IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Neal v. Canada (Attorney General),* 2025 BCSC 1498

Date: 20250806
Docket: S224088
Registry: Vancouver

Between:

Jessy Rae Destiny We-Gyet Neal, Laura Julie-Faith Dobson, Jake Phillip Lopez-Smith and Rachelle Lynn Deschamps

Plaintiffs

And

The Attorney General of Canada and His Majesty the King in Right of the Province of British Columbia

Defendants

Brought under *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Before: The Honourable Madam Justice Wilkinson

Reasons for Judgment

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Place and Dates of Hearing:	Vancouver, B.C. October 7-11, 2024
Written Submissions Received:	December 13 & 20, 2024 April 15, 17, and 25, 2025 May 16 and 26, 2025 June 11, 2025 July 14 and 21, 2025
Place and Date of Judgment:	Vancouver, B.C. August 6, 2025

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INTRODUCTION

[1] The plaintiffs seek certification of their proposed class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*] pursuant to a Consolidated Notice of Civil Claim filed June 5, 2023 (the "Consolidated Claim") and Application for Certification filed November 16, 2023.

[2] This proposed class action follows several related and parallel actions against the federal and other provincial governments concerning the harms suffered by Indigenous children and families in the delivery of child welfare services. The parallel federal class action for on-reserve First Nations children was recently settled, with the amended settlement order indexed as *Moushoom c. Canada (Procureur général),* 2023 FC 1466 [*Moushoom Settlement Order*].

[3] In contrast, this claim is advanced on behalf of Indigenous children and parents not ordinarily residing on-reserve, i.e. "off-reserve" First Nations, Métis, and Inuit children and caregivers coming within the provincial child welfare system during the period of time known as the "Millenium Scoop".

[4] The Federal Court certified a national class action against Canada in the parallel off-reserve proceeding in *Stonechild v. Canada,* 2022 FC 914 [*Stonechild FC*], though the certification was recently overturned in *Canada v. Stonechild*, 2025 FCA 105 [*Stonechild FCA*]. On appeal, the majority found the lower court made legal errors in its understanding and application of the preferability and common issues requirements for certification pursuant to s. 334.16 of the *Federal Court Rules*, the parallel federal class action legislation. For reasons I will explain below in this decision, I do not find *Stonechild FCA* to be a bar to certification against Canada based on these criteria.

[5] This claim involves what the plaintiffs submit is the most recent example of the Crown's systemic, discriminatory conduct since the 19th century toward Indigenous children, beginning with Indian residential schools, then with the Sixties Scoop, and now with the Millennium Scoop.

[6] More specifically, the claim is brought on behalf of certain individuals in British Columbia (BC) as follows:

a) The “Removed Child Class” or “Removed Child Class Members”: all First Nations individuals in British Columbia who at the time of removal were not ordinarily resident on-reserve, and all Inuit and Métis individuals (irrespective of residency on- or off-reserve), who were taken into care at any time between January 1, 1992 and the date of the certification of this action as a class proceeding (the "Class Period");

b) The “Essential Services Class” or “Essential Services Class Members”: Indigenous individuals in British Columbia who, during the Class Period and while they were under the age of 18:

   A. had a need for an essential service (inclusive of essential products); and

   B. faced a delay, denial, or service gap in the receipt of that essential service on grounds, including but not limited to a lack of funding or lack of jurisdiction, or a jurisdictional dispute with another government, level of government, or another governmental department

   (excluded from the Essential Services Class, but only with respect to the defendant Canada, are:

   - the claims of individuals who meet the definition of the Jordan's Class as certified by the Federal Court in *Moushoom v. Canada (Attorney General)*, 2021 FC 1225 (Federal Court File Nos. T-402-19, T-141-20) [*Moushoom Certification Decision*]; and

   - the claims of individuals who meet the definition of the Child Class certified by the Federal Court in *Trout et al v. Canada*, 2022 FC 149 (Federal Court File No. T-1120-21)

(unreported) [*Trout Certification Decision*]; but in every case only to the extent that those claims are captured by the *Moushoom* or *Trout* class actions); and

c) The Indigenous caregiving parents or Indigenous caregiving grandparents of members of the above classes (the "Family Class" or "Family Class Members")

(collectively, the "Class" or "Class Members").

[7] The defendants in the proposed action are His Majesty the King in Right of the Province of British Columbia (the “Province”) and the Attorney General of Canada (“Canada”) (collectively, the “Defendants”).

[8] The proposed class action arises from two interconnected systemic issues:

a) Removed Child Claim: British Columbia’s child welfare system prioritized Indigenous child removals (“Protection Services”) over culturally appropriate prevention services and support to Indigenous children and families (“Prevention Services”), causing the gross overrepresentation of Indigenous children in British Columbia’s child welfare system and reflecting systemic discrimination.

b) Essential Services Claim: the systematic and operational failure of the Defendants to provide equal, non-discriminatory access to other essential health and social services to Indigenous children in BC, leading to gaps, delays, and denials of these services.

[9] For the reasons below, this court grants the plaintiffs’ application for certification of this action as a class proceeding.

CONSTITUTIONAL AND STATUTORY CONTEXT

Indigenous Peoples in Canada

[10] Indigenous peoples in Canada have historically been subjected to different policies and protections based on their grouping into state-created categories: *Varley v. Canada (Attorney General)*, 2025 FC 753 at para. 10. Section 91(24) of the *Constitution Act, 1867*, 30 & 31 Vict, c 3 empowers Parliament with legislative authority over "Indians, and Lands reserved for the Indians". The concept of "Indian" under this section encompasses both "status-Indians" and "non-status Indians" for the purposes of governance under the *Indian Act*, RSC 1985, c I-5. The term "First Nations" has come to replace the term "Indian", referring to Indigenous peoples in Canada who are neither Métis nor Inuit. I therefore use the term "Indian" in this judgment only where appropriate in its legal and historical context, meaning no offence.

[11] In 1939, the Supreme Court of Canada held that Inuit peoples, although not entitled to registration under the *Indian Act*, are considered "Indians" within the meaning of s. 91(24): *Reference as to Whether the Term "Indian" in Head 24 of* Section 91 *of the British North America Act, 1867, Includes Eskimo Inhabitants of the Province of Quebec*, [1939] SCR 104, 1939 CanLII 22 (SCC).

[12] Upon repatriation of the constitution in 1982, s. 35 of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 recognized and affirmed the Aboriginal and treaty rights of "the Indian, Inuit and Métis peoples of Canada", referred to broadly as "Aboriginal peoples": *Varley* at para. 14. In 2016, the Supreme Court clarified that "Indian" under s. 91(24) of the *Constitution Act, 1867* encompasses all Indigenous peoples in Canada, including Métis and non-status "Indians": *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12.

[13] Regardless of designation into one of the categories above or of residence on- or off-reserve, the proposed Class Members are all Indigenous peoples whose rights are recognized and affirmed by s. 35 of the *Constitution Act, 1982*; who are

subject to the jurisdiction of Parliament under s. 91(24) of the *Constitution Act, 1867*; and who are protected from discrimination pursuant to section 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

[14] The Class Members are further protected by Canada's international legal commitments under the *United Nations Declaration on the Rights of Indigenous Peoples*, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 ("Declaration" or "UNDRIP"), adopted by the United Nations General Assembly in 2007 and incorporated into Canada's domestic positive law: SC 2021, c 14. The Declaration has also been adopted into provincial statute: SBC 2019, c 44. Furthermore, in 2019, Parliament enacted the *Act respecting First nations, Inuit and Métis children, youth and families,* SC 2019, c 24 ("Bill C-92").

[15] Parliament enacted Bill C-92 in the wake of a serious national reckoning with Canada's history of abuse of Indigenous children: in 2016, the Canadian Human Rights Tribunal (CHRT) found that Canada's underfunding of First Nations child welfare agencies was discriminatory, injuring First Nations children, their families, and their communities: *First Nations Child and Family Caring Society of Canada v Canada (Attorney General)*, 2016 CHRT 2 [*Caring Society*].

[16] In response, Bill C-92 was constructed to recognize "Indigenous peoples' jurisdiction to make their own laws in relation to child welfare and making cultural continuity an overarching principle in the application of child welfare laws": *Varley* at para. 26. Bill C-92 established national standards and principles within a normative framework for the provision of culturally appropriate child and family services in Canada. It also underscored Parliament's legislative authority to give Indigenous peoples in Canada effective control over their children's welfare by guaranteeing the inherent right to self-government recognized under s. 35(1) of the *Constitution Act, 1982*.

[17] In 2024, the Supreme Court of Canada proclaimed Bill C-92's constitutional validity in *Reference re An Act respecting First Nations, Inuit and Métis children,*

youth and families, 2024 SCC 5 [*Bill C-92 Reference*], on appeal from the Québec Court of Appeal by the Attorney General of Québec and Attorney General of Canada. The Supreme Court held that ss. 8 and 18 of Bill C-92 affirming the right to self-government are, as stated in s. 7, binding on the Crown with "substantive legal effects": *Bill C-92 Reference* at para. 56. The legislation is binding on the Crown in the right of Canada or of a province, thereby binding the federal government as a matter of statutory positive law: *Bill C-92 Reference* at para. 58.

[18] The Supreme Court identified in its constitutional analysis that the pith and substance of Bill C-92 is to ensure the well-being of Indigenous children by applying culturally appropriate services to reduce their overrepresentation in provincial child welfare systems: *Bill C-92 Reference* at para. 32. The Court recognized that normative standards of service delivery are a response to the "disproportionate mass placement of Indigenous children outside their families and their communities" and that "addressing overrepresentation protects the well-being of Indigenous children, youth and families": *Bill C-92 Reference* at para. 84.

[19] The Court also highlighted that Bill C-92 was initiated after the Minister of Indigenous Services brought to the federal government's attention the urgent issue of discrimination within the child and family services provided to Indigenous peoples. Thus, the legal effect of affirming Bill C-92 is also to recognize the existence of and combat discrimination against Indigenous peoples in the government's delivery of child welfare services, especially along the path to reconciliation: *Bill C-92 Reference* at paras. 115–117.

Indian Residential Schools

[20] The mass scooping of Indigenous children in British Columbia and throughout Canada started with the Indian residential school program, described by Canada's Truth and Reconciliation Commission as "one of the darkest, most troubling chapters in our nation's history": Truth and Reconciliation of Canada, *The Final Report of the Truth and Reconciliation Commission of Canada*, vol. 1, *Canada's Residential*

Schools: The History, Part 1 — Origins to 1939 (Montréal: McGill-Queen's University Press, 2015) at VII.

[21] As residential schools closed, survivors commenced class proceedings. Those historical claims eventually resulted in the Indian Residential Schools Settlement Agreement, which provided compensation to survivors and created the Canada's Truth and Reconciliation Commission, indexed as *Quatell v. Attorney General of Canada*, 2006 BCSC 1840.

Sixties Scoop

[22] Before the end of Indian residential schools, the next chapter of mass removals of Indigenous children had begun as of the 1950s. The Crown removed large numbers of Indigenous children from their parents in what is commonly known as the "Sixties Scoop". The Federal Court of Appeal has described the Sixties Scoop as "the practice by Canadian child welfare authorities for many years of taking Indigenous children into care and placing them with non-Indigenous parents, where those children were not raised in accordance with their cultural traditions or taught their traditional languages": *Frame v. Riddle*, 2018 FCA 204 at para. 1.

[23] The Sixties Scoop continued for decades within provincial child welfare systems in Canada. Survivors of the Sixties Scoop commenced class actions. The Ontario Superior Court of Justice found Canada liable for the harm done to class members' cultural identity over an almost two-decade period from 1965 to 1984: *Brown v. Canada (Attorney General),* 2017 ONSC 251 at para. 5 [*Brown Summary Judgment*]. After being found liable on the merits, Canada settled the class actions relating to child welfare systems. That settlement was approved by the Federal Court in *Riddle v. Canada*, 2018 FC 641 [*Riddle Settlement Approval*] and the Ontario Superior Court of Justice in *Brown v. Canada (Attorney General)*, 2018 ONSC 3429 [*Brown Settlement Approval*].

Millennium Scoop

[24] The number of Indigenous children in state care in the past three decades eclipses the number of children in Indian residential schools at their height: *Caring Society* at paras. 161, 257. This latest chapter of mass Indigenous child removals has become known as the “Millennium Scoop”.

[25] This proposed class action, and parallel federal and provincial proceedings in other provinces, cover harms alleged during the Millennium Scoop.

Millennium Scoop: “On-Reserve” vs. “Off-Reserve”

[26] Two separate systems apply to Indigenous children in British Columbia, depending on whether they ordinarily reside on-reserve (i.e. on-reserve First Nations children, for whom Canada has exercised essentially exclusive responsibility) or all other Indigenous children, including First Nations ordinarily residing off-reserve, Métis and Inuit children. In essence, the Government of Canada denies any responsibility for those Indigenous children left in the provincial system.

[27] This action concerns the latter group: off-reserve First Nations, Inuit, and Métis children and caregivers falling within the provincial child welfare system (sometimes referred to collectively with the short form of “off-reserve Indigenous” children and parents).

[28] This dual system is the result of decisions made by the governments of Canada and each province; it exists across the country. As a result, jurisdictional disputes and decisions have directly harmed the lives of the children and families involved. Indigenous children have long been and continue to be the victims of squabbles between the two levels of government, with each taking turns “refusing to intervene to ensure these children’s safety and well-being on the pretext that they do not have the jurisdiction or financial responsibility to do so”: *Renvoi à la Cour d’appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 at para. 558.

[29] In *Bill C-92 Reference*, the Supreme Court similarly acknowledged the pattern of both levels of government passing the buck when it comes to Indigenous child welfare:

> [99] Child welfare in the Indigenous context is not only a field in which Parliament and the provinces can act, but also one in which concerted action by them is necessary…. the federal government and the provincial governments have historically tended to shift responsibility for Indigenous child welfare services to one another … However, today it is recognized that providing such services is the responsibility of both levels of government, which must act in a concerted fashion.
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> [Citations omitted.]

The plaintiffs assert that this duality flows from the policies of assimilation which crystalized in the residential school system, reflecting the government's attitude that Indigenous children having lived off reserve for a certain specified period should in the eyes of Canada be treated "like all other Canadians", i.e., no longer truly or fully Indigenous—assimilated, and therefore no longer a federal responsibility.

[30] In *Bill C-92 Reference*, the Court recognized the importance of "keeping Indigenous children in their community" in order to maintain "cultural continuity": *Bill C-92 Reference* at para. 113. The Province of British Columbia, who opposes certification, intervened in that reference, acknowledging the gross over-representation of Indigenous children in state care.

Outside the Scope of this Claim: "On-Reserve" Claims

[31] For First Nations children ordinarily resident on-reserve, the federal First Nations Child and Family Services ("FNCFS") program reimbursed provincial authorities and agencies for child welfare services.

[32] After a long trial, the CHRT found that the FNCFS, which began on April 1, 1991, was discriminatory in its myriad manifestations across the country by instituting "an incentive to remove children from their homes as a first resort rather than as a last resort" and in prioritizing the removal of First Nations children over providing prevention services aimed at keeping them in their homes and families: *Caring Society* at paras. 344, 458–466. The CHRT found this practice caused harm

"of the worst kind" to the affected First Nations children and families: *Caring Society* at para. 458.

[33] That group of children is covered by the recently settled *Moushoom Settlement Order*. That settlement evolved out of the consolidation of the *Moushoom*, *Trout*, and Assembly of First Nations (AFN) actions (Court file no. T-141-20), in which plaintiffs made overlapping allegations concerning systemic discrimination in the underfunding of child and family services on-reserve and the prioritization of on-reserve child removals. However, *Moushoom Settlement Order* does not address the harms alleged in the Consolidated Claim in respect of off-reserve Indigenous children and families—who are no less Indigenous, no less over-represented in state care, and have allegedly suffered the same discrimination.

This Claim: "Off-Reserve" Claims

[34] First Nations children ordinarily resident off-reserve, Inuit children, and Métis children have been subject to the provincial child welfare system during the Class Period. It is clear to understand how, then, the Province is implicated in the plaintiffs' claims of systemic discrimination. In fact, this was the conclusion drawn by the majority in the *Stonechild FCA* decision reversing certification—that child and family services for First Nations children living off-reserve are provided by provincial governments and the child welfare agencies established under their jurisdiction: at para. 3. Noting that, despite having been described as a "daunting" prospect by the Federal Court, parallel class actions such as this one had been commenced in provincial superior courts, Justice Rennie concluded his reasons as follows:

> [46] Given that the alleged breach of duty arises from the asserted gap between provincial government policies and the 2019 legislation, the preferable procedure for the adjudication of this claim entails proceedings before courts that can compel the participation of provinces responsible for the administration and delivery of child and family services to off-reserve Indigenous children at discovery and trial.

[35] Those provincial actions are currently at various stages of development in this province, Alberta, Manitoba, Ontario, Saskatchewan, and Québec. The most advanced provincial claim is the Québec counterpart to this claim against the

Province of Québec and the Government of Canada. The Québec Superior Court recently authorized (certified) that claim against both defendants as a class action: *A.B. et al c. Procureur general du Québec et al, file no. 500-06-001177-225 (30 avril 2024)* [*A.B.*].

[36] The plaintiffs argue that the federal government is not immune from liability simply because the Province operates services for off-reserve Indigenous families. While Canada has historically provided some support to the Class, starting at the beginning of the Class Period in the early 1990s, Canada decided to cease providing child welfare services with respect to off-reserve Indigenous children and families in British Columbia.

[37] The plaintiffs' claim against Canada commences with this decision, as alleged, to walk away from its constitutional duties towards the Indigenous children and families in the Class and to leave them in the hands of a province unwilling and ill-equipped to support them, despite repeatedly being made aware of such deficiencies and its duty to all Indigenous peoples. The plaintiffs allege that the federal Crown's "complete abandonment" of the Class underscores Canada's self-admitted "consistent approach for off-reserve services" throughout the Class Period. The plaintiffs assert that despite numerous warnings of the failures of child welfare services for off-reserve Indigenous families, Canada continued a policy of wilful ignorance.

Jordan's Principle

[38] Jordan River Anderson was a First Nations child from Norway House Cree Nation. He was born with a severe developmental disability that required years of medical treatment in a Winnipeg hospital. After spending the first two years of his life in the hospital, doctors cleared Jordan to live in a nearby family home. For the next two years, the Government of Canada and the Manitoba provincial government argued over who should pay for his care until he died in 2005 at the age of five. Jordan spent his entire life in the hospital.

[39] In 2005, the First Nations Child & Family Caring Society published the report *Wen:De: We are Coming to the Light of Day ("Wen:De"),* finding that despite section 15 of the *Charter* and international law requiring that First Nations children receive equal benefit under the law, the federal and provincial governments' apathy and inaction denied them that protection. *Wen:De* specifically noted that "jurisdictional wrangling" had resulted in program fragmentation, coordination and reporting issues, and service gaps that allowed First Nations children to "fall through the cracks". It was the *Wen:De* report that proposed the governments adopt the eponymous "Jordan's Principle" to ensure equitable access to public resources for all First Nations children, regardless of residence.

[40] On December 12, 2007, the House of Commons unanimously passed Motion 296, stating: "That, in the opinion of the House, the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children." Canada has now recognized that it is bound by Jordan's Principle. On January 24, 2008, the Premier of British Columbia endorsed Jordan's Principle on behalf of the Province.

