e-document T-213-23-ID 1

FILED / DÉPOSÉ
FEDERAL COURT
COUR FÉDÉRALE
January 31, 2023
31 janvier 2023
Jonathan Macena
OTT | 1

Court File No.

FEDERAL COURT

PROPOSED CLASS PROCEEDING

B E T W E E N:

(Court Seal)

CHIEF DAVID CRATE on behalf of FISHER RIVER CREE NATION,
CHIEF VERA MITCHELL on behalf of POPLAR RIVER FIRST NATION,
CHIEF RAMONA HORSEMAN on behalf of HORSE LAKE FIRST NATION,
CHIEF LEE TWINN on behalf of SWAN RIVER FIRST NATION,
CHIEF JENNIFER BONE on behalf of SIOUX VALLEY DAKOTA NATION,
CHIEF MICHAEL YELLOWBACK on behalf of MANTO SIPI CREE NATION,
CHIEF ALBERT THUNDER on behalf of WHITEFISH LAKE FIRST NATION,
CHIEF RODERICK WILLIER on behalf of SUCKER CREEK FIRST NATION,
CHIEF WILFRED HOOKA-NOOZA on behalf of DENE THÁ FIRST NATION,
and CHIEF DENNIS PASHE on behalf of DAKOTA TIPI FIRST NATION

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

STATEMENT OF CLAIM

TO THE DEFENDANT:

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

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

WITHIN 30 DAYS after the day on which this statement of claim is served on you, if you are served in Canada or the United States; or

WITHIN 60 DAYS after the day on which this statement of claim is served on you, if you are served outside Canada and the United States.

TEN ADDITIONAL DAYS are provided for the filing and service of the statement of defence if you or a solicitor acting for you serves and files a notice of intention to respond in Form 204.1 prescribed by the *Federal Courts Rules*.

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

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

January 31, 2023

Issued by:
Address of local office: Thomas D'Arcy McGee Building
90 Sparks Street, Main Floor
Ottawa, Ontario
K1A 0H9

TO: The Attorney General of Canada
Civil Litigation Section
Department of Justice Canada
50 O'Connor Street, 5th Floor
Ottawa, Ontario K1A 0H8

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I HEREBY CERTIFY that the above document is a true copy of the original filed in the Court./

JE CERTIFIE que le document ci-dessus est une copie confirme À l'original déposé au dossier de la Cour fédérale.

Filing Date January 31, 2023
Date de dépôt : _____

Dated February 1, 2023
Fait le : _____

CLAIM

I. OVERVIEW OF THE CLAIM

1. The plaintiffs bring this action for the collective harms suffered by First Nations across the country as a result of Canada's First Nations child welfare system, in particular, the collective loss of language, culture and tradition through the systemic discriminatory separation of First Nations children from their lands and communities.

2. Against the backdrop of cultural genocide and inter-generational trauma caused to First Nations, Canada introduced a First Nations child and family program in 1991, which the Canadian Human Rights Tribunal has found to be discriminatory contrary to the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6. The Tribunal found that First Nations individuals experienced pain and suffering of the worst kind as a result of Canada's wilful and reckless conduct. Canada ignored and abandoned other First Nations individuals who fell outside the arbitrarily defined parameters of Canada's on-reserve First Nations child welfare program.

3. The First Nations children and families who were personally affected by the impugned discrimination are not the subject of this proceeding. Those individuals are covered by other ongoing class proceedings brought by individual representative plaintiffs, which have the affected children and their families as their sole focus and priority, including *Moushoom v. Canada (Attorney General)*, 2021 FC 1225; *Trout v. Canada (Attorney General)*, 2022 FC 149; and *Stonechild v. Canada*, 2022 FC 914.

4. This claim relates to the devastating impact of Canada's conduct on First Nations communities across Canada, and the collective harm that those nations suffered.

5. Since time immemorial and prior to European contact, each of these nations had its own cultural, traditional, spiritual, and linguistic practices. Canada's discrimination and its admitted cultural genocide breached the rights of each of these First Nations to language and culture, amongst others, by systemically separating First Nations children from their families, lands, and communities and by causing the increasing gross overrepresentation of First Nations children in state care during the Class Period.

6. As the Tribunal stated, there are approximately three times the numbers of First Nations children in state care than there were at the height of the notorious Indian residential schools in the 1940s. This mass scooping of First Nations children from the plaintiff nations herein and other class members not only harmed those children and their families. It also caused their communities to lose their ability to pass their Indigenous cultures, spirituality, traditions, and languages on to their next generations.

II. DEFINED TERMS

7. In addition to any terms defined elsewhere herein, the capitalized terms in this statement of claim have the following meanings:

(a) "**Class**" and "**Class Members**" means the plaintiffs and every other First Nation that is later added as a plaintiff, or opts into this proceeding in the manner and within the time period approved by the Court, collectively.

(b) "**Class Period**" means the period of time beginning on April 1, 1991 and ending on the date this action is certified or such other date as the Court determines appropriate.

(c) "**Canada**" means His Majesty in right of Canada as defined under the *Crown Liability and Proceedings Act*, R.S.C., 1985, c. C-50 and the agents of His Majesty in right of Canada, including the following federal departments responsible for the funding formulas, policies, and practices at issue in this action relating to First Nations children in Canada during the Class Period: the Department of Indian Affairs and Northern Development using the title Indian and Northern Affairs Canada ("INAC") until 2011; Aboriginal Affairs and Northern Development Canada ("AANDC") from 2011 to 2015; Indigenous and Northern Affairs Canada ("INAC") from 2015 to 2017; Indigenous Services Canada and Crown-Indigenous Relations and Northern Affairs Canada, following the 2017 dissolution of INAC; and Health Canada. In this claim, INAC and its predecessors or successors, are referred to interchangeably as Canada, unless specifically identified.

(d) "**Directive 20-1**" means INAC's national policy statement on the FNCFS Program, establishing FNCFS Agencies under the provincial or territorial child

welfare legislation and requiring that FNCFS Agencies comply with provincial or territorial legislation and standards.

(e) "**EPFA**" means the Enhanced Prevention Focused Approach, which Canada implemented in 2007, starting in Alberta and later adding Saskatchewan, Manitoba, Quebec, Nova Scotia, and Prince Edward Island.

(f) "**First Nation**" and "**First Nations**" means:

(i) When referring to nations, communities or bands and for the purposes of the Class definition herein: bands as defined in section 2(1) of the *Indian Act*, R.S.C., 1985, c. I-5, or First Nations peoples with a modem treaty or land claims agreement;

(ii) When referring in this claim to individuals, it means individuals who:

a. have, or are entitled to have, Indian status under the *Indian Act*;

b. met band membership requirements under sections 10-12 of the *Indian Act*; or

c. are recognized as citizens or members of their respective First Nations whether under agreements, treaties or First Nations' customs, traditions and laws;

(g) "**FNCFS Agencies**" means agencies that provided child and family services, in whole or in part, to the Class Members pursuant to the FNCFS Program and

other agreements except where such services were exclusively provided by the province or territory in which the community was located.

