she did not.

[134] In the meantime, and unbeknownst to RR, the Middle Children's behaviour at Hollyburn continued to be very challenging and dangerous – both to the children and the staff working with them.

[135] By July 2017, RR was asking that her file be transferred back to the Ministry of Child and Family Development. On August 25, 2017, RR filed this human rights complaint. It is unclear when VACFSS became aware of it. The Tribunal sent VACFSS a copy of the complaint by letter dated October 27, 2017. Before that, though, there is a note in a supervised access report on September 9 that the social worker had instructed the supervisor to tell RR not to talk about "VACFSS or her human rights case" during the visit. RR also raised the complaint in a meeting with VACFSS on September 14. It appears, then, that VACFSS was aware of the complaint fairly shortly after it was filed, in early September 2017. This was important because RR perceived that VACFSS began to retaliate against her for filing the complaint.[5]

K. "She was seeing a six, I was seeing a nine" (August - September 2017)

[136] Beginning in September 2017, the Practice Manager was involved in overseeing RR's file at VACFSS and making decisions about her access to the children. Just prior to her involvement, and as she was becoming acquainted with the file, two incidents raised concerns for the social workers about RR's ongoing visits with the children.

[137] First, RR and the VACFSS social workers had a disagreement about a planned visit with the children at the PNE on August 26, 2017. The forecast was very hot. The social workers were concerned that the Baby would be at risk of overheating and that RR would not be able to manage all the children. They decided the Baby could not join the activity. In response, RR requested that the PNE visit be cancelled, and all the girls meet her in community. The social workers suspected that RR would disobey instructions and take the kids to the PNE anyway. In a memo for the after-hours team, the social workers described RR as "untruthful" and "very forceful and angry". They warned the team not to engage with her complaints about "VACFSS SW, foster system, media reports etc etc etc". In an email dated September 1, 2017, reporting about the weekend, Social Worker L wrote that RR had taken the girls to a park, and spent "a large portion of the visit napping". This is not consistent with the supervised visit report for that day, which recorded that the park was one of several activities over the eight-hour day and

[5] The complaint which I must decide does not include an allegation of retaliation in violation of s. 43 of the *Human Rights Code,* and so I do not consider the issue further.

does not mention RR napping. I accept that the supervisor may have told Social Worker L things that were not in her report, but I cannot conclude that it would be accurate to say that RR spent “a large portion of the visit napping” – a claim which she denies. Social Worker L does not mention any of the positive things in the report, including that “[RR] keeps her cool… always!! Even when being pushed. Gives the girls positive feedback. She gives them affection even when being hard to deal with ... just kinda smiles and lets it go”.

[138] Next, Social Worker L said the children had told her that the social workers were responsible for cancelling the PNE visit and were lying about RR killing their baby brother. She explained:

> I am concerned that [RR] is saying to her 6 and 8 year old daughters that that social workers are lying about the death of their baby brother – whom they feel a lot of grief about. Also during my visit today [the Middle Children’s] attitude towards me was very different than at my last home visit (mid July). They were not wanting to engage with me, as we usually read stories, draw pictures, and talk very openly about how they are doing and their feelings. I believe that Mom is having very unhealthy adult conversations either with the children or in front of the children during their visit and the supervisor is not intervening appropriately.
>
> I am very worried that due to the lack of appropriate supervision these girls are being coached and emotionally manipulated by their mother during their visits.

As I have said, this was one of VACFSS’s main concerns about RR.

[139] September 10, 2017, was RR’s last visit with the children before their access was reduced by more than half. According to the supervision access report, it was a long happy day. There is a note about RR’s mum asking about the Middle Children’s access to food and the girls reporting that it as locked up, which “Gramma doesn’t like”. The supervisor noted:

> [RR] always engages with the girls. They have a bond… like most mother daughters. There is never a lack of doing things. [RR] is there for her girls… She teaches, she shows them love, she disciplines (even when she feels her hands are tied) …
>
> [RR] … shows love, she plays with the girls, jokes with them.

The only area for improvement was: “Not to ask girls what goes on. I know its frustrating when she isn’t being told anything … but maybe not getting correct info from girls”.

[140] The next day, September 11, the Practice Manager met with the social workers to discuss their concerns around the children’s visits with RR. According to her notes, “the principal source of difficulty was around how to continue to have weekly visits between this mother and her children given that the visits seem to be going very poorly and resulting extreme acting out behavior on the part of the children following the visits”. The specific concerns were: “numerous reports of mom not watching the children on the visits, mom saying things that upset the children on the visits, the children being tired because they’re spending the visits on transit doing mom’s errands for the better part of both Saturday and Sunday while the children are with their mother”. The Practice Manager had not met RR at this point or observed her interactions with the children.

[141] On September 13, the social workers received a batch of supervision reports from July and August. They noted concerns that RR’s mother had attended a visit, the Baby was left alone with RR for 30 minutes, and the Middle Children were “experiencing conflict that [RR] is not able to manage effectively”. Social Worker S – who had only recently taken over RR’s file and not met her in person yet – expressed the view that “visits overall are not working”. The VACFSS team decided to reduce the length of visits and focus on “quality”.

[142] I pause here to address the factors that the VACFSS witnesses said led them to conclude the visits were not going well. From RR’s perspective, it was the opposite: visits were positive experiences for her and the children. Reflecting on the conflict between herself and the Practice Manager in particular, she testified aptly: “she was seeing a six, I was seeking a nine.” The evidence before me supports RR’s view. In addition to her own testimony about the visits, and the testimony of RR’s witnesses who supervised some visits, the visit reports reflect full days, with time spent at home and in the community doing various activities. RR is reported to be affectionate and appropriate with her children, and there is no question that the children love and want to spend time with her. The reports do not support VACFSS’s specific concerns.

1. RR not watching children on visits

[143] In visit reports on January 29, February 5 and 12, 2017, there are notes that RR napped with the Baby. After VACFSS told her not to do this, it does not appear that she did. In preparation for a visit on September 9, 2017, VACFSS instructed the supervisor – who had supervised many visits – to tell RR not to nap on the visit. In her visit report, the supervisor noted that she had never seen RR sleep during the visits.

[144] There are also notes in the reports from early 2017 about times when RR was not actively engaging with the children – either talking to other adults, looking at her phone, or preparing food. Several times, she asked the supervisor if they could watch the children for a few minutes while she went out for a smoke. However, the reports do not support that this was a pattern or that the children were left unattended. Further, these incidents were happening on eight-hour visits. In one of the supervised visit reports, the supervisor recorded a conversation where RR was saying that eight hours was a long time to entertain kids and that in normal circumstances, adults would have gatherings while the children play together. VACFSS interpreted this as a recognition by RR that the visits were "too long". I disagree. Rather, it reflects the ongoing conflict between the parties about how they viewed the visits: for RR, the time reflected what the children could expect in a typical day at home, whereas VACFSS wanted the visits to be "more" than a typical day in order to focus on, and "supercharge", the attachment.

[145] Again, once VACFSS told RR that she had to focus on her children, she did. As the weather warmed up in 2017, she filled the visits with activities outside the home and followed the social workers' expectations. On the whole, I find that the reports do not support VACFSS's conclusion, as of September 2017, that RR was inattentive or that the children were unsupervised on visits.

2. RR upsetting kids on visits

[146] This is VACFSS's view about the impact of RR's behaviour on the children. It is not a view expressed by the supervisors in their reports. It arises in large part from RR's comments, which I

have summarized above, which express unhappiness and fear about the children being in government care, lament the lack of communication, and question the basis for the social workers' concerns. On February 12, RR warned her girls not to let anyone see them naked, especially a man. I accept that these comments may have been difficult for the children, but the root of the concern is RR's conflict with VACFSS rather than any child protection issue. I return to this below.

3. Children spending the visits doing errands for most of the weekend

[147] This is not consistent with the visit reports. In their testimony, the only example the Practice Manager and social workers could give was of a visit on January 28, 2017, when RR took the children to a pawn shop in the morning. RR explains, and the report corroborates, that they stopped at the pawn shop in order to get some money for their day. It was a short stop, and the balance of the eight-hour visit was a fun family day at Granville Island and a movie at home.

[148] Aside from this, there are visits where RR takes the girls grocery shopping and prepares food throughout the day. For example, over an eight-hour visit on August 5, RR went to the grocery store twice, once for about an hour and a half. A social worker's handwritten notes highlighted those trips. That same visit, the family spent the afternoon at the pool.

[149] On the other hand, RR says that she understood from early on that she was not allowed to do errands or housework on her visits and points out places in the reports where she feels this was used against her, for example where the supervisor suggests that RR should do some organizing and cleaning with the children and that the house could get messy. When it came to household chores, she felt, not unfairly, that she was "damned if I did, damned if I didn't".

[150] On the whole, I find it was not accurate to conclude that the children spent "most" of their weekends with RR doing errands.

4. Conflict that RR is unable to manage.

[151] There are reports of conflict between the Middle Children on some of the visits, which sometimes derailed the planned activity and made for a difficult day. However, in their reports the supervisors do not say that RR is unable to manage the conflict and nor is this a feature of all or even most of the reports. The conflict is consistent with, or less than, the reports that VACFSS would receive about the Middle Children from their other caregivers. In those other settings, VACFSS was highly attuned to the children's challenges and worked to support the caregivers in managing them successfully. However, in their dealings with RR, VACFSS used these same challenges as evidence that RR could not parent effectively. For example, VACFSS points to the following note, made by a visit supervisor, to dispute that the visit reports reflect RR's positive parenting skills:

> … of late I notice [child] acting out whereas in past she wouldn't act out (not listen, sass back cry) in front of me. [Child] would say what she felt… answer back mom. Last week startled me because [I] never seen this side of [child]. **[RR] says she doesn't know how to deal with [the child's] anger**… that she has asked for counselling for girls… and they have had some [traumatic] events happen… [emphasis added, as written]

From VACFSS's perspective, the bolded admission is evidence that RR struggled to parent her children effectively.

[152] Again, I find this to be another unfair interpretation of the visit report. At the time of this report (dated June 18, 2017), all of the adults in the children's lives were struggling to deal with their anger and mental health. RR was in a particularly difficult position because she had so little power over her children and felt self-conscious in all their supervised interactions. There are a number of notes in the visit reports about RR expressing concern that she could not discipline the children without jeopardizing her access to them, and RR agreed in her testimony that she felt constrained in how she could respond to some of the challenging behaviour they displayed. Respectfully, it is not reasonable to point to the passage above as evidence that RR lacked proper parenting skills, or to conclude that the supervised visit reports reveal that RR

could not manage conflict between the children. It is difficult to understand how this would be a factor supporting a reduction in in access.

5. Baby left alone with RR for 30 minutes

[153] This refers to a visit on July 17, 2017, when the Baby was dropped off early, before the supervisor arrived. In the supervision report, the supervisor says that RR immediately told her the Baby had been dropped off early and that she understood she was not supposed to be alone with the children. This was not RR's fault, and it is difficult to understand how it could be a factor in reducing access.

6. Mother attending visit

[154] It is true that RR's mother attended and participated in a number of visits. There is no evidence before me that RR had been instructed beforehand that this was not appropriate. The supervisors were present and recorded all interactions, consistent with the expectations that had been communicated to RR.

[155] In sum, having closely reviewed the visit reports, many of which are quite detailed, I cannot understand the basis for the dramatic conclusions that VACFSS was drawing about the quality of these visits. Nor is there other evidence, aside from social workers' vague reference to having information from other sources, to support that visits were not going well. On balance, I prefer RR's account, supported by the visit reports, that her visits were going as well as could be expected in the difficult circumstances. These were days that she and the girls looked forward to and relished, in which they exchanged affection and strengthened their bonds. VACFSS, unfortunately, felt otherwise.

L. Access reduced (September 14, 2017)

[156] The parties met on September 14, 2017. RR attended with several support people, including her mother, the Mental Health Worker, the Family Support Worker, and the Support Worker. This was the first time that the Practice Manager met RR in person. It was an emotional meeting.

[157] At this meeting, VACFSS told RR that her visits with the children would be reduced by half. RR was shocked. She asked whether it was because she had filed a human rights complaint. She says she was "trying to make sense of it". The Support Worker recalls that RR kept asking why her visits were being reduced, but there was no real dialogue or explanation. She describes the VACFSS participants "talking down" and "condescending" to RR about the best interests of the children. The Family Support Worker, Mental Health Worker, and Support Worker all testified that it was not clear from this meeting why visits were being reduced. The Support Worker was impressed with how RR handled the situation.

[158] The Practice Manager says that at one point RR's mother, who was sitting next to her, pounded the table and loudly said: "want me to hit you?". She interpreted that as a threat and warned the meeting participants that she did not want to be put in a situation where the mother could no longer be involved.

[159] RR's witnesses deny that her mother threatened to hit the Practice Manager. They all recall the mother being upset but say there were never any threats of violence. For the reasons I have set out above regarding the witness's credibility, I prefer their evidence. They were all frank in acknowledging that RR's mother did get emotional and upset. They would have recalled a specific threat and none of them did. That said, it is clear that RR and her mother were upset and escalated. Even the Support Worker found the meeting to be triggering based on her own experiences in care.

[160] Social Worker S recalls that it was difficult for the VACFSS participants to explain their "clinical rationale for changing the visits". They suggested that RR visit with the children one-on-one, to really focus on the quality of the visit and strengthening the individual attachments, but RR was resistant to this idea. This would be an ongoing source of contention. RR agrees she was "adamant" that she didn't want one-on-one visits. She saw it as further dividing her family, and she felt it was important to be all together. From the social workers' perspective, this was further evidence that RR was unwilling to prioritize what they had determined to be the best interests of each of the children.

[161] Another point of contention was RR's intention to leave Vancouver and participate in an elder's walk on the Highway of Tears. RR explains that this was a healing journey for her. For VACFSS, however, it was further proof that RR's true agenda was her own advocacy and participation in social causes. In the Practice Manager's notes of the meeting, she recorded "When I inquired as to why she was so upset about the reduction of visit but was willing to be away from all visits with her children for in excess of two weeks, RR and her support folks became very angry". In my view, this inquiry was insensitive and supports the testimony of RR's witnesses about the condescending tone that VACFSS took with RR in this meeting. At this point, RR's children had been in care for over one year. RR had diligently attended all access visits, on time, three times a week. All of her behaviour and communication was geared toward advocating the return of her children. It should not have been a surprise that she was upset about her visits being reduced.

[162] In the result, the children's visits were cut by more than half. They saw RR for four hours on Saturday night and two hours on Pow Wow Night. The Baby would only come to Pow Wow Night twice per month. RR asked for the girls to stay later on Pow Wow Nights so they could be a part of the drumming, but VACFSS did not want the visits cutting into the time the children needed to decompress before bed. RR was very upset but resigned. She testified, "you just have to take what they give you".

M. Physical restraints in care (October 3, 2017)

[163] October 3, 2017, was a Tuesday. That night, RR met with the girls at Pow Wow Night. She asked them questions about their day. She noticed they were eating more than usual and asked what they had for dinner before they came. A told her that they sometimes went to bed without dinner. RR was shocked. She asked more questions about their home life. That is when six-year old B disclosed: "they come into my room and hold me down by my arms and legs".

[164] RR's immediate internal response was to be careful not to show too much emotion, for fear it would seem like she was overreacting. She went outside, smoked a cigarette, and cried. Later, while taking B's sweater off to put on her shawl, RR used the opportunity to look at her

child's body. She saw bruising on B's wrists, arms, thighs, and calves. She saw adult fingerprints on her ankles. RR took pictures and called the police.

[165] The Practice Manager, who was not present, testified that she heard "from other sources" that RR became very agitated, took the microphone, and made a public announcement about finding the bruising. Social Worker B also says she heard about this. RR denies doing this and I find that it did not happen. It is inconsistent with the visit supervisor's description of RR's reaction as follows:

> [RR] did her best to keep the situation calm. [RR] could be described as a force yet there is a real strength to her control and this was proven when she found out someone had abused her child. Her mom Grandma was beside herself and let the anger fly but [RR] was calm and focused.

It is also not consistent with RR's overall caution about protecting the girls and her access to them. Nevertheless, it is the type of rumour that the Practice Manager was ready to believe, and which reinforced VACFSS's negative perception of RR.

[166] The Middle Children were taken to a safehouse for the night and assessed at the hospital the next day. The medical examination confirmed that the bruising was consistent with the application of physical restraints on B. All parties agree that this was inappropriate. The incident had not been reported by Hollyburn, though it should have been. If not for B's disclosure to RR, and her discovery of the bruising, it is possible that the mistreatment would have gone unnoticed and uncorrected.

[167] In her notes, the Practice Manager noted that "ideally, we would not return these girls to the home where this maltreatment occurred". However, because there was no other option, the girls were returned to the same home. VACFSS says that the staff who had been involved were no longer there, and they felt it was safe for the children to return.

[168] Following this incident, there was a police investigation and VACFSS undertook a "protocol investigation". RR was not told anything about the protocol investigation. VACFSS's report would eventually conclude that, though the bruising was consistent with being held, it

was “not considered physical harm” and there were no *CFCSA* s. 13 child protection concerns for the children in the Hollyburn home. In the course of the investigation, the children told VACFSS that they wanted to be with their mother, and would continue to report problems to her. B reported that she did not know the names of the staff in the home, and A reported that she was given time outs for the number of minutes corresponding with her age – which is the same practice RR says she followed while the children were in her care. Finally, following the incident, Hollyburn implemented new policies regarding the use of physical restraints.

[169] RR met and spoke with VACFSS a number of times in the days after she discovered the bruising. She always brought her supports with her. In her evidence, she explains that she wanted witnesses in her meetings with VACFSS because she was afraid that whatever she said could be used against her somehow. She also could not understand why it seemed she was always moving further away from the return of her children. She hoped her support people could tell VACFSS about her good work in the community and help mediate the return of her children.

[170] On October 5, 2017, RR and her supports met with the Practice Manager. This was another emotional meeting. The Support Worker recalls that RR was finding strength and composure in her eagle feather. The Family Support Worker, who was also there, says that her impression was that VACFSS was not receptive to listening to RR or willing to work with her. RR was raising her concerns that her children were being restrained, going to bed without dinner, and that food was being locked up. She connected those issues to the practice in residential schools of abuse and withholding food from children. She wanted some action and accountability for the people who had put hands on her child. RR recalls there were tears in her eyes. As a mother, she worried that things were worse than even she knew. She wondered whether her child’s legs were being pulled apart rather than together. She wanted VACFSS to arrange for a sexual assault kit to be administered on B.

[171] Instead of VACFSS responding to her fears and concerns, RR got the sense that these serious issues were put on the backburner “to focus on how it was going to be going with shorter visits: games, puzzles, etc”. They discussed plans for visits to be supervised by the

Mental Health Worker and the Support Worker, including an upcoming trip to the pumpkin patch – which I return to below.

[172] Toward the end of the meeting, the Practice Manager disclosed to RR that the Teenager had been absent from her foster home for several days and then engaged in serious self harm. RR says that the Practice Manager's tone in delivering this news was "nonchalant". The Mental Health Worker also felt the news was delivered without compassion.

[173] RR's mother became very escalated. She expressed her view that the children were being harmed in care and that it was similar to her own experience in residential school. The witnesses agree that she yelled and pushed papers across a table. The Practice Manager asked her to leave and then called the police, after which the mother did leave. In her notes, the Practice Manager recorded that it was "of particular interest" that she then observed RR and her supports laughing "loudly and playfully" and saying that "they had never seen anyone who could hang in there with [the mother] as long as I had". RR does not recall laughing, though she does recall someone making a comment about her mother being a "pissed off grandma". She says, and I agree, there was nothing funny about the situation: "it was very serious".

[174] RR says that, after this meeting, she could not sleep. Every time the phone rang, she was afraid that it would be news that something had happened to one of her daughters.

N. Pumpkin patch visit and fridge locks

[175] The parties planned a special outing for the family to visit a pumpkin patch on Sunday, October 8. The plan was that VACFSS would arrange payment for the entrance fee in advance. Hollyburn would transport the Middle Children to and from the pumpkin patch, and the Support Worker would supervise the visit. Unfortunately, things did not go as planned.

[176] When the group tried to enter the pumpkin patch, there was no record of VACFSS paying the admission fee. While VACFSS says that the fee was paid, and anyway admission was by donation, I accept that RR and the Support Worker reasonably understood that an entrance fee applied and had not been paid. The Support Worker says this was humiliating. They decided

to change the plan and take the children to Stanley Park for a picnic instead. The Support Worker drove everyone to the park, where they had a lovely day together.

[177] At the end of the visit, the Support Worker dropped RR off at a local store before taking the children back to their residence. She understood that RR was not allowed to go to the residence or talk to the caregivers. At the residence, the Support Worker knocked on the door. When there was no answer, she went inside. She says that the inside of the unit was bare – just a table and chairs. It reminded her of an "SRO" (single room occupancy unit). There was no food out on the counters, and she saw a lock on the fridge. She says this was triggering to her, as a survivor of residential schools, and she almost started crying. She reported the fridge lock to RR.

[178] RR was upset and asked to talk to the Practice Manager about the children's access to food. In response, the Practice Manager attended the residence personally. She saw the child safety latch on the fridge. The Hollyburn Supervisor explains that it had been placed on the fridge to stop or slow the girls down when they were upset, because they had been taking out glass containers and smashing them on the floor. The Practice Manager removed the latch and instructed the Hollyburn staff not to replace it, suggesting they keep any glass containers in a separate fridge that the children could not access. In an email, she said that removing the lock was "for the purpose of the optics".