[41] In 2009, Bill Zaharoff, Director of Intergovernmental Affairs for Indigenous and Northern Affairs Canada (INAC), B.C. Region, sent an email titled "Jordan's Principle: Parallel work with HC", attaching a report titled "*INAC and Health Canada First Nation Programs – Gaps in Service Delivery to First Nation Children and Families in BC Region*". The report states that: "The work of the two departments on Jordan's Principle has highlighted what all of us knew from years of experience: that there are differences of opinion, authorities and resources between the two departments that appear to cause gaps in service to children and families resident on reserve".

[42] The legal significance of Jordan's Principle was discussed in both *Pictou Landing First Nation v. Canada (Attorney General)*, 2014 FCA 21 [*Pictou Landing FCA*], aff'ing 2013 FC 342 [*Pictou Landing FC*] and in *Caring Society*. The Supreme Court also noted Jordan's Principle as an example of the importance of cooperation

between the two levels of government in the context of Indigenous child welfare in the *Bill C-92 Reference* at para. 99.

[43] The CHRT, mirroring Parliament, has defined "Jordan's Principle" as "a child-first principle meant to prevent First Nations children from being denied essential public services or experiencing delays in receiving them". The plaintiffs' Essential Service Claim arises from the same alleged constitutional, human rights, and legal obligations on the Crown as Jordan's Principle. In this regard, the Essential Services Claim reflects the merits findings of the CHRT on the legal significance of Jordan's Principle.

[44] In *Caring Society*, the CHRT found that Canada discriminated against First Nations children by interpreting Jordan's Principle too narrowly. In its compensation decision indexed as 2019 CHRT 39 [*Caring Society Compensation Decision*], the panel determined at para. 245 that Canada's systemic racial discrimination

> … resulted in harming First Nations children living on reserve or off-reserve who, as a result of a gap, delay and/or denial of services were deprived of essential services and placed in care outside of their homes, families and communities in order to receive those services or without being placed in out-of-home care were denied services and therefore did not benefit from services covered under Jordan's Principle.

The CHRT also found that First Nations children, parents, and grandparents "experienced pain and suffering of the worst kind warranting the maximum award" that the CHRT could grant: *Caring Society Compensation Decision* at paras. 225, 245, 247, 249–251.

[45] Although Jordan's Principle has developed with respect to First Nations children, whether on- or off-reserve, the plaintiffs maintain that its underlying human rights and constitutional protections apply to all Indigenous children, including Métis and Inuit. The plaintiffs' experts, Professor Nico Trocmé, Shylo Elmayan, Professor Elizabeth Fast, and Marie Saint Girons, together found that Métis and Inuit children faced institutional barriers and adverse outcomes similar to First Nations children:

> The increased risk of poor outcomes for Métis and Inuit children and families can be attributed to a number of factors, most notably increased exposure to

> socio-economic risk factors – including poverty, inadequate housing and food insecurity – as well as limited access to health and social services to mitigate the increased risk faced by these children and families. These factors have their roots in a history of government policies – from residential schools, to forced relocation, to de-facto restrictions on economic activities – and more recently in the failure to develop effective services to mitigate the impact of this history. Given these histories and the lack of effective remediation services, we conclude that Inuit and Métis children face systemic barriers -- resulting in delays, denials, and gaps – to access essential health and social services. These problems have been ongoing and persistent since 1992. …
>
> In British Columbia … there are very few health services tailored to Inuit or Métis. In 2020 the Minister of Health commissioned an independent review of racism in B.C.'s health care system entitled: In Plain Sight: Addressing Indigenous-specific Racism and Discrimination in B.C. Health Care. This report found numerous and widespread instances of racist treatment of Indigenous peoples within the health care system …
>
> There were pronounced differences in mental health status between Métis youth and non-Métis youth. …
>
> In a study on access to mental health services in British Columbia, Métis adults reported that services were not culturally responsive and in particular that service providers did not understand the impact of historical trauma rooted within health-care experiences.

[46] The Defendants argue Jordan's Principle only applies to First Nations children. If it is necessary to determine whether Jordan's Principle applies to Métis and Inuit children for the purpose of defining the Essential Services Class, this can be done at the common issues trial. I would also note that the Supreme Court uses the term "Indigenous" exclusively in its discussion of Jordan's Principle in *Bill C-92 Reference*. In other words, the Court makes no distinction between First Nations and other groups whose rights are recognized and affirmed under s. 35 of the *Constitution Act, 1982*. If Jordan's Principle does not apply to Métis and Inuit children, it is nevertheless applicable to the First Nations children ordinarily residing off-reserve who comprise part of the Essential Services Class.

[47] The Consolidated Claim pleads that the Defendants breached Jordan's Principle in respect of several causes of action. First, as part of the negligence claim, the plaintiffs allege that the Defendants' failure to comply with the rights and obligations underlying Jordan's Principle breached their common law duty of care. The plaintiffs further allege that the Defendants' failure to comply with Jordan's

Principle infringed their equality rights under section 15(1) of the *Charter*. Finally, the plaintiffs argue that the Defendants' inequitable underfunding and provision of essential prevention services pursuant to Jordan's Principle to the Class Members resulted in their unjust enrichment.

[48] The Defendants deny that Jordan's Principle is justiciable under any private law or *Charter* cause of action. They assert that Jordan's Principle is a legal principle, not a standalone legal right. Accordingly, it cannot be breached or "complied with" in the sense described by the plaintiffs. Likewise, the Defendants argue a *Charter* breach cannot be founded on a breach of Jordan's Principle as it is not a law that can be breached. Citing *Pictou Landing FC* at para. 18, Canada argues Jordan's Principle is a "mechanism to prevent First Nations children from being denied equal access to benefits or protections available to other Canadians as a result of Aboriginal status".

[49] In my view, *Pictou Landing FC* is not supportive of Canada's argument. Rather, Mandamin J.'s decision demonstrates that, by binding itself to Jordan's Principle, the federal government has undertaken to implement it as a policy subject to normative legal standards: *Pictou Landing FC* at para. 87. Where a jurisdictional dispute exists between the two levels of government, Jordan's Principle is engaged with both the federal and provincial Crowns. As the Court held at para. 116, "Jordan's Principle is not an open ended principle. It requires complimentary social or health services be legally available to persons off reserve".

[50] I agree with the plaintiffs' position that *Pictou Landing FC* affirms Jordan's Principle as a justiciable principle within this court's jurisdiction. Jordan's Principle should not be read narrowly: *Pictou Landing FC* at paras. 86, 95. Regardless, the plaintiffs do not argue a breach of Jordan's Principle as a standalone cause of action, nor do they base their common law negligence or section 15(1) *Charter* claims entirely on an alleged breach of Jordan's Principle. Rather, as the plaintiffs in *A.B.* argued at para. 57, the claim situates Jordan's Principle within the alleged duty of care and constitutional guarantees that Canada owes to the Essential Services

Class. Determining whether Jordan's Principle is indeed applicable in these respects requires this court to make a factual determination with respect to government policy.

Honour of the Crown

[51] The Supreme Court of Canada addressed the honour of the Crown in *Québec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39 [*Takuhikan*]. At issue in *Takuhikan* was the federal and provincial governments' failures to adequately negotiate funding under the First Nations and Inuit Policing Program, which resulted in difficulties and harm to the Indigenous communities' abilities to manage their internal security. In 2022, the Québec Court of Appeal ruled against the defendants. Canada did not appeal the ruling and paid the money owed from that judgment. Québec appealed, arguing it was under no obligation to meet certain expectations of funding and contract renewal.

[52] The Court found that Québec breached both its civil contractual obligation to negotiate with the parties in good faith and its public obligation flowing from the honour of the Crown. The Court found that damages should be awarded under the framework of "reconciliatory justice", whose purpose above all is "to restore and improve the relationship between the Crown and Indigenous peoples in order to support reconciliation, a process that not only takes the past into account but also "continues beyond formal claims resolution"": *Takuhikan* at para. 18, quoting *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 32.

[53] In *Takuhikan*, the Court clarified in the role of the honour of the Crown in dealings with Indigenous peoples:

> [147] The honour of the Crown requires the Crown to act honourably in its dealings with Indigenous peoples. This principle arises from "the Crown's assertion of sovereignty over an Aboriginal people and de facto control of land and resources that were formerly in the control of that people" (*Mikisew Cree First Nation v. Canada (Governor General in Council),* 2018 SCC 40, [2018] 2 S.C.R. 765, at para. 21, per Karakatsanis J., quoting Haida Nation, at para. 32, and citing MMF, at para. 66; see also Hogg and Dougan). That practice gave rise to a "special relationship" between the Crown and Indigenous peoples (*MMF*, at para. 67, quoting Beckman, at para. 62).

> [148] The underlying purpose of the principle of the honour of the Crown is to facilitate the reconciliation of the Crown's interests and those of Indigenous peoples, including by promoting negotiation and the just settlement of Indigenous claims (*Mikisew Cree,* at para. 22; see also MMF, at para. 66; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24; Desautel, at para. 22). This purpose transcends the corrective justice at the heart of private law to make room for repairing and maintaining the special relationship with the Indigenous peoples on whom European laws and customs were imposed (see *MMF*, at para. 67; *Haida Nation*, at para. 17). This is what I will call justice linked to reconciliation or reconciliatory justice.
>
> [149] I hasten to add that the principle of the honour of the Crown is not a cause of action. It "speaks to how obligations that attract it must be fulfilled" (MMF, at para. 73 (emphasis in original)). The honour of the Crown is a constitutional principle that "looks forward to reconciliation between the Crown and Aboriginal peoples in an ongoing, 'mutually respectful long term relationship'" (*Desautel*, at para. 30, quoting Beckman, at para. 10, and citing *Mikisew Cree*, at para. 21; *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani Utenam*), 2020 SCC 4, [2020] 1 S.C.R. 15, at paras. 21 and 28).
>
> [Emphasis added.]

[54] Additionally, the Court identified the following situations where the honour of the Crown applies: circumstances that relate to the "reconciliation of specific Indigenous claims, rights or interests with the Crown's assertion of sovereignty" (at para. 156); conduct of the Crown that engages rights recognized and affirmed by s. 35 of the *Constitution Act, 1982* (at para. 156); contractual undertakings that "are not constitutional in nature and that also relate to reconciliation" (at para. 157); treaty land entitlement agreements that are not themselves treaties protected by s. 35(1) (at para. 158); and contractual agreements engaging the Indigenous right to self-government (at para. 158).

CERTIFICATION UNDER THE *CPA*

[55] Section 4(1) of the *CPA* establishes the requirements for the certification of class proceedings. The court must certify the proceeding if the plaintiff establishes that:

> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;

> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[56] Class action legislation is remedial and should be given a broad, liberal, and purposive interpretation in order to achieve the foundational policy objectives as articulated in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, leave to appeal ref'd, [2010] S.C.C.A. No. 32 [*Pro-Sys BCCA*] at para. 64:

> [64] The provisions of the *CPA* should be construed generously in order to achieve its objects: judicial economy (by combining similar actions and avoiding unnecessary duplication in fact-finding and legal analysis); access to justice (by spreading litigation costs over a large number of plaintiffs, thereby making economical the prosecution of otherwise unaffordable claims); and behavior modification (by deterring wrongdoers and potential wrongdoers through disabusing them of the assumption that minor but widespread harm will not result in litigation): *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 at paras. 26-29 [*Western Canadian Shopping Centres*]; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 15 [*Hollick*].
>
> [Emphasis added.]

[57] Accordingly, the provisions of the *CPA* should be interpreted to achieve the three well-settled goals underscored above—namely, judicial economy, access to justice, and behaviour modification: see also *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 14–16; *Western Canadian Shopping Centres v. Dutton*, 2001 SCC 46 at para. 51 [*Dutton*].

[58] Certification is a purely procedural step that "is decidedly not meant to be a test of the merits of the action": *Hollick* at para. 16. The certification stage focuses on the form of the action. In other words, the question is "not *whether* the claim is likely

to succeed, but whether the suit is appropriately prosecuted as a class action": *Hollick* at para. 16; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 102 [*Pro-Sys SCC*]; *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at paras. 19–20.

[59] The evidentiary burden on a certification motion is low. The first requirement (that the pleadings disclose a cause of action) is decided solely on the pleadings. For the remaining requirements pursuant to ss. 4(1)(b)–(e), the plaintiffs need only show "some basis in fact" that the requirements are met. This standard "does not require the court to weigh and resolve conflicting facts and evidence. This is a task for which the court is ill-equipped at the certification stage": *Finkel* at para. 20. The court makes no assessment of the merits of the action at the certification application stage. Evidence is solely required to establish a minimum factual basis for the certification criteria only: *Hollick* at para. 25; *Pro-Sys SCC* at paras. 99–100; *Mentor Worldwide LLC v. Bosco*, 2023 BCCA 127 at paras. 33–34 [*Mentor*].

[60] The certification judge takes on the role of gatekeeper, screening out claims that are not appropriate for resolution as class proceedings. The goal of the *CPA* is to be fair to both plaintiffs and defendants. In this respect, "it is imperative to have a scrupulous and effective screening process, so that the court does not sacrifice the ultimate goal of a just determination between the parties on the altar of expediency": *Thorburn v. British Columbia (Public Safety and Attorney General)*, 2012 BCSC 1585 at para. 117, aff'd 2013 BCCA 480; see also *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2021 BCCA 85 at para. 31; *Pro-Sys SCC* at para. 103.

CAUSES OF ACTION – s. 4(1)(a)

[61] The first requirement for certification under s. 4(1) is that the pleadings disclose a cause of action. This criterion is assessed on the same standard that applies to an application to strike pleadings under R. 9-5(1)(a) of the *Supreme Court Civil Rules*: "whether, assuming the pleaded facts are true, it is plain and obvious the action cannot succeed": *Finkel* at para. 16. The court can only refuse to certify an action on the basis of failing to meet the requirement of s. 4(1)(a) if, based solely on

the pleadings, the claim has no reasonable prospect of success: *Situmorang v. Google, LLC*, 2024 BCCA 9 at para. 54, citing *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198.

[62] In assessing the pleadings, the court must read the claim "generously, and accommodate inadequacies that are merely the result of drafting deficiencies": *Situmorang* at para. 55, citing *FORCOMP Forestry Consulting Ltd. v. British Columbia*, 2021 BCCA 465 at para. 22 [*FORCOMP*], leave to appeal to SCC ref'd, 40051 (30 June 2022). The fact that a claim is novel or unsettled at law is neither a bar to certification, nor is the court obligated to permit such claims to proceed to trial on the basis of novelty: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980, 1990 CanLII 90 (SCC) at 980.

[63] In the certification context, the plaintiff bears the onus of establishing that the action has a prospect of success based on the facts alleged in the pleadings. No evidence may be considered: *Lin v. Airbnb, Inc.*, 2019 FC 1563 at para. 29. The facts alleged must be assumed to be true unless they are patently unreasonable or incapable of proof: *Sherry v. CIBC Mortgage Inc.*, 2020 BCCA 139 at para. 23. Facts based "on assumption and speculation" cannot support a cause of action: *Operation Dismantle v. The Queen*, [1985] 1 SCR 441, 1985 CanLII 74 (SCC) at para. 27. While the test is generous, the plaintiffs must nevertheless clearly plead the facts in sufficient detail for the court to recognize the proposed causes of action. "Bald assertions of conclusions" do not suffice: *Lin* at para. 29. If such is the case, the claim is bound to fail and certification must be denied: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at paras. 18–19 [*Atlantic Lottery*]; *Pearce* at para. 56.

[64] The Defendants bring concurrent applications under R. 9-5(1)(a) to strike the pleadings. As noted above, the analysis undertaken under this rule and under s. 4(1)(a) of the *CPA* is identical: whether, assuming the pleaded facts are true, it is plain and obvious the action cannot succeed or that the pleadings disclose no reasonable cause of action: *Hunt* at 980. The threshold to strike a claim is high and

the matter must proceed to trial where a reasonable prospect of success exists: *La Rose v. Canada*, 2020 FC 1008 at para. 16 [*La Rose FC*], aff'd *La Rose v. Canada*, 2023 FCA 241 at para. 120 [*La Rose FCA*]. A motion to strike will only succeed where the pleading shows "no scintilla" of a cause of action. A mere germ of a cause of action will be enough to sustain the pleading: *Hunt* at 980.

[65] The Consolidated Claim advances five causes of action against the Province and Canada: (i) systemic negligence; (ii) breach of section 7 of the *Charter*; (iii) breach of section 15(1) of the *Charter*; (iv) breach of fiduciary duty; and (v) unjust enrichment.

[66] The plaintiffs seek that this court grant the following relief to the Class Members: (i) an order certifying this action as a class proceeding and appointing the proposed representative plaintiffs as the representative plaintiffs for the Class; (ii) general and aggregate damages for breach of fiduciary duty, failure to uphold the honour of the Crown, negligence, and under s. 24(1) of the *Charter*; (iii) a declaration that the Defendants breached their common law, fiduciary, and constitutional duties to the Class Members; (iv) a declaration that the Defendants failed to uphold the honour of the Crown; (v) a declaration that the Defendants unjustifiably breached the rights of the Class members under ss. 7 and 15(1) of the *Charter*; (vi) a declaration that the Defendants breached Jordan's Principle; (vii) a declaration that the Defendants were unjustly enriched; (viii) special, aggravated, exemplary and punitive damages; (ix) restitution, disgorgement, or other equitable compensation; (x) costs; and (xi) any other relief this court deems just.

Systemic Negligence

[67] The plaintiffs plead that the Province's and Canada's conduct breached their duties of care to the Class Members, causing damage to the Class Members. The negligence claims as pleaded are in systemic negligence. In *Rumley v. British Columbia*, 2001 SCC 69, the Supreme Court differentiated systemic negligence from "common" negligence wherein the impugned conduct is "not specific to any one victim but rather to the class of victims as a group": *Rumley* at para. 34; see also

Chief David Crate on behalf of Fisher River Cree Nation et al. v. The Attorney General of Canada, 2025 FC 561 at para. 63 [*Crate*]. Systemic negligence in the context of institutional abuse entails an institution's failure "to have in place management and operations procedures that would reasonably have prevented the abuse": *Rumley* at para. 30.

[68] Systemic negligence is the appropriate cause of action where the plaintiffs allege the duty of care has been breached systemically, not as individual tortious malfeasance: *Rumley* at para. 30. Regardless of whether or not the claims are pursued on a systemic basis or in common negligence, the plaintiffs must satisfy the same test. As stated in *Canada v. Greenwood*, 2021 FCA at para. 153, "While the scope and content of the duty of care owed by a defendant and the evidence required to establish a breach will be different when the claim is made on a systemic basis, the elements of the tort of negligence are the same".

[69] The test for the elements of the tort of negligence is well-established. As the Supreme Court of Canada set out in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3, a plaintiff alleging negligence must plead:

a) that the defendant owes the plaintiff a duty of care;

b) that the defendant's conduct breached the standard of care;

c) that the plaintiff sustained damage; and

d) that the damage was caused, in fact and in law, by the defendant's breach.

The Province

[70] In particular, the Consolidated Claim pleads that the Province had duties, amongst others, to:

a) adequately fund and prioritize Prevention Services over Protection Services with the knowledge that Indigenous families may require more support for that purpose than non-Indigenous families; and

b) ensure that Indigenous families and communities are involved in the upbringing of off-reserve Indigenous children, and that those children were able to remain in their communities and to learn about and practice their traditions, culture, and language.

