File No. CI22-01-36804

THE KING'S BENCH

Winnipeg Centre

BETWEEN:

AMBER LYNN FONTAINE and TRACY LYNN MCKENZIE

Plaintiffs

and

ATTORNEY GENERAL OF CANADA and THE GOVERNMENT OF MANITOBA

Defendants

Proceeding under *The Class Proceedings Act*, CCSM c C130

FRESH AS AMENDED STATEMENT OF CLAIM

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TO THE DEFENDANTS:

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

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a Manitoba lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the *King's Bench Rules*, serve it on the plaintiffs' lawyer or where the plaintiffs do not have a lawyer, serve it on the plaintiffs, and file it in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Manitoba.

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

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGEMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

August 19, 2022

Issued "L Moody"
Deputy Registrar

AMENDED the 6th day of JAN 2023
under Order of CJ Joyal
dated the 19th day of Dec 2022

Deputy Registrar

S. VINCENT
DEPUTY REGISTRAR
COURT OF KING'S BENCH
FOR MANITOBA

CLAIM

I. DEFINITIONS

1. In addition to terms defined elsewhere in this Statement of Claim, the following terms are defined:

(a) "**Canada**" means His Majesty the King in right of Canada and all of his agents, including but not limited to:

(i) The former Department of Indian Affairs and Northern Development ("**DIAND**");

(ii) The former Indian and Northern Affairs Canada;

(iii) The former Aboriginal Affairs and Northern Development Canada;

(iv) The former Indigenous and Northern Affairs Canada;

(v) Indigenous Services Canada; and

(vi) Crown-Indigenous Relations and Northern Affairs Canada;

(b) "***CFS Act***" means *The Child and Family Services Act*, CCSM c C80;

(c) "**CFS Agency**" means a child and family services agency as defined in the *CFS Act*, whether Indigenous or non-Indigenous, established to administer child and family services in Manitoba during the Class Period;

(d) "**CFS Authorities**" means:

(i) The First Nations of Northern Manitoba Child and Family Services Authority (the "**Northern Authority**");

(ii) The First Nations of Southern Manitoba Child and Family Services Authority (the "**Southern Authority**");

(iii) The Métis Child and Family Services Authority (the "**Métis Authority**"); and

(iv) The General Child and Family Services Authority (the "**General Authority**");

(e) "***Charter***" means the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982 c 11;

(f) "**CHRT**" means the Canadian Human Rights Tribunal;

(g) "**CHRT Decision**" means the decision of the CHRT reported at 2016 CHRT 2, and certain subsequent CHRT decisions relating to the same complaint;

(h) "**Class**" means:

(i) Indigenous individuals who were taken into out-of-home care:

(a) During the Class Period,

(b) While they were under the age of 18,

(c) While they were not ordinarily resident on a Reserve,

(d) By the Crown or any of its agents (the "**Removed Child Class**"),

(e) Excluded from the Removed Child Class are the claims of individuals who meet the definition of the Removed Child Class in the Final Settlement Agreement dated June 30, 2022 in *Moushoom et al v Canada*, Federal Court File Nos. T-402-19 / T-141-20 / T-1120-21 ("***Moushoom***"), if approved by the Federal Court, to the extent that those claims are captured by *Moushoom*;

(ii) Indigenous individuals in Manitoba who:

(a) During the Class Period,

(b) While they were under the age of 18,

(c) Had a confirmed need for an essential service (inclusive of essential products),

(d) Faced a delay, denial or service gap in the receipt of that essential service on grounds including but not limited to lack of funding or lack of jurisdiction, or a jurisdictional dispute with another level of government or governmental department (the "**Essential Services Class**"),

(e) Excluded from the Essential Services Class are the claims of individuals who meet the definition of the Trout Child Class or the Jordan's Principle Class in the Final Settlement Agreement dated June 30, 2022 in *Moushoom*, if approved by the Federal Court, to the extent that those claims are captured by *Moushoom* against Canada only;

(iii) The estates of members of the Removed Child Class and the Essential Services Class who passed away while in the care of the Crown or any of its agents (the "**Estate Class**");

(iv) All parents and grandparents who were providing care to a member of the Removed Child Class or the Essential Services Class when that child was taken into out-of-home care or needed the essential service that was delayed, denied or faced a service gap (the "**Family Class**");

(i) "**Class Period**" means the period of time between January 1, 1992 and the date of certification of this action as a class proceeding or such other date as the Court may deem appropriate;

(j) "***CPA***" means the *Class Proceedings Act*, CCSM c C130;

(k) "**Crown**" means Canada and Manitoba, collectively;

(l) "**CSA Benefit**" mean payments made by the Minister of National Revenue, on behalf of Canada, to CFS Agencies that successfully

applied for those benefits for the care, maintenance, education, training or advancement of a specific child;