(h) "**FNCFS**" or "**FNCFS Program**" means Canada's First Nations Child and Family Services Program, which funded, and continues to fund public services, including Prevention Services, Protection Services and Post-Majority Services, to First Nations children and communities and which Program delegated or abandoned the provision of First Nations Child and Family services to First Nations children brought into care while ordinarily resident off-Reserve despite and in breach of Canada's constitutional obligations to those First Nation children and families.

(i) "**Impugned Conduct**" means the totality of Canada's conduct and practices as pleaded in paragraphs 9 to 91 below.

(j) "**Jordan's Principle**" means a child-first principle that embodies existing constitutional and human rights equality protections and is intended to ensure that all First Nations children in Canada receive needed essential services and products that are substantively equal, taking into account their best interests and cultural rights, free of adverse differentiation, as specified by the Tribunal.

(k) "**Post-Majority Services**" means a range of services provided to individuals who were formerly in out-of-home care as children, to assist them with their transition to adulthood upon reaching the age of majority in the province or territory in which they reside.

(l) "**Prevention Services**" means services intended to secure the best interests of First Nations children, including meeting their distinct cultural and linguistic needs, in the least disruptive manner within their families and communities.

(m) "**Protection Services**" means those services intended to secure the best interests of First Nations children, including meeting their distinct cultural and linguistic needs, where the risk to the child cannot be prevented by Prevention Services.

(n) "**Reserve**" means a tract of land, as defined under the *Indian Act*, the legal title to which is vested in Canada and has been set apart for the use and benefit of an Indian band.

(o) "**Residential Schools**" means schools for First Nations and other Indigenous children funded by Canada from the 19th Century until 1996, which had the objective of assimilating children into Christian, Euro-Canadian society by stripping away their Indigenous rights, cultures, languages, traditions, and identity.

(p) "**Sixties Scoop**" means the decades-long practice in Canada of taking Indigenous children, including First Nations, from their families and communities for placement in non-Indigenous foster homes or for adoption by non-Indigenous parents.

(q) "**Tribunal**" means the Canadian Human Rights Tribunal.

III. RELIEF SOUGHT

8. The plaintiffs, on behalf of themselves and the Class, claim:

(a) an order certifying this action as an opt-in class proceeding and appointing the plaintiffs as representative plaintiffs for the Class;

(b) a declaration that all members of the Class have Indigenous rights to speak their traditional languages, engage in their traditional customs and practices, care for and raise their children and govern themselves in their traditional manner;

(c) a declaration that Canada owed and was in breach of constitutional, statutory, common law, civil law, and fiduciary duties to the Class as well as breaches of international conventions and covenants in relation to the purpose, establishment, funding, operation, supervision, control, maintenance, delegation and support of the FNCFS Program;

(d) a declaration that the FNCFS Program caused cultural, linguistic, and social damage and irreparable harm to the Class;

(e) a declaration that Canada has breached Class Members' linguistic and cultural rights (Indigenous rights or otherwise), as well as international conventions and covenants, and other international law, as a consequence of its establishment, funding, operation, supervision, control, maintenance, delegation and support of the FNCFS Program;

(f) a declaration that Canada breached the honour of the Crown;

(g) a declaration that Canada breached section 35 of the *Constitution Act, 1982*;

(h) a declaration that Canada is liable to the Class for the damages caused by its breach of fiduciary, constitutional, statutory, common law, civil law duties and Indigenous rights, as well as breaches of international conventions and covenants and other international law, in relation to its establishment, funding, operation, supervision, control, maintenance, delegation and support of the FNCFS Program;

(i) non-pecuniary and pecuniary general damages and special damages for breach of fiduciary, constitutionally-mandated, statutory, common law and civil law duties, Indigenous rights, as well as breaches of international conventions and covenants and other international law, including amounts to cover the ongoing cost of care and development of wellness plans for individual members of the nations in the Class, and the costs of restoring, protecting and preserving the linguistic and cultural heritage of the Class members for which Canada is liable;

(j) an order pursuant to rule 334.26 of the *Federal Courts Rules* for the assessment of the individual damages of Class Members;

(k) aggregate damages in an amount to be determined prior to trial;

(l) restitution and disgorgement;

(m) punitive and exemplary damages;

(n) the costs of notice and of administering the plan of distribution of the recovery in this action, plus applicable taxes, pursuant to rule 334.38 of the *Federal Courts Rules*;

(o) costs of the action on a substantial indemnity basis or in an amount that provides full indemnity;

(p) prejudgment and judgment interest pursuant to the *Federal Courts Act*, R.S.C., 1985, c. F-7; and

(q) such further and other relief as this Honourable Court deems just and appropriate in the circumstances.

IV. THE PARTIES

A. The Plaintiffs

i. Fisher River Cree Nation

9. The plaintiff, Fisher River Cree Nation, is a Treaty 5 First Nation located to the north of Winnipeg, in present day Manitoba.

10. Fisher River Cree Nation has long held the view that its communal language, traditions, and culture are paramount and integral to it as a people. The community has fought for decades to protect and maintain the spirit and intent of the treaties and its inherent rights. Nevertheless, the Fisher River Cree Nation has suffered significant harm to its core communal rights to its own culture, traditions, and language as a result

of the impugned discrimination and the resulting mass removal or relocation of its members over the course of the Class Period.

11. Chief David Crate is the elected Chief, and representative in this action, of the Fisher River Cree Nation.

ii. Poplar River First Nation

12. The plaintiff, Poplar River First Nation, is an Ojibwe First Nation in Manitoba. It is named after the Poplar River, which is the main river on which the Nation resides. The Poplar River First Nation Reserve is located on the east side of Lake Winnipeg at the mouth of the Poplar River approximately 400 kilometres from Winnipeg.

13. Poplar River First Nation has suffered significant loss of culture, traditions, and language during the Class Period and directly as a result of the Impugned Conduct. This First Nation community still perseveres to overcome adversity today, having suffered the harmful consequences of the Residential Schools, Sixties Scoop, and in recent decades the Impugned Conduct.

14. Chief Vera Mitchell is the elected Chief, and representative in this action, of Poplar River First Nation.

iii. Horse Lake First Nation

15. The Horse Lake First Nation is a party to Treaty 8 and is headquartered near Hythe, Alberta. It is a member of the Western Cree Tribal Council. Despite being a member of the Western Cree regional council, the Horse Lake First Nation is linguistically and culturally a part of the Danezaa or Beavers.

16. Since time immemorial, the Horse Lake First Nation's language, culture, and traditions have formed an integral part of its identity and nationhood. However, because of Canada's discrimination over the course of several decades as particularized herein, the Horse Lake First Nation had to watch while its children were apprehended or were relocated, and lost their connection to their nation and identity. As a result, the Horse Lake First Nation has suffered long lasting communal harm that to this day it is still working to recover from.