[71] The Consolidated Claim pleads that the Province breached its duties by, amongst others:

a) providing discriminatory services to the Class;

b) failing to provide holistic healing centres, respite and homemaker services for single parents, daycare, family support, counselling, services for suicide prevention, post-suicide counselling, recreational facilities, educational opportunities, and cultural, travel, and exchange activities comparable to those available to non-Indigenous communities;

c) failing to provide sufficient funding for Prevention Services to meet legislated requirements including funding for Indigenous children to (i) learn about and practice Indigenous traditions, customs, and language; and (ii) address the impact of residential schools;

d) regularly failing to fund Prevention Services even if a nurturing environment could be created with support;

e) failing to pay staff who provide services to Indigenous children at levels substantively or normatively equal to staff providing services to non-Indigenous children; and

f) failing to properly train Ministry of Children and Family Development ("MCFD") staff in Indigenous culture, and in particular on custom adoptions.

[72] As pleaded, these are all claims of systemic negligence.

Canada

[73] The Consolidated Claim further pleads that the defendant Canada had duties to fund Prevention Services compared to the removals of Indigenous children within the provincial Indigenous child and family services in a manner that:

a) did not discriminate against Indigenous children off-reserve; and

b) prioritized support for and preservation of Indigenous traditions, culture and language.

[74] The Consolidated Claim pleads that Canada breached these duties by:

a) failing to fix its funding policy relating to Indigenous child services off-reserve, even years after it had done so for to Indigenous child services on-reserve, contrary to, inter alia, a report presented in 2006, a response given in 2007, a 2008 report, the 2016 *Caring Society* decision, a 2017 report, and a 2022 report;

b) failing to cure the discriminatory deficiencies in the Province's child and family services to the Class; and

c) failing to fund non-discriminatory Indigenous child services off-reserve.

[75] The Consolidated Claim pleads that these acts of Canada constituted breaches of its duties because:

> [133] …the operation of the policies and funding formulas employed by the defendants during the Class Period operated to systematically deny Indigenous children in British Columbia from accessing the public services and/or products they needed when they needed them, in a manner consistent with substantive equality and reflective of their cultural needs. The discriminatory and ongoing "perverse incentive" perpetuated by the chronic underfunding of prevention services, while fully funding maintenance and apprehension expenses, is a species of discrimination which violates Jordan's Principle.

[76] The Consolidated Claim pleads that, as underfunding of prevention services and other funding measures were largely in the control of the federal government, Canada is liable for the damage caused to the Class.

[77] These are also all claims of systemic negligence.

[78] The Consolidated Claim also pleads that the Defendants had actual knowledge of all of the alleged failings, yet repeatedly chose not to remedy them.

The Alleged Duty of Care

[79] The plaintiffs in *Brown Summary Judgment* alleged analogous conduct as in this case in respect of the Sixties Scoop: at paras. 76–83. On a motion for summary judgment, the Ontario Superior Court found that the federal Crown owed a duty of care, conducting the following analysis:

a) The Court applied the *Anns/Cooper* test, which requires the court to consider (1) whether there is (a) a relationship of proximity such that (b) failure to take reasonable care might foreseeably cause loss or harm; and (2) if so, whether there are any residual policy considerations that would negate such a duty.

b) The Court held at para. 78 that there was a relationship of proximity because due to “a special and long-standing historical and constitutional relationship between Canada and [Indigenous] peoples” (referring to those individuals whose rights are recognized and affirmed under s. 35 of the *Constitution Act, 1982*) that has evolved into “a unique and important fiduciary relationship”. The Court added at para. 81 that the proximity criterion was satisfied “all the more so when the focus of the extended child welfare regime was a highly vulnerable group, namely, children in need of protection”.

c) The Court held at paras. 79–80 that a “failure to take reasonable care might cause loss or harm to [Indigenous] peoples, including their children”

> because “Canadian law, during the period in question, ‘accepted’ that Canada's care and welfare of the [Indigenous] peoples was a ‘political trust of the highest obligation’. And there can be no doubt that the [Indigenous] peoples' concern to protect and preserve their [Indigenous] identity was and remains an interest of the highest importance”.

d) The Court held at para. 82 that there was no relevant policy consideration that could negate a duty of care.

[80] In analogous cases (catalogued below), courts have found systemic negligence claims to be a reasonable cause of action, even if the standard of care changes, and notwithstanding arguments about justiciability or core policy. The plaintiffs refer me to a number of authorities.

[81] In *Rumley* at paras. 30–32, the Supreme Court of Canada certified common issues on whether the defendant operator of a school committed systemic negligence by failing to create and use procedures that would ensure that children were safe, even though the standard of care may have varied over the alleged class period. In its analysis, the Supreme Court cited the British Columbia Supreme Court’s decision to certify a class action for negligent manufacture and sale over an 11-year period on the grounds that, if the defendant were “partially successful in its defence and ultimately found to have been negligent over part of the period only, that result [could] be accommodated in the answer to the general question”: *Rumley* at para. 31, citing *Chace v. Crane Canada Inc.* (1996), 26 B.C.L.R., (3d) 339 (S.C.) at 347.

[82] In *Papassay v. The Queen (Ontario),* 2017 ONSC 2023, the class consisted of wards of the Crown. The plaintiffs alleged that the Crown should have sought compensation from the Criminal Injuries Compensation Board on their behalf. The Ontario Superior Court certified this as a common issue, explaining at para. 52:

> As was the case in *Rumley*, these questions raise allegations that are systemic in nature. The plaintiffs, as Crown wards, all shared the same legal status in relation to the defendant. The defendant was bound by the same

> legislative framework, albeit one that changed when child welfare legislation was repealed or amended.

[83] In *White v. Canada (Attorney General),* 2004 BCSC 99 at para. 79, this Court held:

> …in the context of a claim of systemic negligence where the issue is not whether particular instances of abuse should have been prevented, but whether sufficient general measures to prevent such abuse were instituted, the need to focus on specific circumstances and individual failings is of secondary importance to the question of whether the Crown, acting through its servants or agents, for example, "failed to respond adequately to some complaints" … or otherwise acted incongruously with a prevailing duty or standard of care.

[84] In *Doe v. The Roman Catholic Archbishop of Vancouver*, 2023 BCSC 833 at para. 30 this Court found that allegations of systemic negligence where the defendant has allegedly "failed to have in place adequate policies, procedures and practices to meet its standard of care" disclosed a cause of action.

[85] In *Francis v. Ontario*, 2021 ONCA 197, the class consisted of prisoners placed in solitary confinement. The plaintiff alleged at para. 100 that the Crown (1) over-relied on solitary confinement, despite the practice being legally authorized; (2) failed to properly exercise its discretion on the appropriate length of solitary confinement, or to stop the practice when there was a risk of permanent injury; (3) failed to investigate ongoing harm caused by that decision; and (4) failed to adequately supervise its agents to "ensure that class members would not suffer unreasonable harm". The Court of Appeal for Ontario held that these pleadings could be sufficient to establish a duty of care in systemic negligence:

> [102] … On the first branch of the test from *Cooper v. Hobart,* [2001] 3 S.C.R. 537, [2001] S.C.J. No. 76, 2001 SCC 79, the prima facie duty test, there is clearly a close relationship between Ontario and the inmates (i.e., proximity) that would support a basis for finding a duty of care. It is well-established that governments owe a duty of care to individuals while they are in custody: *MacLean v. Canada*, 1972 CanLII 124 (SCC), [1973] S.C.R. 2, [1972] S.C.J. No. 69, at p. 7 S.C.R. Ontario does not dispute that is the case.
>
> [103] It follows, from the nature of the relationship, that actions taken which result in injury to an inmate could be reasonably foreseeable. Again, that is accepted to be the case on an individual basis, and we see no principled reason why that could not be the case on a class basis. If identical action is

> taken regarding the inmate population, or a subset of that population, and harm results, it is as foreseeable on a group-wide basis as it is on an individual basis.
>
> [104] That then leads to the second branch of the *Cooper v. Hobart* test, which is whether there are residual policy considerations that would militate against a finding of a duty of care. Those considerations lead to the issue of policy versus operational matters, about which we will have more to say when we come to the next issue, that is, the application of the CLPA. At the risk of foretelling our conclusion on that issue, we will say that we view [page 528] the actions taken in this case, that form the basis of the negligence claim, to be tied to operational as opposed to policy matters.

[86] In *Canada (Attorney General) v. Nasogaluak*, 2023 FCA 61 [*Nasogaluak*], the class was of Indigenous people held in custody by the RCMP. The plaintiff alleged that the Crown had a duty to prevent abuse. The Crown argued that the claim disclosed no cause of action because (1) the RCMP owed no duty to people it detained; (2) any harm was the result of "individual acts of negligence" by employees; and (3) residual policy considerations applied to shield core policy decisions. The Federal Court of Appeal rejected these arguments and held that there was a viable cause of action. In particular, the Court noted at paras. 43–49 that "what is alleged here is proximity at the institutional level", which is different than the duties owed by officers to individual prisoners.

[87] In *Greenwood v. Canada*, 2020 FC 119 at paras. 41–49, aff'd 2021 FCA 186 at paras. 163–164, the class was of RCMP employees harassed at work. The Crown argued that these were individual "workplace disputes", and that these claims would fail on an individual basis because the appropriate claim would be for constructive dismissal. The Federal Court rejected this argument and concluded there was a viable cause of action, because this was a claim in systemic negligence—not "just" workplace disputes.

[88] Courts have also endorsed causes of action on behalf of children in care. In *CH v. British Columbia*, 2003 BCSC 1055 at para. 95 this Court held that the Crown owed a duty of care to a child in care, stating: "It is obvious that, as the guardian of the [child in care], the Ministry was in a relationship of sufficient proximity to give rise to a duty of care."

Core Policy Immunity

[89] Core policy immunity shields high-level government decisions involving economic, social, and political considerations from liability in tort. The Supreme Court of Canada in *R. v. Imperial Tobacco Ltd*., 2011 SCC 42 addressed the question of tort liability for government policy and the scope of state immunity for policy decisions. Chief Justice McLachlin identified two main approaches to the problem, and their respective limitations:

[90] The first approach distinguishes between actions taken by public authorities in and out of their discretion, unless they are acting within their discretion in an irrational manner: *Imperial Tobacco* at para. 73. The Court highlighted the main difficulty with the "discretion" approach is its potential to create "an overbroad exemption for the conduct of government actors", since many decisions can be categorized as discretionary, at least in part: *Imperial Tobacco* at para. 77.

[91] The second approach distinguishes between "operational" decisions and those decisions deemed "core" or "true" policy decisions, the former of which are not immune to judicial review. The "elusiveness of a workable test to define policy decisions protected from judicial review is captured by the history of the issue in various courts": *Imperial Tobacco* at para. 79. State actors at all levels of bureaucracy enjoy varying levels of discretion, including related to how they exercise their budget or prioritize operational tasks: at para. 78. Moreover, decisions rarely fall neatly into the "stark dichotomy between two water-tight compartments—policy decisions and operational decisions", rendering the test difficult to implement in practice: *Imperial Tobacco* at para. 86.

[92] Chief Justice McLachlin concluded the following in *Imperial Tobacco*, highlighting that core policy government decisions are not subject to a blanket unlimited immunity:

> [90] I conclude that "core policy" government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. This approach is consistent

> with the basic thrust of Canadian cases on the issue, although it emphasizes positive features of policy decisions, instead of relying exclusively on the quality of being "non-operational". It is also supported by the insights of emerging jurisprudence here and elsewhere. This said, it does not purport to be a litmus test. Difficult cases may be expected to arise from time to time where it is not easy to decide whether the degree of "policy" involved suffices for protection from negligence liability. A black and white test that will provide a ready and irrefutable answer for every decision in the infinite variety of decisions that government actors may produce is likely chimerical. Nevertheless, most government decisions that represent a course or principle of action based on a balancing of economic, social and political considerations will be readily identifiable.

[93] In *Nelson (City) v. Marchi*, 2021 SCC 41 [*Marchi*], the Supreme Court expounded on judges' continued struggle to define the scope of this immunity in the decade following *Imperial Tobacco*. The Court determined the key focus in ascertaining whether a decision is one of core policy is "always on the nature of the decision": *Marchi* at para. 2. Courts should look to four factors to assess the nature of a government's decision: (1) the level and responsibilities of the decision-maker; (2) the process by which the decision was made; (3) the nature and extent of budgetary considerations; and (4) the extent to which the decision was based on objective criteria: *Marchi* at para. 3. Respect for the separation of powers is an animating principle of core policy immunity, and should guide the court's analysis correspondingly.

[94] Two additional clarifications are critical to the core policy immunity analysis: Firstly, the presence of financial and budgetary decisions does not automatically thrust the impugned action into the ambit of core policy immunity: *Marchi* at para. 58. Whether a government decision involved budgetary considerations is one factor among many to determine if it constitutes a core policy decision.

[95] Second, government action self-defined as "policy" matters is not automatically shielded from scrutiny. As the Court held in *Marchi* at para. 59, "The focus must remain on the nature of the decision itself rather than the format or the government's label for the decision".

Policy, Funding, and Operation

[96] The Defendants argue that the claims are based on alleged underfunding for Indigenous child welfare and that, as such, they are bound to fail. The Province argues that *Marchi* and *K.O. v. British Columbia (Ministry of Health)*, 2022 BCSC 573, aff'd 2023 BCCA 289 support the position that private law actions alleging systemic underfunding are barred by the doctrine of core policy immunity. As noted above, *Marchi* makes clear that funding decisions are not automatically immune from judicial scrutiny. Canada argues that it is not responsible for operational implementation under provincial jurisdiction and that systemic failures, if any, lie in the application of provincial policies, not federal oversight.

[97] The CHRT found in *Caring Society* at paras. 41–45 that funding can constitute a service, rather than a policy decision. Relatedly, the plaintiffs refer me to *Eldridge v. British Columbia (AG),* [1997] 3 SCR 624, in which the Supreme Court of Canada found at para. 51 that the provision of sign language interpretation services was not simply a matter of internal hospital management but rather an “expression of government policy”.

[98] In *Nasogaluak* at para. 41, the Federal Court of Appeal found that matters relating to the “funding, oversight, operation, supervision, control, maintenance, and support of the RCMP in the Territories” were “at least primarily operational matters”, thus falling outside of core policy. That Court did, however, find that the specific government decision to establish the RCMP as the police force in the Territories fell squarely within the definition of a “core policy decision” as per the *Marchi* framework. The Court found it was most appropriate to allow the systemic negligence claim covering the abovementioned actions to proceed on the merits once extricated from the foregoing “true” core policy decision and to remit the matter to the motion judge to delineate the boundaries between the two: *Nasogaluak* at para. 42.

[99] I would characterize the decision in *K.O.* similarly. Justice Baird of our Court found the following:

> [30] In my view, the response to this claim is straightforward: while publicly funded efforts at education and moral suasion to reduce or eradicate mental health stigma may well be eminently sensible, humane, and in our collective best interests, they are optional, not mandatory. It is plain and obvious, not only that this court cannot require the enactment and resourcing of anti-stigma initiatives, but also that it cannot order the government to pay compensation to the plaintiffs and others for its alleged failure to do so adequately or at all. Whether or not the government should take more assertive steps to address this problem is a matter of public policy and resource allocation in which the court system has no say. Even if a system-wide anti-stigma policy were conceived and implemented it would not give rise to the private law duties alleged here: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at paras. 71-73.
>
> [31] I would go further and say that the adequacy of core government policy on important social, economic and political matters – and I would emphasise that healthcare, including mental healthcare, comprises the largest single item of expenditure in the provincial budget, a principal focus of government finances and operations, and a central preoccupation of many citizens and certainly the media – is purely a matter of public law and administration and is not properly the subject of a lawsuit in tort: *R. v. Imperial Tobacco Canada Ltd.* at paras. 90-91.

[100] In contrast, the Consolidated Claim does not attack the establishment of British Columbia's child welfare system. The plaintiffs argue that, within the established programs, the systemic underfunding of preventive services, delay and denial of essential services, inequitable resource allocation, discriminatory funding formulas, and prioritization of child removals all represent systemic operational failures, rather than protected core policy decisions.

[101] In *Moushoom* and *Trout*, the court certified causes of action alleging systemic underfunding of preventive services disproportionately impacting class members.

Conclusion on Core Policy Immunity

[102] The question of whether a decision is in fact core policy "must be proven by the public authority": *Marchi* at para. 79. This Court in *Gibot v. Public Guardian and Trustee*, 2023 BCSC 1597 interpreted *Marchi* to mean that core policy immunity is a "substantive defence", therefore addressed on the merits at trial. The Court dismissed the Public Guardian Trustee's argument that the plaintiffs' negligence claim was bound to fail on this basis: *Gibot* at para. 102; see also *Elizabeth Fry Society of Greater Vancouver v. British Columbia (Public Guardian and Trustee)*,

2025 BCSC 610 at paras. 71–72. Canada's argument as to its level of proximity to operational implementation can similarly be addressed at trial.

[103] Similarly, the Ontario Court of Appeal in *Leroux v. Ontario*, 2023 ONCA 314 found that "the overarching guiding principle for core policy immunity, the separation of powers, remains respected if this claim proceeds to trial, as it has the potential to be adjudicated without compromising the institutional roles and competencies of the three branches of government": at para. 62. Considering the low threshold for certification and the decisions in *Gibot* and *Leroux*, it is not appropriate to consider core policy immunity as a bar to the claim at certification.

Statutory Immunity

[104] The Province raises the statutory immunity provision in British Columbia's *Child, Family and Community Service Act*, RSBC 1996, c 46 [*CFCSA*] as a bar to the claims in tort. Section 101 provides immunity from legal proceedings:

> 101 (1) Subject to subsection (2), no legal proceeding for damages lies or may be commenced or maintained against a person because of anything done or omitted
>
> (a)in the exercise or intended exercise of a power under this Act, or
>
> (b)in the performance or intended performance of a duty under this Act.
>
> (2) Subsection (1) does not apply to a person referred to in that subsection in relation to anything done or omitted in bad faith.
>
> (3) Subsection (1) does not absolve the government or an Indigenous governing body from vicarious liability arising out of anything done or omitted by a person referred to in that subsection for which the government or the Indigenous governing body would be vicariously liable if this section were not in force.

[105] This provision has no application to the Consolidated Claim. The plaintiffs do not bring this action against individual social workers or other government employees in relation to specific acts taken in the exercise of this statute. The Claim does not attack individual child removals; it attacks the implementation of child Protective and Preventive Services as a whole. The claims are in systemic negligence.

[106] If statutory immunity did apply to the claims, the Province's argument must nevertheless be rejected for the exception carved out in sub-section 101(2) of the *CFCSA*. Assuming the facts pleaded as true, the Province is not immune to liability for anything done or omitted in bad faith, as is alleged in the Consolidated Claim.