(m) "**FNCFS Program**" means the Federal Crown's First Nations Child and Family Services program;

(n) "**Indigenous**" includes First Nations, Inuit, and Métis;

(o) "**Indigenous CFS Agencies**" means First Nations Child and Family Services and Métis Child and Family Services Agencies established and mandated by the Southern First Nations Network of Care, the First Nations of Northern Manitoba Child and Family Services Authority, or the Métis Child and Family Services Authority, to provide care for Indigenous children who become wards of those agencies;

(p) "**Maintenance Costs**" refers to the costs required for the care of a child, including housing, food, clothing, education, training, extra-curricular activities and special needs;

(q) "**Manitoba**" means His Majesty the King in right of Manitoba named in this proceeding as The Government of Manitoba pursuant to section 10 of *The Proceedings Against the Crown Act*, C.C.S.M. c. P140, and all of its agents, including but not limited to:

(i) The former Department of Family Services, and Minister of Family Services;

(ii) The former Department of Family Services and Housing, and Minister of Family Services and Housing;

(iii) The former Department of Family Services and Consumer Affairs, and Minister of Family Services and Consumer Affairs;

(iv) The former Department of Family Services and Labour, and Minister of Family Services and Labour;

(v) The Department of Families, and Minister of Families;

(vi) The Director of Child Welfare;

(vii) Manitoba Health;

(r) "**Operating Costs**" refers to the costs of operating a CFS Agency, primarily for salaries, commercial leases, and training;

(s) "**Reserve**" has the same meaning as set out in section 2(1) of the *Indian Act*, RSC 1985, c I-5; and

II. RELIEF SOUGHT

2. The plaintiff claims, on her own behalf and on behalf of the Class:

(a) An order certifying this action as a class proceeding and appointing the plaintiff as the representative plaintiff under the *CPA*;

(b) A declaration that Canada and Manitoba have jointly and severally, and unjustifiably violated the rights of the Class under sections 7 and 15 of the *Charter*;

(c) A declaration that Canada and Manitoba have jointly and severally breached their fiduciary duties and duty of care to the Class, the

honour of the Crown, and the principles of reconciliation defined in section 2 of *The Path to Reconciliation Act*, CCSM c R30.5;

(d) Damages under section 24 of the *Charter* for breach of sections 7 and 15 of the *Charter*;

(e) For breach of fiduciary duty, equitable compensation, disgorgement or restitution in the amount that the Crown ought to have paid to avoid breaching its fiduciary duties;

(f) For negligence:

(i) Special damages in an amount to be particularized before trial;

(ii) General damages;

(iii) Aggravated damages; and

(iv) Exemplary and punitive damages;

(g) A reference to determine any individual issues after the determination of the common issues, pursuant to section 27(1) of the *CPA*;

(h) Costs of notice and distribution, pursuant to sections 19(3)(a), 24(1), and 33(6) of the *CPA*;

(i) Costs of this action on a full or substantial indemnity basis;

(j) Pre-judgment and post-judgment interest pursuant to sections 78-87 of *The Court of King's Bench Act*, CCSM c C280; and

(k) Such further and other relief as this court may deem just.

III. OVERVIEW

3. Since the late 19th century, the Crown has systemically discriminated against Indigenous children, youth, and families in Manitoba due to their race, nationality, and ethnicity. Indigenous people have been neglected for generations by the Crown, and a succession of governmental policies and operational decisions have forced Indigenous people to endure continuous tragedy and crisis. The Crown has continuously sought to separate Indigenous children from their parents, first through the Indian residential schools, then through child and family services. This claim covers one aspect of that cultural genocide: child and family services provided to Removed Child Class members in Manitoba since 1992.

4. Canada and Manitoba have each had a role in creating and funding that system, and each has a responsibility to those children. Having created many of the problems these children face, and having taken the Class into their care, they had constitutional, fiduciary, and common law duties to provide them with the basic necessities of life. At the very least, they had duties to the Class not to retraumatize those children and exacerbate the inter-generational problems they face. The Crown breached those duties.

5. Canada and Manitoba have knowingly underfunded child and family services for Removed Child Class members in Manitoba. This chronic underfunding, neglect, and outright avoidance of their constitutional and legal duties to Indigenous children, youth, and families has prevented child and family services from providing adequate

services and care. As a result, it has failed generations of Indigenous children and families who have come into contact with that system.

6. Canada and Manitoba have engaged in a discriminatory practice of instituting funding structures and related policies that prioritized and incentivized the removal of Indigenous children from their families and placing them in out-of-home care; while underfunding, or failing to fund, prevention and reunification services to assist families in caring for their children. Once those children were in the Crown's care, they were cut off from their families, communities, cultures, languages, and the value systems and spiritual beliefs derived therefrom. All of this followed the same racist assumptions that underlay residential schools and the Sixties Scoop, exacerbating intergenerational trauma.