[179] For her part, the Practice Manager was unhappy that the pumpkin visit had not proceeded as planned and was "fraught with breaches". She spoke to the Support Worker and RR about her concerns. In her notes, the Practice Manager identified the following breaches, some of which I find are unsubstantiated:

a. "In direct contradiction to my request, [the Support Worker] had the mother greet the children at the transporter's vehicle". RR and the Support Worker say, and I accept, that RR did not approach the vehicle.

b. "[T]he family did not remain at the pumpkin patch nor attend the events there" and "spent the day contrary to what was permitted". This is true.

c. "At the end of the day, [the Support Worker and RR] drove the girls back to the foster home (where [RR] is not allowed to attend) … got themselves into the building and made their way to the girls foster home". RR and the Support Worker both say, and I accept, that RR did not go to the home. The Support Worker went alone.

d. "... [T]he staff … sent the girls to that outing with adequate and abundant packed lunches. When the children returned, the lunches were untouched and the children reported that their mother had taken them to McDonald's instead". This is true. RR explains that she likes to buy food for her children.

e. The Support Worker was not authorized to drive the children in her car. This is true. VACFSS was required to pre-approve drivers who may be driving the children, and they did not do so for the Support Worker. The Support Worker explains she was confused by this, and thought she was driving the children home at the end of the day.

Finally, it is also true that the Support Worker generally took the position that a number of VACFSS's rules amounted to micromanaging and – as a visit supervisor – she intended to support the visit in the way she saw best for RR and the children. This was concerning to the Practice Manager.

[180] The parties discussed this outing at another meeting.[6] In her notes, the Practice Manager recorded that the purpose of the meeting was that RR "consistently maintains that she has no clear idea why her children are in care". The Practice Manager reiterated that they were waiting for RR to take two steps: attend residential trauma treatment and to undergo a parental capacity assessment. In response to RR's repeated suggestion that she attend trauma treatment with her children – who also had to process the trauma of their brother's death – the Practice Manager advised that "doing trauma work is not something one['s] children should

[6] The date of this meeting is unclear. The Practice Manager's notes say that it was October 6, but that was before the pumpkin patch visit and cannot be correct.

witness or participate in”. In her notes, she noted “This was work that I believe impedes [RR’s] ability to remain child focused.” RR agreed in this meeting to further trauma treatment.

[181] In response to RR’s questions about why her children were still in care, the Practice Manager queried whether she wanted the other people present to hear the answer. When RR indicated that she wanted to have her support people remain in the meeting, the Practice Manager read from the administrative summary of RR’s history of involvement with child welfare, which she says include “[33] substantiated incidents of child maltreatment and a lengthy history of conflictual involvement with child welfare systems”.[7]

[182] At this point I pause to explain these 33 incidences and VACFSS’s “File Documentation Review”.

O. File Documentation Review

[183] At various points in RR’s dealings with VACFSS and in this hearing, social workers and others have invoked RR’s “33 child welfare interactions” as evidence of ongoing child protection concerns. This reference arises from a File Documentation Review completed by the Consultant in April 2017. The review summarizes RR’s family history and all of her interactions with the child welfare system, going back to 1985. It concludes with a summary, identifying patterns and issues of concern.

[184] The Review documents that, since her first child was born, RR had 33 interactions with the child welfare system. According to the Practice Manager, this means there have been 33 substantiated incidences of child mistreatment. That is not the case.

[185] In BC, anyone can make a report with concerns of child abuse or neglect. The Director is required to assess that information and determine the most appropriate response: *CFCSA,* s. 16. In circumstances requiring a protection response, the Director may open an investigation or pursue a family development response, or **FDR**. An FDR is appropriate where the parent is

[7] The notes say “23 substantiated incidents” but the Associate Practice Manager affirmed in her testimony that this was a typo, and should have said “33”.

willing and able to work collaboratively to mitigate protection concerns. Where a non-protection response is appropriate, the Director can offer support services or make a referral to an appropriate agency or Indigenous community.

[186] In RR's case, her 33 child welfare interactions break down as follows:

a. Eight instances where RR asked the Ministry for respite or support, triggering a non-protection response.

b. One report with no indication of child protection concerns, and no action required.

c. Sixteen investigations and four FDR investigations. Each of these investigations were prompted by a report from a person in the community with concerns about abuse or neglect, in which the Director concluded a protection response was appropriate. Most of the reports concerned allegations that RR was using drugs or alcohol, or that there was violence in or around the home. For many of them, RR disputed the basis for the report. Three investigations determined that RR's children were in need of protection, including the investigation precipitating the removal of all of the children in August 2016.

d. Four "previously assessed reports", which duplicated reports that had been investigated.

In short: out of 33 interactions, 20 triggered a protection response (investigation or FDR) and, of those, three investigations concluded the children were in need of protection. It was simply not accurate for the Practice Manager and others to conclude from this review that there had been 33 substantiated issues of child mistreatment in RR's file.

[187] In her analysis, the Consultant summarized the concerns about RR as relating to misuse of alcohol and/or drugs, domestic violence (reported by RR), leaving the Teenager with others and having unsafe people around the home, RR "feeling overwhelmed with the care of the children", unrealistic expectations for the children, parent teen conflict, reports from the

Teenager of physical and emotional abuse, and the most recent reports of inappropriate physical discipline from the Middle Children. The Consultant then addressed the death of RR's son, noting that some of the file documentation "raises a question about [RR]'s actions or inaction and how these may have contributed to [his] death". She noted that allegations about RR's conduct had not been conclusively corroborated, and made five recommendations that VACFSS continue to investigate RR's role in the death. Finally, the Consultant acknowledged that RR had made "many requests for supports and services" and participated in various programs. She concluded, however, that RR continued to struggle "to implement appropriate parenting strategies". She made two recommendations about how to support RR's success as a parent:

> – Seek support services to provide therapeutic access for [RR] and her children to help them address their histories of trauma with one another and to ensure access visits are highly structured and purposeful.
>
> – Assist [RR] to locate an appropriate trauma counselor or program and to attend appointments on a consistent basis. Conduct ongoing consultation with the trauma counsellor to inform case planning and recommendations for treatment.

These recommendations are reflected in VACFSS's insistence that RR attend residential trauma treatment, in addition to the counseling and programing she had already completed. VACFSS also followed the recommendation to switch to "therapeutic" access for the children. It replaced the previous visit supervisors with a "therapeutic access worker" beginning in October 2017.

P. Therapeutic Access Worker

[188] Following the discovery of bruising on B, and the disclosure that the Teenager had self-harmed, RR's worry and anxiety about the children was extremely high.

[189] In the meantime, VACFSS had arranged for a Therapeutic Access Worker, employed by VACFSS, to supervise RR's visits with the children. On October 19, Social Worker S phoned RR to introduce her to the Therapeutic Access Worker and explain the worker's role. She says this

was a “difficult conversation” and heated from the beginning. RR was in distress – described by Social Worker S as screaming, “ranting”, and crying. She was worried that her children were being sexually assaulted. Social Worker S and Social Worker L questioned whether RR was sober, and this is recorded in Social Worker S’s notes as follows: “all present on the phone question her sobriety, due to her quick escalation, slightly slurred speech, and fixating on saying VACFSS is molesting her children”. The social workers thought it was significant that, during the call, RR confused the date of the children’s removal, saying it happened on April 9 instead of August 9. The call was right after lunch, and Social Worker S says everyone was “quite concerned about that”. The social workers raised their concerns with the Practice Manager.

[190] RR’s first access visit with the Therapeutic Access Worker was on October 21. In her supervision report, the Therapeutic Access Worker recorded that the interactions between RR and the children were positive, but that she had to keep telling RR to keep the conversation “child focused”. She specifically referred to RR talking about her mother being a residential school survivor and that the trauma made it difficult for her mother to stay sober.

[191] In her report following the next visit on November 4, the Therapeutic Access Worker recorded that RR “looked hung over and acted like that”. This is the first time in any of the reports that the supervisor speculated about RR’s use of alcohol or drugs, and there is no suggestion that RR was impaired during the visit or that substance use impacted her care of the children. This type of unsubstantiated speculation, as with speculation during their earlier phone call, would factor into VACFSS’s decision making about RR and her children. Other language used by the Therapeutic Access Worker in her reports is similarly derogatory and critical of RR, describing her as “ranting”, trying to get the Worker to “buy into her cause”, and having an “agenda”. This is different from the tone of reports written by supervisors from outside agencies (not employed by VACFSS). At the same time, the Therapeutic Access Worker did observe that RR had “very good parenting skills”.

Q. VACFSS begins planning to seek continuing custody order

[192] In her notes dated October 25, the Practice Manager recorded:

> … it has come to my attention that RR and a few of her friends have decided to start a website for individuals who feel disgruntled by VACFSS. Earlier today, RR attended our office unannounced and began accosting other clients in the waiting area, who she does not know, to ask them to join her cause. When asked to discontinue this behaviour, RR said she was staging a sit in. I arrived at the office shortly after this had begun, met briefly with RR to explain to her that such behaviour was not appropriate and that she was breaching the confidentiality of other clients. RR refused to change course and has subsequently been banned from attending the [child protection] office site.

[193] In my view, this note is revealing of the Practice Manager's attitude toward RR. To begin, there is no evidence that RR was involved in starting a website for people who "feel disgruntled by VACFSS". Rather, I accept her evidence that she had joined a Facebook group of parents involved with child protection authorities across Turtle Island. The term "disgruntled" is, in my view, dismissive of the legitimate issues that parents face when their child are in government care. In addition, I do not accept that RR was "accosting" – another loaded term – strangers in the VACFSS office. She says, and I accept, that many of the people at VACFSS are also members of her Nation or people she knows through the community, and she was talking to them. RR agrees she may have told them about the Facebook group to give them other parents to connect with. The Practice Manager's notes make clear that she viewed this behaviour as hostile towards VACFSS and minimized RR's legitimate concerns and grievances.

[194] It is true that RR was eventually banned from the VACFSS office, though it is not clear when. It appears that, after October 25, she continued to attend the VACFSS office for meetings until another incident in December.

[195] By the end of October, RR says she had no hope that she would get her kids back: "there was no hoop high enough to please them".

[196] For its part, VACFSS was moving forward in its planning for the children. At the end of October, it retained an assessor to complete the parental capacity assessment for RR. Contrary to their earlier agreements, the assessor was chosen unilaterally by VACFSS, and RR had no input into the questions posed.

[197] In early November 2017, Social Worker S completed a "Strengths and Needs Assessment" and "Reunification Assessment" to assess the possibility of returning RR's children to her. The outcome of these assessments was not positive. In the assessments, Social Worker S questioned whether alcohol use continued to impede RR's ability to parent:

> … [RR] has struggled with her alcohol use in the past … is not forthcoming about her current alcohol use however social workers and visit supervisors have noted on several occasions that [RR] was possibly hungover on visits, and there was an instance in Oct 2017 where social workers suspected [RR] was under the influence of alcohol during a phone call …
>
> It does not seem at this time that alcohol use is impeding her life and parenting time; however, as mentioned [RR] is not open to discussing this with social workers so it is difficult to have a clear idea of what her drinking looks like and how she is coping with her grief and trauma at this time.

Social Worker S also said that RR demonstrates "destructive/abusive parenting":

> The concerns that led the children entering care included disclosures by the girls that [RR] had been physically abusive towards them, burned them with cigarettes and locked them in their rooms for long periods of time by securing the door shut with bungee cords. [The Teenager] also shared that she and her mom fought a lot and that this fighting turned physical on many occasions …
>
> … [RR] has done many programs pertaining to parenting but a concern is she does not seem able to integrate changes to increase her parenting capacity …

These concerns have not been substantiated in this or any other court proceeding. I return to this below.

[198] Next, Social Worker S refers to RR's mental health, and says that she has "chronic/severe symptoms", citing RR's disclosure that "trauma impacts every moment of every single day for her". She says that RR's relationship with the Middle Children is "strained" because she "continues to tell [the children] harmful and inappropriate things such as that they were removed because the social workers said [RR] killed baby … on purpose …. Extreme

violent and destructive emotional outbursts after visits". She says that matters have not progressed since the children were apprehended:

> [RR] does not acknowledge the child protection concerns and focuses instead on making complaints [about] how her rights are not being respected. This makes it challenging to work with [RR] and make progress towards a return of the children.

Social Worker S concludes that RR "needs to address her trauma before she can create a different parenting environment for her children".

[199] Social Worker S then created a family plan dated November 8, which required RR to attend a residential program for trauma, a parenting program, trauma treatment, and alcohol and drug counseling "as needed". At this point, it bears repeating that RR had already participated in extensive trauma counseling and workshops, as well as parenting programs and drug and alcohol counseling. Of the list of expectations, the only thing she had not done was attend a residential program for trauma.

R. Suspension of access (November 2017)

[200] Unbeknownst to her, November 11, 2017, would be RR's last visit with her children until Christmas. During that visit RR made her usual inquiries about the girls' lives – asking about their day, whether they went to school, what they did, what they ate. She says, and I accept, that her practice was to ask open ended questions, always in the presence of the supervisor. In this visit, A – then eight years old – reported that one of the Hollyburn staff had pushed her into a closet, causing her to fall. RR took this very seriously. She had already been worried that the staff might retaliate against the girls after B's disclosure of the physical restraints. She felt powerless but at the same time obligated as their mother to do something to protect them. She phoned the police.

[201] RR readily acknowledges that she knew VACFSS would not be happy that she called the police. She had previously been told to bring any concerns to the social workers first. The difficulty was that she did not trust VACFSS and felt that the only way for her to have any power

in the process of investigating her children's safety was to involve the police directly. She knew, or suspected, that calling the police could have repercussions for her access to the children. She was right.

[202] It took the police six hours to arrive. This extended the visit beyond the scheduled time, and the Therapeutic Access Worker was frustrated, feeling that RR had blown the matter out of proportion. Her report about this visit was demeaning and critical of RR. She wrote that, after A's disclosure, "[RR] immediately played the abuse card stating that I was a witness". She describes RR as having an "agenda" and reported:

> Currently she is very self absorbed with her 'advocacy' and all the committees and board she apparently is now involved in. At one point she said to her girls, 'momma is going to be famous so she can help children that don't have a parent like her'.

[203] VACFSS's assessment of this incident was along similar lines. Social Worker S was frustrated that RR had leaped to assumptions which fed her own narrative about VACFSS abusing her children in care, instead of talking to the social worker to get more information. The Practice Manager says this incident furthered RR's "agenda" to be famous, which she viewed as part of RR's inability to prioritize the needs of the children over her own desires. The Practice Manager says that RR told her that she **wanted** her visits revoked so that she could shine a light on the plight of Indigenous children in care. She goes so far as to say that RR was more invested in the bigger cause than in the return of her own children. I find this deeply unfair. It is clear from all her actions that what RR wanted most was to be reunited with her children. All of RR's witnesses support the depth of her desire to be with her children and reject the proposition that she was motivated by her own ambition to become famous at any cost. Notwithstanding its claims to the contrary, VACFSS persisted in viewing her community building and activism as antagonistic and selfish and, in my view, to hold it against her.

[204] The parties met on November 13, 2017. RR attended with supports, including the Youth Worker, the Support Worker, and the Mental Health Worker. The Youth Worker describes this as the worst meeting he has been a part of in 20 years.

[205] The Practice Manager opened the meeting by warning RR and her supports that VACFSS would not tolerate “rowdiness”. She told those present that RR’s visits with the children were not going well. RR could not understand this. The Mental Health Worker commented that the Practice Manager wielded “a big stick”. The Practice Manager responded with words to the effect that the stick was about to get bigger because RR’s visits with the Middle Children were being cancelled. This was a shock to RR and her supports.

[206] I pause here to note that it is not clear when the Practice Manager decided to suspend visits altogether. In the days following this meeting, the VACFSS team was discussing the decision and gathering evidence in support of it. It is not clear what the extent of the discussion was before the November 13 meeting, or whether this was something that the Practice Manager decided and announced during the meeting, with discussions to follow. Ultimately, the exact timing is not as critical as the rationale, which I address below.

[207] The Youth Worker pleaded with VACFSS to consider the timing of this decision in relation to A’s most recent disclosure. He argued that the message to the Middle Children would be, “if you talk to your mother and police about being physically hurt by the staff looking after you, you will not see your mother as a result”. VACFSS was resolute in its decision, and the Youth Worker says he felt like he was in the “twilight zone”. He says it was clear to him that VACFSS was “using the children as the leverage in their ever-developing conflict with the parent”.

[208] Throughout this meeting, RR and her supports could not understand why the visits were being cancelled. RR was crying. The Practice Manager made a comment about RR being disrespectful to the staff, which RR understood to relate to a complaint she had made about a VACFSS team leader approaching her in a pub in 2016. The Youth Worker says, and I accept, that nothing that VACFSS said in the meeting to justify its decision made any sense.

[209] In her notes of this meeting, the Practice Manager wrote that RR was “not capable of emotional self regulation for more than a few minutes”. I do not accept that. The Youth Worker and the Mental Health Worker both testified that RR was respectful in this and other meetings,

though she was defensive at times and did, as I will explain, become escalated at the end of this meeting. The Mental Health Worker says that RR has an “enormous ability to self-regulate” – something I also observed during the course of this long and difficult hearing. RR never used profanity or personally insulted anyone. At most, her witnesses say she would “smirk” or shake her head in disbelief and continue questioning VACFSS’s decisions that did not make sense to her.

[210] Towards the end of the meeting, RR was questioning what the consequences would be of the Therapeutic Access Worker telling her not to call the police about A’s disclosure. She said that the Therapeutic Access Worker was upset because she had to stay later to wait for the police. At this point, the Therapeutic Access Worker lost her temper and responded, “I cancelled my fucking dinner plans!” RR became very upset and insisted that the Therapeutic Access Worker apologize for swearing at her. She was escalated, and voices were raised. The Youth Worker says that this comment brought “tensions to a boiling point just short of a physical brawl”. VACFSS told RR to leave or they would call the police. She left. The Therapeutic Access Worker did later apologize to RR, and RR accepted the apology.

[211] In her notes written after the meeting, the Practice Manager said that the Therapeutic Access Worker’s swearing “appears to have been precisely what RR was waiting for”. She describes RR’s response as “menacing” and says she lit a cigarette inside the foyer of the building as “another attempt to see if she could bait someone into offending her”. RR and her supports all deny that she did this, and I prefer their evidence that RR took out a cigarette and lighter as she was leaving, and lit it outside. Again, these notes are revealing of the harsh light through which the Practice Manager viewed RR.

[212] Following this meeting, both the Family Support Worker and the Youth Worker wrote to VACFSS to express their concerns about what had transpired. The Family Support Worker says it was “exceptional” for her to do this, but she felt that the Practice Manager had been unprofessional and things had gone too far. The Practice Manager responded to the Family Support Worker’s email. She acknowledged that the Therapeutic Access Worker’s comment was “inappropriate” and said the worker had taken full responsibility. Then she went on:

> What I was equally aware of is that your client shouted about that comment for several minutes – essentially disturbing most of the people working in the building. I was not aware of efforts of yours to calm your client. In fact, when [RR] eventually agreed to leave the room, she walked down the stairs and proceeded to light a cigarette inside our building! – which she would know is prohibited by law and by common courtesy. After more yelling, on [RR's] part, she was eventually agreeable to leaving the building.
>
> Thank you for your concern about the meeting. It is my hope that, going forward, a higher degree of mutual respect and cooler heads will prevail for the sake of your client and her children.

[213] On November 29, 2017, VACFSS applied for a continuing custody order for RR's children. If granted, the order would allow VACFSS to terminate the children's relationship with RR and to consent to their adoption: *CFCSA,* s. 50; *BB* para. 2. Dr. Turpel-Lafond explains that, in most cases, "by the time the children is [under a continuing custody order] … the relationship has pretty much been severed with the birth parent in particular".

S. Rationale for the suspension of access

[214] The Practice Manager says that, by this point, "things were deteriorating quite rapidly and were a sharp contrast to what the therapeutic doctors involved were recommending" for the children. She determined that the situation needed a "reboot". Ultimately, I agree with the Youth Worker's assessment that VACFSS was locked in its conflict with RR and responded by asserting its power over her access to her children.

[215] The Practice Manager testified that the November 11 visit was not the reason for the decision to suspend access. In my view, it clearly was. One of VACFSS's primary concerns about RR was its perception that she was constantly questioning and criticizing the quality of the children's care and, in doing so, undermining the Middle Children's trust in their other adult caregivers. VACFSS perceived this as evidence that RR's true agenda was to expose the injustices of the child welfare system, rather than to act in the best interests of her own children and address the child protection concerns it had identified. Though they may have described it differently, the VACFSS team shared the Therapeutic Access Worker's assessment

that RR responded to A's disclosure by "playing the abuse card" and that this was not in the children's best interests.

[216] Aside from the November 11 triggering event, the VACFSS witnesses gave a number of reasons for the decision to suspend visits. I consider each in turn.

1. Clinical recommendations

[217] VACFSS says that clinical recommendations for the Middle Children supported a suspension of access with their mother. They point to two sources: the children's therapist, and their psychosocial assessment.

[218] At the outset, I observe that none of these recommendations cited by VACFSS accounted for the girls' Indigeneity and the importance of their culture. This is a significant omission, which failed to consider one of the primary strengths in RR's connection to her children, and the acknowledgements in the *CFCSA* and international documents that Indigenous children have a right to their culture: Convention on the Rights of the Child, Article 30; UN Declaration on the Rights of Indigenous Peoples.