Statutory Authority

[107] The Province further argues that the claim in systemic negligence is barred by the defence of statutory authority. This doctrine is described in *Ryan v. Victoria (City)*, [1999] 1 SCR 201, 1999 CanLII 706 (SCC):

> [54] Statutory authority provides, at best, a narrow defence to nuisance. The traditional rule is that liability will not be imposed if an activity is authorized by statute and the defendant proves that the nuisance is the "inevitable result" or consequence of exercising that authority. See *Lord Mayor, Aldermen and Citizens of the City Manchester of v. Farnworth*, [1930] A.C. 171 (H.L.), at p. 183; *City of Portage La Prairie v. B.C. Pea Growers Ltd*., 1965 CanLII 101 (SCC), [1966] S.C.R. 150; *Schenck v. Ontario (Minister of Transportation and Communications)*, 1987 CanLII 21 (SCC), [1987] 2 S.C.R. 289. An unsuccessful attempt was made in *Tock*, supra, to depart from the traditional rule. Wilson J. writing for herself and two others, sought to limit the defence to cases involving either mandatory duties or statutes which specify the precise manner of performance. La Forest J. (Dickson C.J. concurring) took the more extreme view that the defence should be abolished entirely unless there is an express statutory exemption from liability. Neither of those positions carried a majority.
>
> [55] In the absence of a new rule, it would be appropriate to restate the traditional view, which remains the most predictable approach to the issue and the simplest to apply. That approach was expressed by Sopinka J. in *Tock*, at p. 1226:
>
> > The defendant must negative that there are alternate methods of carrying out the work. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance. It is insufficient for the defendant to negative negligence. The standard is a higher one. While the defence gives rise to some factual difficulties, in view of the allocation of the burden of proof they will be resolved against the defendant.

[108] In essence, the Crown should not be held liable in damages for actions which Parliament has directly authorized: *Gautam v. South Coast British Columbia Transportation Authority*, 2020 BCCA 135 at para. 260; *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181 at 1225–1226.

[109] This doctrine is limited in several respects. Statutory authority only shields governments from liability for harm that is an "inevitable result" or "inevitable result" of legislation or the exercise of statutory power: *Sutherland v. Vancouver International Airport Authority*, 2002 BCCA 416 at para. 113. The Province argues that the harm alleged in the Consolidated Claim, if proven, would fall under such a case.

[110] Courts assess whether harm was an "inevitable consequence" by comparing the necessary causal connection between the work authorized and the damage founding the tort claim: *Sutherland* at para. 113, citing *Tock* at 1225. Statutory authority does not immunize the state if it were practically feasible to avoid the infringement of private rights: *Ryan* at para. 55. In order to assess what is "practically feasible" in the case at bar, the Province refers me to *Thomas v. Rio Tinto Alcan Inc.,* 2024 BCCA 62 at para. 169, which holds that courts conducting this inquiry must demonstrate a "common sense appreciation of practicalities, such as finances, expense, and other relevant circumstances".

[111] Determining "issues of statutory authority turns on the particular facts of each case thus rendering such determination generally unsuitable for summary judgment proceedings": *Torino Motors (1975) Ltd. v. British Columbia* (1988), 63 D.L.R. (4th) 168 (B.C.C.A.), 1988 CanLII 2881 (BC CA) at 171. I cannot rule on an incomplete and disputed factual record, particularly "in the context of complex issues of constitutional law and novel legal claims": *Thomas v. Rio Tinto Alcan Inc*., 2013 BCSC 2303 at para. 49.

Conclusion on Systemic Negligence

[112] Assuming the facts pleaded as true, it is not plain and obvious that the cause of action in systemic negligence is bound to fail against either the Province or Canada.

Breach of Sections 7 and 15(1) of the *Charter*

[113] The Consolidated Claim pleads that the Defendants breached their section 7 and 15 rights under the *Charter* in a manner that cannot be demonstrably justified in a free and democratic society pursuant to section 1 of the *Charter*. They seek (i) a declaration that the Defendants unjustifiably breached these rights and (ii) that damages are awarded under s. 24(1) of the *Charter*.

[114] The Supreme Court provides guidance on *Charter* interpretation in *Canada (Attorney General) v. Power*, 2024 SCC 26 [*Power*]:

> [26] The *Charter* must be given a generous and expansive interpretation; not a narrow, technical or legalistic one (*Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, at p. 156). *Charter* provisions must be "interpreted in a broad and purposive manner and placed in their proper linguistic, philosophic, and historical contexts" (*Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 25).
>
> [27] A purposive approach considers constitutional principles. Indeed, "the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text" (*Reference re Senate Reform*, at para. 26).

Section 7

[115] Section 7 of the *Charter* reads:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[116] To establish a breach of section 7 of the *Charter*, the plaintiff must show that the state's conduct: (a) interferes with, or deprives them of, their life, liberty or security of the person; and that (b) the deprivation in question is not in accordance with the principles of fundamental justice: *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 55.

[117] For the first step of the section 7 analysis, the Claim pleads the following *Charter* breaches:

a) the Defendants caused or contributed to the poverty, the social problems, and the intergenerational trauma suffered by Indigenous peoples by creating and operating residential schools and the Sixties Scoop;

b) the Defendants caused or contributed to Indigenous children and families needing to rely on the services it provides by creating and operating child services and taking Indigenous children into care; and

c) the Defendants failed to provide necessary health and other essential social services to Indigenous children and families, causing them to suffer adverse health effects, psychological and physical abuse, and loss of liberty to practice their culture.

[118] The plaintiffs allege that the disproportionate prevalence of child removals engages the principles of life and security of the person of the Class.

[119] For the second step of the analysis, the plaintiffs claim that these violations of their rights cannot be justified in accordance with the principles of fundamental justice pursuant to section 1 of the *Charter*.

Section 15

[120] Section 15(1) of the *Charter* reads:

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

[121] To establish a violation of section 15(1) of the *Charter*, the plaintiff must show that the impugned law or state conduct: (a) on its face or in its impact, creates a distinction based on enumerated or analogous grounds"; and (b) imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage: *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at para. 27.

[122] Substantive equality, rather than formal equality, is the animating norm of section 15: *R. v. Kapp*, 2008 SCC 41 at para. 15. In essence, the court may find that facially neutral state conduct "had the effect of placing members of protected groups at a disadvantage", either by creating headwinds or through an "absence of accommodation": *Fraser* at paras. 53–54. As such, a claimant need not show that the defendant had any intent to discriminate in order to establish a section 15 breach: *Fraser* at para. 69. Indeed, even if a legislative scheme was designed to help a protected group, that does not save a provision or its application found to have the effect of hurting a protected group or subset of that group: *Centrale des syndicats du Québec v. Québec (Attorney General)*, 2018 SCC 18 at para. 35.

[123] To find a violation of section 15(1), a claimant does not have to show that all members of the protected group are affected in the same way. In other words, "heterogeneity within a claimant group does not defeat a claim of discrimination": *Fraser* at para. 72. As the Supreme Court has previously held, "[t]he fact that discrimination is only partial does not convert it into non-discrimination": *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, 1989 CanLII 96 (SCC) at 1248, quoting James MacPherson, "Sex Discrimination in Canada: Taking Stock at the Start of a New Decade" (1980), 1 C.H.R.R. C/7 at C/11. An impugned law or state conduct may have implications "for claims based on multiple grounds of discrimination": *Fraser* at para. 74.

[124] The Consolidated Claim pleads that the Defendants' policies draw distinctions between the Class Members and other individuals solely based on their status as Indigenous children and families who do not reside on-reserve, or alternatively based on their residence on-reserve but lack of First Nations status. By doing so, the plaintiffs allege the Defendants infringed the Class Members' section 15(1) rights guaranteed under the *Charter*.

[125] In particular, the plaintiffs allege the following conduct by the Defendants:

a) Failing to sufficiently fund Indigenous child and family services, including the operational and other costs of child and family service agencies, to

ensure that reasonable and appropriate preventative and other child and family services were made available and provided to the plaintiffs and other Class Members, in some cases by the Province itself; and

b) Breaching Jordan's Principle, and causing delays, denials or service gaps in the Essential Services Class Members' access to essential services.

[126] At the first stage of the section 15(1) analysis, the Consolidated Claim pleads that the child and family services provided in British Columbia created a distinction in effect between Indigenous children and families who reside off-reserve, compared to both (i) non-Indigenous children and families and (ii) Indigenous children and families who reside on-reserve. This is an alleged distinction based on race (an enumerated ground) and Aboriginality-residence (an analogous ground): *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.

[127] At the second stage, the Consolidated Claim pleads that the impugned conduct exacerbated the historical disadvantages of the Class, including disconnection from their families and communities, intergenerational trauma from residential schools and the Sixties Scoop, and stereotypes depicting Indigenous parents as unfit to raise their children

Arguments Raised by the Defendants

[128] The Defendants deny breaching any of the Class Members' section 7 or 15(1) *Charter* rights. In the alternative, if they did, the Defendants assert that those breaches were justified under section 1. The Defendants further oppose certification of the *Charter* claims on several grounds: (i) the claims erroneously impose positive duties onto the government, contrary to the *Charter*; (ii) the claims are non-justiciable because they do not impugn a specific law, act, or conduct; (iii) the claims are barred by Crown immunity; (iv) damages awarded pursuant to s. 24(1) of the *Charter* would be an inappropriate or unjust remedy; and (iv) the claims are barred by the defence of statutory authority.

Positive Rights

Section 7

[129] The Defendants counter that the plaintiffs' section 7 *Charter* claim is bound to fail because the state is under no positive obligation to ensure a specific quality of life, liberty, or security of the person within the meaning of that section, specifically as it concerns the duty to provide funding or services. The Defendants assert it is settled law that section 7 does not impose a positive duty. Respectfully, the law on section 7 is far from settled.

[130] The Québec Court of Appeal rejected the same argument in the parallel action *A.B*., citing *Gosselin v. Attorney General of Québec,* 2002 SCC 84 as evidence that courts remain "open to an interpretation according to which some form of positive duty or obligation would be created": *A.B.* at para. 92. In *Gosselin*, the Court found that the circumstances did not warrant imposing novel positive obligations on the state to shore up the claimant's section 7 rights. Nevertheless, Chief Justice McLachlin, writing for the majority, left open the possibility that "a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances" in the future: *Gosselin* at para. 83.

[131] As McLachlin C.J. explained, courts should not rigidly delimit the legal rights enshrined in the *Charter*:

> [82] One day s. 7 may be interpreted to include positive obligations. To evoke Lord Sankey's celebrated phrase in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136, the *Canadian Charter* must be viewed as "a living tree capable of growth and expansion within its natural limits": see *Reference re Provincial Electoral Boundaries (Sask.),* [1991] 2 S.C.R. 158, at p. 180, per McLachlin J. It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. In this connection, LeBel J.'s words in Blencoe, supra, at para. 188 are apposite:
>
> > We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to

> safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*.
>
> The question therefore is not whether s. 7 has ever been — or will ever be — recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.
>
> [Emphasis added.]

[132] Neither *Gosselin* nor any subsequent authority provides criteria for defining "special circumstances": see *Kreishan v. Canada (Citizenship and Immigration)*, 2019 FCA 223 at para. 139. The definition remains therefore open to interpretation. As previously mentioned, unsettled law is not a bar to certification: *Hunt* at 980.

[133] In her dissenting opinion in *Gosselin*, Justice Arbour conceived even more expansively of the *Charter*'s legal rights protections, finding section 7 extends beyond negative rights of "non-interference" to include a "positive dimension, such that they are not merely rights of non-interference but also what might be described as rights of "performance", [thereby] violable by mere inaction or failure by the state to actively provide the conditions necessary for their fulfilment": *Gosselin* at para. 319.

[134] In this paradigm, the government's legislative and executive decisions in areas like social assistance inherently assume positive obligations to meet basic needs. One could reasonably infer a parallel between welfare benefits and other necessities of life, such as health care, to suggest that section 7 supports claims for equitable access to essential services: *Gosselin* at para. 148. Accordingly, where underfunding and the denial and delay of essential services compromise a claimant's physical and psychological integrity, these deficiencies may trigger section 7's life and security interests. The provision of essential health care services is one such category of services already recognized by the Supreme Court: *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 1988 CanLII 90 (SCC) at 59; *Chaoulli v. Québec (Attorney General)*, 2005 SCC 35 at para. 119.

[135] Even hewing to the narrower standard set by the *Gosselin* majority, the Court in *A.B*. found at para. 95 that the "allegations of a chronic, systemic, and harmful

conduct on the part of the Respondents, as well as of an underfunding campaign that targeted Indigenous children specifically … could be declared in violation of fundamental rights guaranteed by the Canadian [*Charter*]". In other words, those claims could be made through the orthodox "negative rights" framework without needing to address section 7's broader dimensions.

[136] In *Single Mothers' Alliance of BC Society v. British Columbia*, 2019 BCSC 1427 [*Single Mothers*], this Court approved a class action challenging the constitutionality of British Columbia's family law legal aid statutory scheme. Chief Justice Hinkson accepted the plaintiffs' two arguments on their section 7 claim: First, as established in *Gosselin*, the question of whether section 7 protects positive rights is unsettled and should not be struck prior to a full hearing of the matter. Second, properly understood, the plaintiffs' section 7 claim was a negative rights claim: *Single Mothers* at paras. 105–109. The court was unable to conclude that the claim had no reasonable prospect of success: at para. 112.

[137] In *La Rose FC*, the plaintiffs were Canadian youths who brought an action against Canada for violating their ss. 7 and 15 *Charter* rights through a failure to meet climate change emission targets. Canada advanced three arguments against certifying the section 7 claim: (1) there was no reasonable cause of action because no positive rights are conferred by section 7; (2) the claim was speculative and incapable of proof; and (3) the impugned conduct did not disclose a discrete law, state action, or network as the foundation of the s. 7 analysis: *La Rose FC* at paras. 39–48.

[138] The Federal Court struck the claim on the third basis: *La Rose FC* at para. 62. However, Justice Manson went to pains to clarify that Canada's argument in relation to the positive rights framing of the section 7 *Charter* claim was insufficient to find the claim disclosed no reasonable cause of action:

> [67] I am not prepared to find that the plaintiffs would be unable to argue a negative rights claim or that they are otherwise barred from arguing a positive rights claim at this stage in the proceedings. Therefore, this argument has not been accepted as an additional basis for striking the section 7 Charter claim.

The Court rejected Canada's position that the plaintiffs' claim solely engaged positive rights, and considered this issue to be arguable on the merits: at para. 68, aff'd *La Rose FCA* at para. 9.

[139] In *La Rose FCA*, the Court of Appeal at para. 117 underscored the "analytical limits of [the] positive/negative rights dichotomy". As Rennie J.A. described:

> [101] Regardless of which side of the debate is to be preferred, there is one point on which there is agreement: the line between positive and negative rights is at times difficult to draw. The traditional distinction asserts that positive claims require positive governmental action, whereas negative claims require the government to refrain from acting in some way (*Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, 462 D.L.R. (4th) 1 at para. 20 [*Toronto (City)*]). However, some rights have both positive and negative elements; others have gone further in writing that "no right can exist without some form of corresponding obligation to do or not do something"…
>
> [102] Many rights exist on the margins [...] Consider also the right to accessibility: an individual with disabilities requires an assistive device, but only because the state has constructed inaccessible programs and infrastructure. The right at issue appears positive, but it was only brought about because the state failed to refrain from breaching existing negative rights. (See Sandra Fredman, "Human Rights Transformed: Positive Duties and Positive Rights", [2006] P.L. 498 at 502; see also Vasuda Sinha, Lorne Sossin, & Jenna Meguid, "Charter Litigation, Social and Economic Rights & Civil Procedure" (2017) 26:3 J. L. & Soc. Pol'y 43 at 60).
>
> [103] This at times false dichotomy has been recognized judicially. Abella J.'s dissent in *Toronto (City)* noted that "[a]ll rights have positive dimensions since they exist within, and are enforced by, a positive state apparatus" and that "[a]ppropriate verbal manipulations can easily move most cases across the line" (*Toronto (City)* at para. 153, citing S. F. Kreimer, "Allocational Sanctions: The Problem of Negative Rights in a Positive State" (1984), 132 U. Pa. L. Rev. 1293, at 1325); put otherwise, a right may be seen as negative or positive depending simply on the perspective taken. The majority in *Toronto (City)* relied on the distinction between state action and state restraint for the purposes of their freedom of expression analysis, but they too acknowledged that the distinction between positive and negative entitlements is "not always clearly made, nor… always helpful" (*Toronto (City)* at para. 20, citing *Haig v. Canada*, [1993] 2 S.C.R. 995, 1993 CanLII 58 (SCC)).
>
> [104] Mactavish J. (as she then was) acknowledged the difficulty in characterizing a claim as either "exclusively positive or exclusively negative" in the context of a section 7 analysis in *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651, [2015] 2 F.C.R. 267 at para. 520 [*Canadian Doctors*]. Mactavish J. noted that "section 7 jurisprudence has demonstrated that the fact that a particular claim may involve a request that the government spend money in a particular way is not necessarily fatal to the claim" (*Canadian Doctors* at para. 522). Indeed, the Supreme Court has found section 7 rights violations within this blurred zone.

> For example, the right to state-funded counsel was recognized in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, 1999 CanLII 653 (SCC); and the right to be exempted from prohibitive legislation in *PHS*. Both may be conceptualized depending on the perspective taken, as positive rights claims.

[140] The Court cited *Leroux* in its decision, which it summarized at paras. 107–108:

> [107] In *Leroux v. Ontario*, 2023 ONCA 314, 481 D.L.R. (4th) 502 [*Leroux*] the Ontario Court of Appeal allowed a section 7 claim to proceed to trial, even though it "sail[ed] close to asserting a positive constitutional obligation". The claimants in *Leroux* alleged that the government's inadequate provision of supports for persons with developmental disabilities violated section 7. The Court distinguished the claim from other failed positive rights claims under section 7 since the claimants in this case had already been approved for government support which was effectively denied in its implementation.
>
> [108] In allowing the claim to go forward, the Court cited the principle that claims should be struck with care, noting that this principle may apply with particular force "for novel Charter claims that explore the scope of a right, as such claims often require a trial and an evidentiary record to fully understand the nature of the impugned state action and the harms experienced by claimants" (*Leroux* at para. 86, citing Lorne Sossin and Gerard J. Kennedy, "Justiciability, Access to Justice and the Development of Constitutional Law in Canada", (2017) 45:4 Fed. L. Rev. 707, at 719).

[141] In *Mathur v. Ontario,* 2024 ONCA 762, an appeal on the constitutionality of a greenhouse gas emission reduction plan enacted by the Ontario government under provincial climate change legislation, the Ontario Court of Appeal rejected the application judge's analysis of the plaintiffs' s. 7 claim. The Court of Appeal found at para. 4 that the judge erroneously characterized the application as a positive rights argument, namely that the plaintiffs were seeking to impose new positive obligations to combat climate change on the provincial government.

[142] Instead, the Court found that Ontario had voluntarily assumed a positive statutory obligation to combat climate change and produce a respective emission target and plan by enacting the *Cap and Trade Cancellation Act, 2018,* S.O. 2018, c. 13, and was obligated to produce a plan and a target that were *Charter* compliant according to this statutory mandate. The Court found Ontario had voluntarily assumed this positive statutory mandate: *Mathur* at para. 53. The Court declined to

decide the application and instead remitted the matter for a new hearing for the issues to be considered through the correct analytical lens.

Section 15

[143] The Defendants similarly argue that section 15(1) of the *Charter* does not impose a "positive duty or obligation on the state to remedy social inequalities or enact remedial legislation": *R v. Sharma*, 2022 SCC 39 at para. 63. The Supreme Court in *Sharma* explained the rationale behind this principle:

> …Were it otherwise, courts would be impermissibly pulled into the complex legislative domain of policy and resource allocation, contrary to the separation of powers. In [*Québec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux,* 2018 SCC 17], this Court struck down amendments to Québec's pay equity legislation that "interfere[d] with access to anti-discrimination law" by undermining existing legislative pay equity protections (para. 39). But in so doing, Abella J. expressly *declined* to impose a "freestanding positive obligation on the state to enact benefit schemes to redress social inequalities" (para. 42).