7. Canada and Manitoba have also failed to take steps, or took steps that were inadequate, to address the chronic underfunding despite being aware of the harm and systemic discrimination that their actions perpetuated. They were aware as they commissioned persons and institutions to investigate these problems and identify solutions. Those persons and institutions made dozens of concrete recommendations, but the Crown chose not to follow them. In so doing, it consciously put the colonial aims of assimilation and cultural genocide above the lives of Indigenous children.

8. The discriminatory conduct alleged in this proposed Class Action is not the fault of individual child welfare workers in Manitoba, many of whom did the best they could with the little resources they had. Rather, it is the result of the Crown's funding

structures and related policies, which systemically deprived child welfare service providers of the necessary prevention, protection, and reunification services.

9. Further, the Crown deprived Indigenous children who needed essential health, social and other services and products of substantively equal access to such services and products. The Crown was repeatedly admonished by parliamentary and other public institutions that Indigenous children needing essential services face service gaps, delays and denials on grounds such as jurisdictional disputes between governments. Instead of addressing these chronic failures, Manitoba and Canada evaded responsibility, and each pointed to the other as the one with the obligation and jurisdiction to provide the essential services needed by Indigenous children in Manitoba.

10. This systemic underfunding was an extension of the Crown's historic apathy and racism towards Indigenous people in Manitoba. Although current underfunding and neglect may be, on their surface, less overtly racist than the policies of the past, they are no less discriminatory and destructive in their results.

IV. FACTS

A. <u>The Plaintiffs' Experience</u>

(i) Tracy Lynn McKenzie

11. Tracy Lynn McKenzie is a status First Nations person living in Winnipeg.

12. Ms. McKenzie's mother, uncle and aunt were Sixties Scoop survivors. Her grandparents were Indian residential school survivors.

13. Ms. McKenzie was born in Winnipeg in 1990 where she lived with her mother and siblings until the age of three. At that time, her infant sister passed away from sudden infant death syndrome. Her mother fell into a deep depression and grief for the loss of the child. Not receiving any support for herself personally or prevention services to care for her children, she took to drinking.

14. The Crown removed Ms. McKenzie from her family at the age of three; thus starting a brutal journey through over 30 placements that included, amongst others, safe houses, shelters, group homes, hotels, emergency shelters, and foster homes. As a young child in the child welfare system, Ms. McKenzie felt severed from her roots and community, and was often unable to communicate with the people in whose care she was placed. There was no stability or sense of connection, adding to her anxiety and trauma. Over these years in care, Ms. McKenzie lost all connection to her culture, her Indigenous traditions, values, and identity.

15. Ms. McKenzie has now been diagnosed with clinical depression and post-traumatic stress disorder.

16. She has three First Nations children: two boys and one girl. Both of her sons were permanently taken into care while she tired to cope with her own challenges. She received no prevention services that enabled her to keep and care for her children at home.

17. In 2015, her daughter was born while Ms. McKenzie was finally in rehab and able to slowly start turning her life around. She was able to return to school to finish grade 12 and start a college diploma in Child and Youth Care. She has since been

volunteering and then operating a harm reduction shelter to help other youth. She has reconnected with her family and is slowly finding a sense of community.

18. Her sons are still in government care, and she is fighting to be reunited with them.

(ii) Amber Lynn Fontaine

19. Amber Lynn Fontaine is an Ojibway person, and a status First Nations registered with Sagkeeng First Nation in Manitoba. She was born, grew up, and still lives in Manitoba. Ms. Fontaine was born July 14, 1987 in Pine Falls, Manitoba.

20. In February 1994, when Ms. Fontaine was six years old, she was apprehended from her family by a provincial child welfare agency in Manitoba. Ms. Fontaine was in care for the period between February 11, 1994 and September 27, 1994, before being returned to her family. During this time, Ms. Fontaine was placed in the care of three separate Caucasian families, none of whom included members of her Indigenous community.

21. Ms. Fontaine experienced intense anti-Indigenous racism while in care as well as general maltreatment, including the following:

(a) She was forced to attend church with a foster family, and was provided no opportunity to connect with Ojibway practices or spiritual teachings, as she had been exposed to when living at home with her own family;

(b) As a child, she had naturally occurring strands of white hair. She was very proud of it, as in her Ojibway culture white hair

is a sign of wisdom. When Ms. Fontaine shared this fact with a foster family, the foster mother sat her down and forcibly plucked the white hairs from her head, because that worldview was incompatible with the Christian culture of the foster family;

(c) At one point while in care, she was suspected to have head lice. As a first resort, her foster family immediately shaved her head rather than attempting to comb the lice out. She was sent to school with her shaved head and experienced bullying for that fact; and

(d) Owing to her dark skin, a foster father pejoratively nicknamed Ms. Fontaine “Blackie” and addressed her as such.