[219] The VACFSS witnesses each testified that the Middle Children's therapist had recommended that the children have no face-to-face contact with RR. This was also a theme in their written communications during this period. In her notes, the Practice Manager wrote that this was a recommendation that the "therapist … and others had been recommending… for months". The therapist did not testify and so this assertion is hearsay. However, when the therapist did eventually make written recommendations, at VACFSS's request, she did not recommend zero contact. I am not satisfied that the therapist recommended, based on all the relevant information, that access between the children and RR be suspended.

[220] The evidence of the therapist's alleged recommendation is a note by Social Worker L of a phone call on October 23, 2017. This note was disclosed after Social Worker L's testimony and she could not be recalled to testify about it, or the conversation. The note says that the therapist had met with the children nine to ten times and that her "recommendation for access

is to have none, retraumatizing, don't know full scope of trauma, can't regulate emotions". It says the therapist recommended that contact be only through writing letters. Subsequent emails between social workers also refer to this recommendation. Parenthetically, I observe that the therapist never met RR or observed her interactions with the children. The only information she had about that relationship was from VACFSS and directly from the children.

[221] The day **after** VACFSS told RR that the visits were being suspended, Social Worker P emailed the therapist to report that the November 11 visit had gone "very badly and there was severe behaviour leading up to the visit". She wrote:

> Writing today to follow up on something [Social Worker L] said (I believe). Was it you who recommended that the girls not have any face to face contact with mom at present and only through letter writing?
>
> If this was you – did you ever put this in a written report …
>
> Can you tell me a little more about this recommendation?

In response, the therapist agreed to make some recommendations for the girls and asked to be copied with information about incident reports and other documents. This belies the suggestion that the therapist had already made her recommendation that the children have no in person contact with their mother.

[222] While it awaited the therapist's recommendations, VACFSS continued to assert that she had recommended no in-person contact, including in response to a query from the Aboriginal Services Branch. When the therapist did finally put her recommendation in writing on December 1, 2017, she said something different. Regarding the Middle Children's access to RR, the therapist recommended that "visitation with biological family be time-limited, consistent, closely supervised and highly structured so that it may set the family up for success" and that the visits "focus on quality over quantity". By this time, however, the Middle Children's access to RR had been suspended and would remain so.

[223] Next, the Practice Manager referred to the Middle Children's psychosocial assessments, which recommended that caregivers ensure "stability, predictability and nurturance, supporting

child-centred visits, providing behavioural support." In her view, their visits with their mother were not meeting these needs. (This was not, I note, the same standard being applied to the Middle Children's experience in their staffed residence.) In an internal VACFSS email dated October 26, a social worker recorded that the assessing doctor would be recommending "a 2 parent family with lots of hugs, nurturing and love" and that they have no face-to-face access with RR. Again, the evidence before me in this hearing does not allow me to conclude that the doctor ultimately made this recommendation or what the basis of any such recommendation would be. The reference to a "2 parent family" suggests that RR's status as a single mother was a factor potentially disqualifying her from giving her children the care that others were deciding they needed.

[224] Ultimately, while I accept that the Practice Manager genuinely believed that the children's time with their mother was contrary to their mental health needs, I have found that her assessment was tainted by a number of factors, including most significantly her negative perceptions of RR and their interpersonal conflict. Stripped of these considerations, the children's psychosocial reports do not amount to a clinical rationale for cutting off their access to their mother entirely.

2. Children's behaviour in Hollyburn home

[225] There is no dispute that the Middle Children were displaying very escalated and difficult behaviour in the Hollyburn home. None of this was reported to RR at the time, and she only learned the full extent of the behaviour during this hearing as critical incident reports were disclosed and the various witnesses gave their evidence. VACFSS's assessment was that their time with RR was triggering to the Middle Children and was a catalyst for some of their most challenging behaviour.

[226] The difficulty with this assessment is that it ignores or downplays other very significant issues in the girls' lives during this period. To begin, the children had displayed highly escalated and even violent behaviour throughout their time in foster care, and had spent nearly the first nine months of their time in care without any mental health supports. This behaviour became

more extreme after they moved into the Hollyburn facility, where they were cared for by rotating staff working on shifts. By the Hollyburn Supervisor's own description, the first months in the house were "chaos" – quite contrary to the clinical recommendations that the children be in a "safe, nurturing" environment marked by "stability, routines, and a sense of order and predictability". There was high turnover among the staff, who were challenged by the girls' behaviour. In the October 2017 protocol investigation into the use of physical restraints on B, there is a record that B – six years old – still did not even know the names of some of the staff who were caring for her. While some of their escalated behaviour can be connected in time to an access visit, not all of it is.

[227] I accept that each visit with their mother also brought a new separation from her, which was clearly difficult for the Middle Children, who loved and wanted to be with her. I accept the likelihood that this sometimes manifested in escalated behaviour that was difficult for the caregivers to manage. I do not, however, accept that it was reasonable for VACFSS to attribute all of the children's behaviour to their mother or that an appropriate solution was to suspend their access to her.

3. RR scaring and manipulating the Middle Children

[228] VACFSS's primary, and ongoing, concern about RR was about the type of conversations that she was having with, or around, the Middle Children. There were two pieces to this.

[229] First, VACFSS was concerned that the subject matter of these conversations was inappropriate and potentially traumatizing for the children. The Practice Manager says that RR "continued to tell the children very terrifying things about the foster care system that they were imminently going to have to return to each time" and that she "continued to pull the conversations with her children that were taking place in a very short period of time … to being about herself and her needs, which is not the jobs of a six and eight year old to respond to". As an example of the "terrifying things" that she says RR was telling her children, the Practice Manager says that RR told the children "they're being poisoned and their organs are being harvested". I do not accept this.

[230] RR did ask the Practice Manager about what happens to the bodies of children who die in care. She had read an APTN article online, with the headline: "Grand Chief 'horrified' Alberta quietly allows organ harvesting from children who die in provincial care". She says that she was curious about what happened in BC, particularly in light of her experience of losing a child and of the critical incidents experienced by her children in care. The Support Worker and the Mental Health Worker both testified that harvesting organs is a fear, and topic of conversation, among survivors of residential schools and around missing and murdered Indigenous women and girls. At the same time, they say that they never heard RR speak about that concern, particularly in front of the children. There is nothing in any of the supervised visit reports to support that RR was telling the Middle Children that their organs would be harvested, or they were being poisoned. These are the types of comments that, if they had been made, would have been recorded. Further, RR says, and I accept, that if she really believed that her children were being poisoned or in imminent danger, she would have called the police – as she did on the two occasions when she did fear they were being mistreated.

[231] Second, VACFSS says that the girls were being primed by RR to make allegations of abuse. This concern was articulated in an email from Social Worker S on November 14, in which she wrote: "RR has stated to several VACFSS workers that she will continue to make complaints and allegations that her children are being abused in care" and that she will continue to tell her children "to make allegations that they are being abused". Social Worker S said that A's allegation of being pushed into a closet was not true, and that she had thrown herself into the closet and made good on her threat to report that the Hollyburn staff had hurt her on purpose. Social Worker S says this is a pattern of increased behaviour. She concludes that "it seem[s] like this is coming from their mother."

[232] I accept that RR was resolute in her intention to talk to the girls about their wellbeing and to report any issues of concern. However, I do not accept that she was manipulating or priming the girls to make unfounded allegations of abuse, or that the concerns that she did report were unfounded. The only times that RR phoned the police with concerns about her daughters were after the discovery of bruising, which was a substantiated report of

inappropriate physical restraints, and after A alleged she was pushed. She phoned the police a third time, not during an access visit, to inquire about whether certain sleep habits were normal for children, but did not escalate this concern beyond making the inquiry. This is hardly a pattern of making false, unsubstantiated, or numerous allegations of child abuse.

[233] Nor is there evidence in the supervised visit reports to support that RR was interrogating her children or encouraging them to falsify allegations. RR testified, and I accept, that she expressed curiosity about the girls' lives and asked open ended questions about their care. She nurtured a relationship in which her children could share their fears, worries, and hardships. In VACFSS's interview of B following the application of physical restraints, B repeatedly identified her mother as an adult she would go to for help. At the same time, RR was clearly afraid about her children being in care, and deeply worried about the potential for abuse or self-harm. She was not allowed any contact with their caregivers and was not included in any discussions about their home life. She did not trust VACFSS and, by this point, VACFSS had a very poor view of her. The relationship was highly conflictual. I accept that RR did make comments on their visits that would have alerted the Middle Children to her fears and this conflict. Some of the topics that VACFSS considered inappropriate included: VACFSS's visit expectations; the girls' removal and placement; a boil on her mother's leg; residential schools and trauma; addiction; RR's "advocacy" relating to child welfare and VACFSS; the child protection trial; and the girls' clothing.

[234] I appreciate that VACFSS did not want these types of topics discussed during access visits, which were supposed to focus on the children and their attachment to RR, and that VACFSS wanted any conflict or concern to be mediated by the social workers. I also appreciate and accept that this put the Middle Children in a very difficult position, torn between two sets of adults in their lives. However, I am not satisfied that any of RR's conduct amounted to manipulating or encouraging the children to make false allegations.

4. RR saying she would sabotage her visits

[235] VACFSS says that RR told the Therapeutic Access Worker that she would continue to "sabotage" her visits with the children. The Therapeutic Access Worker did not testify and RR denies saying this, or at any time trying to sabotage her visits. I do not accept that is something that she would do. RR was deeply committed to her time with her girls, and all of her fight was to have them returned to her. She understood that, by phoning the police or reporting allegations of abuse, she risked having her visits reduced or cut off entirely. She was not willing to stop doing what she thought was in the children's best interest. Though VACFSS may have viewed that as "sabotage", I do not think that is a fair assessment, or a reasonable explanation for suspending access.

5. RR's failure to acknowledge child protection concerns and comply with VACFSS's requests

[236] Finally, the Practice Manager says that it was significant that RR still would not do the two things VACFSS had asked of her: residential trauma treatment and a parental capacity assessment. It was of ongoing concern that RR had never acknowledged the child protection issues. It is true that, even in this hearing, RR maintains that she did not do the things alleged, namely hit and pinch the girls, burn them with cigarettes, or lock them in their rooms for extended period without food. It bears repeating that the children have since retracted some of their original allegations and the others have never been substantiated through any investigation or findings of a court.

[237] In her final visit with the Middle Children, the issue arose about RR confining the girls to their room using a bungee cord – which was a primary reason they had been apprehended. The Therapeutic Access Worker reported to VACFSS that RR had demonstrated how she used the bungee cord to close the children's door while they were in time out:

> … [RR] got to talking about the fact that her kids shouldn't even be in care. In this, at some point she said, "I'll show you. I think I still have the bungee cord". She got a cord from closet hooked it around bedroom door handle … When she was done I had a big smile on my face, and even giggled, at which she said "what?" I shared that my daughter in law and I had tried

> the same thing, my granddaughters were in time out but wouldn't stay in their room. Before I could even finish the story, she said 'see'. I then stated that can't be the only reason the girls were taken into care at which she quickly changed the subject.

Social Worker S testified that this was very significant because it was the first time that RR was accepting any responsibility for the child protection concerns. Her impression was that RR "was more boasting … or quite proud, almost, that she had done that". In fact, RR had always maintained that she only used the bungee cord to keep the children in their rooms during age-appropriate time-outs. In Social Worker L's notes from the date of the removal on August 9, 2016, she wrote that RR "admitted to locking in room with bungy chord" [as written]. In the note above, it is the Therapeutic Access Worker – not RR – who was smiling and giggling, which makes it difficult to understand how RR could be taken as proud or boasting. Rather, it seems that RR was incredulous that this was a reason her children were in care. Social Worker S's interpretation of this report, once again, rested on untrue information and cast RR in the worst possible light.

[238] Overall, it is difficult to understand what a parent can be expected to do when they disagree that there were child protection concerns to warrant the removal of their children. The only thing that they can do is what RR did, which is to challenge the removal through the court process. For RR, that process ultimately took over two and a half years and never resulted in any finding about the legitimacy of the original concerns. In the meantime, her refusal to accept VACFSS's child protection allegations was an ongoing issue of concern for the social workers and was a factor in the suspension of access and in prolonging their time in care.

[239] Aside from a single visit on December 23, the Middle Children's access to RR was suspended entirely until June 25, 2018.

T. RR banned from VACFSS office (December 8, 2017)

[240] On December 8, 2017, there were nationwide demonstrations about child welfare system, under the title "Operation Red Bird". RR and others participated in action in Vancouver.

They demonstrated at a few locations, ending with VACFSS. At VACFSS, they drummed and sang for their children in care who would have to spend Christmas away from their families.

[241] The Practice Manager came out to the demonstration. She says that she joined in singing before telling the people to leave. From RR's perspective, it felt like they were being mocked. It is undisputed that the Practice Manager made a gesture of putting her wrists in handcuffs to signal that she would call the police if they did not leave. The Practice Manager explains that one of the other parents present had a no-contact order prohibiting her from attending the office.

[242] From that day onward, RR was banned from attending the VACFSS office.

U. Christmas visit (December 23, 2017)

[243] In this period, the parties were engaged in mediation through the court. As part of that process, they agreed that RR could have a Christmas visit with the Middle Children. That visit took place over four hours on December 23. The visit was supervised by the Therapeutic Access Worker.

[244] In her visit report, the Therapeutic Access Worker said that "on two occasions [RR] was required to be reminded that she was not to ask certain questions or discuss certain things regarding placement or VACFSS". The trigger for this comment was that RR learned that B had regressed and was wetting the bed, and she was concerned about potential sexual abuse. Like the other reports, the Therapeutic Access Worker inserts her own judgements and speculations, for example speculating that the girls did not tell RR about their recent adventures because they "are aware that Mom would find something wrong".

[245] In her evidence, the Practice Manager says that the Therapeutic Access Worker contacted her for help during this visit because B was not being attended to. She says that RR became angry about this and they were concerned it would escalate, and so the Practice Manager ended the visit. She says that RR introduced her to the children as "the woman who took you away and stopped your visits". In a January 5 email, Social Worker S said that the visit

had been cut short “due to mother verbally abusing the therapeutic access worker”. None of this is reflected in the supervised visit report, and it was not put to RR in her testimony. I am not prepared to make a finding that it happened.

[246] In an email dated January 5, 2018, Social Worker S reflected on the Christmas visit and concluded that “Mom’s access will not be changing in the near future”.

V. No access (January – June 2018)

[247] The Middle Children went to the same school as RR’s niece. In January 2018, RR tried to steal little moments with her Middle Children when she was taking her niece to and from school. The Practice Manager emailed her to warn that if the school saw her on the property again, they had been directed to phone the police. After that, RR withdrew and stopped going to the school.

[248] The next time RR saw the girls was in the spring, when her bus happened to drive past the girls on the street. RR was so happy and excited, she jumped off the bus and gave them hugs and kisses. Their interaction was short, and RR quickly got on the next bus. In the meantime, however, the Hollyburn staff had already called the police. Social Worker B agrees this was “overkill”, but Social Worker S defends the decision that the staff made “in the face of a menacing and threatening parent”. Contrary to this characterization, Hollyburn’s own report of this encounter was that “[RR] was very respectful and appeared to be in good spirits … and the visit went exceptionally well”. In my view, the incident speaks to the degree to which the Hollyburn staff had been primed to view RR as a threat, and Social Worker S’s entrenched negative opinion of RR.

[249] During this time, RR did not see the Baby at all.

[250] In the meantime, RR’s time in supportive housing had expired and she became homeless. Between February and June 2018, she stayed in shelters and at friends’ houses. There was a period when VACFSS could not reach her. Her mother phoned Social Worker S several times, very distressed and worried about RR and the children. RR says this was a difficult

time. The trial for VACFSS's application for continuing custody was scheduled to begin on March 13, and March 27 was the anniversary of her son's death, which was always a hard time of year.

[251] During this period, Hollyburn staff were asking Social Worker S for permission to change or cut A's hair to make it easier to manager. A has textured hair, and the staff were reporting it was taking up to two hours to untangle every day. A was also asking for a change. Social Worker S reported back that RR would not consent to a haircut, "not even a trim".

[252] RR explains that hair is sacred in her culture and her tradition. Hair connects a person to their ancestors. There is a protocol and process to cutting hair, which includes smudging it and burying it in the mountains. Failing to follow that protocol is disrespectful. She understood that A wanted to cut her hair, but says that the Middle Children did not understand the traditions because they were not in their culture. She told Social Worker S that, if they were going to cut A's hair, she wanted them to give her the hair so she could bury it. She says Social Worker S brushed off the request. In the end, A's hair was cut without her permission and without giving her the hair. From RR's perspective, this was a "real insult" to her culture.

[253] The continuing custody trial began on March 13 and would continue on various dates through to the end of October. I have only minimal information about this process.

[254] On March 22, VACFSS proposed to resume visits between RR and her children by having her meet with each child individually for about 30-60 minutes, once per week. Social Worker S set out the expectations for these visits in a letter dated March 22:

- Your visit time is for you to spend quality time with one of your daughters at a time. No one else (besides the supervisor) is permitted to be on the visit. If other people attend the location of your visit, your visit [will] end.
- Your visit is to remain in the location that has been set … We expect that you will engage fully with your child in the activity and focus on fun and learning together.
- The visit is to remain child-focused at all times. This means that there is to be no discussion about trial, media, etc, and no questioning of your children beyond what is child appropriate, i.e., asking if they did anything

special at school for Easter. If you speak about inappropriate topics to your child or the supervisor in front of the child, your visit will end.

- Since the duration of your visits will be shorter than what you previously had, it is very important that you are on time and prepared for each visit, in order to make the most of the time you do have together …

RR continued to resist the idea of meeting with her children individually, and was very unhappy with the reduction in time. She was not included in the planning or discussion process about these visits and felt that VACFSS was working against her. Visits did not resume at this time.

[255] Social Worker S says that, during this period, RR was "very escalated" and focused on her "Facebook group". On March 23, she emailed Hollyburn staff and the Middle Children's therapist to set up a plan to avoid "the issue of mom being aggressive with [Hollyburn] workers". She says that the only reason there had not been a serious incident already was because VACFSS had "tightly managed" RR's interactions with the staff, which was a "full time job". Again, I find this an unfair characterisation of the level of threat posed by RR, which poisoned the view that others had about her.

W. Access resumes, conflict escalates (June – December 2018)

[256] In June 2018, Social Worker B took over the Middle Children's files. Her relationship with RR was strained from the outset. By this point, there were no visits happening and most of the parties' communications were through the lawyers. Visits were eventually reinstated in June RR says at the direction of the Provincial Court judge. All visits were now supervised by VACFSS employees, including Social Worker B.

[257] The first June visit was a celebration of B's birthday at the aquarium. Notwithstanding the happy occasion, it was a difficult visit. RR was disappointed that family and friends could not attend, and that it was only two hours. She felt overly managed and criticized for small things. Social Worker B accepts that having the social worker supervise the visits was triggering for RR and made it difficult for her to focus on the children. In her visit report, Social Worker B recorded that RR expressed concerns about how A's hair was being cared for and told the girls that the limits on their visit had been decided by the social workers. There were power

struggles within the visit. For example, RR wanted to take the girls outside near the forest to smudge, but Social Worker B said that they could not go near the forest because the visit was for the aquarium. When RR went to follow one of the girls into the bathroom, Social Worker B told her that the child could go on her own. This was upsetting to RR, whose habit was to go in with her children to wipe down the seats before they use the toilet. When RR wanted to say goodbye to the girls at the car, and wave at them until they were out of sight, Social Worker B told her that was not the arrangement for this visit. RR recalls feeling very criticized the whole visit. Throughout, she made comments about their time being too short.

[258] After this, RR says she felt she had no choice but to finally agree to one-on-one visits with the children. VACFSS gave another letter of expectations dated July 6, 2018, explaining that the individual visits would be for one hour "at a location agreed upon in advance". Family visit would be two hours "at a location agreed upon in advance" and be supervised by a supervisor and an additional VACFSS staff. All interactions were to be monitored and the visits would be child-centred and structured. The letter warned that "If at any time during the visit, any of the child's rights to access are compromised the visit may be terminated".

[259] VACFSS explains that its intention with these visits was to "front load" the Middle Children as much as possible by giving them information about what to expect during each of the visits. This was one of the recommendations of the mental health professionals working on the team and one of the ways that VACFSS was trying to anticipate and minimize unexpected interactions with RR. For each visit, RR was given the choice to go to a park or meet the girls at the VACFSS office. She always chose the park option, and Social Worker B would choose the park – usually the one closest to the VACFSS office so that she could have support if necessary. Unfortunately, this approach took away any residual power RR may have had in her interactions with the children, and escalated the parties' conflict.

[260] At the July 24 family visit, the Hollyburn staff arrived early to pick up the Middle Children and saw RR. This was unplanned, and staff (none of whom testified) later described that RR had an "aggressive outburst" towards them. I prefer RR's account, that the staff person jumped into the car when they saw each other, and tried to hide her face behind a paper. This

was humiliating for RR, who felt like she had a “virus”. RR made a comment about refusing to hide, and then told the kids she loved them and left. After this, Social Worker B continued to work to ensure there was no contact between RR and the Hollyburn staff. It is apparent that the Hollyburn staff continued to view RR as a threat. In an August 3 email, Hollyburn expressed concern that they had seen RR near one of the caregivers’ apartments. The email made note that “at no time has [RR] appeared to be intoxicated or behaving abnormally”. This note suggests there may have been some reason to expect that she would be, which reason could only have come from VACFSS.