17. Chief Ramona Horseman is the elected Chief, and representative in this action, of Horse Lake First Nation.

iv. Swan River First Nation

18. The Swan River First Nation is a Woodland Cree community in northern Alberta.

19. The Swan River First Nation has historically found its sense of community through socializing, reinforcing family ties, alignment of families on its traditional territories. The Swan River First Nation has engaged for many generations in different cultural activities in different seasons as a way of reinforcing its cultural and linguistic identity.

20. As a result of the Impugned Conduct, the Swan River First Nation experienced significant damage to the community's children and families, whose departure, separation, and cultural and linguistic disconnection it had to face. Not only did those children and families suffer the loss of their culture, language, and identity, but the

Impugned Conduct also directly undermined the nation's communal linguistic and cultural rights, amongst others.

21. Chief Lee Twinn is the elected Chief, and representative in this action, of the Swan River First Nation.

v. Sioux Valley Dakota Nation

22. The plaintiff, Sioux Valley Dakota Nation or Wipazoka Wakpa, is a First Nation located on the banks of the Assiniboine River in Southwestern Manitoba. Sioux Valley Dakota Nation is the largest Dakota Nation in Canada, and is not a signatory to a treaty.

23. Sioux Valley Dakota Nation has historically given significant primacy to its culture, language, and traditions. That has not prevented the devastating impact of the Impugned Conduct on the survival, everyday use and longevity of its culture, language, and traditions.

24. Chief Jennifer Bone is the elected Chief, and representative in this action, of Sioux Valley Dakota Nation.

vi. Manto Sipi Cree Nation

25. The plaintiff, Manto Sipi Cree Nation, is a remote Cree community in Northern Manitoba, at the mouth of the God's River along the north shoreline of God's Lake. The community can only be reached by winter road or by air.

26. Being a remote community, Manto Sipi Cree Nation has particularly suffered the harms resulting from the apprehension of its children and the need for its members to move elsewhere to access essential services, because the Nation faces significant service gaps. As a result of the Impugned Conduct, Manto Sipi Cree Nation suffered the loss of culture, language, and traditions.

27. Chief Michael Yellowback is the elected Chief, and representative in this action, of Manto Sipi Cree Nation.

vii. Whitefish Lake First Nation

28. The Whitefish Lake First Nation is a First Nation in northern Alberta.

29. The Nation is a part of the Kee Tas Kee Now Tribal Council, and Treaty 8 First Nations. The people of the Whitefish Lake First Nation have exercised their traditional culture and language in their traditional territories since before contact. They have lived the trauma and separation of their children through the Residential Schools, Sixties Scoop, and now the Impugned Conduct. As a result, the Whitefish Lake First Nation's communal rights to their language, culture and traditions have suffered at the hands of Canada.

30. Chief Albert Thunder is the elected Chief, and representative in this action, of Whitefish Lake First Nation.

viii. Sucker Creek First Nation

31. The Sucker Creek First Nation is a Cree First Nation whose Reserve community is located along the southwestern shore of Lesser Slave Lake near Enilda, Alberta. It is a Treaty 8 First Nation.

32. The Sucker Creek First Nation has historically made it a priority to preserve its language and culture, and protect its traditional land and treaty rights. The mass scooping of its children through the Impugned Conduct, however, undermined many of its efforts in that direction and materially harmed the community and many of its members.

33. Today, the Sucker Creek First Nation continues to be resilient in its efforts to strengthen and preserve its community, culture, language, and traditions, through its communal efforts and sacrifices. However, the damage caused over multiple generations has not proven easy or simple to repair.

34. Chief Roderick Willier is the elected Chief, and representative in this action, of Sucker Creek First Nation.

ix. Dene Thá First Nation

35. The Dene Thá First Nation is a Treaty 8 First Nation, and part of the North Peace Tribal Council, in Northern Alberta.

36. Since time immemorial, the people of this First Nation have lived in their traditional territory, spoken their language, Dene Dháh, and practiced their culture and traditions. The Dene Thá people place a high value on their traditional way of life.

Hunting and trapping have always been a staple of the Dene Thá people. They have been said to "live everywhere" on their land without boundaries. It has only been recently, in relation to the rich Dene Thá history, that formal settlements have been created.

37. The inter-generational cycle of trauma and genocide that has culminated in the Impugned Conduct has deprived many Dene Thá children of the opportunity to learn their native language and First Nation culture and traditions. Consequently, the Dene Thá First Nation has likewise lost the ability to pass its language and culture to such children and suffered the resulting harm to its communal culture and language.

38. Chief Wilfred Hooka-Nooza is the elected Chief, and representative in this action, of Dene Thá First Nation.

x. Dakota Tipi First Nation

39. The Dakota Tipi First Nation is situated approximately 80 kilometers west of Winnipeg, Manitoba, on the Yellow Quill Trail. In 1972, the Sioux Village settlement near Portage La Prairie divided into two, therefore creating two First Nations presently known as Dakota Tipi First Nation near Portage La Prairie and another First Nation.

40. For millennia, the people of Dakota Tipi First Nation spoke their native Sioux and practiced their traditions and unique culture.

41. However, the community is still grappling with the devastation caused to its communal fabric through the Residential Schools, Sixties Scoop, and most recently the Impugned Conduct, such that most of the community members now speak English.

42. Chief Dennis Pashe is the elected Chief, and representative in this action, of Dakota Tipi First Nation.

B. The Defendant

43. The defendant, the Attorney General of Canada, represents Canada, and is liable and vicariously liable for the Impugned Conduct.

44. In particular, Canada is liable and vicariously liable for the acts and omissions of its agents—INAC and its predecessors and successors—which were responsible for the services provided, or not provided, to First Nations through the FNCFS Agencies or the province/territory.

V. HISTORY OF FIRST NATIONS CHILD WELFARE AND ESSENTIAL SERVICES

45. Pursuant to section 91(24) of the *Constitution Act, 1867*, Parliament has jurisdiction over First Nations peoples. Provinces and territories have jurisdiction over child and family welfare generally. Each province and territory has its own child and family services legislation. However, First Nations (or "Indians" in section 91(24)) are ultimately the constitutional responsibility of Canada.

46. Child and family services, also referred to as "child welfare", consist of a range of services intended to prevent and respond to child maltreatment and to promote family wellness. Canada has had a dark history in First Nations child welfare and inter-generational trauma as described in the following sections.

A. Residential Schools

47. Starting in the 19th Century, Canada systemically separated First Nations children from their communities, and placed them in Residential Schools. Among other things, Canada used the Residential Schools as child welfare care providers for the First Nations children whose circumstances may have required child and family services.

48. These schools were built on the racist stereotype that First Nations were not able to act as parents. They had the nefarious purpose of "killing the Indian in the child", thus directly targeting First Nations' national and ethnic identity, culture, languages, and traditions. Following the discovery of unmarked mass burial sites at former Residential Schools, Prime Minister Justin Trudeau acknowledged that Canada has committed genocide against Indigenous peoples in Canada.