[144] The Court clarified the logic behind this limitation in *R. v. Kapp* at para. 25:

> [25] The central purpose of combatting discrimination, as discussed, underlies both s. 15(1) and s. 15(2). Under s. 15(1), the focus is on *preventing* governments from making distinctions based on the enumerated or analogous grounds that: have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping. Under s. 15(2), the focus is on *enabling* governments to pro-actively combat existing discrimination through affirmative measures.

[145] By grounding *Charter* analysis in incrementalism, legislatures are given "reasonable leeway to deal with problems one step at a time, to balance possible inequalities under the law against other inequalities resulting from the adoption of a course of action, and to take account of the difficulties, whether social, economic or budgetary, that would arise if it attempted to deal with social and economic problems in their entirety": *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, 1990 CanLII 60 (SCC) at 317.

[146] Once the state chooses to provide a benefit or service, it must do so in a *Charter*-compliant, non-discriminatory manner. This duty may require "governments to take positive action, for example by extending the scope of a benefit to a

previously excluded class of persons": *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 at para. 73; *Vriend v. Alberta*, [1998] 1 SCR 493 at paras. 59–64. To establish a breach, it is sufficient to show that a group or subset of that group received inferior quality of care or a "difference in 'quality' of treatment": *Fraser* at para. 55.

[147] In my opinion, the plaintiffs do not allege an infringement of the Class Members' section 15(1) *Charter* rights on the basis that the Defendants had a "freestanding positive obligation" to "redress social qualities" as described in *Alliance* at para. 42. Rather, they allege that the policies implemented by the Defendants produced a discriminatory effect in violation of the Class Members' equality guarantee.

[148] If assessing the duties alleged to have been violated under this cause of action does pull the court into "the complex legislative domain of policy and resource allocation", that question can be addressed at trial. Unlike in *La Rose FCA*, in which the appellants' section 15(1) claim was struck at para. 85 on the grounds that the "adverse or disproportionate effect" that climate change has on youth fell outside the scope of section 15, the adverse effect alleged here has been considered by courts previously. On the content of the pleadings, the section 15(1) claim is not bound to fail.

Justiciability and* Charter *Scrutiny

[149] The Defendants submit that the plaintiffs have not pointed to any particular impugned law or conduct that infringes the *Charter*, and as such it is impossible to address either the justification or proportionate balancing analysis under the *Charter*. They claim that the plaintiffs raise broad claims which cannot be properly adjudicated, amounting to a public inquiry.

[150] The Defendants refer me to *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852 in support of this position. In *Tanudjaja*, the Ontario Court of Appeal upheld at para. 19 the motion judge's conclusion that a *Charter* application asserting that Canada and Ontario had given insufficient priority to issues of homelessness

and inadequate housing was not justiciable. The Court provided several reasons for this conclusion, none of which are applicable to the case at bar.

[151] First, the Court determined the claim was not grounded in a particular law or a particular application of that law, which it understood to be an “archetypal feature of *Charter* challenges under s. 7 and s. 15”: *Tanudjaja* at para. 22. Political issues, as opposed to legal ones, are not properly justiciable by the courts: *Tanudjaja* at para. 26. Only questions with sufficient legal elements warrant judicial intervention: *Canada Assistance Plan (Re)*, [1991] 2 S.C.R. 525, [1991] S.C.J. No. 60, 1991 CanLII 74 (SCC) at 545.

[152] The Court in *Tanudjaja* distinguished its decision from the ones in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 [*PHS*] (where a specific state action was challenged) and *Chaoulli v. Québec (Attorney General)*, 2005 SCC 35 (where a specific law was challenged). In both those cases, the Supreme Court found that the subject matter of the *Charter* challenge possessed a “sufficient legal component to engage the decision-making capacity of the courts”: *Tanudjaja* at para. 27. In contrast, the “diffuse and broad nature of the claims” in *Tanudjaja* did not permit an analysis under s. 1 of the Charter: at para. 32. The Court concluded:

> [33] Finally, there is no judicially discoverable and manageable standard for assessing in general whether housing policy is adequate or whether insufficient priority has been given in general to the needs of the homeless. This is not a question that can be resolved by application of law, but rather it engages the accountability of the legislatures. Issues of broad economic policy and priorities are unsuited to judicial review. Here, the court is not asked to engage in a "court-like" function, but rather to embark on a course more resembling a public inquiry into the adequacy of housing policy.
>
> [Emphasis added.]

[153] The subject matter of these *Charter* claims is distinguishable. The issue before me is not “demonstrably unsuitable for adjudication”, as the Court found in *Tanudjaja*. In contrast, the plaintiffs here have pleaded *Charter* causes of action containing a “sufficient legal component to anchor the analysis”: *Tanudjaja* at para. 35.

[154] As in *PHS*, the plaintiffs at bar challenge state action—that is, the application and provision of child and family services pursuant to provincial legislation and executive policies, not the policies in and of themselves. As the Court observed in *PHS*, the line between policy and law is not always clear for the purposes of *Charter* scrutiny:

> [105] The issue of illegal drug use and addiction is a complex one which attracts a variety of social, political, scientific and moral reactions. There is room for disagreement between reasonable people concerning how addiction should be treated. It is for the relevant governments, not the Court, to make criminal and health policy. However, when a policy is translated *into law or state action*, those *laws and actions* are subject to scrutiny under the *Charter*: *Chaoulli*, at para. 89, *per* Deschamps J., at para. 107, *per* McLachlin C.J. and Major J., and at para. 183, *per* Binnie and LeBel JJ.; *Rodriguez*, at pp. 589-90, *per* Sopinka J. The issue before the Court at this point is not whether harm or abstinence-based programmes are the best approach to resolving illegal drug use. It is simply whether Canada has limited the rights of the claimants in a manner that does not comply with the *Charter*.

[155] The fact that the matter is "contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it": *Chaoulli* at para. 107. This responsibility extends to administrative and executive action.

[156] Complexity is also an insufficient reason to strike a *Charter* claim: *Tanudjaja* at para. 35. While the Consolidated Claim implicates various operational systems, the plaintiffs have clearly outlined the *Child, Family and Community Services Act* as the primary piece of legislation and the Ministry of Children and Family Development and the indivisible Crown as the executive entities impugned in its *Charter* claims. It is not apparent that the *Charter* claims take the court beyond the limits of its institutional capacity.

Crown or Limited Government Immunity

[157] The Province submits that, as with the *Marchi* core policy immunity from liability in tort, the Crown enjoys an immunity from liability under the *Charter*. The Province refers me to *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New*

Brunswick, [2002] 1 SCR 405, 2002 SCC 13 (CanLII) [*Mackin*], in which the Supreme Court articulated a "limited government immunity" given to government "specifically a means of creating a balance between the protection of constitutional rights and the need for effective government": at para. 79. This immunity provides a way for courts to determine whether awarding a remedy such as compensatory or punitive damages would be "appropriate and just" under s. 24(1) of the *Charter*, in conjunction with or in lieu of damages based on civil liability.

[158] The plaintiffs refer to the same species of immunity as "Crown immunity". In *Power* at para. 4, the Supreme Court clarified that the immunity established in *Mackin* is a "limited immunity", not absolute. Governments are not automatically immune to liability for executive action or policies. While the state "must be afforded some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform", executive conduct (including policy-making and the application of legislation) can never be sanctioned if it is unconstitutional, violates the *Charter*, is made in bad faith, constitutes an abuse of power, or is otherwise clearly wrong: *Power* at para. 70, citing *Vancouver (City) v. Ward*, 2010 SCC 27 at para. 40 [*Ward*].

[159] In *A.B.* at paras. 62–74, the Québec Court of Appeal rejected Québec's argument that Crown immunity should prevent the plaintiffs' claims from advancing to trial. The Court found that the allegations contained in their pleadings suggested that, even if immunity were to apply as a valid defence, it might be rendered ineffective in the circumstances, since it will not protect the state "with respect to public policies which are subsequently said to go against the *Charter* or to violate fundamental rights": *A.B.* at para. 70. The Court determined at para. 74 it was necessary for the question of state immunity to be debated at trial.

[160] The plaintiffs assert that systemic childcare practices, such as prioritizing child removals over preventive services, violate the *Charter*. The plaintiffs emphasize that facially neutral policies can nonetheless perpetuate systemic discrimination in violation of the *Charter*. In this respect, the plaintiffs argue the

Defendants' systemic prioritization of removals and discriminatory delivery of child welfare services disproportionately impacted off-reserve Indigenous children and families, undermining cultural continuity. These failures perpetuate the historical disadvantage to Indigenous peoples firmly recognized in the Sixties Scoop, Millenium Scoop, and within the greater legacy of intergenerational trauma and colonialism: *Bill C-92 Reference* at 5.

[161] The Province argues the Consolidated Claim asks the court to second-guess high-level legislative and governmental decisions, particularly where they involve policy priorities and budgetary discretion. However, the Consolidated Claim does not argue that a particular piece of legislation governing preventive and protective services for off-reserve Indigenous children should be declared unconstitutional. The plaintiffs argue the implementation and operation of policies pursuant to such legislation violated the Class Members' ss. 7 and 15 *Charter* rights.

[162] In *Little Sisters Book and Art Emporium v. Canada (Minister of Justice*), 2000 SCC 69 [*Little Sisters*], the Court accepted the evidence of the plaintiff that the Canadian Customs Department had discriminated on the basis of sexuality in implementing a neutral Customs procedure for seizing imported materials. The Court found discrimination in both the exercise of administrative discretion of the state agency and in its own internal procedures for procedural review: *Little Sisters* at para. 94.

Budgetary Decisions as Policy

[163] As with their argument in respect of the tort claims, the Defendants plead the *Charter* claims are non-justiciable as they seek compensation for the alleged impacts of budgetary allocation. The Supreme Court of Canada has previously found that, while the government is given wide discretion in funding decisions, these decisions cannot contravene constitutional and statutory obligations. In *Kelso v. The Queen*, [1981] 1 SCR 199 the Court stated at 207:

> No one is challenging the general right of the Government to allocate resources and manpower as it sees fit. But this right is not unlimited. It must be exercised according to law. The government's right to allocate resources cannot override a statute such as the Canadian Human Rights Act.

[164] In *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, the Court found at para. 180 that the provincial government's budgetary policy on school transportation resulted in systemic underfunding, thereby breaching the claimants' section 23 *Charter* rights.

[165] Causes of action for alleged *Charter* breaches were certified in *A.B.*, *Moushoom*, and *Trout*. Where underfunding results in or exacerbates a deprivation to a claimant's section 7 rights or unjustifiably perpetuates discrimination against them, those budgetary decisions cannot be cleanly divorced from their respective policies. Rather, one could consider budgetary allocation, as it relates to service provision, to be an "expression of government policy": *Eldridge* at para. 51.

Damages as an Appropriate Remedy

[166] The plaintiffs seek a declaration that the Defendants breached their ss. 7 and 15 *Charter* rights as well as an award of monetary damages under section 24(1) of the *Charter*. Section 24(1) provides the following:

> 24 (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[167] These remedies may include damage claims for *Charter* breaches where appropriate. The court should apply a four-part test as articulated in *Ward* at para. 4 to determine whether it is appropriate to award damages:

> … The first step in the inquiry is to establish that a *Charter* right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. The final step is to assess the quantum of the damages.

[168] The claimant bears the burden of establishing a *prima facie* case at the first two steps. If established, the onus then shifts to the respondent to prove that

countervailing factors would render damages inappropriate or unjust: *Quinn v. British Columbia*, 2018 BCCA 320 at para. 49.

[169] The Defendants argue the Consolidated Claim has not sufficiently pleaded the element of causation between the Class Members' impugned *Charter* rights and the alleged breach. It seems ill-conceived to assess causation at the preliminary stage. This would require the court to make factual findings without consulting the full evidentiary record and arguments, inhibiting its ability to draw reliable conclusions: *Tanudjaja* at para. 71. It is not plain and obvious that the plaintiffs cannot prove causation based on the facts pleaded.

[170] The Defendants' remaining objections are: (i) the existence of alternative remedies and (ii) concerns for good governance: *Ward* at para. 33.

[171] The Province argues that the plaintiffs' claim for *Charter* damages is duplicative of the claim for damages in tort, so a *Charter* remedy would be inappropriate or unjust since alternative remedies are available to the plaintiffs in their private law causes of action. Considering that the Province simultaneously seeks to have the plaintiffs' private law causes of action struck on the basis of core policy immunity from liability in tort, the argument for alternative remedies strikes me as decidedly paradoxical.

[172] Chief Justice McLachlin explains in *Ward* that private and *Charter* damages are distinct remedies serving different purposes:

> [34] A functional approach to damages under s. 24(1) means that if other remedies adequately meet the need for compensation, vindication and/or deterrence, a further award of damages under s. 24(1) would serve no function and would not be "appropriate and just". The *Charter* entered an existent remedial arena which already housed tools to correct violative state conduct. Section 24(1) operates concurrently with, and does not replace, these areas of law. Alternative remedies include private law remedies for actions for personal injury, other *Charter* remedies like declarations under s. 24(1), and remedies for actions covered by legislation permitting proceedings against the Crown.
>
> [35] The claimant must establish basic functionality having regard to the objects of constitutional damages. The evidentiary burden then shifts to the state to show that the engaged functions can be fulfilled through other remedies. The claimant need not show that she has exhausted all other

> recourses. Rather, it is for the state to show that other remedies are available in the particular case that will sufficiently address the breach. For example, if the claimant has brought a concurrent action in tort, it is open to the state to argue that, should the tort claim be successful, the resulting award of damages would adequately address the *Charter* breach. If that were the case, an award of *Charter* damages would be duplicative. In addition, it is conceivable that another *Charter* remedy may, in a particular case, fulfill the function of *Charter* damages.
>
> [36] The existence of a potential claim in tort does not therefore bar a claimant from obtaining damages under the *Charter*. Tort law and the *Charter* are distinct legal avenues…

[173] The plaintiffs have provided separate bases for their private law and *Charter* causes of action. No cause of action properly pleaded is bound to fail simply because another is properly pleaded: *Nasogaluak* at para. 74. Furthermore, private and *Charter* causes of action do not cancel each other out by the mere fact of being grounded in the same underlying conduct: *Francis v. Ontario*, 2021 ONCA 197 at para. 94. To strike the *Charter* causes of action on the basis of alternative remedies would be premature.

[174] Second, the Province argues that concerns for "good governance" militate against *Charter* damages. The term "good governance concerns" is not defined in *Ward*, though it "may take different forms": *Ward* at para. 38. The Court in *Ward* added at para. 41:

> … *Mackin* stands for the principle that state action taken under a statute which is subsequently declared invalid will not give rise to public law damages because good governance requires that public officials carry out their duties under valid statutes without fear of liability in the event that the statute is later struck down. The present is not a situation of state action pursuant to a valid statute that was subsequently declared invalid. Nor is the rationale animating the *Mackin* principle — that duly enacted laws should be enforced until declared invalid — applicable in the present situation. Thus, the *Mackin* immunity does not apply to this case.

[175] The Ontario Court of Appeal's analysis in *Francis* is also instructive:

> [60] *Ward* makes it clear that good governance concerns do not necessarily defeat a claim for damages. State conduct that is sufficiently blameworthy will give rise to *Charter* damages despite good governance concerns. For example, a law passed in bad faith will not be immunized from *Charter* damages by good governance concerns. To the contrary, awarding *Charter* damages for state actions based on laws enacted in bad

> faith promotes good governance. The blameworthiness threshold referred to in *Ward* is not a single bright line but will vary with the nature of the state conduct giving rise, both to the *Charter* violations and the good governance claim: see *Ward*, at paras. 39-43; *Brazeau/Reddock*, at paras. 66-67.
>
> [Emphasis added.]

[176] For these reasons, it is not plain and obvious that *Charter* claims should be struck due to the existence of alternative remedies or good governance concerns.

Statutory Authority

[177] As with the plaintiffs' private claims in tort, the Province argues that the claims for damages under the *Charter* are barred by statutory authority. While discretionary administrative decisions are subject to *Charter* protection, the scope is limited and such discretion must be exercised in compliance with the *Charter*: *Little Sisters* at para. 133. The Defendants could not have authorized a breach of the *Charter* by statute. Whether such a breach occurred, and, if so, whether it can be justified by the saving provision under the *Charter* is a question for trial.

Conclusion on* Charter *Claims

[178] The ss. 7 and 15(1) *Charter* claims as pleaded in the Consolidated Claim are not bound to fail. Any of the defences raised by the Defendants, if applicable, should be considered at trial.

Breach of Fiduciary Duty

[179] It is trite law that the relationship between the Crown and Indigenous peoples is fiduciary in nature; however, not every aspect of that relationship will give rise to a legally enforceable fiduciary duty or obligation: *Wewaykum Indian Band v. Canada*, 2002 SCC 79 at para. 83, [*Wewaykum*]; *Manitoba Métis Federation Inc v. Canada (Attorney General)*, 2013 SCC 14 at para. 48, [*MMF*]; *Southwind v. Canada*, 2021 SCC 28 at para. 61; *Varley* at para. 145.

[180] Likewise, while the honour of the Crown permeates all of the Crown's dealings with Indigenous peoples, it does not give rise to a freestanding cause of

action: *MMF* at para. 73; *Ontario (Attorney General) v Restoule*, 2024 SCC 27 at para. 220 [*Restoule SCC*]; *Takuhikan* at para. 149; *Varley* at para. 145.

[181] A fiduciary duty or obligation may arise from the relationship between the Crown and Indigenous peoples in two ways, defined as either a *sui generis* or *ad hoc* duty: *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para. 44.

***Sui Generis* Fiduciary Duty**

[182] The *sui generis* fiduciary duty derives from the honour of the Crown, a public law obligation, and from the Crown's assumption of "discretionary control over a specific or cognizable [Indigenous] interest: *MMF* at para. 300. "Cognizable" or "specific" Indigenous interests are recognized "on a collective basis": *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 50 [*Elder Advocates of Alberta Society*]. The interest affected must be one to which the group has a "pre-existing distinct and complete legal entitlement": *Alberta v. Elder Advocates of Alberta Society* at para. 51.

[183] Traditionally, courts have recognized a *sui generis* duty related to the management of reserve land as a clear example of a pre-existing legal interest: *Guerin v. The Queen*, [1984] 2 SCR 335, 1984 CanLII 25 (SCC); *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, 1995 CanLII 50 (SCC); *Williams Lake Indian Band* at para. 80.

[184] However, the list of categories of cognizable Indigenous interests is not closed, and such interests may apply to other kinds of relationships between the Crown and Indigenous people beyond real estate: *Takuhikan* at para. 72. This area of Aboriginal law is "rapidly evolving": *Brown v. Canada (Attorney General),* 2013 ONSC 5637 at para. 44 [*Brown Certification*]. The court in *Brown Certification* reasoned that, as with reserve lands, Indigenous culture and identity are also "not a creation of either the legislative or executive branches of government" and may therefore fall within the *sui generis* category: at paras. 42–46. Likewise, the court in

Varley found at para. 203 that "the Indigenous interests that may be the subject of a *sui generis* fiduciary duty extend beyond reserve lands and may include the protection of Indigenous identity and culture and that these interests are protected by section 35 of the Constitution Act, 1982". As with this certification proceeding, *Varley* dealt with Indigenous interests in the context of child welfare services.