[261] On August 2, RR’s visit with the Middle Children was supervised by a family preservation counselor. They had sushi and, at RR’s request, went to Adanac Park. They had a lovely time, and at the end of the visit, one of the girls said they wanted to go back to that park again.

[262] The next visit was supervised by Social Worker B. It went very badly.

[263] At the beginning of the visit, RR asked the girls if they wanted to go back to Adanac Park and they both excitedly said yes. Social Worker B intervened to say that was not the plan, and that their options were to go to the park across the street or stay in the VACFSS office. She explains that it was not possible to go to Adanac Park because of documented concerns of “public outbursts” and the need to have quick access to the VACFSS office, staff, and managers. Social Worker B would not support visits so far away from VACFSS managers.

[264] Social Worker B says that RR became immediately escalated and made a “large scene”. She asked RR to step outside to have the conversation away from the children, and she refused. Other VACFSS staff arrived and tried to intervene. Social Worker B then determined that the wellbeing of the children was compromised and that she had to end the visit. The Middle Children were crowding around their mother, yelling at her and the other supervisor to leave their mother alone. Social Worker B called the police.

[265] According to Social Worker B’s report, RR called her lawyer and talked to her on speaker phone. The lawyer told RR to “record staff, film everything, I don’t trust them at all”.

[266] RR began filming on her phone. Social Worker B asked her to stop filming and she refused. RR told her children not to go with the social workers and told them that they would be coming home soon. She asked the Middle Children to repeat how they were being mistreated in care and encouraged them to "tell their story".

[267] For her part, RR recalls feeling "totally shut down". At some point, she sat down in a chair and started feeding the children. Social Worker B told her not to do that, and if they did not leave with her right now, she would cancel the visit. RR did not move.

[268] When the police arrived, RR was emotional. She told the officer that VACFSS did not care that her children were being seriously physically assaulted by the staff and pleaded with B to tell the officers again about the restraints. She was holding her children and asking the police if they were going to pull her children's fingers off her body and drive her out to the middle of nowhere and "leave me like all Indigenous women". An auntie arrived and began taking pictures and singing. RR was emotional testifying about the feeling that she refused to give up even though she knew she "couldn't win". She knew that, after this incident, she probably would not be allowed to see the girls again. Her lawyer tried to speak to Social Worker B about why the visit was being cancelled, but Social Worker B redirected the lawyer to speak to the Director's lawyer.

[269] Eventually RR left, and Social Worker B took the children. Social Worker B says this incident raised *CFCSA* s. 13 concerns about the emotional safety of the children.

[270] After this, visits were temporarily placed back on hold again. Social Worker B issued another letter of expectations, adding additional expectations that there would be "zero tolerance for video or audio recording during visit"; the "visit meeting location will begin in the family room at [the VACFSS office]"; and "visits will not include additional parties which have not been preapproved by social worker." She also reminded the school that RR was not to have unsupervised contact with the children, and instructed the school to call if they saw RR at the school.

[271] This was a very difficult time for RR. In her testimony, she recalls that she would wake up every day with tears in her eyes, wondering how she could breathe. She spent the nights replaying things in her head. She was using medicinal cannabis, and was tired and stressed. In a supervised visit report dated September 26, the family preservation counsellor interpreted RR's exhaustion negatively:

> FPC … observed [RR] to have a lower affect than usual. This was seen by [RR] having a quieter voice, slower speech and a flat facial affect. FPC … also was usure whether or not she smelled alcohol residue on [RR]'s clothes.
>
> …
>
> Overall, [RR's] energy level was much lower than usual. FPC … did not smell alcohol on [RR's] breath and had no concern of [RR] being intoxicated in the visit but queries if [RR] was recovering from alcohol consumption the evening before as FPC … queries the smell of alcohol odor from [RR's] clothing.

RR says, and I accept, that she was not drinking during this time. Even if she were, there is no suggestion that she was impaired around the children or that it otherwise impacted her relationship with them. Regardless, this type of speculation and judgement about her sobriety continued to be part of her record.

[272] In September 2018, during the court proceedings, VACFSS offered to withdraw its application for a continuing custody order and agree to a six-month temporary custody order with a plan for reunification. RR rejected that proposal because there was disagreement on key terms.

[273] In the meantime, visits supervised by Social Worker B continued to go badly. At a visit on October 25, Social Worker B says RR was making comments in front of the girls that were "fear inducing", including that Social Worker B did not want the kids to practice their culture or to ever return home. When she tried to end the visit early, RR refused and asked: "what are you gonna do? Grab them? Take them from my arms?". RR told the children that, after this, Social Worker B would not let them see her anymore but that she was going to fight for them in court.

It is apparent that, by this time, these visits – supervised by a social worker who was also on the other side of court litigation – were untenable.

[274] After this, visits were put on hold again. Social Worker B took the position that she would continue to advocate for the visits to be on hold “until we have evidence that the mother is taking steps to address her behaviours during visits”.

[275] On October 29, the BC Provincial Court ruled that the parental capacity assessment that VACFSS sought to rely on was inadmissible. The judge concluded that the assessor’s report was “not logically relevant; was not necessary and was not prepared by a properly qualified expert”. Among other things, the judge found it significant that the assessor never observed RR interact with her children and had relied on hearsay records to draw conclusions about her ability to parent. This is the only decision the court would make regarding the child protection proceedings.

[276] The last visit that RR had with the children in 2018 was another Christmas visit on December 23, this time at the VACFSS office. RR says this visit was a “real struggle” because she was not comfortable in the office. Nevertheless, the supervisor reported that it went well.

[277] This is the end of the period at issue in this complaint, but for the sake of completeness I will include a “postscript”.

X. Postscript: The children return

[278] In April 2019, after a three-day healing circle through the Indigenous Court, the parties agreed to a three-month temporary custody order, on conditions that:

a. RR would secure housing.

b. RR would engage in trauma counseling, ongoing parenting programs, never be under the influence of non-prescription drugs or alcohol in the presence of the children, and would always supervised by a responsible sober adult.

c. The Middle Children would continue mental health services.

d. The family's file would be transferred back to the Ministry of Child and Family Development.

RR did secure housing, and the Baby was returned, full time, by July 31, 2019. The Middle Children moved back on September 1, 2019.

[279] At the time of this hearing, all of the children were doing well in RR's care. They are active in their culture, and the Middle Children have been leaders in events honouring missing and murdered Indigenous women and girls. They smudge, participate in Pow Wow, and love dancing and drumming in their ribbon skirts. The Teenager graduated high school and is going to university – an opportunity that RR and her parents never had.

[280] RR is a community leader and has been blanketed for her contributions in the Indigenous community. Her witnesses testified with pride about her success. The Support Worker calls RR a "phoenix rising", who is beautiful to watch with her children. The Family Support Worker calls RR "one of my success stories" who "enlightens me". RR's eyes sparkle when she is looking or talking about her children, and she cares for them "on all spectrums of the medicine wheel".

VI FINDINGS OF DISCRIMINATION

[281] As I have said, the burden is on RR to prove that: she has characteristics protected under s. 8 of the *Code*; she was adversely impacted in respect of VACFSS's services; and her protected characteristics were a factor in that adverse impact: *Moore* at para. 33. I am satisfied that she has met this burden, and so it falls to VACFSS to justify those impacts.

[282] I begin with RR's protected characteristics.

A. Protected characteristics

[283] As an Afro-Indigenous woman, there is no dispute that RR is protected from discrimination based on her race and ancestry. She has a dark brown complexion and is protected from discrimination based on colour. RR also alleges discrimination based on mental

disability. VACFSS disputes that the ground of mental disability is engaged in this case, but I am satisfied that it is. There are two elements to this.

[284] First, the parties have referred throughout the proceedings to RR's "trauma". While "trauma" on its own is not a mental disability, in RR's case it did manifest in a number of conditions including anxiety, depression, and post-traumatic stress disorder. Those diagnoses were made by the Doctor in the PWD application, and are consistent with other evidence in this hearing. While I appreciate that RR and the Doctor disputed or resiled from some information in the PWD application, their evidence did not undermine those diagnoses and I accept that they apply. Further, it is apparent that, throughout its dealings with RR, VACFSS at least perceived that she had mental health challenges that had to be addressed before it would consider returning her children. For example, in the November 2017 Strengths and Needs Assessment, the social worker opined that RR "needs to address her trauma before she can create a different parenting environment for her children". This perception of persistent impairment from a mental health condition is itself enough to engage the protected ground of mental disability: *Granovsky v. Canada (Minister of Employment and Immigration),* [2000] 1 SCR 7 at para. 29; *Klewchuk v. City of Burnaby (No. 6),* 2022 BCHRT 29 at paras. 354-355.[8]

[285] Second, VACFSS perceived that RR had an alcohol use disorder that required ongoing attention and treatment. Among other places, this is reflected in the File Documentation Review, the social workers' ongoing attention and concern about RR's alcohol use, and the final terms governing the return of the children, which included a requirement that she abstain from alcohol or drug use in the presence of children. Addiction, including the perception of addiction, is captured by the protection against discrimination based on disability: *Stewart v. Elk Valley,* 2017 SCC 30 at para. 3.

[286] I am satisfied, then, that RR is protected from discrimination based on those characteristics specifically at issue in this complaint – race, ancestry, colour, and mental

[8] The legislation refers to "mental disability", and I find this ground is engaged. Throughout these reasons I use terms like mental health conditions or trauma interchangeably with disability to describe RR's more specific characteristics.

disability. However, this Tribunal has long recognized that people are not simply a bundle of "disembodied and distinct grounds" which experience discrimination separately and independent of one another: *Radek v. Henderson Development (Canada) and Securiguard Services (No. 3),* 2005 BCHRT 302 [***Radek (No.3)***] at paras. 463-465; *Campbell (No. 4)* at paras. 12-13. I do not consider these four characteristics in isolation from each other, or from RR's other relevant circumstances. I take an intersectional approach, which accounts for the interrelationship between multiple identities, and power structures, that shape people's lives.

[287] In this case, it is important to acknowledge that RR is a racialized Afro-Indigenous woman with disabilities, an intergenerational survivor of residential schools, single mother to children with their own health challenges, who is living in poverty in an urban centre. As West Coast LEAF points out, "each of Indigeneity, sex, and mental health disability can be considered as its own risk class within the child welfare system, especially where it intersects with poverty". This Tribunal must be alive to cases – as here – where these characteristics overlap, with compounding effects.

B. Adverse impact

[288] There is no dispute that RR was adversely impacted in her dealings with VACFSS throughout the period of this complaint. Most significantly, VACFSS separated RR from her children by retaining custody over them. As the Supreme Court of Canada has recognized, "state removal of a child from parental custody … constitutes a serious interference with the psychological integrity of a parent" and restricts their *Charter* right to security of the person: *G(J)* at paras. 61 and 69. For the purposes of the *Human Rights Code,* it constitutes an adverse impact: see generally *KW v. BC Ministry of Children and Family Development (No. 2),* 2021 BCHRT 43 at paras. 84-86.

[289] VACFSS argues that the Tribunal does not have jurisdiction to consider whether its ongoing custody of the children violated the *Code.* I disagree.

[290] The Tribunal cannot review decisions made by the BC Provincial Court in relation to custody or access: *Gonzales v. Ministry of Attorney General,* 2009 BCSC 339; *Brar v. BC*

Veterinary Medical Association, 2015 BCHRT 151 at para. 42; *Higgins v Catholic Children's Aid Society,* 2016 HRTO 415. However, in this case, the Court has not made any decisions related to RR's children. All of the interim and temporary custody orders which continued VACFSS's custody over the children during the relevant period were entered into by consent. They were necessitated by VACFSS's ongoing assessment – which RR always disputed – that the children were in need of protection.

[291] The parties disagree about the significance of the consent orders. VACFSS argues that when custody orders are made by consent, there is "a presumption that the [children] are in need of protection". It submits: "If a parent does not believe there are protection issues they can have the matter adjudicated. A court will not make an order to keep a child in the care of the Director if there are no protection issues". I agree with RR that this submission is inconsistent with the *CFCSA* and case law concerning consent orders, as well as arguments that VACFSS has made elsewhere about RR's insistence on "going to trial".

[292] In *EB v. Director of Child and Family and Community Services,* 2016 BCCA 66, the BC Court of Appeal expressly rejected a similar argument, reasoning that: "the contention that the Provincial Court was required to make a finding that the child was (or might be) in need of protection before making a consent order for interim custody is without merit": para. 62. The *CFCSA* provides a specific mechanism for parents and the Director to consent to an interim or temporary custody order, without requiring the parent to admit the "grounds alleged by a director for removing a child": s. 60. This type of consent order is commonly used to "permit the Ministry of Children and Family Development and the Provincial Court to provide services children and their parents require, without making a finding that a child is in need of protection": *BB* at para. 2. The court may make these orders "without a hearing, the completion of a hearing or the giving of evidence": s. 60(2). If a court is later asked to make a contested order under the *CFCSA,* it must hear evidence and make a finding that the children were in need of protection at the date of the removal: *BB* at para. 43.

[293] RR argues, and I accept, that parents may consent to interim or temporary orders for a variety of reasons. In this case, RR's consent allowed VACFSS to provide services to the children

and for the parties to plan for the children without court adjudication: *BB* at para. 2. Though the parties agree that all interim and temporary custody orders were made by consent, it does not appear that all consents were made in the written form contemplated by s. 60. VACFSS has not provided me with any authority to suggest that this is significant. *BB* and *EB* support that the courts honour the intent of consent orders, which allow the parties to move forward without court adjudication and without express findings that children are in need of protection. In this case, it was to be the role of the judge hearing the continuing custody application to determine whether the children were in need of protection at the time of removal and whether such an order was warranted. Ultimately, the judge never made that determination because the matter was resolved by another consent order which led to the return of the children.

[294] In addition, VACFSS's argument that consent orders are evidence that RR and the court "implicitly" accepted the child protection concerns is difficult to reconcile with its other arguments regarding RR's decision making. RR's initial refusal to consent to an interim custody order to facilitate the children's access to medical services was identified by VACFSS as a "serious child protection concern" and evidence of her unwillingness to put the children first. Elsewhere, VACFSS has described RR's insistence on a trial as "putting up hurdles". Though VACFSS now says that if RR disagreed with the child protection concerns, she could have refused to consent to interim orders and elected to "have the matter adjudicated", that is not the message it gave her at the time.

[295] In the result, the court has never issued a decision or made a finding that RR's children were in need of protection during the relevant time. This is not a case like *AT v. Children's Aid Society of Ottawa,* 2020 HRTO 237, in which the Human Rights Tribunal of Ontario concluded that the discrimination complaint was a "collateral attack" on the child custody proceedings which had resulted in a court order for Crown wardship. In this case, there are no court orders or decisions under attack.

[296] During the period of this complaint, VACFSS retained custody of the children under consent orders necessitated by its own ongoing assessment that the children were in need of protection. This was something within VACFSS's discretion, not reviewed by the courts, and

which was part of its ‘service’ relationship with RR. It is significant that VACFSS could have returned RR’s children to her at any time, and says it was prepared to do so if she took certain steps including the parental capacity assessment and residential trauma treatment. In its argument, VACFSS accepts that the Tribunal has jurisdiction over its decision not to consider returning custody of the children until these steps were completed. This argument properly recognizes the scope of the Tribunal’s jurisdiction to review VACFSS’s decision making that has not been subject to any court decision, which includes its decision not to return RR’s children to her throughout the period of the complaint.

[297] In addition to the ongoing separation from her children, VACFSS made a number of decisions which negatively impacted RR in her relationship with her children. This included decisions to reduce or suspend access, supervise and restrict visit activities, and exclude her from important aspects of her children’s lives. Though each of these decisions gave rise to separate adverse impacts on RR, I will not analyse them separately. They all arose within the broader context of VACFSS’s decision to retain custody and control over the children. Below I describe these decisions as part of VACFSS’s escalating “command and control” response to RR, which was inherently connected to its ongoing assessment that she posed an undue risk to the children. It is this assessment which is at the heart of VACFSS’s argument that any and all adverse impacts on RR flowing from its decisions were justified in order to protect her children. I consider this below.

C. Connection

[298] The next issue is whether RR’s protected characteristics were a factor in the adverse impacts I have described. I begin with what RR is **not** required to prove. She is not required to prove that her protected characteristics were the only, overriding, or causal factor in VACFSS’s conduct: *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center),* 2015 SCC 39 [***Bombardier***] at para. 52. They must simply be one factor. There can be, and in this case are, other factors at play.

[299] RR is also not required to prove that VACFSS intentionally discriminated against her: *Code,* s. 4; *Radek (No. 3)* at para. 482. This is because human rights law rests on an "effects-based model which critically examines systems, structures, and their impact on disadvantaged groups": *Fraser v. Canada (Attorney General),* 2020 SCC 28 at para. 31. In this case, I accept that no one at VACFSS intentionally discriminated against RR. For the most part, I accept that the social workers involved in this complaint were doing their best under difficult circumstances. The Supreme Court of Canada has recognized the "highly adversarial" context of child protection and the daily challenges that social workers face:

> Child protection work is difficult, painful and complex. Catering to a child's best interests in this context means catering to a vulnerable group at its most vulnerable. Those who do it, do so knowing that protecting the child's interests often means doing so at the expense of the rest of the family. … [T]heir statutory mandate is to treat the child's interests as paramount …
>
> *Syl Apps Secure Treatment Centre v. BC*, 2007 SCC 38 at para. 64

I accept that VACFSS and its employees are genuinely dedicated to doing child protection work in a way that recognizes, and does not perpetuate, the discriminatory impacts of child welfare on Indigenous people. They undertake immersive training, and deliberately design policies to better understand and avoid the discriminatory failings of colonial child welfare. However, as I will explain, these positive, and non-discriminatory, intentions are not determinative.

[300] Finally, RR is not required to prove that VACFSS treated her differently than other people. In that regard, I agree with VACFSS that "there is no evidence of any differential treatment towards RR compared to any other parent whose children were in care with VACFSS". Evidence of differential treatment is not necessary because "equality is not about sameness": *Withler v. Canada (Attorney General),* 2011 SCC 12 at para. 31.

[301] I turn now to the connection that RR **must** prove. There are three ways of looking at the connection in this case. The nature of the connection is important to whether or not the adverse impacts can be justified.

[302] First, there are circumstances where a parent's mental health issues, substance use disorder, and/or the intergenerational impacts of residential schools impair their ability to safely care for their children, triggering the intervention of child protection authorities. The child protection concern is not the characteristic itself but its actual impact on the child: *KW* at para 91-92. In these circumstances, a child protection agency acting in good faith to protect a child may justify adverse impacts on the parent so long as it takes all reasonable and practical steps to accommodate their *Code*-related needs: *British Columbia (Public Service Employee Relations Commission) v. BCGSEU,* [1999] 3 SCR 3 [***Meiorin***] at para. 38; *Québec (Commission des norms, de l'équité, de la santé et de la sécurité du travail) v. Caron*, 2018 SCC 3 at para. 29. This is the type of connection that VACFSS says arises in this case, and which it says is justified to protect RR's children.

[303] However, it is critical to understand that mental health issues, substance use disorders, and intergenerational trauma from residential schools are not themselves inherent barriers to parenting or indicia that a child is not safe: *KW* at para. 92. Assuming otherwise gives rise to the second type of possible connection, which is always a discriminatory one. Child protection intervention which derives from stereotype, prejudice, or assumptions that a person is unsafe to parent because of their protected characteristics cannot be justified because it imposes a standard that is not reasonably necessary to achieve the purpose of protecting children: *Meiorin* at paras. 57-59; *Grismer* at para. 31. This type of connection is often subtle, unconscious, and must be inferred: *Campbell (No. 4)* at para. 102. This is the type of connection that RR says arises in this case.

[304] These two circumstances – where protected characteristics impair the ability to parent safely and where they are merely perceived to do so – are not mutually exclusive. There may be cases where a child protection agency responds to legitimate concerns but is also influenced by stereotype. In those cases, the decision to remove the child may be justified but the parent could still experience discrimination arising from the stereotyping. A remedy would flow from the harm of being stereotyped and not the harm of losing the child.

[305] Finally, a connection can be established where, because of their protected characteristics, a parent faces barriers in their interactions with child protection agencies: *Campbell (No. 4),* at para. 98. In this case, the issue is whether RR has different needs in her interactions with VACFSS arising from her identity as an Indigenous mother with trauma. This perspective focuses on how VACFSS's conduct impacted RR in connection with her protected characteristics. It recognizes that treating RR the same as everyone else may produce a discriminatory outcome: *Ewert v. Canada*, 2018 SCC 30 at para. 59; *R v. Barton*, 2019 SCC 33; *Fraser* at paras. 29-48. Where this type of connection arises, a child protection agency can justify adverse impacts by showing that it has taken all necessary and reasonable steps to address those barriers. In child welfare, a human rights response recognizes that First Nations parents have an "additional need … to receive adequate child and family services, including least disruptive measures and, especially, services that are culturally appropriate": *2016 Caring Society* at para. 422. VACFSS accepts that "often when a child welfare agency is required to intervene with Indigenous parents, it will have a disproportionately negative impact on those parents when compared with other cases": see also *Radek (No. 3)* at para. 563. In this case, the parties do not fundamentally dispute that RR's Indigeneity and trauma gave rise to specific needs in her interactions with the child welfare system, though they do dispute whether VACFSS met those needs.