B. Sixties Scoop

49. As further detailed below, as of 1951, Canada clarified that provinces could provide child services to First Nations children. This gave the provinces and territories free rein to continue separating First Nations children from their families and communities with the explicit or implicit intention of taking away their identity, culture, indigeneity, languages, and traditional ways of living. By the 1970s, the provincial programs and analogous programs across the country removed more than 1 in 3 Indigenous children from their families, placing approximately 70% of them in non-Indigenous households. This practice has become known as the "**Sixties Scoop**".

50. The Sixties Scoop proceeded from the same racist, stereotypical premise as the Residential Schools: that First Nations parents were unfit to raise their children and that First Nations should become assimilated into the broader non-Indigenous society. It thus perpetuated intergenerational trauma on First Nations individuals and communities. In a summary judgment reported at *Brown v. Canada (Attorney General)*, 2017 ONSC 251, the Ontario Superior Court of Justice found that those "scooped" children in the Sixties Scoop "lost contact with their families. They lost their aboriginal language, culture and identity", all of which "resulted in psychiatric disorders, substance abuse, unemployment, violence and numerous suicides".

51. The period commonly known as the Sixties Scoop did not in fact end until 1991.

C. FNCFS Program

52. After the Sixties Scoop, came the next round of cultural genocide and discrimination toward First Nations, or what has become sometimes known as the "Millennium Scoop", and is the subject of this proceeding.

53. As the Residential Schools closed down, Canada undertook the provision of child and family services to some First Nations children and their families. However, Parliament did not pass federal legislation regarding First Nations child and family services.

54. Canada chose to operate First Nations child welfare services in a federal legislative vacuum filled by the statutory provisions below with respect to First Nations children and families ordinarily resident on a Reserve:

(a) section 4 of the *Department of Indian Affairs and Northern Development Act*, R.S.C., 1985, c. I-6, gave the Minister of Indian Affairs and Northern Development authority over all "Indian affairs" and "Yukon, the Northwest Territories and Nunavut and their resources and affairs"; and

(b) section 88 of the *Indian Act* provided for the application of provincial or territorial child welfare legislation to First Nations as provincial or territorial "laws of general application"—those services were funded by Canada.

55. Canada chose to altogether ignore its constitutional and other legal responsibilities with respect to the First Nations who do not meet Canada's definition of ordinary residence on a Reserve, and simply left those children and families to their fate at the hands of highly discriminatory provincial child welfare services.

56. With respect to First Nations ordinarily resident on a Reserve, Canada required FNCFS Agencies to use provincial/territorial child welfare laws as a condition of funding. The funding itself was provided on the basis of formulas crafted by Canada.

57. Thus, Parliament did not enact laws to govern the way child welfare services were to be provided to First Nations and to ensure that they were provided fairly, adequately, and without discrimination.

58. During the Class Period, Canada funded First Nations child welfare services through one of four channels that were based on uniform policies, objectives, and systemic short-comings that were common across the country:

(a) Directive 20-1;

(b) the EPFA; and

(c) certain funding agreements signed between Canada and a province or territory or with a non-First Nations-operated child and family service entity to, amongst others, provide child welfare funding.

59. Canada provided no funding to First Nations who did not meet Canada's stringent eligibility requirements in the categories above, including primarily First Nations who did not meet Canada's "ordinarily resident on a Reserve" requirement.

60. Directive 20-1, which came into effect on April 1, 1991 and marks the beginning of the Class Period, was a cabinet-level spending measure that established uniform funding standards for First Nations children and families who were unilaterally considered by Canada to be "ordinarily resident on-reserve". It governed and controlled federal funding to FNCFS Agencies for child and family services to First Nations where an agreement did not exist between Canada and the relevant province or territory.

61. Canada designed its funding channels, including Directive 20-1, based on assumptions that failed to take into account and adhere to Canada's constitutional and other legal responsibilities, and without regard to the realities of First Nations communities, which were vastly affected by discriminatory practices and cultural genocide in the Residential Schools and the Sixties Scoop.

62. This approach directly and foreseeably resulted in perpetuating and worsening systemic shortcomings inherited from the Residential Schools and Sixties Scoop, ultimately guaranteeing the chronic under-provision of child welfare services as well as other essential services and products on which First Nations children and families relied. These shortcomings included the following:

(a) funding models that incentivized the removal of First Nations children from their homes and communities, many of which were remote communities, and placed them in state care;

(b) inflexible funding mechanisms that did not account for the particular needs and associated cost of servicing diverse First Nations communities, and the operating costs of an agency delivering the services therein;

(c) funding models that ignored the pressing need for Prevention Services, family support and culturally appropriate services;

(d) inadequate funding for essential programs and services, and inadequate funding to align services with standards set by provincial or territorial legislation;

(e) a 22% disparity in per-capita funding for First Nations children and families, compared with services delivered to children and families off-Reserve, despite the heightened needs of First Nations children and families and the increased costs of delivering those services to them;

(f) a self-serving, parsimonious interpretation by Canada of Jordan's Principle, leading to First Nations children and families continuing to face delays, denials, and service gaps with respect to essential services or products that they needed; and

(g) no child welfare provision whatsoever for First Nations children and families who did not meet Canada's parameters of the FNCFS Program (with these First Nations children and families being left to their fate at the hands of provinces and territories).

63. In 2007, Canada admitted these systemic deficiencies, and sought to rectify some of them in some provinces by implementing the EPFA. Canada announced that the EPFA was designed to allow for a more flexible funding formula and an allocation of funds for Prevention Services.

64. Nonetheless, the implementation of the EPFA failed to remedy the systemic discriminatory funding of services to First Nations children and families. The EPFA suffered from the same systemic shortcomings and false underlying assumptions that plagued Directive 20-1 and Canada's other funding formulas.

65. These longstanding systemic failures of Canada's funding formulas constricted and hampered the FNCFS Program and harmed generations of First Nations children and families, whose care Canada undertook to provide.

66. In some instances, Canada's funding methods and practices imposed on First Nations families what is known as "Care by Agreement", which replicates some

provisions in provincial and territorial child-welfare legislation that allow for parents to voluntarily place their children in state custody often while maintaining parental guardianship. Care by Agreement became another mechanism through which First Nations children and families were separated from their extended families and communities, and placed in out-of-home care to receive the essential services that they required.

67. Canada was well aware of these chronic problems. Over the course of the Class Period, numerous independent reviews, parliamentary reports, and audits, including two reviews by the Auditor General of Canada and a joint review by INAC and the AFN, identified these deficiencies and decried their devastating impact on First Nations children and families.