Ad Hoc **Fiduciary Duty**

[185] A fiduciary obligation may arise in the Crown-Indigenous context "where the general conditions for a private law *ad hoc* fiduciary relationship are satisfied": *Williams Lake Indian Band* at para. 44. An *ad hoc* fiduciary relationship is established on a case-by-case basis: *Elder Advocates* at paras. 33, 37. The content of the Crown's fiduciary duty varies based on the circumstances in which it arises, though it includes, "to some extent, the duty of loyalty, the duty of good faith, and the duty of disclosure (appropriate to the subject matter), among other duties": *Restoule v. Canada (Attorney General),* 2018 ONSC 7701 at para. 531.

[186] As a general rule, the government must act in the interest of all citizens. Therefore, to find the Crown has assumed an *ad hoc* fiduciary duty, the claimant must demonstrate (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control: *Elder Advocates of Alberta Society* at para. 36; *Lac Minerals Ltd v. International Corona Resources Ltd*, [1989] 2 SCR 574 at 597*; Wewaykum* at para. 83; *Restoule SCC* at paras. 228, 231.

[187] Courts have previously recognized interests in "property rights, interests akin to property rights, and the type of fundamental human or personal interest that is implicated when the state assumes guardianship of a child or incompetent person" as well as interests in "culture and identity" as interests that can establish the

existence of a fiduciary duty assumed by the Crown: *Elder Advocates of Alberta Society* at para. 51; *Brown Certification* at para. 44.

[188] In *A.B.*, the Québec Superior Court certified a breach of fiduciary duty as a cause of action, finding that "without issuing any kind of opinion on such a cause of action's potential for success […] the Petitioners have proven the existence of an arguable case revolving around the violation of the Respondents' fiduciary duties or obligations": at para. 85. Canada argues that *A.B.*, as with *Brown Certification*, cannot establish that a claim for fiduciary duty exists in this case, as the facts alleged are distinct. Canada directs the court to *Brown Summary Judgment*, where that court found that the evidence did not establish the existence of a cognizable Indigenous interest under the first category or of the government's "direct administration of that interest" under the second category: at paras. 68–71.

[189] The test for summary judgment is distinct from the one for certification. Summary judgment motions will be granted where there is no genuine issue requiring a trial. As set out in *Hryniak v. Mauldin*, 2014 SCC 7 at para. 49:

> [49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

Therefore, *Brown Summary Judgment* is a ruling on the merits of the class action rather than its authorization. In contrast, the test for certification is whether it is plain and obvious, taking the facts pleaded as true, that the cause of action is bound to fail. Assuming the plaintiffs have made out the essential elements of their claim for breach of fiduciary duty, weighing the relevant facts and law requires a complex process that would be unsuitable at the authorization stage: *A.B.* at para. 84.

[190] Even if *Brown Summary Judgment* is controlling on the viability of the cause of action against the federal Crown, the decision has no bearing on the plaintiffs' claim for breach of fiduciary duty against the Province. The two claims must be assessed separately.

The Province

[191] The Consolidated Claim pleads the Province stood in *loco parentis* with the respect to the plaintiffs and the Removed Child Class Members within its care—i.e., a relationship of guardian and wards. The plaintiffs plead the Province was, at all material times, responsible for the management, operation, administration, and funding of MCFD, and all predecessor departments responsible for the development of policies, procedures, programs, and operations management relating to the provision of Indigenous child and family services in British Columbia, including the funding arrangements reached with Indigenous Services Canada and all predecessor departments.

[192] The Consolidated Claim pleads the *CFCSA* imposes a duty on the Province to act in the best interests of Indigenous children:

> **Guiding principles**
>
> **2** This Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations and in accordance with the following principles:
>
> (a)children are entitled to be protected from abuse, neglect and harm or threat of harm;
>
> (b)a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;
>
> (b.1)Indigenous families and Indigenous communities share responsibility for the upbringing and well-being of Indigenous children;
>
> (c)if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;
>
> (d)the child's views should be taken into account when decisions relating to a child are made;
>
> (e)kinship ties and a child's attachment to the extended family should be preserved if possible;
>
> (f)Indigenous children are entitled to
>
> (i)learn about and practise their Indigenous traditions, customs and languages, and
>
> (ii)belong to their Indigenous communities;
>
> (g)decisions relating to children should be made and implemented in a timely manner.
>
> …

Best interests of child

4 (1) Where there is a reference in this Act to the best interests of a child, all relevant factors must be considered in determining the child's best interests, including for example:

(a) the child's safety;

(b) the child's physical and emotional needs and level of development;

(c) the importance of continuity in the child's care;

(d) the quality of the relationship the child has with a parent or other person and the effect of maintaining that relationship;

(e) the child's cultural, racial, linguistic and religious heritage;

(f) the child's views;

(g) the effect on the child if there is delay in making a decision.

(2) If the child is an Indigenous child, in addition to the relevant factors that must be considered under subsection (1), the following factors must be considered in determining the child's best interests:

(a) the importance of the child being able to learn about and practise the child's Indigenous traditions, customs and language;

(b) the importance of the child belonging to the child's Indigenous community.

…

Rights of children in care

70 (1.1) In addition to the rights set out in subsection (1), Indigenous children have the right to

(a)receive guidance, encouragement and support to learn about and practise their Indigenous traditions, customs and languages, and

(b)belong to their Indigenous communities.

…

Out-of-home living arrangements

71 (1)When deciding where to place a child, the director must consider the child's best interests.

…

(3) If the child is an Indigenous child, the director must give priority to placing the child as follows:

(a) with the child's extended family or within the child's Indigenous community;

(b) with another Indigenous family, if the child cannot be safely placed under paragraph (a);

(c) in accordance with subsection (2), if the child cannot be safely placed under paragraph (a) or (b) of this subsection.

[193] The Consolidated Claim pleads the Province exercised discretionary control or power over all aspects of the lives of the Class, including their Indigenous culture and identity, their family unity and connections, life and safety, as the MCFD is statutorily empowered to make decisions impacting the residence, access to family, culture, and language, and access to services. The Consolidated Claim pleads the Removed Child Class and the Essential Services Class Members' physical, mental, emotional, spiritual, and cultural interests stood to be adversely affected by the MCFD's exercise of discretion or control under the *CFCSA* on behalf of the Province, and that similar interests were engaged for the Family Class, including to the right to take care of their own children.

[194] Without considering the merits of this claim, I am satisfied for the purposes of certification that the plaintiffs have made out an arguable case for breach of the *ad hoc* fiduciary duty by the Province.

Canada

[195] The Consolidated Claim pleads that, at all material times, Canada was responsible for the establishment, management, operation and administration of Indigenous Services Canada and Crown-Indigenous Relations and Northern Affairs Canada, and all predecessor departments responsible for the development of policies, procedures, programs, operations, and management relating to the provision of Indigenous child and family services, including funding arrangements reached with the Province's Ministry of Children and Family Development and all other predecessor departments, as well as other essential health and social services.

[196] While Canada acknowledges jurisdiction under Section 91(24) of the *Constitution Act, 1867*, over "Indians and Lands reserved for the Indians", it denies specific obligations to legislate or provide programming with respect to the proposed Class Members. The plaintiffs argue that the Honour of the Crown imposes constitutional duties to ensure substantive equality and cultural preservation in child welfare policies based on its fiduciary duties to the class members.

[197] The Supreme Court *in Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC), emphasized that statutory interpretation must align with international obligations, including children's rights. This means that administrative, executive and legislative action must consider the best interests of the child as its primary consideration in all actions concerning children, pursuant to arts. 3, 9, and 12 of the *Convention on the Rights of the Child,* Can. T.S. 1992 No. 3.

[198] The Consolidated Claim pleads that Canada had previously undertaken to support Indigenous child welfare in British Columbia, including for off-reserve Indigenous children. It had begun to do so, and subsequently retracted its support at the beginning of the Class Period without ensuring the Province would adequately service off-reserve children and family members in a non-discriminatory manner. In 2011, Canada introduced a new funding formula in some provinces, called the Enhanced Prevention Focused Approach (the "EPFA"). The purported goal of the EPFA was to provide more funding, especially for Prevention Services. However, it fell short of that goal and in any event, was not implemented in BC.

[199] The Consolidated Claim pleads that on or about September 10, 2018, Canada established the Inuit Child First Initiative to extend its Jordan's Principle program mandated by the CHRT to Inuit children, thereby constituting an undertaking to act in the best interest of this group. The Consolidated Claim pleads that, despite this decision, Inuit children have continued to suffer denials, service gaps, and delays in essential services. The Consolidated Claim pleads that Canada's funding decisions constitute assumption of discretionary control over the Class.

[200] As the legal interest identified with regard to the fiduciary duties of the Province and Canada are the same, I am satisfied that the third requirement to find an *ad hoc* duty has been met. If "culture and identity" interests are indeed guaranteed under s. 35 of the *Constitution Act, 1982*, then it is established that any

interests and rights under s. 35 satisfy the requirement of an "independent legal interest": *Williams Lake Indian Band* at para. 53; *Restoule* at para. 521.

[201] Second, for the purposes of surviving the pleadings stage, I am willing to accept there is an arguable case that the Class was vulnerable to the federal Crown's control, given the jurisdiction Canada exercises over the Class pursuant to s. 91(24) of the *Constitution Act, 1867*. Whether this section imposes a positive duty to legislate is irrelevant to the vulnerability criterion.

[202] The court found no *ad hoc* duty arose in *Varley*, as the federal government did not exercise discretionary power over Indigenous identity and culture during the period covered by the action, and did not "take any decision regarding a child's apprehension, placement or adoption; this was done by provincial officials": at para. 200. The plaintiffs at bar point to the federal government's funding decisions and agreements as evidence of Canada exercising discretionary power over the Class Members' legal interests. Without weighing the merits of that argument, I accept that it is distinct from the arguments made in *Varley* and is not bound to fail.

[203] It is difficult, however, to find anything in the factual relationship pleaded that suggests Canada made an undertaking to act in the best interests of the Class above others, such that it assumed an *ad hoc* fiduciary duty. Unlike in *Brown Certification* at para. 48, the plaintiffs have not pointed to the specific execution of an agreement that could establish an undertaking by the federal Crown to exercise its discretion over funding in the best interests of the Class (with the potential exception of the Inuit Child First Initiative constituting an undertaking for Inuit children). Indeed, the plaintiffs allege Canada's willful blindness and unwillingness to remedy its funding decisions constituted negligence to the Class. While the threshold is low on certification, the plaintiffs have not made out an arguable case for an *ad hoc* relationship between the Class and Canada.

[204] There is, however, an arguable claim for breach of a *sui generis* fiduciary duty by Canada. While novel, the plaintiffs have identified a legal interest in the Class' Indigenous culture and identity, family unity, and connections that may satisfy the

interests guaranteed under s. 35 of the *Constitution Act, 1982*. The Consolidated Claim alleges Canada wielded discretionary power over funding programs for the Class Members, and that Canada's "denial and wilful ignorance" caused the Class to suffer damages. Without assessing the merits of these claims, I am satisfied the plaintiffs have made out the essential elements of a cause of action in breach of *sui generis* fiduciary duty against the defendant Canada.

Unjust Enrichment

[205] The elements of unjust enrichment are not in issue. According to the "principled approach" to this equitable doctrine, the plaintiffs need to plead (a) enrichment to the defendant; (b) a corresponding deprivation; and (c) an absence of a juristic reason that would justify the enrichment: *Moore v. Sweet*, 2018 SCC 52 at para. 38. The principled approach is firmly established in this province's jurisprudence*: Wilson v. Fotsch*, 2010 BCCA 226; *Kim v. Choi*, 2020 BCCA 98; *De Angelis v. Siermy*, 2022 BCCA 401.

[206] Unjust enrichment is, ultimately, an equitable remedy that allows courts to "to identify circumstances where justice and fairness require one party to restore a benefit to another": *Moore* at para. 38. The plaintiff's loss can be measured according to both the wealth in their possession before the unjust transfer to the defendant *and* by the wealth they would have reasonably possessed but for the deprivation: *Lac Minerals Ltd. v. International Corona Resources Ltd*., [1989] 2 S.C.R. 574 at 669–670; *Moore* at para. 44. Courts should not account for reciprocal benefits at the deprivation stage to demonstrate that the plaintiff benefited in some way from the exchange: *Wilson v. Fotsch*, 2010 BCCA 226 at para. 19.

[207] The Consolidated Claim pleads that as a consequence of the Defendants' conduct, the Defendants were enriched and received financial benefit and gain at the expense of the Class through the impugned conduct; that the plaintiffs and other Class Members suffered a corresponding deprivation; and that no juristic reason exists for the Defendants' enrichment or the corresponding deprivation to the plaintiffs and the other Class Members.

[208] The plaintiffs claim the Defendants were enriched by spending less on Indigenous child and family services than they would have spent if they had properly administered those programs in a non-discriminatory manner. The Consolidated Claim pleads that this underfunding and discriminatory provision of essential services resulted in Class Members' deprivation. The plaintiffs plead an absence of juristic reason for this corresponding deprivation.

[209] The Defendants argue that the plaintiffs have not set out the material facts to address the necessary elements to support a cause of action in unjust enrichment. Namely, they plead that the Consolidated Claim does not address economic deprivation to the plaintiffs or a corresponding economic enrichment to the Defendants. While courts typically favour a "straightforward economic approach" to the first two stages of the analysis, it is not determinative: *Moore* at para. 41. The benefit conferred from the plaintiff to defendant need only be "tangible" for the purposes of being restored: *Kerr v. Baranow*, 2011 SCC 10 at para. 38; *Moore* at para. 38.

[210] The causal link between the enrichment and corresponding deprivation does not need to be a "direct transfer of wealth from the plaintiffs to the defendant" in the exact sense described by the Province: *Sharp v. Royal Mutual Funds Inc.*, 2020 BCSC 1781 at paras. 115–129, aff'd 2021 BCCA 307 at paras. 85, 92. The plaintiff does not need to establish that their loss was a *direct* result of the plaintiff's gain, nor even that the enrichment passed directly between the two parties: *Moore* at para. 45; see also *Cie Immobilière Viger Ltée v. Lauréat Giguère Inc.*, [1977] 2 S.C.R. 67, 1976 CanLII 4 (SCC) at 79; *Lacroix v. Valois*, [1990] 2 S.C.R. 1259, 1990 CanLII 46 (SCC) at 1278–79.

[211] The onus is on the plaintiff to demonstrate that the defendant was enriched, whether directly by the plaintiff or a by a third party, as a consequence of the plaintiff's deprivation. Canada concedes that the plaintiffs have set out material facts alleging that it redirected funding services to other individuals. Whether this funding ought to have gone to the plaintiffs is a question better suited for trial.

[212] The Province further pleads that there is no basis in fact that there was any enrichment of the Province based on the "plaintiffs' theory the funds were not retained but rather were used for other policy priorities". However, to satisfy the enrichment requirement, the defendant need not have retained the benefit permanently: *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 37; *Kerr* at para. 38. Where a defendant pleads this "change of position" defence, the court will consider the overall fairness of awarding restitution after proceeding through the tripartite analysis on the merits. Only once all three criteria are satisfied will the court consider defences that would otherwise bar recovery: *Garland* at paras. 36–37.

[213] The Province argues the Consolidated Claim does not set out any material basis for the third requirement. The analysis for the absence of juristic reason is two-fold, as set out in *Garland* at paras. 44–46:

> First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. . . . The established categories that can constitute juristic reasons include a contract (*Pettkus*, *supra*), a disposition of law (*Pettkus*, *supra*), a donative intent (*Peter*, *supra*), and other valid common law, equitable or statutory obligations (*Peter*, *supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.
>
> The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.
>
> As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations.

[214] The Province argues that any enrichment—if it indeed occurred and at the expense of the Class—falls within a clear juristic reason: the disposition of law: *Gladstone v. Canada (Attorney General)*, 2005 SCC 21 at para. 19; *Kerr* at para. 41; *Moore* at para. 57. Disposition of law is "a broad category that applies in various circumstances, including "where the enrichment of the defendant at the plaintiff's

expense is required by law, such as where a valid statute denies recovery": *Moore* at para. 63.

[215] The clear existence of a disposition of law would indeed be fatal to certification of this cause of action. The test to determine whether the case at bar falls under one of the existing categories of juristic reason is "flexible, and the relevant factors to consider will depend on the situation before the court": *Kerr* at para. 44, citing *Peter v. Beblow*, [1993] 1 SCR 980, 1993 CanLII 126 (SCC) at 990.

[216] Given the plaintiffs' assertion that funding and operational decisions (while authorized by law) were made in a discriminatory and negligent manner, it cannot be said unilaterally that the *prima facie* case has been rebutted. Where the parties contest whether legal justification exists for the alleged enrichment, courts have reserved that question for trial: *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2022 BCCA 366 at para. 29.

[217] On the content of the pleadings, the plaintiffs have made out the essential elements of this cause of action against the Province and Canada.

Additional Defences Raised

[218] The Defendants raise two additional defences that would apply to both the private and *Charter* causes of action alleged in the Consolidated Claim. I do not accept either as a bar to certification.

Impermissible Collateral Attack

[219] The Province argues that the Removed Child Claim asks this Court to relitigate the basis for the removal of every individual in the Removed Child Class to assess whether it was wrongfully made or decided, constituting an impermissible collateral attack. It asserts that such complaints should instead be adjudicated through the review and appeal procedures of the *CFCSA*. The Province submits that any causes of action arising from the Removed Child Claim, whether private or constitutional, are barred by the finality doctrines of abuse of process, *res judicata*, issue estoppel, and collateral attack.

[220] This argument mischaracterizes the nature of the Removed Child Claim. The Claim does not allege that each removal of an Indigenous child in British Columbia was incorrect and must be reversed. Indeed, the plaintiffs do not seek the reversal of any decision to remove a child. Rather, the Removed Child Claim alleges that the child welfare system as a whole was discriminatory, and that each member of the Class was harmed by being forced into and managed by a discriminatory system. The plaintiffs seek compensation for the Class for these alleged damages: *Canada (Attorney General) v. TeleZone Inc*., 2010 SCC 62 at paras. 18–19.

[221] The Ontario Superior Court rejected this argument in *Brown Certification* at para. 10:

> …the Federal Crown is wrong to argue that because all of the placements were pursuant to court orders and the courts acted in the best interests of the children, that the so-called Sixties Scoop cannot now be questioned or challenged. Remember, the plaintiffs are not challenging the actual court decisions that allowed the aboriginal children to be placed in non-aboriginal homes. There is no collateral attack in this proposed class action on the judicial decisions. … They seek damages for the harm that was caused not by the court orders but by the alleged breaches of fiduciary and common law duty on the part of the Federal Crown.
>
> [Emphasis added.]

[222] I come to the same conclusion with respect to this defence.

Claims are Time-Barred by Statute

[223] To the extent that the Defendants rely on limitations defences in their responses to civil claim under the provincial and federal limitations statutes, such limitations issues should await a determination of the common issues: *Pausche v. British Columbia Hydro & Power Authority*, 2000 BCSC 1556 at para. 38; *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at paras. 99–100.

[224] It is not plain and obvious that the claims are statute-barred.