[306] In the sections that follow, I consider each type of possible connection. I begin by assessing the child protection concerns that VACFSS says it was responding to. In this section, I find that VACFSS did not have a reasonable basis to conclude that RR's children were in need of protection. As such, the first type of connection – where a parent's protected characteristics actually impair their ability to parent – is not established. Next, I consider the second type of connection, which is one rooted in stereotype and prejudice. I find that VACFSS's reliance on RR's trauma, child welfare history, and conflict with social workers supported an **assumption** that she was not fit to parent, based on stereotype and prejudice connected to RR's mental health and Indigeneity. Finally, I find that RR faced barriers in her interactions with VACFSS related to her mental health and Indigeneity which manifested in a profound distrust of VACFSS and required accommodation. Instead, this distrust and the conflict it generated unfairly

influenced VACFSS's decision-making regarding RR's parenting and triggered an escalating response, causing her further harm.

[307] Throughout this analysis, I will endeavour to adopt the intersectional approach advocated by the National Inquiry:

> An intersectional approach puts a person's individual lived experience in context, to reveal systemic or underlying causes of discrimination. Understanding the connections among systems, institutions, and people, and how they can create further harm or help keep people safe, is vitally important to finding a way forward through concrete solutions to address violence.
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> *Reclaiming Power*, vol 1a at pp. 102-111.

To this end, I have touched on some of the ways in which Canada's child protection system – historically and today – disproportionately impacts Indigenous people in ways inherently connected to Indigenous identity and colonization. This context properly situates the complaint within broader structural, systemic, forces which act as "built-in headwinds" to disadvantage Indigenous families, especially mothers: eg. *Reclaiming Power* Vol 1a p. 313; *Fraser* at para. 47; citing *Eaton v. Brant County Board of Education*, [1997] 1 SCR 241, at para. 67. This recognition is, of course, the very reason that VACFSS exists. However, I was struck in this hearing by how closely the facts of this case replicated the broader trends explained by Dr. Turpel-Lafond as features of a child welfare system that is in many ways inherently harmful to Indigenous families, children, and communities because of their Indigeneity. I conclude that the discrimination in this case is the effect of a wider web of laws, policies, and practices which interact to create a system stacked against Indigenous families, especially single mothers living in poverty, with disabilities, and with children with disabilities. In other words, RR's complaint illuminates systemic discrimination: *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission),* [1987] 1 SCR 1114 [***Action Travail***].

1. Connection #1: Protected characteristics impair safety of the children

[308] In this section, I consider the first type of connection – where a parent's protected characteristics actually impair their ability to parent – and explain why the evidence does not

establish that RR's protected characteristics impaired her ability to safely care for her children during the period of the complaint. Specifically, the evidence does not substantiate the child protection concerns that VACFSS argues explained and justified its decisions.

[309] As I have said, VACFSS's authority to remove a child without a court order is set out in the *CFCSA.* VACFSS must have reasonable grounds to believe that the child needs protection and that their health or safety is in immediate danger or there are no less disruptive measures which could protect the child. This is the basis on which VACFSS originally apprehended RR's children in August 2016. During the period of the complaint, the children remained in VACFSS's custody under consent orders, necessitated by VACFSS's assessment that the children remained in need of protection and there continued to be no less disruptive means of protecting them.

[310] VACFSS does not dispute that RR's trauma, and her history and conflict with the child welfare system, are connected to her Indigeneity and were factors in its decision to retain custody over her children. This is apparent in its insistence that RR complete residential trauma treatment and a parental capacity assessment before it would return her children. There is similarly no real dispute that RR's substance use, which I have found engages the protected ground of disability, was an issue of ongoing concern. However, VACFSS says that this is a case where those characteristics actually impaired RR's ability to safely parent her children such that its interventions were justified by the need to keep them safe. This argument requires me to assess the child protection concerns that VACFSS says it was responding to.

[311] Section 13 of the *CFCSA* sets out a list of circumstances when a child is in need of protection. For the period of this complaint, I understand that the child protection concerns that VACFSS had identified were:

a. "the child has been, or is likely to be, physically harmed by the child's parent": s. 13(1)(a). This concern arose based on the August 2016 allegations and RR's history of involvement with child welfare.

b. "the child is emotionally harmed by (i) the parent's conduct, or (ii) living in a situation where there is domestic violence by or towards a person with whom

the child resides": s. 13(1)(e). A child is emotionally harmed for the purpose of this section if they demonstrate severe anxiety, depression, withdrawal, or other self-destructive or aggressive behaviour: s. 13(2). This was perhaps the biggest concern, and arose in connection with the mental health needs of the Middle Children, RR's behaviour on supervised visits, and VACFSS's determination that she was unable to put the children's needs ahead of her own.

c. "the child's development is likely to be seriously impaired by a treatable condition and the child's parent refuses to provide or consent to treatment": s. 13(1)(g). This was based on VACFSS's assessment that the Middle Children needed "specialized interventions" that RR refused to accept and acknowledge.[9]

[312] My findings above are determinative of these concerns, which I have found not substantiated. I will consider each of them in turn. Before I do, however, I situate this issue within one of the headwinds of the child welfare system which often operates to the detriment of Indigenous caregivers: a Eurocentric conception of, and focus on, risk.

a. Context: Assessment of risk under the *CFCSA*

[313] The system created and regulated by the *CFCSA* – which VACFSS is bound to implement – is rooted in a Eurocentric approach to child welfare, heavily focused on a narrow assessment of risk. I agree with the submissions of West Coast LEAF, grounded in the evidence of Dr. Turpel-Lafond, that:

> … These roots are reflected in a myopic emphasis on protecting children from real or perceived harm over other considerations, including cultural continuity and the value of children maintaining relationships with their parents and community. The singular object of securing children's safety (in the narrow sense of the term) has in turn justified the development of BC's risk-adverse, command-and-control system. This approach is often at cross-purposes with securing the overall well-being and safety of

[9] Aside from references to physical and emotional harm, and one reference to s. 13(1)(g), VACFSS did not pinpoint the specific subsections of s. 13 that it says were engaged. I have identified these sections as the most applicable taking into account its broader submissions.

> Indigenous children and families as understood from the perspective of Indigenous communities.

In particular, the evaluation of the best interests of Indigenous children, and the ways in which the system intervenes to 'protect' them, often operate to the detriment of those children, their families, and their communities.

[314] To begin, the evaluation of risk and the best interests of the child are weighted against Indigenous parents. As Ardith Walkem, QC (now Justice Walkem) explains:

> When the standard of the "best interests of the child" is applied, Indigenous Peoples have reason for caution. Common sense assumptions about what is in the best interests of a child, or what is required to keep a child safe, have been used to remove Indigenous children and keep them from their families and communities. Past considerations of the [best interests of the Indigenous child] have led to decisions about immediate protection of an Indigenous child that severed the child's connection to their culture, extended family and community, and led to long term damage and disconnection.
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> *Wrapping Our Ways* at p 79, citation omitted

Section 4 of the *CFCSA* specifically identifies the importance of an Indigenous child's connection to their own "traditions, customs and language" and to their community. In practice, however, Dr. Turpel-Lafond explains that "the best interests of the child under the [*CFCSA*] is very slanted against First Nations parents and it's very easy to make the case that the First Nations parent [is] not a good parent".

[315] Child protection under the *CFCSA* is largely about predicting, and trying to avoid, risk to children. The problems with applying this risk-based approach to Indigenous parents are complex. I highlight three relevant, and interrelated, deficiencies and their application in RR's case. In doing so, I acknowledge that there are legislative and policy attempts to mitigate the impacts of these deficiencies, and that not all of these intrinsic problems lead to discrimination against Indigenous families in every case.

[316] First, child protection agencies have developed a number of tools to help them measure and assess risk. These include internal risk assessment tools – such as the Ministry's

Vulnerability and Reunification Assessment tools I have mentioned in this case – as well as parental capacity assessments undertaken by third party professionals. Generally speaking, such tools are based on Eurocentric standards of parenting which fail to account for the unique needs and circumstances of Indigenous parents and their children: Choate & Lindstrome. As the Supreme Court of Canada has recognized, risk assessment tools which treat everyone the same without accounting for the unique needs and circumstances of Indigenous peoples create conditions for discrimination: *Ewert* at para. 59. Indeed, Dr. Turpel-Lafond explains that "being an Indigenous person and having those risk tools applied means you actually start off off the chart": see also Judith Mosoff, Isabel Grant, Susan B Boyd & Ruben Lindy, "Intersecting Challenges: Mothers and Child Protection Law in BC", (2017) 50:2 UBC L Rev 435 [**Mosoff & others**] at pp. 6-7.

[317] One reason that Indigenous people are disadvantaged in these risk assessments is that "risk is assessed based on current expressions of colonialism": Choate & Lindstrome at p. 52. Poverty, addiction, unstable housing, prior involvement with child welfare, and historical and intergenerational trauma are identified as risk factors for children – as they were in RR's case. The risk assessment assigns these factors to the caregiver, without accounting for their transitory nature and that they can usually be alleviated with appropriate supports. In fact, Dr. Turpel-Lafond explains, a parent who asks for support risks investigation and having their children removed. The need for support becomes part of a pattern of concern for child protection authorities. The parent is labelled unfit. This was true of RR, whose requests for respite from the Ministry would later be (wrongly) considered part of a pattern of "substantiated child maltreatment". Ultimately, the same factors are "introduced to the next generation by government failure to act in any way other than removal of children": Choate & Lindstrome at p. 52. In this way, the child welfare system continues its "punishing attitude towards First Nations mothers in particular": Dr. Turpel-Lafond.

[318] Second, and relatedly, many of the risk assessment tools focus on the perceived deficits in Indigenous parenting, without properly weighing the strengths in a parent's resilience or connection to culture: Choate & Lindstrome at p. 50. Specifically, "the culture of the mom as a

First Nations mother and her family supports are not considered protective to her and her child, [when] in fact they are proven to be protective": Dr. Turpel-Lafond. In parental capacity assessments, "Indigenous identity is most often ignored, minimized or completely misunderstood": *Wrapping Our Ways* at p 132. Not only is this a failure to account for the strengths of the caregiver, but it also fails to respect the rights of Indigenous caregivers, children, and communities, to maintain and pass on their Indigenous culture: see discussion at para. 47 above.

[319] Finally, the risk assessment tools focus exclusively on the risk posed to the children by remaining in the care of their families. They do not measure or account for the risks posed to Indigenous children who are taken into care, and the long-term negative outcomes for Indigenous children who are raised in care: see generally *Wrapping Our Ways* at pp. 83-86. In this way, a double standard is allowed to operate whereby Indigenous families may be held to a higher standard in their caregiving than the system into which their children may be removed.

[320] These methods of assessing risk can, and do, adversely impact Indigenous caregivers in connection with their Indigeneity. I repeat that this does not mean that child protection authorities cannot or should not consider legitimate risks posed to children as a result of – for example – a caregiver's substance use, trauma, mental health, or the intergenerational impacts of residential school. Rather, the focus must be on the actual risk to the child. This is the issue I turn to now.

b. Likelihood of physical harm

[321] The allegations which initially triggered VACFSS to remove RR's children related to physical harm. The evidence before me is insufficient to support a conclusion that those allegations were substantiated or supported a likelihood that the children would be physically harmed with RR. VACFSS took the position in this hearing that those original allegations fell outside the scope of this complaint, but at the same time proceeded on the assumption that they were substantiated and grounds for ongoing concern. I cannot make the same assumption. Those allegations are very much disputed between the parties and have never

been the subject of a court decision. At least some of the original allegations were expressly retracted and/or disproven (eg. the cigarette burns). The police investigation did not lead to any charges, and there is no evidence of an investigation by VACFSS that substantiated the allegations. For example, though RR asked social workers to speak to the staff and neighbours at the supportive housing complex where the family was living, it appears VACFSS never did. Further, the social workers based at least some of their original decision making about the children's vulnerability on a wrong suspicion that RR was in some way responsible for her son's death.

[322] Without any finding that the original allegations were substantiated, RR's child welfare history cannot on its own support a conclusion that there was a likelihood of physical harm. First, as I have explained, a number of VACFSS witnesses demonstrated they did not have an accurate understanding of that history. Second, a history of child welfare interactions is not on its own evidence that a child is in need of protection. Again, RR's situation parallels other trends in the wider system:

> Even where Indigenous parents have stopped substance abuse, or removed themselves from dangerous situations, their histories are often used to deny them the opportunity to care for their children. If a history of substance abuse exists, the court or social work teams may ignore the good (childcare support from within the Indigenous community; healing that has happened) and emphasize the bad (previous incidents of alcohol abuse; past involvement in the child welfare system), resulting in the disqualification of large numbers of people. There is no consideration of whether community resources for treatment are available or the extent to which an applicant has been personally involved in excessive drinking or violence that may be taking place elsewhere in the extended family.
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> *Wrapping Our Ways* at p. 123

In RR's case, her situation in the fall of 2016 was different than it was in previous interactions with child welfare. She had completed significant programming, was living in supportive housing, was not using alcohol or drugs in ways that impacted the children, and had found strength in her connection to culture and community.

[323] By April 2017, when the period of this complaint begins, it is not clear that VACFSS even continued to have concerns about physical harm. When the Associate Practice Manager told RR in November 2016 that her children would be home by Christmas, VACFSS says that the initial protection concerns had been "addressed" and that its focus had shifted to the "presenting behaviour" of the Middle Children. There is no evidence that, during the period of this complaint, RR ever posed a physical threat to her children. None of the supervised visits raise any concern about physical harm; to the contrary, they report RR is physically affectionate and appropriate with the children.

[324] In short, the evidence before me, considered as a whole, does not support that VACFSS had reasonable grounds to believe that RR's children faced a likelihood of physical harm for the period of this complaint.

c. Likelihood of emotional harm

[325] VACFSS's primary concern during the period of this complaint seems to have been the likelihood that the children would be "emotionally harmed" by RR. Its evidence in support of this concern is (1) the Middle Children's "complex developmental problems" which it says are attributed to their conditions in RR's care and (2) RR's behaviour during the period of the complaint.

[326] There is no dispute that the Middle Children had mental health and other developmental issues that needed to be addressed. VACFSS disputes that it blamed RR for this, but I agree with RR that it did. VACFSS argues that it is "rarely possible" to "establish beyond reasonable doubt a one to one correspondence between child behavioural and developmental problems and parental acts of omissions", but that in RR's case "a preponderance of evidence established the existence of developmental problems while the children were [in] RR's care". Whatever this "preponderance of evidence" is, it is not before me. Likewise, it says that the girls' violent behaviour in foster care "can be linked to this behaviour being modelled" in RR's home, but does not explain how. In fact, there is no evidence before me that the children were

displaying the level of concerning behaviour reported by their foster parent while in RR's care, or that this was a child protection concern at the time of their removal.

[327] Systemically, it is not unusual to focus on a parent as the sole cause of the developmental conditions of their children, without a broader understanding of other forces which could impact a child's health and wellbeing. Professor Mosoff explains that this is particularly true of certain mental health issues:

> … Mental health labels that are linked to affection, discipline or nurturing are inevitably the mother's fault. Yet it is not surprising that children are labelled as having attachment disorders when many of them have been separated from their mothers from early infancy and have interacted with their mothers only in supervised settings. Others have been in and out of state care multiple times over their short lives. Yet none of their symptoms are attributed to the actions of the state, only to those of the mother. … [Mosoff & others at p. 35]

[328] In relation to RR, social workers repeatedly expressed concern that the children demonstrated poor attachments and needed a stable and nurturing environment; VACFSS submits that some of their behaviour was "indicative of disordered attachment and ambivalence". The difficulty with many of VACFSS's theories about how RR was harming the children was that they fail entirely to consider the impact of multiple removals and separations from their family, and their conditions in government care.

[329] When the Middle Children were initially taken into care, their therapy was stopped. Their brother had died less than two years ago. They were separated from their mother and two of their siblings and placed with a foster parent who consistently expressed that she struggled to care for them. In that context, they displayed very concerning behaviours with each other and with their foster parent. VACFSS says that, once it became aware of the children's "complex developmental problems" and the critical incidents in the foster parent's home, it was "mandated to remove the children until the [serious safety concerns] could be properly addressed". It does not explain how these safety concerns support a conclusion that the Middle Children were in need of protection in **RR's** care, as opposed to in the care of the foster parent.

[330] One example of VACFSS's myopic focus on RR as the cause of the Middle Children's emotional distress is A's suicide attempt, nine months after she was removed from RR. The treating doctor expressed concern that A did not have a family doctor and was not connected to a counselor or any mental health supports in the community. A said that her intention was to try to get back to her mother. And yet VACFSS interpreted the incident as evidence that A was not safe with **RR**. It says that this incident was "indicative of highly concerning behavior which indicated that the children came into care with serious emotional and behavioral dysregulation that required specialized parent child intervention". In its meeting with RR after this incident, it was focused more on RR's behaviour in posting about A on social media than on the circumstances that led A to take such a drastic step. In all the circumstances, I am not satisfied that A's self-harm is evidence that she was emotionally harmed by **RR** rather than her situation of being in government care, without mental health supports.

[331] Another example relates to the Middle Children's behaviour in the staffed Hollyburn residence, which was VACFSS's justification for reducing and suspending their access to their mother. When the Middle Children were moved into Hollyburn, they had been in government care for 11 months. Their first few months in that residence were marked by turmoil and staff turnover. The girls were cared for by various people – at times whose names they did not even know. A engaged in serious self harm, and they were violent against each other and staff. B was bruised by physical restraints applied on her at six years old. This living arrangement was clearly contrary to VACFSS's own assessment that the Middle Children needed stability, predictability, and nurturing. At the same time, the Middle Children did not display the degree of violence or dysregulation in RR's care – either before the apprehension or during any of the supervised visits. And yet that violence and dysregulation was identified as a child protection concern vis-à-vis their relationship with their mother. This was not a reasonable assessment.

[332] It is apparent from these examples that VACFSS applied a much more stringent standard on RR than it did on the foster parent or the Hollyburn staff. Another example relates to the Middle Children's foster parent, who repeatedly told RR and VACFSS that she was struggling to meet the Middle Children's needs, and that other children in the household did not want to be

around them. The foster parent reiterated to the Middle Children that their time in the house was temporary, such that they could not sign up for ballet classes or do any longer-term planning. VACFSS's response to the foster parent's complaints stands in stark contrast to its response to RR. For example, in a note dated November 7, 2016, a social worker wrote:

> [The foster parent] stated several times throughout our conversation that she does not have the skills to parent these girls and is not coping well. I offered [the foster parent] a child care worker to come in the night to ensure she can get some rest while supervising the children. [The foster parent] said that she had pondered this option …
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> … [The foster parent] informed that she has told the SW that she is not coping, however, there is not an alternative placement for them yet.

In contrast, VACFSS interpreted RR's comment that she sometimes did not know how to cope with the Middle Children's anger as evidence that she struggled to parent her children effectively and support for its conclusion that the children were unsafe in her care. It never offered her respite to support her ability to care for the children.

[333] A primary reason that VACFSS concluded RR was likely to emotionally harm her children was its conclusion that her trauma impaired her ability to parent. In support of this conclusion, VACFSS relied on the PWD Application as well as RR's own statements that trauma impacts her daily. Above I have explained that neither the Doctor nor RR said that her trauma made her children unsafe. Trauma on its own is not a child protection concern. The focus **must** be on how it impacts the children.

[334] VACFSS points to RR's behaviour during the period of the complaint as evidence that her trauma was impacting the children. The Practice Manager explained that "the prevailing concern … the most chronic issue was the mother's inability to stop talking about her own trauma in front of two children who were six and eight years old". When she was asked for the "most compelling evidence … indicating that [RR] was out of control", the Practice Manager went on:

> The fact that despite having done numerous less-intensive programs to attempt to bring – to address her trauma and her healing, she continued

> to be compelled – many times in an hour was the phrase used in one of the reports – to talk about herself, her hardship and to tell the children how endangered they were in foster care.

Consistent with other social workers, the Practice Manager concluded that RR needed to "have her own trauma under control" before she could "resume full time parenting of two very traumatized and difficult children". There are four main problems with this assessment.

[335] First, as I will explain below, I find that VACFSS's views of RR during the period of the complaint were tainted by stereotype which prevented a fair assessment of her abilities as a parent.

[336] Second, and related, I have found that many of VACFSS's assertions about how RR was behaving were inaccurate and exaggerated. I have found many of its assertions that RR was harming the children on supervised visits, including by telling them they were being poisoned and that their organs would be harvested, unsubstantiated. I have found that RR was not manipulating or encouraging the Middle Children to make false allegations of abuse.

[337] I have accepted that RR did discuss topics with the children that VACFSS considered inappropriate, including VACFSS's visit expectations, the girls' removal and placement, a boil on her mother's leg, residential schools and trauma, addiction, RR's "advocacy" relating to child welfare and VACFSS, the child protection trial, and the girls' clothing. However, there is no evidence, aside from the social workers' and Practice Manager's assertions, that these supervised conversations could reasonably support a conclusion that the Middle Children were at risk of emotional harm in RR's care. Several of these topics relate directly to their shared Indigenous identity and heritage, and the reality of the lives of their family and community. Conversations related to their conditions in government care would not be necessary if they were returned to RR.