VI. TRIBUNAL PROCEEDINGS AND FINDINGS

68. Faced with Canada's inaction and apathy, the Assembly of First Nations and the First Nations Child and Family Caring Society filed a complaint with the Canadian Human Rights Commission in February 2007. The complaint alleged that Canada discriminated against First Nations peoples in the provision of child and family services and by its failure to implement Jordan's Principle, in violation of section 5 of the *Canadian Human Rights Act*. In 2008, the Canadian Human Rights Commission referred the complaint to the Tribunal (File No. T1340/7008).

69. On January 26, 2016, the Tribunal rendered a 176-page decision (2016 CHRT 2), finding that Canada systemically discriminated against First Nations children on-

Reserve and in the Yukon in providing services contrary to section 5 of the *Canadian Human Rights Act*.

70. Since then, the Tribunal has retained jurisdiction over the complaint and has issued multiple non-compliance orders against Canada. On September 6, 2019 (2019 CHRT 39), the Tribunal made "an order for compensation to address the discrimination experienced by vulnerable First Nation Children and families in need of child and family support services on reserve." However, the Tribunal process is concerned with individuals only and does not include compensation for the plaintiff nations or the Class herein.

C. Tribunal's Findings Regarding Canada's Funding Practices

71. The Tribunal found that, despite changes made to the FNCFS Program, the following systemic flaws plagued the delivery of child and family services:

(a) The design and application of the Directive 20-1 funding formula provided funding based on flawed assumptions about children in out-of-home care and based on population thresholds that did not accurately reflect the service needs of many on-Reserve communities. This resulted in inadequate fixed funding for operation (such as capital costs, multiple offices, cost of living adjustment, staff salaries and benefits, training, legal, remoteness, and travel) and Prevention Service costs. The inadequate fixed funding hindered the ability of FNCFS Agencies to provide provincially/territorially mandated child-welfare services, and

prevented FNCFS Agencies from providing culturally appropriate services to First Nations children and families.

(b) While Canada systematically underfunded Prevention Services, it fully funded out-of-home care by reimbursing all such expenses at cost except for Post-Majority Services.

(c) Canada's practice of under-funding prevention and least disruptive measures while fully reimbursing the cost of First Nations children in out-of-home care created a perverse incentive to remove First Nations children from their homes and communities as a first, not a last, resort, in order to ensure that a child received required services.

(d) The structure and implementation of the EPFA funding formula "perpetuates the incentives to remove children from their homes and incorporates the flawed assumptions of Directive 20-1 in determining funding for operations and prevention, and perpetuating the adverse impacts of Directive 20-1 in many on-reserve communities."

(e) Canada failed to adjust Directive 20-1 and EPFA funding levels to account for inflation and cost of living.

(f) Canada failed to update agreements with some provinces/territories to ensure that First Nations children and families received adequate and non-discriminatory child and family services.

(g) Canada failed to coordinate the FNCFS Program and the provincial/territorial funding agreements with other federal departments and government programs and services for First Nations children on-Reserve, resulting in service gaps, delays, and denials for First Nations children and families.

D. Tribunal's Findings Regarding Essential Services and Jordan's Principle

72. Separate and apart child welfare deficiencies particularized above, for decades, Canada systemically denied First Nations children the essential health and social services and products that they needed, when they needed them and in a manner consistent with substantive equality and reflective of their cultural needs.

73. Canada knew of these systemic shortcomings in the provision of essential services to First Nations. As early as the 1980s, Canada was aware through numerous reports and studies that its funding formulas and practices denied First Nations children essential services and products contrary to their substantive equality rights that were later given the name Jordan's Principle. This included, amongst others:

(a) The House of Commons' Special Committee on the Disabled and the Handicapped report (1981);

(b) The House of Commons' Standing Committee on Human Rights and the Status of Disabled Persons follow-up report (1993);

(c) The Royal Commission on Aboriginal Peoples (1996);

(d) The "Baby Andy" Report (2002);

(e) Wen:De: We are Coming to the Light of Day (2005); and

(f) Report of the Truth and Reconciliation Commission of Canada (2015).

74. This state of affairs continued until 2007 when the House of Commons formally named the *Charter*-protected substantive equality protections "Jordan's Principle" to honour the memory of Jordan River Anderson, a First Nation child from Norway House who died in a Winnipeg hospital bed while officials from the governments of Canada and Manitoba bickered over who should pay for his specialized care close to his hospital. The Tribunal summarized Jordan's life story as follows:

> Jordan River Anderson [was] a child who was born to a family of the Norway House Cree Nation in 1999. Jordan had a serious medical condition, and because of a lack of services on reserve, Jordan's family surrendered him to provincial care in order to get the medical treatment he needed. After spending the first two years of his life in a hospital, he could have gone into care at a specialized foster home close to his medical facilities in Winnipeg. However, for the next two years, AANDC, Health Canada and the Province of Manitoba argued over who should pay for Jordan's foster home costs and Jordan remained in hospital. They were still arguing when Jordan passed away, at the age of five, having spent his entire life in hospital.

75. Jordan's Principle incorporates Canada's longstanding obligations to treat First Nations children without discrimination and with a view to safeguarding their constitutionally protected substantive equality rights to the essential services that they need. Jordan's Principle mandates that all First Nations children should receive the essential public services and/or products they need, when they need them and in a manner consistent with substantive equality and reflective of their cultural needs. The need for the legal rule arose from Canada's practice of denying, delaying or disrupting

essential services to First Nations children due to, among other reasons, jurisdictional payment disputes within the federal government or with provinces or territories.

76. Jordan's Principle reaffirms existing *Charter* and quasi-constitutional rights of First Nations children to substantive equality, and seeks to ensure substantive equality and the provision of culturally appropriate services. For that purpose, the needs of each child must be considered and evaluated, including by taking into account any needs that stem from historical disadvantage and the lack of on-Reserve or surrounding services.

77. Canada has admitted that Jordan's Principle is a legal rule, not merely a principle or aspiration.

78. Jordan's Principle preserves human dignity by providing First Nations children with essential services and products without adverse differentiation including denials, delays or service gaps because of intergovernmental/interdepartmental funding or jurisdictional squabbles. Jordan's Principle requires the government (federal, provincial or territorial) or department that first received the request to pay for the service or product. Once it has paid and the child has received the service or product, the payor can resolve jurisdictional issues about who was responsible to pay.

79. In breach of the letter and spirit of Jordan's Principle and the rights that underlie it, Canada's bureaucratic arm unilaterally restricted its application to cases that could meet the following three criteria:

(a) a jurisdictional dispute has arisen **between a provincial government and the federal government**;

(b) the child has **multiple** disabilities requiring services from **multiple** service providers; and

(c) the service in question is a service that would be available to a child residing off Reserve **in the same location**.

80. The Tribunal found that the processes set up by Canada (via memorandums of understanding between Health Canada and AANDC) to respond to Jordan's Principle requests made delays inevitable: the processes included a review of policy and programs, case conferencing and approvals from the Assistant Deputy Minister, before interim funding was provided. These processes exacerbated the very delays and gaps that Jordan's Principle was designed to prevent.