Conclusion on *CPA* s. 4(1)(a)

[225] Taking the facts pleaded in the Consolidated Claim as true, it is not plain and obvious that the plaintiffs' claims cannot succeed. The plaintiffs have pleaded the

necessary elements to certify causes of action in systemic negligence, breach of sections 7 and 15(1) of the *Charter*, breach of fiduciary duty, and unjust enrichment.

EVIDENCE

[226] To meet the standard of certification, the plaintiffs must show "some basis in fact" for the remaining requirements in ss. 4(1)(b)–(e) of the *CPA*: *Hollick* at para. 25; *Mentor* at paras. 33–34. This is a low burden. This evidentiary standard does not require the court to resolve conflicting facts or evidence. It is not a requirement to show that the action will succeed, that a *prima facie* case has been made, or that there is a genuine issue for trial: *Miller v. Merck Frosst Canada Ltd.*, 2011 BCSC 1759 at paras. 37–40, leave to appeal to BCCA ref'd, 2012 BCCA 137. Nor does the standard require that all material facts required for the resolution of the action be identified, much less proven: *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 at para. 99.

[227] The abovementioned test reflects the principle that the court is ill-equipped to resolve conflicts in the evidence or engage in finely calibrated assessments of evidentiary weight at the certification stage: *Pro-Sys* at paras. 99–100; *Hollick* at paras. 24–25.

[228] In assessing whether the procedural requirements of the certification test are met, "the certification judge is not to be drawn into a battle of the experts or a consideration of the merits of the claim": *Ewert* at para. 7. Where expert evidence conflicts as to matters that may affect whether a proposed common issue can be resolved on a class-wide basis, "the plaintiff's evidence need not prove its case nor be preferred over the conflicting evidence": *Bowman v. Kimberly-Clark Corporation*, 2023 BCSC 1495 at para. 74. This threshold is "deliberately low because the evidence has not been through the trial laboratory" and "anticipates that the evidence will be more developed at trial and the findings of fact may well be different": *Bowman* at para. 74.

[229] Where defendants rely on their own affidavits to attempt to rebut the plaintiff's established basis in fact, it "must give the defendants' evidence less weight" if it

becomes “unclear if there are other materials in the defendants’ knowledge that were not included in the affidavits”: *Cantlie* at para. 171.

Reports and Publications

[230] The Consolidated Claim is supported by a number of government and public official reports, studies, statistics, and expert opinions, as well as affidavit evidence from the proposed class representatives.

[231] Government and public official reports throughout the Class Period identify overrepresentation and a need for reform with respect to child welfare services for Indigenous children and families in British Columbia. In February 1991, the provincial Ombudsman (as the office was then known) delivered a public report to the Legislative Assembly of British Columbia, titled “*Public Report No. 24 Public Response to Request for Suggestions for Legislative Change to Family and Child Service Act February 1991*”. Among its recommendations was a shift in emphasis to prevention and family support as alternatives to Indigenous child removals. In particular, the Ombudsman noted at page 2 of the report:

> If there were specific statutory provisions and available services to allow alternatives (for example, family support within the home environment, placement with an appropriate relative or family friend, or an agreement or restraining order forbidding the alleged abuser from entering the family home), the necessity of apprehending the child may decrease considerably.

[232] In October 1992, the Community Panel on Family and Children’s Services’ Aboriginal Committee, delivered a report to the Honourable Joan Smallwood, then-Minister of Social Services in British Columbia, titled “*Liberating Our Children, Liberating Our Nations*”. The Aboriginal Committee was appointed by the Province to review its family and child protection legislation. In the introduction to the October 1992 report, the authors noted that although Indigenous people made up less than 4% of the population of British Columbia, they comprised 51.6% of children in care. In 2024, the percentage of Indigenous children in state care has risen to 69.2% of children in care, despite the total number of children in care having fallen over the past three decades: British Columbia, Ministry of Children and Family Development,

Children and Youth in Care (CYIC) (British Columbia: MCFD Reporting Portal, 31 March 2024) at 4.14.

[233] In 2006, the Child and Youth Office for British Columbia and the Office of the Provincial Health Officer published the "*Joint Special Report – Health and Well-Being of Children in Care in British Columbia: Report 1 on Health Services Utilization and Mortality"*. Noting the over-representation of Indigenous children in the Ministry's care, the authors stated at page 67 that "special strategies are required for Aboriginal children and youth in British Columbia, and that these strategies must be developed in partnership with Aboriginal communities".

[234] Also in 2006, the Honourable Ted Hughes published an independent review of the Province's child protection system, titled "*BC Children and Youth Review – An Independent Review of BC's Child Protection System" (the "Hughes Report"),* noting the importance of strengthening families and communities—i.e. Prevention Services—in order to keep Indigenous children safe and the need to focus on off-reserve children. Mr. Hughes also noted that disputes between the Province and Canada actively reduced access to essential health and social services.

[235] In 2007, the provincial Representative of Children and Youth (the "Children's Representative") and the Office of the Provincial Health Officer published a report titled "*Health and Well-Being of Children in Care in British Columbia: Education Experience and Outcomes*". The authors of this report found that "Aboriginal children in care have poorer educational outcomes than non-Aboriginal children in care and non-Aboriginal children with special needs", while also noting that "a higher percentage of children in care are Aboriginal than are recorded by the Ministry of Children and Family Development".

[236] In 2008, the Office of the Auditor General of British Columbia published a report titled "*Management of Aboriginal Child Protection Services – Ministry of Child and Family Development*", continuing to raise the alarm about the disproportionate impact of the Impugned Conduct on Indigenous children and families in British Columbia. Of note were findings regarding MCFD's operations:

> [MCFD] has not made a persuasive business case for securing the funding needed to run an effective child protection service for Aboriginal children … [MCFD] has yet to develop a process to identify the financial resources required to provide the needed services. …
>
> [MCFD] has a workload model to approximate the number of social workers it needs. This model, however, is not designed to include culturally-appropriate practices such as building relationships with each Aboriginal community and working collaboratively with extended Aboriginal families to find child protection solutions. The result: the workload of many ministry front-line workers and managers is underestimated, making it challenging for them to carry out their work ….

[237] Also in 2008, the Office of the Auditor General of Canada published a report to the House of Commons, titled "*Report of the Auditor General of Canada to the House of Commons*", including a chapter on Indigenous child and family services. Of British Columbia, the Auditor General stated: "Studies indicate that in British Columbia, an Aboriginal child is about six times more likely to be taken into care than a non-Aboriginal child. Of all BC children who are in care, 51 percent are Aboriginal—yet Aboriginal people represent only about 8 percent of BC's population."

[238] In December 2008, the Children's Representative published a report titled "*2008 Progress Report on the Implementation of the Recommendations of the B.C. Children and Youth Review ("Hughes Review*") decrying the Province's limited progress in addressing fifteen of the recommendations made as part of the Hughes Report in 2006.

[239] In November 2013, the Children's Representative published a report titled "*When Talk Trumped Service: A Decade of Lost Opportunity for Aboriginal Children and Youth in B.C*.", noting:

> This area is rife with perverse performance measures, the absence of any real incentives for change and no end-state goals on how services to Aboriginal children and youth will be improved. The Ministry of Children and Family Development (MCFD) has awarded money for projects but often assumed little or no management or responsibility for initiatives launched. There has been a significant expenditure on "talking" – with virtually no involvement by Aboriginal children and youth themselves – and without a single child being actually served.

[240] The Children's Representative noted the Ministry of Children and Family Development's promised service delivery changes, including a shift from "intervention to prevention". The Children's Representative stated: "[Delegated Aboriginal Authorities] and the Caring for First Nations Children Society maintain that they do not have money for prevention or to provide services at the same level as those provided to non-Aboriginal children."

[241] In October 2014, the Children's Representative published a report titled "*Not Fully Invested – A Follow-up Report on the Representative's Past Recommendations to Help Vulnerable Children in B.C*.", finding:

> It has long been known that Aboriginal children and youth are grossly over-represented in the B.C. child welfare system. Despite comprising just eight per cent of the total B.C. child population, more than 50 per cent of the children in government care are Aboriginal.
>
> The Representative has issued a number of reports that have identified concerns about the well-being of Aboriginal children and youth, but subsequent recommendations have resulted in slow response and little commitment to a dedicated focus on this issue – from either the federal or provincial government.

[242] In May 2015, the Children's Representative published a report titled "*Paige's Story: Abuse, Indifference and a Young Life Discarded*". The Children's Representative observed the serious disconnect between: (i) the Province's stated legislation and policy; and (ii) on-the-ground care for Indigenous children. The report discussed "stark examples of [Indigenous] children receiving far less than the standard of care called for by law and common decency."

[243] In October 2015, the Children's Representative published a report titled "*The Thin Front Line: MCFD staffing crunch leaves social workers over-burdened, B.C. children under-protected" ("The Thin Front Line").* The Children's Representative summarized her findings, in part, as: "The results of the review are alarming. The problems are systemic and have accumulated over time, worsening and not improving."

[244] In March 2017, the Children's Representative released a report titled "*Delegated Aboriginal Agencies: How resourcing affects service delivery*", observing:

> The findings of this review echo the Representative's 2013 report *When Talk Trumped Service*, as well as a 2008 report from B.C.'s Auditor General – namely that, while MCFD espouses visionary plans and high-level commitments to Indigenous child welfare, there is a disconnect between how the ministry plans for and supports Indigenous child welfare and how it supports actual service delivery.

[245] On June 7, 2018, the Province and Métis Nation BC signed a Joint Commitment document, recognizing, amongst others, that "the child welfare system in British Columbia has not met the needs of Métis children and families, as evidenced by the disproportionate number of Métis children and youth in care".

[246] In July 2020, the Children's Representative published a report titled "*Invisible Children: A Descriptive Analysis of Injury and Death Reports for Métis Children and Youth in British Columbia, 2015 to 2017*", noting, "The Representative shares concerns that significant opportunities to connect Métis children and youth with culture and community are being lost in the absence of consistent and informed identification of Métis heritage and active attention to and funding for cultural connections."

[247] In 2021, the Children's Representative published a report titled "Skye's Legacy: A Focus on Belonging", finding:

> What is … evident is colonialism's strong influence on the B.C. child welfare system both historically and today, when more than 67 per cent of the children currently in government care in B.C. are Indigenous despite the fact Indigenous people comprise less than 10 per cent of the total provincial population. According to the Ministry of Children and Family Development's (MCFD) most recent Service Plan, an Indigenous child is nearly 18 times more likely to be removed from their parents than a non-Indigenous child. …
>
> Colonialism still reaches into families — through the intergenerational trauma that too often goes unrecognized or ignored and therefore unsupported, and through structural bias and systemic racism – to negatively affect the services provided and by extension the outcomes for children, youth, parents and grandparents.

[248] In 2022, the Children's Representative published a report titled "*At a Crossroads: The roadmap from fiscal discrimination to equity in Indigenous child welfare" (the "Crossroads Report").* The Children's Representative found that:

> …MCFD's current funding approach mirrors the previous funding approach of the federal government that was found to be discriminatory in (at least) one clear way: it ties funding to a reliance on children being in care. This aspect of MCFD's funding approach could also be interpreted as continuing to discriminate against B.C.'s First Nations, Métis, Inuit and Urban Indigenous children residing off-reserve.
>
> …
>
> The structural roots of child welfare services in B.C. rest upon a foundation that prioritizes safety and protection. It is tied to white settler notions of what is "acceptable" parenting and child rearing, and of "protecting children" who are vulnerable. It also encompasses assumptions around intent or incapacity of parents – especially those who do not conform to the white settler ideas about parenting. …
>
> The Standardized Funding Approach for ICFS Agencies serving children who live off-reserve is limited to protection services only. …
>
> MCFD's Standardized Funding Approach bears resemblance to the previous federal funding formula known as Directive 20-1, which was found to be discriminatory through the Canadian Human Rights Tribunal ruling affirmed by the Federal Court. … MCFD's current Standardized Funding Approach shares in common with the discriminatory Directive 20-1 a reliance on children being in care as the basis for funding.

[249] The plaintiffs' expert on this application, Dr. Jeannine Carriere, a Professor at the University of Victoria School of Social Work (Indigenous Specialization), stated in her report: "The allocation of funding for child and family services used during the Class Period did not account for or address the complex social issues faced by Indigenous children and families. Issues of inequitable access for off-reserve Indigenous children and family have been and are systemic in British Columbia."

[250] The Province's general risk assessment tool, called "The Risk Assessment Model for Child Protection in British Columbia", showcases this differential treatment identified by Dr. Carriere. The risk assessment tool operationalized child removals under the governing legislation, s. 13 of the *CFCSA*. It applied to all children and families that came into contact with child welfare in British Columbia (whether

Indigenous or non-Indigenous) and was used to determine if the child should be removed.

[251] Dr. Carriere opines that the Province's operational risk assessment tool institutionalized factors that, in the absence of appropriate prevention services and supports to equal the playing field, disproportionately targeted Indigenous parents to remove their children.

[252] Many of these same factors were identified as systemic contributing factors to persistent over-representation by the public reports and findings summarized above.

[253] There is also evidence regarding the situation of Métis children and families in the Class. The Executive Director for Citizenship and Children & Families at Métis Nation British Columbia, Colleen Hodgson, has deposed in support of this application:

> When it comes to our children and youth, the child welfare system today is a continuation of the Residential School system of the past. Not only do the harms of Residential Schools persist in the generations of Métis families and communities in British Columbia, but the very system that is supposed to protect Métis children, youth and families today is in fact continuing to harm our children and youth — and continuing to break our families and our communities apart. This has continuously been the case for decades now. …
>
> In all of our dealings with the Province and Canada on the issue of Métis children and youth in care, we have heard the defendants increasingly talk about "prevention", and about transforming the child welfare system from a system that has focused on "protection" for decades to a system focused on "prevention" — all aimed at reducing the number of Indigenous children in care and fulfilling the governments' obligations under the UN Declaration on the Rights of Indigenous People. …

[254] The Consolidated Claim also alleges the Defendants' systemic failure to provide non-discriminatory access to health and social services essential to the Indigenous child's health and wellbeing. As found by Parliament's Special Committee on the Disabled and the Handicapped as of the early 1980s:

> While all disabled Canadians have obstacles to overcome, Native Canadians who are disabled often have more. If they live in the north or on reserves, they are isolated from services for the handicapped that are usually located in cities. And if they go to the cities to take advantage of these services, they

> must abandon a familiar lifestyle and community. As well, they often have to cope with the obstacle of prejudice.

[255] The claims of the Essential Services Class target, to quote from Canada, "the gaps in health, social services and education for First Nations children and families" (and for Inuit and Métis children who are also Indigenous and deserving of the same protections).

[256] There is some evidence to support the claim that similar to child welfare, other essential health and social services have historically faced federal and provincial jurisdictional wrangling. Jordan's Principle and essential health and social services are relevant to child welfare. One of the Truth and Reconciliation Commission's Calls to Action 1-5 on child welfare was Call to Action 3, which stated:

> "We call upon all levels of government to fully implement Jordan's Principle."

[257] The final report of the Truth and Reconciliation Commission and its Calls to Action called for an end to "Aboriginal children paying the highest price — in particular, children with complex developmental, mental health, and physical health issues".

Jordan's Principle-Related Evidence

[258] Since 2018, Canada has acknowledged that Inuit children are entitled to equal rights to access essential services as those available to First Nations under "Jordan's Principle". Canada has established the "Inuit Child First Initiative" in parallel with its Jordan's Principle service delivery program.

[259] The systemic issues underlying Jordan's Principle and the claims of the Essential Services Class have also been the subject of decades of public reports.

[260] In 1981, the House of Commons' Special Committee on the Disabled and the Handicapped noted the jurisdictional impediments and ineffective administration that left Indigenous populations underserved in health and social services.

[261] In 1993, the House of Commons' Standing Committee on Human Rights and the Status of Disabled Persons published a report titled "Completing the Circle: A Report on Aboriginal People with Disabilities", finding:

> The federal/provincial jurisdictional logjam shows up most graphically in the provision of health and social services to Aboriginal people. Under the Constitution Act, 1867, the delivery of these services falls under provincial authority but, because of the cost, provincial governments have generally refused them to status Indians who live on reserve. Consequently, the federal government has made some, but not all, of the services provided to other Canadians available to status Indians on reserve.
>
> In all of this wrangling, both levels of government appear to have forgotten the needs of the people themselves. In this complex and overlapping web of service structures, some people even find themselves falling through the cracks and unequally treated compared to their fellow citizens.

[262] In 1996, the Royal Commission on Aboriginal Peoples published a report titled "*Report of the Royal Commission on Aboriginal Peoples*" where it found that the "present jurisdictional tangle makes some health and social problems almost impossible to solve. For example, the problems of Aboriginal people with disabilities cannot be dealt with by any one level of government in the absence of co-operation from the others".

[263] In February 2017, the Children's Representative published a report titled *"Broken Promises - Alex's Story*", reviewing the death of an 18-year-old Métis youth in care who took his own life after 17 care placements over 11 years. The report found the lack of access to essential health and social services at fault: "Despite five separate referrals to Child and Youth Mental Health services, and overwhelming evidence that Alex desperately needed robust and effective mental health interventions to cope with repeated traumatization, he was never connected to appropriate services and this failure had a direct link to his subsequent death."

IDENTIFIABLE CLASS – s. 4(1)(b)

[264] The second requirement for certification as a class proceeding is that there be an identifiable class of two or more persons: *CPA*, s. 4(1)(b). Our Court of Appeal summarized the principles governing this requirement in *Jiang v. Peoples Trust*

Company, 2017 BCCA 119 at para. 82, leave to appeal to SCC ref'd, 38738 (14 November 2019):

> - the purposes of the identifiable class requirement are to determine who is entitled to notice, who is entitled to relief, and who is bound by the final judgment;
> - the class must be defined with reference to objective criteria that do not depend on the merits of the claim;
> - the class definition must bear a rational relationship to the common issues — it should not be unnecessarily broad, but nor should it arbitrarily exclude potential class members; and
> - the evidence adduced by the plaintiff must be such that it establishes some basis in fact that at least two persons could self-identify as class members and could later prove they are members of the class.
>
> [Emphasis in original.]

[265] The plaintiffs seek certification on behalf of three proposed classes who were allegedly harmed by Canada and the Province: (i) the Removed Child Class, (ii) the Essential Services Class, and (iii) the Family Class.

Removed child class

[266] This class definition uses objective criteria: (1) place of residence, (2) First Nations, Inuit, or Métis identify, (3) the fact of being removed as a child, (4) during the class period. No element of the definition is dependent on the outcome of the litigation.

[267] The definition of this class is neither unnecessarily broad nor insufficiently defined or otherwise vague. It only captures Indigenous children in British Columbia who were removed during the class period. The definition is rationally connected to the proposed common issues, as described in the proceeding section.

[268] Similar class definitions were certified on a contested basis in class actions alleging similar misconduct in Indian residential schools, day scholars, the Sixties Scoop (*Brown*), and the Millennium Scoop (*A.B.*).

[269] Similar class definitions were also certified on consent in class actions alleging similar misconduct in Indian day schools (*McLean*) and the Millennium Scoop (*Moushoom* and *Trout).*

Essential services class

[270] This class definition also uses objective criteria: (1) age, (2) Indigenous identity, (3) having a need for an essential service, (4) a delay, denial, or service gap in the receipt of that essential service, (5) during the class period, and (6) not having their essential services claims covered by the settlements of *Moushoom* or *Trout*. No element of the definition is dependent on the outcome of the litigation.