[338] There is no question that the later visits supervised by VACFSS staff were negative and upsetting to both RR and the Middle Children. In my view, this was almost inevitable because of the degree of the conflict at that time and the untenable proposition that RR should be supervised in her visits by the same social workers who were in court arguing in favour of an

order that would permanently separate her from her children. It is not evidence that RR was likely to emotionally harm her children if they were returned to her care.

[339] This leads to the third problem with VACFSS's perception that RR's trauma created a risk of emotional harm for her children: it wrongly assumes that RR's behaviour within the highly conflictual and triggering child welfare system is an accurate reflection of how she would parent her children in the safety of their own home. RR's fears that her children were unsafe in foster care, for example, would be allayed if they were no longer within that system. Many of VACFSS's "child protection" concerns were actually concerns about RR's non-compliance with its own suggestions and demands, which it interpreted to mean that she was "unable to put the needs of the children first". Two examples suffice. VACFSS argues:

a. "the fact that RR took [an issue about the food the children were eating] to the point of a standoff shows that RR was not able to put her children's well-being first"; and

b. "RR's refusal to agree to the one to one visits vs. group visit resulting in no visitation, were conscious choices and evidence of her inability to put her children first".

In both of these examples, "putting her children first" meant doing what VACFSS said. However, in both examples, RR had her own view about what was in the best interests of her children and in nurturing their relationship. She wanted to feed her children and provide for them, and was afraid about the prospect they were being deprived of food in care. She did not want to meet with her children separately; she wanted them to have time together as a family. Both of these examples ignore the intense and triggering power dynamic, in which VACFSS held all the power and RR held virtually none. In reality, it was not up to RR whether an issue about food came to the point of a standoff: it was up to VACFSS. Most importantly, however, the source of RR's disagreement was not that she did not care for the children, or could not meet their emotional needs, but simply that she saw their needs differently.

[340] Finally, VACFSS disregarded or ignored the work that RR had done, and continued to do, to promote her wellbeing and ability to parent. After the August 2016 removal, this included: addictions counseling, drumming circle, trauma workshops, trauma counseling, a family violence program, ongoing work with a group of Elders, a healing walk on the Highway of Tears, and maintaining connections with other supports and advocates in the community, some of whom testified in this hearing. The supervised visit reports include many positive observations of RR's skills as a parent, which appear to have been completely ignored.

[341] At the same time, consistent with the systemic pattern I have identified above, VACFSS failed to account in any meaningful way for the strength of RR's connection to her culture, and its significant benefits to the children's emotional wellbeing. For example, in the detailed psychosocial assessments of the children which VACFSS relied on to assess their best interests, the psychologist makes a number of very detailed recommendations to support the children in their home lives, at school, with peers, in therapeutic interventions, and in foster care. Further recommendations address how to set boundaries, impose discipline, monitor their wellbeing, help them to relax, ensure adequate sleep and exercise, and "develop emotional vocabulary". Not one of the recommendations addresses the children's connection to culture or highlights RR's unique strengths as a parent in nurturing and protecting that connection. And as the conflict with RR escalated, VACFSS cut off the children's direct access to their culture by cancelling community and cultural activities like Pow Wow night and reducing their access to their mother and extended family. It purported to address the children's cultural needs with some pan-Indigenous programing, and some smudging in the Hollyburn home, and also points to the presence of an Indigenous staff person at Hollyburn (whose Nation and culture is unknown) and the Therapeutic Access Worker, who was Indigenous from a different Prairie Nation. On the whole, however, the evidence before me supports that the children's connection to RR's specific culture was not a very significant or overriding consideration in VACFSS's assessment of their needs and best interests, or of RR's strengths as a parent. This failure – which is a significant one, and which violates important rights held by RR and her children – further undermines the reasonableness of VACFSS's assessment that the children faced a likelihood of emotional harm in RR's care.

[342] In sum, I am not persuaded that VACFSS had reasonable grounds to perceive that RR's children were in need of protection from emotional harm in her care. Rather, the heart of this purported child protection concern was RR's conflict with VACFSS – an issue I consider in more detail in relation to the third type of connection below.

d. Developmental needs that RR would not meet

[343] There is no dispute that the Middle Children had mental health issues that required treatment, and that the level of violence and dysregulation they were demonstrating in care was very concerning. VACFSS argues that it was compelled to intervene because RR was unable or unwilling to meet these needs. I disagree.

[344] Systemically, it is not unusual for an Indigenous child's disabilities to support a conclusion that they are in need of protection, and to justify their removal from their Indigenous family and community. However, "the fact that a child (or their parent or family member) is disabled or has special needs should call for more supports to be offered for their family and community to care for them, not be used as an indicator that the child cannot be placed within their family or community": *Wrapping Our Ways* at p. 118.

[345] Above I have found that RR did recognize the Middle Children's needs for mental health interventions and had arranged for them to attend therapy twice a week in her care. After their removal, she advocated strongly for mental health supports and filed an official complaint alleging that VACFSS was not meeting their mental health needs. I have also found that VACFSS wrongly conflated RR's reluctance to agree to an interim custody order for the purpose of allowing VACFSS to consent to medical interventions with her willingness to ensure their needs were met. In fact, she agreed to attend medical appointments and give her consent to treatment. She was only reluctant to agree to steps that she perceived might compromise her rights as a parent.

[346] Overall, the evidence before me establishes that RR was proactive and diligent in pursuing services for her children and in fighting for their wellbeing. Once again, the real issue was her refusal to do everything on VACFSS's terms. I am not satisfied that VACFSS had

reasonable grounds to conclude that the children were in need of protection because RR refused to provide necessary treatment.

e. Conclusion: children not in need of protection

[347] In sum, I am not satisfied that VACFSS had reasonable grounds to believe that RR's children were in need of protection. Its focus on RR's trauma, mental health, and relationship with the child welfare system was not related to the actual impact of these characteristics on her children. Rather, it rested on stereotype and assumptions about RR as a parent, and conflict with RR that was connected to her Indigeneity and required accommodation. I turn to these issues next.

2. Connection #2: Stereotype and prejudice

[348] Any complaint alleging anti-Indigenous discrimination must recognize the ongoing prevalence of prejudice and stereotypes about Indigenous peoples throughout Canadian society: *R. v. Le,* 2019 SCC 34 at para. 83. In the criminal context, the Supreme Court of Canada has repeatedly acknowledged the "widespread racism against Indigenous people" which pervades all aspects of the criminal justice system: see e.g. *Barton* at para. 199; *Ewert* at para. 57. Common stereotypes include "that Indigenous people are suspicious, not credible, prone to criminality, uncivilized, drunk, lacking a coherent social and moral order, and 'belonging' in prison": *Campbell (No. 4)* at para. 127; *R v. Williams*, 1998 CanLII 782 (SCC), at para. 58; *Radek (No. 3)* at paras. 134-142. In the child welfare context, stereotypes include that Indigenous parents "simply do not care, or do not care enough": *Wrapping Our Ways* at para. 124.

[349] Still other negative stereotypes apply to people with mental illness, including that they are dangerous, untrustworthy, or deficient: *Ontario (Attorney General) v. G,* 2020 SCC 38 [***G***] at paras. 61-63; *Customer v. A Restaurant and a Manager,* 2018 BCHRT 138 at paras. 36-37; *KW* at para. 88. Mental illnesses are unique in that they "regularly cause people to lose their rights and freedoms in ways that are unimaginable in other health conditions": *G* at para. 62, citing H. Stuart, J. Arboleda-Flórez and N. Sartorius, *Paradigms Lost: Fighting Stigma and the Lessons Learned* (2012), at pp. 103-11. Women with mental health issues are "often constructed as

needy, dependent, selfish, and or self-absorbed, as well as unable to put their children's needs ahead of their own": West Coast LEAF submission, citing Mosoff & others at pp. 464-467. People with substance use issues may be stereotyped as morally blameworthy, untrustworthy, and prone to criminality, and Dr. Turpel-Lafond described the child welfare system as punishing towards parents with addictions: see e.g. *Stewart* at para. 58 (per Gascon J, dissenting but not on this point).[10]

[350] These stereotypes and prejudices intersect and overlap, with compounding effects. They form "part of our historical and social fabric, and are imbued in all of us through social interactions, the education system, the media and entertainment industries, and other means": *Abbott v. Toronto Police Services Board,* 2010 HRTO 1314 at para. 45. They most often manifest in subconscious bias which operates unintentionally: *Francis v. BC Ministry of Justice (No. 3),* 2019 BCHRT 136 [***Francis (No. 3)***] at para. 288, citing Ontario Human Rights Commission, *Policy and Guidelines on Racism and Racial Discrimination* (2005) [**OHRC Guidelines**] at p. 21. Actors in the child welfare system are drawn from this same social fabric. Further, as I have discussed, negative prejudice towards Indigenous caregivers has in many ways become embedded within the child welfare system as a whole: OHRC Guidelines at pp. 12-14, cited in *Brar* at para. 713.

[351] One feature of the child welfare system which creates conditions for stereotyping and prejudice against Indigenous caregivers is the profound power imbalance between caregivers, on the one hand, and the many people and professionals empowered to make or influence decisions about their children, on the other. The power imbalance is exacerbated when caregivers are already made vulnerable by the impacts of other social forces like racism, discrimination, colonialism, or misogyny. Dr. Turpel-Lafond explains how the system creates and then resolves power struggles:

> … it's an extremely intrusive system and it set up power struggles between parents and social workers that the social worker will win the

[10] None of the parties have addressed anti-Black racism, and how RR's Blackness may have factored into the discrimination in this case: *Perry v. Honu Boat Charters and another (No. 2),* 2022 BCHRT 68 at paras. 68-76. As such, I do not consider this issue.

> power struggle every single time because they have a professional role that is recognized in legislation with almost no checks and balances in it. And the parent is a nobody who is a child abuser and is an Aboriginal person as well, which means they can't command resources in the community because many people in the society and community may already decide that they're unfit.
>
> … This balance – imbalance, if you like – systemically is absolutely devastating.

[352] These power dynamics go beyond social workers and parents. Dr. Turpel-Lafond explains that, within the system, "people are constantly registering their observances about the parent and then somehow relaying them to the social worker". Caregivers, for example, "tend to think very poorly of the parents", especially First Nations and single mothers. Dr. Turpel-Lafond says she frequently saw caregivers who would record "a lot of judgments … like 'mom appeared drunk today', 'mom was angry', 'child is upset after they see mom'". These judgements influence perceptions of the parent by those who exercise power and who may already be primed to view a parent through a lens of stereotype or suspicion. And as Professor Mosoff explains, the labels can stick:

> Once a label gets attached to a woman it is very difficult for her to portray herself as a competent mother. Where she struggles to overcome the challenges that led to the labels initially, she may be construed as selfish and unwilling to put her child's needs before her own. [Mosoff & others at p. 33]

[353] This is what happened to RR. As I have said, VACFSS's records, and its evidence in this hearing, included numerous comments about RR that were derogatory and judgemental, including descriptions that she was "menacing", "aggressive", "threatening", "twist[ing] words", potentially drunk/hungover, "ranting", selfish, "self-absorbed", "playing the abuse card", "untruthful", "disgruntled", and "very forceful and angry". These labels – which I have found unjustified – attached to RR and influenced the views of people throughout the system. Within VACFSS, the Practice Manager and social workers began their work with RR with a preconceived notion that she was difficult and unreasonable, and to be viewed with suspicion. This view was then transmitted to other people involved in the children's care. For example, the Hollyburn

caregivers were warned to be careful of RR and in turn responded by treating her as dangerous – phoning the police on a chance encounter with RR, reporting to VACFSS about her whereabouts and whether or not she seemed intoxicated, and opining that the girls' behaviour was caused by their visits with RR.

[354] Similarly, third party professionals, including doctors, psychologists, and counsellors, are often called upon to advise child welfare workers and offer expertise about families and their children. Such professionals are "often seen as better qualified than the mother herself to describe her life, her challenges, her ability to parent and the needs of her children": Mosoff & others at p. 446; see also *In the Matter of RA,* 2002 YKTC 28 at paras. 228-230. They are often not Indigenous, and are not necessarily trained or competent to understand Indigenous family structures and child caring practices: see eg. Choate & Lindstrome. In RR's case, VACFSS sought to rely on the opinions and advice of non-Indigenous professionals who had never met RR and/or observed her interact with the children, including the psychologist who completed the psycho-social assessments, the children's therapist, and the parental capacity assessor. In considering the mental health needs of the Middle Children, it was VACFSS's express position that RR was "not in the best position to recommend appropriate treatment for the mental health needs of the children".

[355] Systemically, then, Indigenous caregivers like RR find themselves assessed and judged by multiple actors within the system, each of whom is drawn from the same "social fabric" of anti-Indigenous discrimination and who are empowered to influence or make decisions about the caregiver's ability to parent. RR described feeling disheartened within this system: "so many different fresh workers coming on and they all have an opinion about me".

[356] This is the broader context in which I find that stereotypes pervaded VACFSS's judgement about RR. I agree with RR that, for a number of reasons, VACFSS "could not gain a true understanding or appreciation of [RR] as a person, unable to see beyond its … stereotypical, biased and discriminatory views it steadfastly held of her as a neglectful, harmful, abusive and incapable Indigenous mother".

[357] Stereotype and prejudice help to explain the otherwise inexplicable disparity between how VACFSS judged the children's best interests in their relationship with their mother as opposed to their interests in government care. VACFSS attributed escalations in the Middle Children's behaviour to their visits with RR, without considering the undoubtedly significant impact both of being in foster care and then of transitioning to an unstable staffed resource. It ignored or downplayed the serious harm the Middle Children experienced in care – which included self-harm, inter-sibling violence, violence with staff, and the application of physical restraints – while at the same time exaggerating the safety risks in RR's care arising, for example, from the SkyTrain incident or the Baby standing up in a highchair one time, or from the nature of conversations that RR had with or around the children.

[358] Stereotypes also help to explain why VACFSS persistently interpreted RR's behaviour in the most negative light possible. For example, if RR appeared tired or with a low affect, rather than consider that she might be tired and stressed, the immediate speculation was about her sobriety and use of alcohol. If RR expressed fears about, and questioned, her children being in care – fears which many Indigenous parents have good cause to harbour – then she was ranting and making false allegations. When she called the police, she was "playing the abuse card" – a common myth used to delegitimize racialized people and which itself can be evidence in support of discrimination: *Brar* at para. 726; *Francis (No. 3)* at para. 289 and 324. When she resisted offers of collaboration, she was labelled as aggressive and angry, or unwilling to put her children first. Her initial refusal to agree to an interim custody order was evidence that she was unable or unwilling to provide medical care for the children and a "serious child protection concern" – a view that persisted throughout the period of the complaint. The evidence before me in this hearing did not support those assessments. However, they are labels that stuck.

[359] Finally, stereotyping and prejudice also explain the persistence in RR's records of notes and risk assessments which continued to question whether she was responsible in any way for her son's death, even after she denied it and the Coroner's report concluded she was not. In my view, RR never escaped this lingering suspicion that she was somehow at fault for her son's death. This suspicion influenced risk assessments, and triggered recommendations for further

investigation in the File Documentation Review. When the children were transferred to Hollyburn, VACFSS told Hollyburn that “B discloses that her mother killed her brother and she knows this because she saw her mom laying over him”, without explaining to the people who would be caring for her children that RR was not at fault or giving them any tools to address this very traumatic misapprehension. This suspicion, which is belied by the events leading up to the death as well as the Coroner’s findings, rests on a prejudicial view that RR is the type of parent who was likely to be drinking and endangering her children.

[360] VACFSS strenuously denies that it was influenced by stereotype in its dealings with RR. I accept that it was better placed than non-Indigenous child welfare agencies to avoid the influence of stereotype. Its leadership, and several of the workers involved in RR’s file, were themselves Indigenous and all of its staff receive the type of extensive training that is necessary to better understand and avoid problematic reliance on stereotype and prejudice. There were attempts to engage with RR in a strength-based, trauma-informed, way – for example in the May 18, 2017 integrated case management meeting. In that regard, I agree that the circumstances of this case are different from *Radek (No. 3)* and *Campbell (No. 4),* where the Tribunal identified deficiencies in the institutional understanding of, and approach to, Indigenous peoples. However, VACFSS’s origins in the urban Indigenous community and awareness of the context of Indigenous people in child welfare do not immunize it from the anti-Indigenous racism that is pervasive in Canadian society more broadly and within child welfare specifically: *Williams.* Nor does my conclusion that VACFSS has discriminated against RR mean that it discriminates against all of the Indigenous people it serves.

[361] In sum, I am satisfied that VACFSS did view RR through a lens of stereotype throughout the relevant period. This prevented VACFSS from assessing the actual needs of her children and led it to view RR as an adversary and threat, triggering an escalating “command and control” response. This was the opposite of what RR needed to successfully navigate this system – an issue I turn to next.

3. Connection #3: Responding to RR's needs

[362] The final type of connection in this case arises from the adverse impacts that RR experienced in her interactions with VACFSS because of her Indigeneity and trauma. These impacts were harms in themselves, but also led to the conflict which VACFSS would use to justify its ongoing custody and decision-making regarding the children.

[363] Above I have described how the *CFCSA* sets up a system marked by a profound power imbalance. Courts have long recognized this power imbalance and its disproportionate impact on certain groups of families: see eg. *G(J)* (per L'Heureux-Dubé J., concurring) at para. 114; *Kawartha-Haliburton Children's Aid Society v. MW,* 2019 ONCA 316 at para. 68-69. As Dr. Turpel-Lafond explains, the system's application to Indigenous families has been problematic from the start:

> … this command and control system came in through the *Indian Act* without the consent of First Nations and then replicated that absolute lack of consent at every single level, which is we don't really care what you think; we know better than you know and if you dare to stand up to us, you will see the long-term consequences.

[364] This expression of power and control, within the context of a system that has devastated Indigenous communities, can be extremely triggering for Indigenous caregivers. Given the impact of residential schools and child welfare on Indigenous Peoples, "distrust of the child welfare process is an expected and natural reaction": *Wrapping Our Ways* at p. 129. "Distrust or hostility toward the child welfare system may reflect feelings of powerless, fears about a lack of justice or equality. In some cases, there may be systemic biases and stereotypes actively at work which Aboriginal community and family members are reacting to": *Wrapping Our Ways* at p. 45. Justice Wolfe put it this way:

> It is trite to say that as a result of a history that requires such remedial legislation, Indigenous families sometimes find it difficult to work with child welfare agencies. This is true even when they are partnered with First Nations to provide culturally appropriate approaches to services. It is a strange dynamic to have to put your faith in the people who have taken your children, but even stranger when working with Indigenous

> families given this history of systematic discrimination. This is the context a court must consider when it is asked to use perceived non-cooperation with a society as a justification to keep Indigenous children on orders that don’t allow them to live with their parents.
>
> *Kina Gbezhgomi Child and Family Services v. M.A*, 2020 ONCJ 414 at para. 44

[365] In RR’s case, she directly connected her struggle with VACFSS to her Indigeneity and the larger plight of Indigenous people in child welfare. Many of the fears she expressed to VACFSS derived from the horrors of residential school that had been passed down to her, as well as broader patterns of violence against Indigenous women and girls – including physical and sexual abuse, deprivation of food, the use of physical restraints, unfamiliar sleeping habits, and the harvesting of organs. She continued to perceive that social workers were blaming her for the death of her son, that there was no legitimate basis to remove the children in 2016, that her efforts to seek support were held against her, and that the expectations being imposed on her were not culturally appropriate and in any event kept changing. During the period of this complaint, RR could never understand or accept the child protection concerns and progressively lost all trust that VACFSS was working in good faith to return them to her.

[366] In these circumstances, Indigenous families may respond in a number of ways, including by retreating and giving up. The Support Worker testified that, in her decades of experience, most mothers she worked with took that route. Others, like RR, choose resistance.

[367] That resistance required a human rights response. Instead, it sowed the seeds of what would become an escalating and intractable conflict with VACFSS, in which VACFSS wrongly conflated RR’s resistance with her ability to safely parent her children. This is not a new pattern. In the context of residential schools, the Truth and Reconciliation Commission observed how the state-sanctioned system treated parents who chose to resist:

> … Almost invariably, the system declined to accept the validity of parental and student criticisms. Parental influences were judged by school and government officials to be negative and backward. The schools also suspected parents of encouraging their children in acts of disobedience. Once parents came to be viewed as the ‘enemy’, their criticisms, no

> matter how valid, could be discounted. [TRC Report at p. 114, citations omitted]

[368] A similar trend occurs in child protection: *Wrapping Our Ways* at pp. 127-129. The command and control child welfare system creates conditions for social workers and others to respond to parental resistance by asserting more control and power over them. A parent who resists risks being labelled antagonistic, selfish, and an unfit parent. Dr. Turpel-Lafond explains:

> … the tools that the parent might have are challenging because a parent that questions a social worker too much is a parent that has a borderline personality problem, self-diagnosed often in the system, or a parent that needs to have a parental capacity assessment, which is kind of like sending you to the proctologist.

In most cases, Dr. Turpel-Lafond says, “the parent that was zealous and traumatized would be very severely punished in [the child welfare] system for speaking up”: see also *Interrupted Childhoods*.