81. Canada's narrow and bureaucratic interpretation of Jordan's Principle resulted in it determining that no cases—zero—met its stringent criteria for Jordan's Principle between 2007 and 2016. The Tribunal found that Canada's stringent definition and its layered assessment of each case "defeats the purpose of Jordan's Principle and results in service gaps, delays and denials" for First Nations children.

82. Canada's application of Jordan's Principle was so stingy that an $11-million fund set up by Canada with Health Canada to address Jordan's Principle requests was never accessed. In essence, Canada interpreted away Jordan's Principle, leaving tens of thousands of First Nations children to suffer.

83. The delays, denials and service gaps that First Nations children experienced with respect to essential services at the hands of Canada during the Class Period adversely impacted the plaintiff nations and the Class in three general ways:

(a) As the Tribunal found, Canada's discriminatory under-provision of essential health and social services (contrary to Jordan's Principle's underlying rights and protections) further exacerbated the numbers of First Nations children in state care, torn away from their homes and communities. Due to a lack of essential services on-Reserve, many First Nations children were placed in out-of-home care in order to access the services and products that they needed.

(b) In addition, many parents had no choice but to leave their communities with their children in the hopes of their children gaining access to the essential services that they needed, but which were not available to their communities. The example of Jordan River Anderson is illustrative in that he spent almost all of his life away from his Norway House community because he could only access some of the essential services that he needed at a Winnipeg hospital. This particularly affected remote communities.

(c) In the absence of essential services within the reach of First Nations communities, many First Nations children with health and other issues who needed essential services would simply go without those services and pay the ultimate price through their suffering and, in some cases,

> premature death or suicide. As Canada has acknowledged, the tragic epidemic of suicides in First Nations communities is linked to factors including discrimination, community disruption and the loss of culture and language.

84. The plaintiff nations and the Class lost their children and families to discrimination in the provision of essential health and social services, and thus directly suffered the communal loss of their rights to culture traditions, and language during the Class Period.

85. The Tribunal ordered Canada to cease its discriminatory practices, reform the FNCFS Program, and take measures to implement the full meaning and scope of Jordan's Principle in the non-discriminatory provision of essential services to First Nations children.

E. The Binding Effect of Tribunal Findings

86. The Tribunal made numerous factual findings against Canada, who participated as a party to that contested proceeding. Neither Canada nor the complainants sought judicial review of the Tribunal's decision. The Tribunal's merits decision became final on March 2, 2016.

87. The plaintiffs plead and rely upon the findings of the Tribunal in 2016 CHRT 2 and subsequent decisions in the same proceeding. Canada is estopped in this action from re-litigating or denying the Tribunal's findings.

F. First Nations Children Delegated or Abandoned by the FNCFS Program

88. Canada has jurisdiction over "Indians" under section 91(24) of *The Constitution Act, 1867*, which imposes a constitutional duty to First Nations regardless of place of residence in Canada.

89. Canada arbitrarily chose to leave many First Nations children and families to their fate at the hands of the provinces and territories, even though they were within Canada's constitutional jurisdiction and historical sphere of responsibility. In doing so, Canada also disregarded international treaties it has signed, which required it to act in the best interests of First Nations children and families regardless of where in Canada they resided.

90. Canada's apathy and avoidance of duty directly resulted in the overrepresentation of First Nations children in child welfare both on and off-Reserve. This overrepresentation and the mass scooping of First Nations children from their families and being placed in a patchwork of systemically broken child welfare placements around the country, made it impossible for those children to maintain their connection to their families and First Nations communities.

91. As a result, Canada's discriminatory conduct not only adversely impacted the plaintiff nations and the Class, it also adversely impacted the Class by disconnecting even more First Nations children from their communities, cultures and languages.

VII. CAUSE OF ACTION: CANADA'S DUTIES

92. Canada breached the Class Members' rights to culture and language (whether or not as Indigenous rights); breached its fiduciary, constitutional, statutory obligations to the Class; was negligent, breached international conventions and covenants and other international law and constituted a civil fault in Quebec. The Impugned Conduct, having been found by the Tribunal to have been "wilful", "reckless" and "of the worst kind", was so egregious that punitive and exemplary damages should be awarded.

A. Indigenous Rights to Culture and Language

93. The communal cultural, traditional, and linguistic rights of the plaintiff nations and other Class Members are rights as a matter of common law, civil law, under international law binding on Canada, and also form part of their constitutionally protected Indigenous rights.

94. Separate and apart from individual rights, these rights belong to First Nations as nations.

95. Section 35(1) of the *Constitution Act, 1982* constitutionalized existing Indigenous rights: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Canada's Constitution does not define Indigenous rights under section 35, but these Indigenous rights have been recognized to include cultural and social rights, and rights associated with and dependent on land rights and the right not to be separated from First Nations lands.

96. Indigenous rights are collective rights of distinctive Indigenous societies flowing from their status as the original peoples of Canada. These rights are founded on the fact of the prior occupation of what is now Canada by Indigenous societies before Europeans arrived. After contact, Indigenous interests and customary laws were presumed to survive the assertion of sovereignty, as part of the law of Canada.

97. While any individual member of a First Nation enjoying an Indigenous right can take advantage of that right, the right itself belongs to the nation as a whole.

98. One necessary corollary to Indigenous rights to culture and language is recognizing their sovereign right to self-government in relation to child and family services. This is so because this jurisdiction is essential to the cultural, traditional, and linguistic security and survival of each First Nation in the Class.

99. Furthermore, the right to language and culture includes a right for each nation to pass its language and culture to its next generations, and thus keep those rights alive. In Indigenous societies, communal practices and customs are passed from one generation to the next by means of oral description and actual demonstration. As such, to ensure the continuity of Indigenous practices, customs, languages and traditions, a substantive Indigenous right includes the incidental right to teach such a practice, custom and tradition to a younger generation. This is how First Nations have ensured the continued existence of their Indigenous societies for millennia. This is also how the mass scooping of First Nations children and disconnecting them from their communities has systemically prevented the teaching and passing on of First Nations practices, customs, languages, and traditions.

B. Fiduciary Duties

100. Canada is in a continuing fiduciary relationship with the Class and has the responsibility to act in a fiduciary capacity with respect to First Nations peoples. This relationship is trust-like, rather than adversarial. Contemporary recognition and affirmation of Indigenous rights must be defined in light of this historic relationship.

101. Furthermore, the circumstances of this case gave rise to a fiduciary duty on Canada with respect to the Class.

102. Canada controlled all aspects of the lives of First Nations children in state care through the FNCFS Program as well as those First Nations children needing essential services. The accumulated history of generations of mass child removals through the Residential Schools, Sixties Scoop and then FNCFS made First Nations children and families even more dependent on Canada for child and family, and other essential services. The First Nations children and families whom Canada abandoned on account of constraints based on arbitrary jurisdictional boundaries such as "ordinary residence on a Reserve" were equally vulnerable to, and suffered greatly from, Canada's failure to perform its duties.