[271] This class definition applies the same objective parameters identified by the CHRT in the operative order of its compensation decision relating to individuals who would be eligible for compensation for discrimination due to past breaches of Jordan's Principle that "resulted in harming First Nations children living on reserve or off-reserve who, as a result of a gap, delay and/or denial of services were deprived of essential services and placed in care outside of their homes, families and communities in order to receive those services or without being placed in out-of-home care were denied services and therefore did not benefit from services covered under Jordan's Principle": *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 at para. 251.

[272] The definition is not unnecessarily broad. It only captures Indigenous children in British Columbia who faced delays, denials, or service gaps during the class period. It properly excludes claims settled in *Moushoom* and *Trout*. The definition is understandable and rationally connected to the proposed common issues, as described below.

[273] Similar class definitions were certified on a contested basis in *A.B.*, a class action alleging essentially the same misconduct, also during the Millennium Scoop, in another province. In *A.B*., the applicants limited the essential services class to the Inuit. The Québec Superior Court approved the class definitions but reduced the

definition of essential services to the following: psychological, therapy and other support services relating to a youth coming into contact with the child welfare authorities (“signalement”) and necessary follow-up services. The Court decided that the definition of essential services accepted in *Moushoom*, *Trout* and the CHRT was overly broad in light of the evidentiary record before the Québec Superior Court on the authorization application.

[274] Similar class definitions were also certified on consent in class actions alleging essentially the same misconduct, also during the Millennium Scoop, on-reserves (*Moushoom* and *Trout*).

Family class

[275] This class definition is tied to objective criteria of: (1) having a child or grandchild in one of the other classes and (2) being their caregiver at the time. No element of this definition is dependent on the outcome of the litigation.

[276] The definition is not unnecessarily broad as it only captures caregiving parents and grandparents, nor is it insufficiently defined or otherwise vague. The class definition is rationally connected to the proposed common issues, as described below.

[277] Similar class definitions were certified on a contested basis in *A.B.* Similar class definitions were also certified on consent in class actions alleging similar misconduct, also during the Millennium Scoop, on-reserves (*Moushoom* and *Trout*).

Conclusion on identifiable class

[278] There is ample evidence in the record before me to support the existence of these three classes. I find each class to be identifiable as set out above such that the classes as defined meet the requirements of s. 4(1)(b) of the *CPA*.

COMMON ISSUES – s. 4(1)(c)

[279] The third requirement for certification is that “the claims of the class members raise common issues, whether or not those common issues predominate over issues

affecting only individual members": *CPA*, s. 4(1)(c). The *CPA* defines "common issues" in s. 1 as "common but not necessarily identical issues of fact" or "common but not necessarily identical issues of law that arise from common but not necessarily identical facts".

[280] The commonality threshold is "low; a triable factual or legal issue which advances the litigation when determined will be sufficient": *Finkel* at para. 22. The central question is "whether allowing the [class proceeding] will avoid duplication of fact-finding or legal analysis": *Dutton* at para. 39.

[281] Issues can be common even when they address only "a very limited aspect of the liability question": *Finkel* at para. 23. Common issues need merely to advance or terminate the claims of the class members, not necessarily determine the liability of a defendant to every, or even any, class member. This is succinctly stated in *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343, 1997 CanLII 4111 (C.A.), leave to appeal to SCC ref'd, [1998] S.C.C.A. No. 13:

> [53] ... the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief.

[282] In *Trotman v. WestJet Airlines Ltd.*, 2022 BCCA 22, the Court of Appeal confirmed that the test for commonality in British Columbia only requires demonstrating that an issue can be resolved in common:

> [57] The certification judge is not to conduct an adjudication on the merits. There need only be some basis in fact for the proposition that the issue can be determined on a class-wide basis…. The evidence at this stage "goes only to establishing whether these questions are common to all the class members"…. Said another way: "is there some evidence of class-wide commonality, that is some evidence that the proposed common issue can be answered on a class-wide basis"

[283] In *Mentor*, the Court noted that "regarding the commonality requirement, the plaintiff must show some basis in fact that the issues are common to all class members, not some basis in fact that the acts alleged actually occurred": at para. 33.

[284] When assessing the proposed common issues, the following principles apply:

a) Commonality should be approached purposively and "must not be applied inflexibly": *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 45.

b) It is not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues: *Dutton* at para. 39.

c) It is not essential that class members be identically situated *vis-à-vis* the opposing party, and wide differences are tolerated. It may be that a particular claim will be sustainable for only a portion of the class, due to differences in their relative positioning *vis-à-vis* the defendants, but particularly since these differences may not be apparent until the common issues trial, the court always has the capacity and option to provide "nuanced" answers to the common questions: *Dutton* at paras. 39–40; *Stanway v. Wyeth Canada Inc.*, 2012 BCCA 260 at para. 61 [*Stanway BCCA*].

d) Success for one class member on a common issue need not necessarily mean success for all, but it must not mean failure for another. A common question can exist even if the answer "might vary from one member of the class to another": *Vivendi* at para. 45.

e) It is not necessary "that a plaintiff's expert's methodology establish that each and every class member suffered a loss" or be able to identify "those class members who suffered no loss so as to distinguish them from those who did": *Pioneer Corp v. Godfrey*, 2019 SCC 42 at para. 102.

Proposed Common Issues (i)-(ii): Breach of Fiduciary Duty

[285] Proposed common issues (i)-(ii) address the question of whether the Defendants owed fiduciary duties to the Class, and if so, whether their impugned conduct breached that duty. As they focus on the defendants, rather than on any specific class member, they are common to the Class.

[286] These common issues are contextually grounded in the special fiduciary relationship between the Crown and Indigenous persons in Canada and the honour of the Crown as well as the obligations undertaken by the Defendants in protecting the rights and wellbeing of Indigenous children. The governing statute in BC is the *CFCSA*, prioritizing the best interests of the affected Indigenous children.

[287] The systemic nature of the claim supports the commonality of these proposed issues. As stated in *Cloud* at para. 82:

> The resolution of these common issues therefore takes the action framed in negligence, fiduciary duty and aboriginal rights up to the point where only harm, causation and individual defences such as limitations remain for determination. This moves the action a long way.

Proposed Common Issues (iii)-(vi): Systemic Negligence

[288] Common Issues (iii)-(v) address whether the Defendants owed duties of care to the Class, and if so, whether their impugned conduct breached the standard of care and caused damages, and whether aggregate damages are appropriate.

[289] Again, these questions focus on the Defendants, rather than on each specific Class Member and as such, they are common to the Class.

[290] The Province argues that the claims relating to the Removed Child Class and Family class are fundamentally incapable of moving forward, because the child removal claims require a “case-by-case consideration of the unique circumstances of each child” and would require a “comprehensive review of each class members’ child welfare records”. Canada argues that “[c]onsidering the varying experiences and individual circumstances that are fundamental to this claim, the matter will

necessarily break down into individual proceedings." However, this is a mischaracterization of the fundamentally systemic nature of the claim.

[291] As the Supreme Court of Canada stated *Rumley* at para. 30:

> …the respondents' argument is based on an allegation of "systemic" negligence – "the failure to have in place management and operations procedures that would reasonably have prevented the abuse" … These are actions (or omissions) whose reasonability can be determined without reference to the circumstances of any individual class member. It is true that the respondents' election to limit their allegations to systemic negligence may make the individual component of the proceedings more difficult; clearly it would be easier for any given complainant to show causation if the established breach were that JHS had failed to address her own complaint of abuse (an individualized breach) than it would be if, for example, the established breach were that JHS had as a general matter failed to respond adequately to some complaints (a "systemic" breach). … however, the respondents "are entitled to restrict the grounds of negligence they wish to advance to make the case more amenable to class proceedings if they choose to do so"…

[292] The decision in *Stonechild FCA* with regard to commonality can also be distinguished from the case at bar. The majority at para. 32 listed 19 questions that the court would need to answer in respect of individual class members to determine the content and scope of any duty that might be owed by Canada and whether it was breached. As the plaintiffs point out, many of these questions, such as personal questions (e.g. whether the Class Member spoke an Indigenous language prior to being taken into care) or policy-related questions (e.g. which agency or authority was responsible for providing the Class Member with child welfare services) are not relevant to these proceedings. Therefore, it is not apparent in this case that individual questions will predominate over common ones.

Proposed Common Issues (vii)-(xv): Breaches of the *Charter*

[293] Common Issues (vii)-(xv) address whether the Defendants breached section 7 of the *Charter* or section 15 of the *Charter*, whether they can be justified under section 1 of the *Charter*, and what remedies are available under section 24(1) of the *Charter*.

[294] These questions focus on the Defendants, rather than on each specific Class Member.

[295] Similar common issues were certified on a contested basis in *A.B.* and by consent in *Moushoom* and *Trout*.

Proposed Common Issues (xvi)-(xvii): Unjust Enrichment

[296] Common Issues (xvi)-(xvii) address whether the Defendants were unjustly enriched by their alleged systemic maltreatment of Class Members, and if so, whether the court can make an aggregate assessment of a restitutionary award and in what amount. These questions focus on systemic actions of the Defendants with respect to the Class Members. They are common to the Class.

Proposed Common Issues (xviii)-(xix): Punitive Damages

[297] Common Issues (xviii)-(xix) address punitive damages.

[298] Courts have repeatedly held that punitive damages are appropriate to certify as common issues in systemic negligence cases. In *Rumley* at para. 48, the Court of Appeal held:

> Any award for punitive damages should reflect the overall culpability of the defendant. It does not have to be linked to the harm caused to any particular claimant and does not require individualized assessment. A global award can be assessed for the successful class members as a group, and allocated among them as the trial judge considers appropriate. The plaintiffs would be required to succeed on a common issue related to sexual abuse as well as proving moral culpability to establish a foundation for punitive damages.

[299] In *Liptrot* at para. 190, this Court reviewed the authorities and concluded that "an award of punitive damages can be a common issue to be determined and assessed in the context of all claims and not on an individual basis". The Court went on to note that, depending on the evidence that is adduced at trial, determining the quantum of punitive damages might require assessment of harm to individual students. Nonetheless, that was not a bar to certification of the common issue.

[300] The plaintiffs plead that the Defendants' knowledge and callous indifference warrants an award of punitive damages.

[301] Similar common issues were certified in *A.B., Moushoom* and *Trout.*

Common issues respecting methodology and assessing damages

[302] The Defendants submit that the plaintiffs have provided no workable methodology to determine how aggregate damages will be assessed across the Class. It is well established that where a common question as to aggregate damages is proposed, the plaintiffs must provide some basis in fact for a workable method to determine this across the class: *Lewis v. West Jet,* 2022 BCCA 145 at para. 152; *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 at para. 81. The plaintiffs have not provided a workable method that would allow for an assessment of damages.

[303] The Defendants argue that there is no workable methodology to assess *Charter* damages, enrichment, deprivation, or punitive damages on a class-wide basis. The plaintiffs submit that while an expert methodology is not required at this stage, direction is provided by way of the methodologies applied in the *Moushoom* and *Trout* settlement. They also refer me to the methodology discussed in *Good v. Toronto (Police Services Board)*, 2016 ONCA 250 and my acceptance of that methodology in *Gionet v. Syngenta*, 2024 BCSC 1440 at paras. 179–80:

> In *Good v. Toronto (Police Services Board)*, 2016 ONCA 250 at para. 73, leave to appeal to SCC ref'd, 37050 (10 November 2016), the Court of Appeal for Ontario certified issues assessing a base amount of non-pecuniary general damages, based on a sampling of the harm experienced by individual class members.
>
> I see no reason why that would not be available or applicable here.

See also *Richard v. the Attorney General of Canada*, 2024 ONSC 3800 at para. 363.

[304] The plaintiffs have therefore provided some basis in fact to support a workable methodology with respect to the assessment of damages. There is no direction with regard to unjust enrichment. Proposed common issue xvii regarding

damages on an aggregate basis for unjust enrichment is not certified. However, it may be addressed at the common issues trial if necessary.

[305] If I am in error on the adequacy of the direction provided, then I would find as the Court did in *Crate* at para. 98 that the issue of aggregate damages generally can be addressed at the common issues trial if necessary.

Conclusion on s. 4(1)(c)

[306] The extensive evidentiary record before me as described above provides some basis in fact with react to each of the proposed common issues apart from those addressing aggregate damages. Therefore, all proposed common issues are certified except common issue xvii.

PREFERABLE PROCEDURE – s. 4(1)(d)

[307] The next step requires the court be satisfied that a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues: *CPA*, s. 4(1)(d). The burden lies with the plaintiff to show some basis in fact (1) that a class proceeding would be a fair, efficient and manageable method of advancing the claim, and (2) that it would be preferable to any other reasonably available means of resolving the class members' claims: *Hollick* at paras. 28, 31.

[308] Section 4(2) of the *CPA* provides a non-exhaustive list of considerations that must inform the preferability analysis:

a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

d) whether other means of resolving the claims are less practical or less efficient; and

e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[309] At both steps of the analysis, the court must keep in mind the three goals of class action litigation: access to justice, judicial economy, and behaviour modification: *AIC Limited v. Fischer*, 2013 SCC 69 at paras. 8, 16.

[310] In this case, all three goals of class actions weigh in favour of certification. First, a class action would provide access to justice for class members. The final outcome of the proposed *Stonechild FCA* proceedings are unknown pending an anticipated application for leave to appeal. If certification in those proceedings is restored, and the claim ultimately successful, this court and the Federal Court can manage the risk of overlap or double compensation through the adjudicative process. If the FCA decision stands, the tens of thousands of Indigenous children otherwise allegedly entitled to remedies under these proceedings will be left without recourse. To predicate certification of these proceedings on the development of the *Stonechild* proceedings—where different harms are alleged—would demote access to justice.

[311] The Defendants submit that, as the majority found in *Stonechild FCA*, the plaintiffs in this case ask the court to reverse the preferability onus by requiring the Defendants to “disprove the bare assertions of the plaintiffs” made “simply by parroting the objectives of class proceedings”: *Stonechild FCA* at paras. 10, 11. Canada argues the Consolidated Claim presupposes class action litigation as the “default” procedure with no factual indication of how the proceedings would play out.

[312] In my view, the plaintiffs have explained in concrete terms why no better forum to resolve these claims exists. They have provided some basis in fact to satisfy ss. 4(1)(d) and 4(2) of the *CPA*. The application record (including the

representative plaintiffs' and other Class Member witnesses' evidence and affidavits, and the litigation plan) presents specific evidence as to how the proceedings will unfold and speaks to the preferability of this proceeding over any alternatives.

[313] The plaintiffs on certification "cannot be expected to address every conceivable non-litigation option in order to establish that there is some basis in fact to think that a class action would be preferable": *AIC Limited* at para. 49. Moreover, a defendant cannot simply state that another procedure would be preferable without supporting their position by some evidentiary basis: *AIC Limited* at para. 49. Until the commencement of these proceedings, the Defendants proposed no alternative process. The Province simply submits that the claim is too big to certify, citing *Kett* at para. 208.

[314] Nonetheless, similar claims for on-reserve children are not only certified, but are in the process of being administered. The number of class members involved in the *Moushoom* and *Trout* process is certainly greater than the number of class members subject to this claim. Further, when read in context, it is clear that the majority's reasoning in *Stonechild FCA* with respect to manageability is concerned primarily with "the myriad individual issues necessitating the involvement of the provinces and territories and agencies" rather than issues that are individual at the level of each class member: *Stonechild FCA* at para. 41.

[315] Individual actions would be far less efficient, more expensive, and impractical. There is no evidence that any Class Members wish to pursue these claims on an individual basis. Considering the quantum of damages for each Class Member, which could be dwarfed by the costs associated with bringing a claim, there is no apparent interest for any reasonable Class Member to control the prosecution of separate actions at significant time and expense. Tens of thousands of individual claims, which is the only alternative suggested by the Province, is clearly not preferable in my view. I note also there is no commitment to a commission of inquiry.

[316] Due to the systemic nature of this claim, a class action is the preferable procedure. The Supreme Court of British Columbia noted in *Liptrot* at para. 194 that

"in cases of alleged systemic abuse, courts have repeatedly found that access to justice and judicial economy favour a common issues trial, to determine fundamental aspects of the nature and extent of the legal duties owed by the defendants to the class members and whether those duties were breached". Moreover, in the circumstances before me, and given the long history of conduct involved, a class action would bring much-needed pressure on the defendants to modify their behaviour. Thus, the third criterion also tips in favour of class action litigation.

[317] Further basis in fact for the preferability of a class action is that in the parallel *Stonechild FC* action, Canada conceded that the claim could be "viable" as a class proceeding if brought in a provincial superior court of a province, so that the claim would also engage the shared liability of the Province. Canada stated it was its desire to try to resolve the issues in the *Stonechild* action in such a provincial claim. The Court endorsed this approach in *Stonechild FCA* at para. 46, and Canada appears to have taken the same position in *Crate* at para. 102.

[318] Now that Canada faces just such an action, it reverses course in the application before me. While the Federal Court in *Crate* found that multiple provincial claims would not be preferable due to cost consequences, I find that here where the claim involves children in British Columbia only, proceeding under the *CPA* would be preferable. Where individual claims may need to be assessed to some degree, it is clear to me that the common issues are a necessary first step in the resolution of the Class Members' claims. I also find that many of the individual questions of Class Members raised in *Stonechild FCA* are not relevant in this case due to the different harms alleged, meaning these proceedings should ostensibly be more efficient and accessible: *Stonechild FCA* at para. 45.

[319] I agree that a class proceeding as proposed provides a fair and efficient procedure for advancing the Class Members' claims, and there is no other realistically available alternate procedure for resolving the claims. Certification will advance the policy objectives of the *CPA* by promoting access to justice, judicial economy, and behavioural modification.

SUITABLE REPRESENTATIVE PLAINTIFF – s. 4(1)(e)

[320] Finally, certification as a class proceeding requires the presence of a suitable representative plaintiff. Section 4(1)(e) of the *CPA* provides:

> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[321] As deposed to in their respective affidavits, the proposed representative plaintiffs are committed to fairly and adequately representing the interests of the class. I find that they do not have, on the common issues, interests that are in conflict with the interests of other class members.

[322] The plaintiffs have provided some basis in fact to satisfy the criteria at s. 4(1)(e).

[323] I am satisfied that the proposed representative plaintiffs are appropriate.

[324] With regard to a workable litigation plan, the purpose of the litigation plan at the certification stage is to aid the court by providing a framework for advancing the litigation and to demonstrate that the plaintiffs and class counsel have a clear grasp of the complexities involved in the case. Courts do not scrutinize the plan to ensure that it will be capable of carrying the case through to trial and generally anticipate that plans will require amendments as the case proceeds: *Fakhri et al. v. Alfalfa's Canada Inc. (cob Capers Community Market)*, 2003 BCSC 1717 at para. 77, aff'd 2004 BCCA 549.

[325] The plaintiffs have produced a plan for the proceeding that sets out a workable method of advancing the action on behalf of the class and of notifying Class Members of the proceeding. The plaintiffs have put forward a detailed and

comprehensive litigation and notice plan that provides a workable method for advancing the litigation.

CONCLUSION

[326] This action is certified as a class proceeding as proposed.

[327] The class definition as proposed is approved.

[328] The proposed common issue xvii with regard to aggregate damages for unjust enrichment is not approved. The remaining proposed common issues are approved.

[329] The representative plaintiffs are approved.

[330] The litigation plan is approved.

"Wilkinson J."