[369] VACFSS acknowledges that resistance may be an “anticipated anti-colonial stance” and submits that it did not “punish” RR for her resistance. I find that it did. VACFSS expressly identified RR’s “lengthy history of conflictual involvement with child welfare systems” as a barrier to her parenting. That conflict continued into her relationship with VACFSS, and it is undisputed that RR’s conflict with VACFSS became a primary impediment to the return of her children. RR continued to dispute the basis for the children’s removal and insist that she would contest it in court. She resisted steps that would require her to relinquish power and privacy in relation to VACFSS. By the period of this complaint, which starts after RR perceived that VACFSS had done a “180 degree turn” from its promise to return her children by Christmas, RR’s distrust of VACFSS was cemented and the relationship was a conflicted one. RR said all along she did not understand why the girls were in care or what she had to do to get them back. She felt like the goal posts kept changing, which was a fair assessment.

[370] The conflict was exacerbated when RR began to participate in wider and more public advocacy about conditions for Indigenous people in the child welfare system, conduct which VACFSS wrongly interpreted to be evidence of RR’s desire for fame and notoriety at the

expense of her children. As that conflict escalated, so too did VACFSS's exertion of control over the children, cutting off access entirely or only allowing visits that were completely controlled by the social worker. Some of those decisions were made directly in response to RR raising complaints about the children's conditions in care: for example, the decision to suspend access after B's suicide attempt or A's allegation of being pushed into a closet, and decisions to require visits close to the VACFSS office in case of a conflict. When the Middle Children were moved to the Hollyburn residence, RR was excluded from that process and cut off from communicating with their caregivers. She was prohibited from attending their school, at risk of the police being called.

[371] Because of her Indigeneity and trauma, including the trauma of many years of negative interactions with the child welfare system, RR had a heightened need to be empowered and included in decisions respecting her children and to have complete, ongoing, and accurate information about their wellbeing. She needed reasons to trust that VACFSS was working towards having the children returned to her, rather than finding ways to keep them apart. I accept that her distrust made it more challenging for VACFSS to engage in the collaborative process it envisions. However, by responding with escalating assertions of power and control, at the expense of RR's agency and relationship with her children, VACFSS created the conditions for conflict that deepened the harm to RR and became the driving force in VACFSS's decision making regarding her children.

4. Conclusion: connection

[372] In sum, I am satisfied that RR's Indigeneity and disabilities were a factor in the adverse impacts she experienced, including VACFSS's decisions to continue custody over her children, reduce and suspend her access to them, and exclude her from important parts of their lives. First, VACFSS relied on stereotypical assumptions to view RR's trauma, substance use, conflict with the child welfare system, and the intergenerational impacts of residential school, as risk factors for the children, while at the same time not weighing in any significant way the protective benefits of RR's connection to culture. These assumptions pervaded its assessment that her children were in need of protection, which I have found was not reasonable in all the

circumstances. Second, RR's fears and distrust she harboured towards the child welfare system were based on her life experience as an Indigenous woman. This distrust was at the root of her conflict with VACFSS, and required a human rights response. Instead, it was the basis for escalating expressions of power and control, further harming RR and influencing VACFSS's decision making about her children.

[373] The burden shifts now to VACFSS to justify these impacts as reasonably necessary to safeguard the best interests of RR's children.

D. Justification

[374] To justify the adverse impacts on RR, VACFSS must prove:

a. it was acting for a purpose rationally connected to its function as a child protection agency;

b. it was applying standards adopted in good faith, in the belief they were necessary for the fulfillment of the purpose; and

c. the standards were reasonably necessary, in the sense that VACFSS could not meet its goal of protecting RR's children while accommodating RR, without incurring undue hardship.

Grismer at para. 20

[375] At issue in this complaint are VACFSS's decisions not to return RR's children to her care and restrict her access and involvement in their lives. I accept that the purpose of these decisions was to protect RR's children from harm and ensure their safety and wellbeing: *CFCSA,* s. 2. It is a purpose rationally connected to VACFSS's function as a delegated child protection agency. The parties do not dispute that VACFSS made the decisions in good faith, believing that they were necessary for the safety and wellbeing of RR's children.

[376] The heart of this complaint, as in so many, is at step three of the justification analysis, which examines whether the adverse impacts I have set out above were reasonably necessary

to achieve the purpose of protecting RR's children. To meet this requirement, VACFSS must show that it could not meet its goal of protecting RR's children while accommodating RR, without incurring undue hardship: *Grismer* at para. 30. I am not satisfied that it has done so.

[377] Above I have explained that removing an Indigenous child from their family, and interfering in their familial relationships, is a last resort. The first step for VACFSS to justify its ongoing custody of RR's children would be to establish to reasonable grounds for its belief that her children were in need of protection. I have already found that it has not established such reasonable grounds. Absent a basis to retain custody of the children, its decisions cannot be justified and are discriminatory. However, for the sake of completeness, I will undertake an alternative analysis which assumes that there were reasonable grounds to retain custody of the children. In that situation, VACFSS must establish there were no other less disruptive means to protect the child. This includes demonstrating that it took all reasonable and practical steps to support the caregiver before concluding nothing more was possible. RR has an obligation to facilitate this process as much as possible, including to accept reasonable solutions without insisting on perfection: *Central Okanagan School District No. 23 v. Renaud,* [1992] 2 SCR 970.

[378] VACFSS says that it took a "trauma-informed and restorative" approach to working with RR by not following legislative timelines and taking a "different view of the best interests of the child than the Ministry respecting a delay in decision-making, as it recognizes that some families may take longer to get to a place where a child is able to return home". I understand this submission to be that VACFSS accommodated RR by not seeking a continuing custody order sooner, even though it was entitled to by the legislation. Instead, it says it continued to work towards reunification while allowing significant access. It says that the delay in returning the children was caused by RR's refusal to do the two things it had asked: residential trauma treatment and the parental capacity assessment. I am not satisfied that either of these were reasonable prerequisites to the return of her children.

1. Residential trauma treatment

[379] First, there is no evidentiary foundation for VACFSS's conclusion that residential trauma treatment was the only appropriate treatment for RR. None of her own caregivers made this recommendation. Rather, the suggestion derives from the social workers' non-expert perception that RR needed something "more intensive" because the other work she had done "wasn't working", evidenced by the fact her children had been removed once again. In my view, the insistence that RR undertake the exact type of programming that VACFSS chose was not reasonable and is emblematic of the command and control approach which exacerbated their conflict.

[380] Above I have explained how VACFSS wrongly conflated its conflict with RR with the best interests of her children. The insistence that she complete specific programming is an example of that. Systemically, Professor Mosoff explains that there is often an assumption that "any conscientious parent would agree to participate in whatever programs the [child protection agency] recommends". And yet, taking into account the conflictual context of child welfare, it is understandable why many parents view social workers and "helping professionals" with "skepticism and distrust": Mosoff & others at pp. 59-60. In RR's case, the evidence shows that she accepted the need for supports and actively sought those out. She was actively engaged in counseling and building connection and community, and did complete some specific courses recommended by the social workers. She testified that she will "happily" be engaged in trauma counselling for the rest of her life. She explained to VACFSS that she did not want to go to residential trauma treatment because it required her to leave her community and be separated from her children for several months. This was reasonable and there is no evidence that VACFSS meaningfully considered the other supports that RR had put into place. In fact, VACFSS unfairly viewed a number of her community activities, which she described as healing, in a negative light, as evidence that she was overly concerned with fame at the expense of her children.

[381] VACFSS says it could not consider RR's other programming because RR refused to sign consents to release information for her clinical and other records. However, RR did offer to meet with VACFSS and any of her service providers, for example as they did in May 2017 with

her counsellor. She also offered to, and did, provide letters affirming her participation in specific services. VACFSS has not explained why that was insufficient. Even if it were, it was within RR's rights to refuse to consent. The *CFCSA* establishes a process by which VACFSS could have applied for access to the records it felt it needed: s. 65. It did not avail itself of this option.

2. Parental capacity assessment

[382] Turning now to the requirement of a parental capacity assessment, the evidence about this is confusing. RR did agree to a parental capacity assessment on condition that the assessor be chosen jointly by the parties. She wanted to have some agency to ensure the assessor brought an awareness of Indigenous parenting within a context of poverty, which was a legitimate concern. For some reason that is not apparent to me, this never happened. Instead VACFSS chose the assessor and designed the questions unilaterally. As I have said, the resulting report was ultimately found inadmissible by the court on the basis that the assessor was not an expert and that it was irrelevant. In these circumstances, I cannot conclude that it was reasonably necessary to retain custody of the children until RR completed the parental capacity assessment or that RR obstructed that process.

[383] RR asked on a number of occasions that VACFSS take her into care alongside the children, so she could be supported in addressing whatever concerns VACFSS had. This would be a less disruptive measure than removing her children. Dr. Turpel-Lafond explained that this is a practice in many First Nations, which takes the whole family into care rather than simply removing the child. VACFSS told her this was not an option. And, aside from suggestions of specific treatment or programming, there is no evidence that VACFSS offered RR any concrete supports. Instead, consistent with Dr. Turpel-Lafond's evidence, it set out a list of tasks for her to accomplish on her own.

[384] VACFSS says that it made efforts to support and correct RR in her parenting by having visits supervised by the Therapeutic Access Worker. That is not how those visits ultimately went, however. As I have described, the Therapeutic Access Worker was judgemental about RR, for example speculating about her use of alcohol and her "agenda". The November 11 visit in

particular revealed the challenges in that relationship. When A made an allegation of shoving in the Hollyburn facility and RR called the police, the Worker became upset and determined that RR was playing the "abuse card". She later swore at RR in a meeting. This was not a supportive relationship. Nor, in this case, can I conclude that VACFSS was accommodating, or supporting, RR by having her visits supervised by VACFSS social workers on the other side of court litigation.

[385] Ultimately, I am not persuaded that VACFSS exhausted or considered all other less disruptive measures short of retaining custody of RR's children. In fact, its escalating response to her over the period of the complaint was the opposite. In the face of RR's questioning and resistance, VACFSS undertook a full command and control response. It progressively exercised more and more control over RR. It cut off communication between RR and the Middle Children's caregivers, replaced third party visit supervisors with VACFSS social workers and staff, reduced and suspended her access to the children, and asserted increasing control over the visits, including over the topics she could discuss with her children and how they could mourn their brother's death as a family. It cut off the Middle Children's access to RR's Nation and culture. Near the end of this period, RR's agency was reduced to a choice between meeting her children at the VACFSS office or at a specific park chosen by the social worker. At the end, even this choice was taken away.

3. Conclusion: Justification

[386] VACFSS has not shown that its decision to retain custody of RR's children was reasonably necessary. First, I am not satisfied that there was a reasonable basis to conclude the children were in need of protection during the period of the complaint. Rather, that assessment was based on stereotype and the conflict between VACFSS and RR, which was exacerbated by its increasing command and control approach to her through the period of the complaint. Even if there were child protection concerns, VACFSS did not consider or exhaust less disruptive measures but instead went in the opposite direction. In all the circumstances, its insistence on residential trauma treatment and a parental capacity assessment as prerequisites to the return of the children were not reasonable. The adverse impacts on RR are not justified.

[387] In these circumstances, I find that VACFSS has violated s. 8 of the *Code*.

VII REMEDY

[388] I have found RR's complaint justified. I declare that VACFSS's conduct, as set out in this decision, is discrimination contrary to the *Code*: s. 37(2)(b). I order VACFSS to stop the contravention and refrain from committing the same or similar contravention: s. 37(2)(a).

[389] In addition, RR seeks orders that VACFSS:

a. prioritize and implement meaningful policies and training with respect to its interactions with Indigenous Peoples within a reasonable time period, to be determined by the Tribunal; and

b. further implement an evaluation process to ensure that its policies and training with respect to Indigenous Peoples are being adhered to and implemented effectively, respectively, and within a reasonable time period, to be determined by the Tribunal. [*Code,* s. 37(2)(c)(i)]

[390] RR did not make any specific submissions about why these orders are appropriate, and I am not persuaded that they are. VACFSS already prioritizes policies and training about how to serve Indigenous people in child welfare. Its leaders are all Indigenous and its policies are specifically designed with the needs of Indigenous people in mind. There is no evidence before me about how these policies, and VACFSS's training, are insufficient or what a Tribunal order could add to the work already being done. I trust that VACFSS will take any steps it considers necessary to comply with my orders to stop the contravention and refrain committing the same or similar contraventions. I decline to make these further orders.

[391] I do, however, find that it is appropriate to order VACFSS to compensate RR for injury to her dignity, feelings, and self-respect: *Code,* s. 37(2)(ii).

A. Injury to dignity award

[392] A violation of a person's human rights is a violation of their dignity. The primary way that the *Human Rights Code* addresses this violation is by giving the Tribunal discretion to order compensation for injury to a complainant's dignity, feelings, and self-respect. The purpose of these awards is to compensate the complainant, and not to punish the respondent.

[393] To determine an appropriate award, the Tribunal generally considers three broad factors: the nature of the discrimination, the complainant's social context or vulnerability, and the effect on the complainant: *Torres v. Royalty Kitchenware Ltd.,* 1982 CanLII 4886 (ON HRT); *Gichuru v. Law Society of British Columbia (No. 9),* 2011 BCHRT 185 [***Gichuru (No. 9)***] at para. 260, upheld in 2014 BCCA 396. Ultimately, the amount of injury to dignity damages is "highly contextual and fact-specific": *Gichuru (No. 9)* at para. 256. While the Tribunal may consider awards in other cases, the exercise is not to identify a "range" established in other cases. Rather, it is to try to compensate a complainant, as much as possible, for the actual injury to their dignity: *University of British Columbia v. Kelly*, 2016 BCCA 271 [***Kelly***] at paras. 59-64*; Francis v. BC Ministry of Justice (No. 5),* 2021 BCHRT 16 [***Francis (No. 5)***] at para. 176. In this case, RR seeks an award of $150,000.

[394] In the following sections, I set out some highlights from the evidence about the nature of the discrimination, social context, and impact. However, this is not an exhaustive exploration of these issues, many of which have been discussed elsewhere in my reasons. I reach my decision on remedy based on all the facts I have set out in this decision.

1. Nature of the discrimination

[395] The discrimination I have described in this complaint is profound. Broadly speaking, state removal of a child engages a parent's right under the *Charter of Rights and Freedoms* to security of their person. It is a "serious interference with the psychological integrity of the parent" and a "serious intrusion into the family sphere": *G(J)* at para. 61; *Winnipeg Child and Family Services v. K.L.W.,* 2000 SCC 48 at paras. 85-87. In *G(J),* the Supreme Court of Canada explained:

> … The parental interest in raising and caring for a child is … “an individual interest of fundamental importance in our society”. Besides the obvious distress arising from the loss of companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere. Further, the parent is often stigmatized as “unfit” when relieved of custody. As an individual’s status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state’s conduct. [at para. 61, citation omitted]

[396] State interference in the relationship between an Indigenous parent and their child takes on special significance given the context I have touched on this decision. Ms. Spence described Indigenous children as a “sacred bundle”, reflecting their special place in many Indigenous communities. The 1996 *Royal Commission on Aboriginal Peoples* described it this way:

> Children hold a special place in Aboriginal cultures (...) They must be protected from harm (…). They bring a purity of vision to the world that can teach their elders. They carry within them the gifts that manifest themselves as they become teachers, mothers, hunters, councillors, artisans and visionaries. They renew the strength of the family, clan and village and make the elders young again with their joyful presence.
>
> Failure to care for these gifts bestowed on the family, and to protect children from the betrayal of others, is perhaps the greatest shame that can befall an Aboriginal family. It is a shame that countless Aboriginal families have experienced, some of them repeatedly over generations.
>
> *Royal Commission on Aboriginal Peoples (1996)*, Gathering Strength vol. 3, p. 21, cited in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2019 CHRT 39 [***2019 Caring Society***] at para. 1.

[397] Discriminatory child welfare practices are today a primary and ongoing threat to reconciliation and the safety, equality, and rights of Indigenous people. The Truth and Reconciliation Commission of Canada intentionally focused their first five Calls to Action on child welfare, in order to "shed a focused and prominent light on the fact that the harms of residential schools happened to children, that the greatest perceived damage to them was their

removal from their home and family; and that the legacy of residential schools is not only continuing but getting worse, with increasing numbers of child apprehensions through the child welfare system": *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2018 CHRT 4 [***2018 Caring Society***] at para. 124. The National Inquiry into Missing and Murdered Indigenous Women and Girls found a "direct link between current child welfare systems and the disappearances and murders of, and violence experience by, Indigenous women, girls, and 2SLGBTQQIA people": *Reclaiming Power,* Volume 1a, p. 355. It described the apprehension of Indigenous children as "the strongest form of violence against a mother" which "violates fundamental human rights and compromises culture, health, and security.": pp. 7 and 339. Finally, in the *First Nations Caring Society* case, the Canadian Human Rights Tribunal described the unnecessary removal of an Indigenous child from their caregiver and community as "a serious harm causing great suffering to that child, the family, and the community": *2019 Caring Society* at para. 161.

[398] In this case, the discrimination was ongoing over nearly two years. Throughout that entire period, RR was denied custody of her children. For seven months, she was cut off from them almost entirely. When she did see the children, their interactions were closely supervised and scrutinized. Eventually, VACFSS applied for a continuing custody order, and RR faced the prospect of permanent separation from her children.

[399] Throughout this time, RR was excluded from key parts of her children's young lives, including their education. She did not see any report cards, she did not get them dressed for picture day, or see a class photo. She was alienated from their school, whose administrators were told at various points to phone the police if she was seen at the school. She was given little information about their lives, which stoked her worst fears. She learned about many significant things that happened to her children, including the level of violence and dysregulation they were experiencing in the Hollyburn residence, for the first time in this hearing.

[400] Very significantly, RR was impeded from transmitting cultural values and practices to her children. Though VACFSS made some efforts to connect RR's children with their culture, this was not prioritized. The programs it provided the children were pan-Indigenous and not rooted in RR's specific Nation. Contrary to RR's wishes, the children did not smudge every day or, for long periods in the complaint, at all. Also contrary to RR's wishes, her daughter's hair was cut without regard for the ceremony and significance of a haircut in her culture. For various periods in the complaint, the children were not allowed to participate in the gatherings of their community and extended family at Pow Wow night.

[401] VACFSS argues that the nature of the discrimination is mitigated by the fact that it was acting in good faith, within its statutory mandate, to protect the best interests of RR's children. It relies on *Gichuru (No. 9)*, in which the Tribunal considered the Law Society's "statutory mandate and public responsibility to inquire into the medical fitness of applicants" and rejected Mr. Gichuru's argument that the Law Society had acted abusively or egregiously: paras. 267-270.

[402] I agree, and acknowledge, that VACFSS was acting within its statutory mandate and that I have not made specific findings that any of the social workers acted maliciously or in bad faith. I also accept that, if I had found malice, abuse, or intentional egregious conduct, those factors could have made the nature of the discrimination worse. However, ultimately, I cannot conclude that VACFSS's statutory mandate or good intentions meaningfully diminish the nature of the discrimination. Regarding its mandate, I find it is the opposite.

[403] As I have explained, the power that VACFSS exercises as a child protection agency is almost unparalleled in Canadian society: the power to take a person's children based on an allegation. With such power comes a grave responsibility to exercise its duties free of discrimination. As this case demonstrates, the consequences for failing in that responsibility could not be more severe – for the parent and for the child. In my view, the extraordinary power that VACFSS exercises within its mandate is a factor which weighs in favour of a higher award.

2. Social context

[404] Next, I consider that RR's social context increased the impact of this discrimination on her. In many cases, the Tribunal refers to this as a complainant's "vulnerability", but more recently the Tribunal has recognized the deficiencies in that term: see eg. *Nelson v. Goodberry,* 2021 BCHRT 137 at para. 35; *Lafleche v. NFLD Auto dba Prince George Ford (No. 2),* 2022 BCHRT 88 at para. 78. I agree with the assessment of Dr. Barry Lavallee:

> Indigenous women are not vulnerable, Indigenous women are targeted in secular society for violence. There's a very big difference to [being] vulnerable. To be vulnerable in medicine means that if I irradiate your body and you have no cells, you are vulnerable to an infection. But, to be vulnerable to murder because of your colour, and your positionality and just being Indigenous is targeting. It is an active form of oppression of Indigenous women.
>
> [cited in *Reclaiming Power,* Volume 1a at p. 125]

And so, while I do not say that RR was "vulnerable", I do say that her identity as a racialized Afro-Indigenous single mother living with trauma and few economic resources is such that she has been subject to a lifetime of oppression and discrimination. It also exacerbated the already significant power imbalance between her and VACFSS. I have described the dynamics of that power imbalance above. I will not repeat them here except to highlight they are an important part of the context of the discrimination.

[405] RR came to her interactions with VACFSS after a lifetime of negative experiences with child welfare, including as a child. She was raised by intergenerational survivors of residential schools. She has been socially and economically marginalized. She has experienced numerous traumatic events in her life, including the trauma of losing a baby, and then being unable to escape suspicion for his death. In her evidence, RR described VACFSS's conduct as exacerbating and perpetuating the historical disadvantages imposed on her family, mainly as a result of residential schools: *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2017 CHRT 7 at para. 404. She explains:

> My mother went to Indigenous – into residential school, you know. She was in and out of foster care. I was in and out of foster care as a child, and I thought, when is this cycle going to stop? ... I came to VACFSS with high hopes that they would have a better understanding with how the systemic injustices were affecting my family and my kids, and instead I feel that the services they provided me and my children traumatized us more than we ever – before with any other society.