103. First Nations children and families were at all times vulnerable to Canada's exercise, or failure to exercise, its discretion and the power that Canada had over them as a fiduciary. The Class Members were similarly vulnerable to Canada's exercise of its discretion with respect to their specific affected interests: *i.e.*, their communal cultural, traditional, and linguistic rights; and the right to raise and care for their own children in accordance with their traditions, cultures, and practices.

104. Canada's fiduciary obligation to First Nations peoples arose from its discretionary control over the specific Indigenous interests at issue here, *i.e.*, the right to culture and language, amongst others (a *sui generis* fiduciary duty).

105. Canada undertook—amongst others, through legislation such as *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24, international and other documents particularized herein—to exercise its discretionary control over the First Nations peoples' right to language and culture in the best interests of each nation.

106. Furthermore, the honour of the Crown is at stake in every dealing with First Nations peoples. It requires that Canada act honourably and in good faith in each such dealing. It is not a mere incantation, but rather a core precept that finds its application in concrete practices, in this case the operation of child welfare and the delivery of other essential health and social services to First Nations children and families.

107. The honour of the Crown cannot be delegated. In this instance, Canada could not delegate its fiduciary responsibilities to First Nations children and families off-Reserve to the provinces and territories. Canada remains responsible in equity for the consequences of its actions and interactions with the provinces and territories, which affected First Nations interests.

108. Separate and apart from its duties to individuals, Canada owed these fiduciary duties to First Nations as nations.

C. Duty of Care

109. Canada had the responsibility of designing, funding and overseeing the child welfare program and other essential health and social services at issue during the Class Period.

110. Throughout the Class Period, Canada owed a common law duty of care to the plaintiff nations and the other Class Members to take steps to sufficiently fund and operate First Nations child and family services and the operational and other costs of child and family and other essential services, including by ensuring that reasonably appropriate Prevention Services, child and family services, and other essential services were made available and provided to First Nations children and families.

111. Canada owes a duty of care to the Class in funding and otherwise administering child and family services and other essential services. This duty arises out of Canada's unique constitutional relationship detailed above, which creates a close and trust-like proximity between Canada and First Nations peoples.

112. It is reasonably foreseeable that Canada's failure to take reasonable care might harm First Nations children and families, as well as the Class. It is also reasonably foreseeable that Canada's inaction and avoidance of its duties would harm the Class, particularly with respect to the Class's cultural, traditional, and linguistic rights.

113. Canada was required to fund child and family services and other essential services in a manner that: (i) did not discriminate against First Nations; and (ii) prioritized support for and preservation of First Nations traditions, culture and language.

114. Separate and apart from its duties to the affected First Nations individuals, Canada owed this duty of care to First Nations as nations.

D. Canada's International Obligations and Undertakings

115. Canada has ratified many treaties containing obligations relating to the rights and interests of the Class, including, amongst others:

(a) the Declaration on the Rights of Indigenous Peoples;

(b) the Convention on the Rights of the Child;

(c) the Convention for the Elimination of All Forms of Racial Discrimination;

(d) the Convention on the Elimination of All Forms of Discrimination Against Women;

(e) the Convention on the Prevention and Punishment of the Crime of Genocide;

(f) the International Covenant on Economic, Social, and Cultural Rights; and

(g) the International Covenant on Civil and Political Rights.

116. These instruments codify and govern the rights of First Nations peoples to:

(a) not have children separated from their families through discrimination;

(b) not be subjected to an act of cultural genocide, *i.e.*, those acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group by, amongst others, forcibly transferring the children of the group to another group;

(c) to maintain personal relations and direct contact with their family on a regular basis;

(d) to retain shared responsibility for the upbringing of First Nations children;

(e) to preserve communal First Nations identity, culture, and language; and

(f) not be subjected to forced assimilation or destruction of culture.

117. These international duties clarify and inform the contents of Canada's fiduciary duties, duty of care, and other duties to the Class.

VIII. CAUSE OF ACTION: CANADA'S BREACHES

A. Canada Breached First Nations' Rights

118. The Impugned Conduct has breached the rights of the Class Members to maintain and pass on their cultures, traditions and languages as particularized above. Canada has breached those communal rights both as a matter of Indigenous rights in section 35(1) of the *Constitution Act, 1982*, and as a matter of Canada's common law, civil law, and other obligations.

119. This breach affected the entire Class across the country regardless of the cultural and linguistic differences amongst diverse First Nations.

120. As found by the Tribunal, through the Impugned Conduct, Canada systemically took away First Nations children from their communities. This deprived the Class Members of their cultures, languages and traditions over the course of generations. This deprivation included First Nations' deprivation of the right to teach and pass on their cultures, languages and traditions to their next generations. The Tribunal found:

> The legal and substantial practical interests of First Nations children, families, and communities stand to be adversely affected by [Canada]'s discretion and control over the FNCFS Program and other related provincial/territorial agreements. The Panel agrees … that **the specific Aboriginal interests that stand to be adversely affected in this case are, namely, indigenous cultures and languages and their transmission from one generation to the other**. Those interests are also protected by section 35 of the *Constitution Act, 1982*. The transmission of indigenous languages and cultures is a generic Aboriginal right possessed by all First Nations children and their families. …
>
> It is enough to say that, by virtue of being protected by section 35 of the *Constitution Act, 1982* **indigenous cultures and languages must be considered as "specific indigenous interests"** which may trigger a fiduciary duty. Accordingly, **where the government exercises its discretion in a way that disregards indigenous cultures and languages and hampers their transmission, it can breach its fiduciary duty**. [emphasis added]

121. The Impugned Conduct adversely affected the same specific Indigenous interests of each nation whose children were scooped through the FNCFS, Canada's breaches of Jordan's Principle, and Canada's policy of avoidance regarding First Nations children ordinarily resident off Reserve.

122. This harm took place within the tragic history of colonial policies that led to Residential Schools, Sixties Scoop, and other assimilationist measures by Canada. The FNCFS Program was yet another chapter in that dark history targeting First Nations children. As a result, a disproportionate number of First Nations children currently live in state care compared to other Canadian cultural communities.

123. One demonstrable result of these serial colonial policies is that, for example, of the 1.8 million Indigenous people living in Canada in the 2022 census, only 86,000 (or 4.7%) predominantly spoke an Indigenous language at home.

B. Canada Breached its Fiduciary Duties to Class

124. The Impugned Conduct breached Canada's fiduciary duties to the Class by, amongst others, the following:

(a) Systemically separating First Nations children from their communities through discrimination;

(b) Failing to meet the basic need of First Nations children to essential health and social services, thus paving the way toward more systemic removals, mass migrations, death and suffering, and the resulting disconnection from communities;

(c) Adversely impacting the cultural, spiritual, traditional, and linguistic rights of First Nations;

(d) Denying the Class the right to pass their cultures, traditions, and languages to their children and next generations;

(e) Directly causing the loss of First Nations culture, language, traditions and identity; and

(f) Committing cultural genocide against First Nations peoples.