Given this context, RR was especially vulnerable to the message she perceived VACFSS was sending her, that she was not a fit mother and her children were better off without her. I return to this below.

[406] VACFSS argues that RR's long history of trauma "has had a significant impact on her and will likely continue to have a significant effect on RR for some time to come". It suggests that, given this history, "it is difficult to determine with precision what impact the alleged discriminatory conduct had on RR, **if any**" [emphasis added]. This suggestion that the discrimination I have found in this case may have had no impact on RR given her life experience is deeply troubling. It suggests that RR is a person who may not be impacted by a separation from her children, a proposition which I emphatically reject. It also misunderstands how the Tribunal assesses factors like trauma in its damage awards. In fact, a history of trauma can exacerbate the impacts of discrimination and support a higher award: *Araniva v. RSY Contracting and another (No. 3),* 2019 BCHRT 97 at para. 135; *Francis (No. 5)* at para. 96. That is the case here.

3. Impact

[407] I turn now to the evidence which I heard about the impact that the discrimination had on RR. To begin, I reject VACFSS's argument that that there is "insufficient evidence" to support a high award in this case. It cites *Davis v. Canada Border Services Agency,* 2014 CHRT 34, in which the Canadian Human Rights Tribunal noted that the complainant had not provided any expert evidence regarding the impact of the discrimination.

[408] It is true that RR has not submitted expert medical or other evidence about the impact of the discrimination on her. She does not need to. While in some cases expert evidence of

impact may support a high award, it is not a pre-requisite: *Gichuru (No. 9)* at para. 266. In this case, I have considerable material and evidence before me to assess the impact of discrimination on RR based on the historical and social context – as discussed above – as well as the very specific impacts she has described in her own testimony. In that regard, RR is an expert in her own experience. I have found her evidence to be reliable and she has testified clearly about the impacts of the discrimination. I reject a suggestion that complainants are required to retain expert professionals to describe their own experience in every case, in order for the Tribunal to recognize that experience with a high award for injury to dignity.

[409] RR testified emotionally about the impact of these events on her. While her kids were out of her care, RR felt afraid every day. She could not protect them, and felt punished if she tried. Crying, she explains:

> I was denied to be a mother to my kids and they needed me because they were emotionally upset and it's very clear in all of these documents – they just wanted to be with their mom. And I was denied that. We were denied to be a family. And even pushed away, so our visits had to be separated in one-on-one visits – why can't we be a family? Why couldn't we be together?

RR missed years of her children's lives and still, to this day, does not know everything they went through. As noted above, she learned of many terrible events for the first time in this hearing.

[410] RR testified about the feeling of waking up at night with tears in her eyes, wondering how she could breathe. She used medicinal marijuana to cope, and at the lowest points when she was separated from her children, she used more to try to sleep and find some peace.

[411] In May 2017, RR lost an opportunity to secure safe, permanent family housing in a four-bedroom suite because VACFSS would not return her children to her. The following year, when her access was suspended completely and VACFSS was pursuing a continuing custody order, RR lost her housing altogether and was homeless for several months.

[412] Overall, RR felt like "the whole system did not want me to have my kids". She questioned her value as a mother and a person:

> … When my visits got suspended, I was under the impression that the kids were getting better because they weren't seeing me. Almost trying to make me think, and make me feel, that my kids were better off without me. And let me just go off and wander off and go die, and crawl under a rock and die somewhere, right? That was how I felt.

[413] RR was pushed to the brink of hope: "It's hard to even have hope when you don't have your children with you. It's hard to even want to live anymore when you don't have your kids". She felt labelled as "another single mother drunk Indian that's basically disposable" and who would "end up giving up for her kids". She described the feeling of "so many different fresh workers coming on and they all have an opinion about me". By the end of the period in the complaint, she says:

> I was emotionally, mentally, and physically and emotionally, just exhausted. Like I felt like I was under water and VACFSS is sitting here on a rowboat, and sitting here watching me drown and not even helping me and I'm swimming and trying to catch a breath and trying to breathe. And I'm not getting any help, or … support. I felt like I was drowning.

[414] RR says three things kept her going through this "long grueling process": her culture, her love of her children, and the support of community organizations who had faith in her when she did not have faith in herself. She credits the judge in the child protection proceedings with guiding her children back to her. However, to this day, she lives in fear that her children could be taken away from her again, for reasons she does not understand and cannot control.

[415] In sum, the nature of the discrimination is what the Canadian Human Rights Tribunal described as a "worst-case scenario": *2019 Caring Society* at para. 13. The impact of the discrimination was exacerbated by RR's social context and the profound power imbalance between the parties. That impact, as described by RR, was significant. The discrimination struck at the core of RR's psychological integrity and identity as a parent, causing her to question the value of her own life. These factors favour a high award. I turn next to the appropriate amount.

4. Amount of the award

[416] The injuries of discrimination do not lend themselves easily to monetary compensation. There is no mathematical formula that calculates dignity. Comparison between cases is

inherently imperfect and can be a demoralizing exercise in valuing – or devaluing – a person's pain.

[417] At the same time, compensatory damages are how the *Code* achieves its purpose of providing redress to people who have been discriminated against: s. 3(e). Difficult as it may be, the Tribunal must apply its expertise and exercise its discretion to identify an appropriate amount of money to compensate a complainant – as much as money ever could – for the indignity and harms of discrimination.

[418] As I have said, in assessing this amount, the Tribunal is not bound by a range established in previous cases: *Kelly* at para. 60; *Francis (No. 5)* at para. 176. At the same time, however, it should be mindful of other awards to ensure some degree of consistency and predictability for members of the public who need to understand their human rights and obligations. Other complaints are helpful as benchmarks to ground the analysis.

[419] In this case, VACFSS argues that an award of "no higher than $20,000" is appropriate. This was the amount ordered in *Smith v. Mohan (No. 2),* 2020 BCHRT 52 and *Campbell (No. 4),* both cases involving discrimination against Indigenous complainants. VACFSS argues that the discrimination in those cases was more severe than here. Without diminishing the seriousness of the discrimination in either case, I disagree. In *Smith,* the complainant was subjected to racist comments from her landlord and a dispute about smudging that led her to lose her housing. In *Campbell,* the complainant was discriminated against in a single encounter with the police in which she was prevented from protecting her son. In contrast, the discrimination I have described in this year spanned a lengthy period and separated a mother from her children. It is more severe than the circumstances in *Smith* or *Campbell,* and warrants a higher award.

[420] RR seeks an award of $150,000. She relies on *Francis (No. 5)*, a case in which the Tribunal awarded $176,000 to a Black man who had been extremely impacted by years of racial harassment at work. The Tribunal summarized those impacts as follows:

> The impacts on Francis were extreme. He developed a mental illness. Not only did Francis lose his employment, but he has also lost his ability to

> work. In addition to the extreme losses that Francis has experienced in regards to his employment and mental health, he has also experienced a deterioration in his physical health and social well being. He experienced financial loss which included the loss of his home. Although his wife continued to work, they had to borrow money from friends and went to the food bank to get groceries. His relationship with his wife has suffered. He has lost a decade with his children. His wife feels sickened by how this case has impacted her husband. Her view is that this has destroyed him as a human.

In this case, RR does not have similar evidence about the lifelong impact of the discrimination on her. At the same time, however, the nature and context of the discrimination supports a similarly "extreme" impact.

[421] *Francis (No. 5)* was an unprecedented award. Before *Francis (No. 5)*, the highest injury to dignity award in BC was $75,000 in *Kelly,* itself an outlier*.* In *Kelly,* the complainant was discriminated against when UBC's conduct delayed his lifelong dream of becoming a doctor. He experienced "deep humiliation and embarrassment … for a significant period of time", lost his income and independence, and isolated himself socially. In my view, both the nature of the discrimination and impact on RR are more severe.

[422] Today, most injury to dignity awards in BC are between $10,000 and $40,000, though the Tribunal has said that the trend is upwards: *Biggings obo Walsh v. Pink and others,* 2018 BCHRT 174 at para. 163. Notably, in Ontario, damages for human rights complaints have been higher. This is most evident in complaints involving sexual harassment or assault: eg. *AB v. Joe Singer Shoes Limited,* 2018 HRTO 107 ($200,000); *G.M. v. X Tattoo Parlour 2*018 HRTO 201 ($75,000); *O.P.T. v. Presteve,* 2015 HRTO 675 ($150,000 and $50,000); *NK v. Botuik*, 2020 HRTO 345 ($170,000). There is no principled reason why the remedies for discrimination should vary dramatically based on the province where the discrimination occurs. I consider these Ontario precedents helpful in my assessment of an appropriate award.

[423] The only case I am aware of where a human rights body ordered compensation to an Indigenous caregiver for discrimination in child welfare is *First Nations Caring Society*. There, the Canadian Human Rights Tribunal ordered the maximum amount allowable for "pain and

suffering" under the federal legislation, which is $20,000. And so, ultimately, the case is not helpful to me because the remedy was capped by the legislation. I am not aware of any other complaint where a human rights body has ordered compensation to an Indigenous caregiver for discriminatory child welfare practices.

[424] This is an unprecedented complaint. It exposes systemic forces of discrimination and their profound impacts on an Indigenous mother. In my view, it is a complaint that warrants an award at the highest end of human rights damages. Considering all of these circumstances, I am satisfied that the amount RR asked for – $150,000 – reflects the injury to her dignity, feelings, and self-respect.

[425] Finally, I unequivocally reject VACFSS's submission that any award should be placed in trust for RR's four children. Although VACFSS purports to make this suggestion in RR's interests, it is paternalistic. It perpetuates the harmful narrative that a woman's interests should be subsumed by, or indivisible from, her children's. This is an award to compensate RR for injury to her dignity. As the Canadian Human Rights Tribunal has explained, "[f]inancial compensation belongs to the victims/survivors who are the ones who should be empowered to decide for themselves on how best to use this financial compensation": *2019 Caring Society* at para. 260. RR is a smart woman, represented by able legal counsel. She can and should make her own decisions about how to use the award.

VIII APPLICATION FOR COSTS

[426] RR applies for an order of costs against VACFSS for improper conduct in the course of the complaint: *Code,* s. 37(4). She argues that VACFSS failed to comply with its disclosure obligations throughout the process and acted improperly by violating an understanding that witnesses would be excluded from the proceeding until their testimony. She says that this conduct has negatively impacted the integrity of this process and warrants an award of $5,000. I agree.

[427] The Tribunal's *Rules of Practice and Procedure* set out a process by which parties must exchange all arguably relevant documents well in advance of a hearing. Pre-hearing document disclosure is fundamental to the fairness of this process. It allows the parties to properly prepare and present their case, and ensures the Tribunal has the best possible evidence to make its decision. In this case, I find that VACFSS failed to comply with its disclosure obligations, to the detriment of the process. The background is as follows.

[428] RR filed this complaint on August 25, 2017. The Tribunal set disclosure deadlines early in the process, before VACFSS applied to dismiss the complaint. That application was denied on April 30, 2019, and a hearing was scheduled to proceed in February 2020. On January 28 and February 3, 2020, about three weeks before the hearing began, VACFSS disclosed the reports from RR's supervised visits with the children. It is apparent from my reasons above that these reports are highly relevant to VACFSS's assertion that it was necessary to restrict RR's access to her children because the visits were not going well.

[429] Notwithstanding this late disclosure, the hearing proceeded, as scheduled, on February 18. RR called her witnesses and closed the evidentiary part of her case by February 25.

[430] On February 26, VACFSS opened its case. On the last day scheduled for hearing – February 28 – it was apparent that more hearing dates were required. The parties scheduled three more days in April 2020. Before the complaint could resume, the COVID-19 pandemic intervened. By consent of the parties, the April dates were adjourned and rescheduled in September 2020.

[431] The hearing reconvened on September 8-11, 2020, and VACFSS called the remaining witnesses on its witness list. Based on their testimony, RR became aware that there were further relevant documents that had not been disclosed. I set a schedule for VACFSS to disclose the further documents requested by RR, and a process for the parties to call or re-call witnesses if necessary in November 2020.

[432] On October 15, 2020, VACFSS disclosed the further documents RR requested as well as a significant volume of further documents. This included a number of highly relevant documents:

a. social worker notes and communications, including relevant notes of Social Worker L and Social Worker S – both of whom had already testified.

b. plans of care for the children and the assessment reports which VACFSS relied on to make decisions about RR's custody and access to the children. These were prepared by Social Workers A, S, and L, all of whom had already testified. They included Vulnerability Assessments, Reunification Assessments, and Strengths and Needs Assessments which formed the basis for much of VACFSS's decision making.

c. critical incident reports for the children while they were living at the Hollyburn facility. These reports contained extensive new information about the children's dysregulation and self-harm while in care, which was a basis on which VACFSS says it was making decisions about RR's access.

d. reports about the children from their foster parents and Hollyburn. Again, this included new information about the children's behaviour in care which VACFSS says was influencing its decisions about RR's access.

e. medical assessments of the children, which VACFSS has argued were a primary basis for its conclusion that they could not return to RR until their mental health needs were properly addressed.

f. transfer reports prepared by VACFSS for the Hollyburn facility to prepare for the Middle Children's transition to Hollyburn.

It is apparent from my reasons above that I have relied on nearly all these records to make my decision and that they are highly relevant to the issues in the complaint.

[433] On October 26, VACFSS retained new counsel in the proceeding, Harvey Delaney. Mr. Delaney is not responsible for any of the improper conduct I am describing. However, the late change of counsel necessitated another adjournment to give Mr. Delaney the opportunity to get up to speed. The hearing was adjourned again until January 2021.

[434] In January 2021, one of the participants became ill and the hearing was adjourned by consent. New dates were scheduled in April 2021. Between January and April, a number of issues arose as a result of the newly disclosed documents. I convened case management conferences with the parties, and ordered third party disclosure from Hollyburn. I also made rulings about how the newly disclosed documents could be admitted, and which witnesses could be called and re-called as a result of the late disclosure.

[435] In early April, RR received the third-party disclosure from Hollyburn. This included several hundred pages of daily log notes, over 80 weekly updates, almost 1,000 emails related to the children, and further critical incident reports and policies. I granted her request to adjourn the April dates until June to review the documents. In May 2021, VACFSS disclosed further relevant documents about its communications with Hollyburn.

[436] On June 10, 2021, Mr. Delaney disclosed an email written by former VACFSS counsel to Social Worker L before her testimony. The email included “excerpts” from the cross examination of Social Worker A and Social Worker S, in order to prepare Social Worker L. Though I had not made a formal order excluding witnesses from the proceeding, I agree with RR that the hearing proceeded on the understanding that witnesses were not present in the room until it was time for them to testify in order to preserve their evidence. Previous counsel’s email was inconsistent with that understanding.

[437] The hearing proceeded on June 14-17, and further dates were added on June 25, July 6 and 7, and July 21, 2021. On these dates, VACFSS completed its case, including by re-calling two of its witnesses to testify about documents disclosed after they had testified. RR was also re-called for this purpose. And so, the evidentiary portion of this complaint finally completed on July 21, 2021 – about 17 months after the hearing began.

[438] VACFSS argues that it complied with its disclosure obligations and was at all times acting on the advice of former legal counsel, in good faith based on its understanding of the issues in the complaint. It says that the scope of the complaint expanded throughout the hearing, such that documents it had reasonably understood not to be relevant then appeared to become

relevant. It argues that “As this hearing progressed, new and different areas, not foreseen in the scope that was laid out for this case, became apparent”.

[439] I do not agree that the complaint evolved during the hearing or that the documents that were disclosed late in the process should not reasonably have been identified as relevant much earlier. In the Dismissal Decision, I set out the issues in the complaint. I said that the complaint concerned VACFSS’s “decisions to continue to deny [RR] custody of her children, and place various restrictions on her access to them”: para. 13. In the hearing, VACFSS said it based those decisions on the mental health of the children, the quality of supervised visits, the recommendations of professionals, its assessment of the risk(s) to the children, and the children’s dysregulation in care following visits with their mother. Documents relevant to those issues, therefore, are central to the main issues in the complaint and clearly should have been disclosed. Inexplicably, they were not disclosed until October 2020, after the close of RR’s case and only after she asked for further disclosure. Likewise, I said in the Dismissal Decision that RR could prove discrimination by showing she was subject to an unreasonably strict parenting standard compared to the other caregivers: para. 78. I referred to the children engaging in self-harm and being mistreated in the foster home. From this, VACFSS should have known that documents related to the children’s wellbeing and treatment in care – including critical incident reports and records relating to allegations of mistreatment – were arguably relevant and should be disclosed.

[440] VACFSS’s conduct in failing to disclose highly relevant documents until the eve of, or during, the hearing had a prejudicial impact on the process. RR was required to prepare and present her case, and cross-examine VACFSS’s key witnesses, without the benefit of all relevant evidence. She only became aware of many of the documents through the evidence of VACFSS’s witnesses, who were referring to records that she had never seen. The late disclosure complicated and prolonged the hearing process, triggering at least one adjournment and requiring a number of interim rulings. Witnesses had to be re-called to testify about documents disclosed after their evidence, which is inherently inefficient. At least one important witness, Social Worker L, was not available to be recalled and cross-examined about some of her notes,

including the note that the children's therapist was recommending they have no face-to-face contact with RR.

[441] Likewise, I find that VACFSS's previous counsel behaved improperly when she told Social Worker L about the testimony and cross-examination of other witnesses in order to allow her to prepare her own evidence. Though I did not make an express order to exclude witnesses, the hearing proceeded on the understanding that witnesses should not be present until their evidence. VACFSS's previous counsel was experienced and aware of the expectation. For example, on the second day of hearing they noted that a person on their witness list would not be giving evidence because they were seated in the gallery. They ought to have known this behaviour was improper and risked compromising the integrity of Social Worker L's evidence*: Asad v. Kinexus*, 2008 BCHRT 293 at para. 754.

[442] VACFSS argues that none of this conduct rises to the level of impropriety warranting a costs award. It cites Tribunal decisions which have required "a notion of intentional wrongdoing or culpable action, in the sense of conduct that a reasonable person would know is wrong": *Jacobs v. Dynamic Equipment Rentals Ltd and Stewart (No. 2),* 2005 BCHRT 353. This is a standard that was set in *Hendrickson v. Long & McQuade Ltd,* [1999] BCHRTD No. 4 (QL), which has been subsequently rejected by the Tribunal.

[443] In *McLean v British Columbia (Ministry of Public Safety & Solicitor General),* 2006 BCHRT 103, a case cited by VACFSS, the Tribunal held that the high threshold set in *Hendrickson* was no longer appropriate in the context of the Tribunal's direct access system. It held:

> … where a party contravenes a rule or an order, such conduct may, under the express terms of s. 37(4)(b), constitute improper conduct. While a party's intention in doing so may be relevant, **no specific intention is necessary for the breach of a rule or order to be improper**. More generally, while conduct which is the result of intentional wrongdoing may certainly be "improper", in my view, improper conduct is not necessarily limited to intentional wrongdoing**. Any conduct which has a significant impact on the integrity of the Tribunal's processes, including conduct which has a significant prejudicial impact on another party, may**

> **constitute improper conduct within the meaning of s. 37(4).** [para. 8, emphasis added]

[444] I accept that VACFSS did not engage in any of this conduct intentionally or in bad faith to obstruct or undermine the process. However, I do find that the failure to properly comply with the Tribunal's disclosure rules had a significant prejudicial impact on RR's ability to prepare and advance her case efficiently. And, while I am ultimately satisfied that any potential unfairness was remedied by allowing certain witnesses to be recalled, the late disclosure did negatively impact the efficiency of the hearing, and the Tribunal's ability to provide a timely resolution of the complaint. It is the type of conduct that should not be condoned in this process.

[445] Likewise, while I cannot discern any specific prejudice from previous counsel's violation of an implied expectation that witnesses would be excluded until their evidence, I find that it is conduct that counsel ought to have known was wrong and should not be condoned.

[446] The purpose of a costs award is punitive: *Terpsma v Rimex Supply (No. 3),* 2013 BCHRT 3 at para. 102. In determining the appropriate amount, the Tribunal will consider factors including the nature of the conduct being sanctioned and its impact on the process, the ability of the party to pay, their culpability, any other consequences they have already experienced, and any mitigating factors: *Kelly v. Insurance Corp of British Columbia (No. 1),* 2007 BCHRT 382 at para. 91. Balancing these factors, I agree with RR that an award of $5,000 is appropriate. It is an amount which recognizes the severity of the conduct – particularly the failure to disclose relevant documents – while at the same time accounts for the fact that VACFSS is a non-profit organization.

[447] I order VACFSS to pay RR $5,000 as costs for improper conduct.

IX ORDERS

[448] I have found that VACFSS discriminated against RR in violation of s. 8 of the *Human Rights Code*. I make the following orders:

a. I declare that VACFSS's conduct contravened s. 8 of the Code: *Code*, s. 37(2)(b).

b. I order VACFSS to cease the contraventions and refrain from committing the same or similar contraventions: *Code*, s. 37(2)(a).

c. I order VACFSS to pay RR $150,000 as compensation for injury to her dignity, feelings, and self-respect: *Code*, s. 37(2)(d)(iii).

d. I order VACFSS to pay RR $5,000 as costs for improper conduct in the course of the complaint: *Code,* s. 37(4).

e. I order VACFSS to pay RR post-judgement interest on the damage award until paid in full, based on the rates set out in the *Court Order Interest Act*.

Devyn Cousineau

Tribunal Member

Human Rights Tribunal