125. Canada's fiduciary duties owed to the Class were not delegable to any other party, through agreements or otherwise. It was empowered and obligated to monitor and remedy the many systemically discriminatory problems afflicting First Nations child and family services and other essential services.

126. Canada was required to act in the best interests of the Class, but continuously failed to do so. As particularized herein, Canada was alerted numerous times to the discriminatory inadequacies of child and family services provided to the Class. Canada knew or reasonably ought to have known of all of the inadequacies and, in breach of the honour of the Crown and its fiduciary duties, did nothing to intervene or meet its duties owed to the Class.

127. The Impugned Conduct amounted to Canada putting its own interests ahead of those of the Class, and harmed the Class in a way that amounted to betrayal of trust and to disloyalty.

128. The Class Members were harmed by Canada's exercise, or lack thereof, of its discretion and control in these circumstances.

C. Canada was Negligent to the Class

129. The Impugned Conduct, in particular its operational components, breached Canada's duty of care to the Class, including through the conduct grounding Canada's breaches of its fiduciary duties to the Class, as particularized above.

130. The reasonably foreseeable effects of Canada's negligence include the harm and damages to the Class particularized herein.

D. Canada Breached *Civil Code of Quebec*

131. Canada owed duties under the *Civil Code of Quebec* not only to First Nations individuals affected by the Impugned Conduct in Quebec, but also to First Nations as nations in Quebec.

132. Where Canada's actions took place in Quebec, the Impugned Conduct constituted a fault pursuant to Article 1457 of the *Civil Code of Quebec*. Canada knew or ought to have known that the Impugned Conduct would cause tremendous harm to First Nations communities.

133. The Class sustained injuries as a direct and immediate consequence of the Impugned Conduct. These injuries include, but are not limited to, loss of language, culture, traditions, membership, community ties and resultant community trauma.

I. DAMAGES AND REMEDIES

134. The plaintiffs and Class Members are entitled to appropriate remedies for the breach of their collective rights at issue in this action. Without appropriate remedies,

those rights would be meaningless, and their repeated and continued breaches could not be prevented in the future.

A. Damages Suffered by the Class Members

135. As the Tribunal acknowledged, "[the Tribunal's merits decision] is about how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and **their communities**" [emphasis added]. None of those communities have had access to justice for the discrimination that has adversely affected them for decades.

136. As a result of Canada's breach of its constitutional, statutory, common law, civil law, international conventions and covenants and fiduciary duties, the plaintiff nations and other Class Members suffered harm and damages, including but not limited to, the relief sought above and for the following:

(a) the Impugned Conduct systemically denied First Nations non-discriminatory child welfare services and other essential services;

(b) the Impugned Conduct systemically separated First Nations children from their communities to be placed in state care;

(c) the Impugned Conduct systemically breached the rights of First Nations to their own cultures, languages and traditions;

(d) the Impugned Conduct systemically breached First Nations' rights to pass their cultures, languages and traditions to their next generations to keep them alive;

(e) the Impugned Conduct systemically destroyed First Nations' cultures, languages, identity, and traditions;

(f) the Impugned Conduct perpetuated and worsened the communal inter-generational trauma of First Nations flowing from the Residential Schools and the Sixties Scoop;

(g) the Impugned Conduct depleted First Nations populations from communities and adversely impacted communities' economic and social survival and wellbeing; and

(h) the Impugned Conduct often caused First Nations communities to have to expend their limited resources to supply to their members the essential services that Canada failed to provide contrary to Jordan's Principle.

B. Disgorgement

137. Canada's failure to provide adequate and equal funding for services and products to First Nations constituted a breach of its fiduciary duties owed to those nations, through which Canada inequitably obtained quantifiable monetary benefits over the course of the Class Period.

138. Canada should be required to disgorge those benefits, plus interest.

C. Punitive Damages

139. Canada knew that the Impugned Conduct harmed First Nations communities. Canada had already caused unimaginable harm and suffering to First Nations through Residential Schools and the Sixties Scoop, and knew, or should have known, that the Impugned Conduct would perpetuate and exacerbate those harms. The Tribunal found that Canada had willfully and recklessly engaged in systemic discrimination against First Nations in respect of child welfare and other essential services, adversely affecting First Nations children, families *and* communities.

140. Yet, Canada proceeded in callous indifference to the foreseeable injuries that First Nations would, and did suffer. Canada perpetuated the system in furtherance of its policy of assimilation while knowing that its treatment of First Nations was contrary to its constitutional, legal, and international obligations about civil and political rights and the prohibition of genocide, amongst others.

141. The high-handed way in which Canada conducted its affairs warrants the condemnation of this Court. Punitive and exemplary damages should be awarded because Canada's misconduct was malicious, oppressive, and high-handed. As the Tribunal found:

> Canada's conduct was devoid of caution with little to no regard to the consequences of its behavior towards First Nations children and their families both in regard to the child welfare program and Jordan's Principle. Canada was aware of the discrimination and of some of its serious consequences on the First Nations children and their families. Canada was made aware by the NPR in 2000 and even more so in 2005 from its participation and knowledge of the Wen:de report. Canada did not take sufficient steps to remedy the discrimination until after the Tribunal's orders. As the Panel already found in previous rulings, Canada focused on

financial considerations rather than on the best interest of First Nations children and respecting their human rights.

142. This was the same conduct, amongst others, that systemically harmed the Class Members. The plaintiffs plead and rely upon the following:

(a) *Federal Courts Act*, R.S.C., 1985, c. F-7

(b) *Federal Court Rules*, SOR/98-106

(c) *An Act respecting First Nations, Inuit and Metis children, youth and families*, S.C. 2019, c. 24

(d) *Constitution Act, 1867*, 30 & 31 Victoria, c 3 (UK)

(e) *Constitution Act, 1982*, Schedule B. to the *Canada Act 1982* (UK), 1982 c 11

(f) *Crown Liability and Proceedings Act*, R.S.C., 1985 c. C-50

(g) *The Canadian Bill of Rights*, R.S.C. 1985, App. III, Preamble, ss. 1 and 2

(h) *The Indian Act, R.S.C. 1985, ss. 2(1), 3*

(i) *Sioux Valley Dakota Nation Governance Act, S.C. 2014, c.1*

(j) *The Sioux Valley Dakota Nation Governance Act, C.C.S.M. c. S135*

(k) *United Nations Convention of the Rights of the Child*

(l) *United Nations Declaration on the Rights of Indigenous Peoples*

(m) *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14

(n) *United Nations International Convention for the Elimination of all forms of Racial Discrimination*

(o) *United Nations International Covenant on Civil and Political Rights*

(p) *United Nations Convention on the Prevention and Punishment of the Crime of Genocide*, 78 U.N.T.S. 277

(q) Such other and further grounds as the applicants may advise and this court may accept.

143. The plaintiffs propose that this action be tried at Ottawa.

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