22. Ms. Fontaine now lives in Winnipeg, Manitoba and has a daughter of her own. She is working hard to connect with her Indigenous roots after a difficult youth in which she faced many barriers related to the intergenerational effects of residential schools and colonialism, exacerbated by her experiences during her time in care.

B. Manitoba and the Legacy of Family Separation

23. This claim relates to the failings of the child and family services system in Manitoba for Removed Child Class members and their families since 1992. However, the problems of that system are rooted in historical patterns of racist goals and assumptions towards Indigenous child and family services. Additionally, since

1951, services off Reserves have been connected to services on Reserves. Since 2005, they have been integrated into one system. Thus, this section traces the evolving history and structure of Indigenous child services on and off Reserves since their inception.

(i) Residential Schools

24. The Crown has a long history of systemic discrimination against Indigenous children.

25. In 1831, Canada opened its first church-run residential school. In the 1880s, the federal government began funding and sponsoring church run schools across the country. This system targeted Indigenous children and youth by separating them from their families in what the Truth and Reconciliation Commission of Canada ("**TRC**") called a "systemic, government-sponsored attempt to destroy Aboriginal cultures and languages and to assimilate Aboriginal peoples so that they no longer existed as distinct peoples." Between 1879 and 1946, residential schools served as the primary mechanism for Indigenous child welfare throughout the country.

26. The full horrors of these institutions are comprehensively described in the TRC's final report dated 2015, which concluded that:

(a) Roughly 150,000 Indigenous children were forced to attend residential schools, often taken forcibly from their parents and not allowed to return for years at a time;

(b) Residential schools were characterized by institutionalized neglect, physical and sexual abuse, and death rates so much higher than the

population average that children were buried in unmarked, mass graves;

(c) The fundamental premise behind residential schools was that Indigenous parents were unfit to be parents – an assumption that was demonstrably false; and

(d) The goal of residential schools was not to educate Indigenous children, but rather to break the links Indigenous children had to their families and cultures, which amounted to cultural genocide.

27. In 1920, the *Indian Act* mandated attendance at designated schools for all Indigenous children between the ages of 7 and 15 years old who were physically able to attend. In Manitoba, there were 17 residential schools operating between 1886 and 1980.

28. Until the early 1950s, Canada, through the Department of Indian Affairs, dealt with all child welfare interventions involving Indigenous families living on reserve. The designated Indian Agent or the Royal Canadian Mounted Police would intervene in emergency situations, and, in most cases, the removed child was sent to a residential school.

29. The last residential school in Manitoba closed in 1996. That did not prevent the Crown from perpetuating the same racist premise and causing the same types of traumas, this time under a new name: child and family services.

(ii) Sixties Scoop

30. Prior to 1951, neither Canada nor Manitoba provided significant child services to Indigenous children. Canada did not want to pay for child services, but it has exclusive constitutional jurisdiction over “Indians, and Lands reserved for the Indians”, so it was unclear if Manitoba had jurisdiction to do so. That jurisdictional issue was resolved in 1951, kicking off what is now known as the “**Sixties Scoop**”.

31. Between 1951 and 1991, Manitoba created child and family services programs. They were general programs theoretically serving all children, but in fact primarily targeting Removed Child Class members. Those programs removed more than 1 in 3 Indigenous children from their parents, placing 70% of them with non-Indigenous families. These programs proceeded on the same racist premise as residential schools: a belief that Indigenous parents were unfit to raise their own children. Again, the goal was to break the links Indigenous children had to their families and cultures. This was cultural genocide.

32. By 1981, 50% of children and youth placed up for adoption by child and family services were Indigenous. Manitoba also permitted out of province adoptions.

33. While the Sixties Scoop occurred across Canada, the situation in Manitoba was particularly egregious because thousands of Indigenous children were “exported” to the United States. In the 1980s, the public outcry over this practice of “exporting” children forced Manitoba to acknowledge that its child and family services were inadequate.

34. In response, Manitoba commissioned two reports: (1) the Kimelman Report published in 1985 (the "**Kimelman Report (1985)**"), and (2) the Aboriginal Justice Inquiry Report published in 1991 (the "**AJI Report (1991)**").

35. The Kimelman Report stemmed from a public inquiry led by Chief Judge Edwin C. Kimelman into the high rates of international adoptions in Manitoba. The Kimelman Report made several recommendations, including the need to recognize the importance of a child's connection to their Indigenous heritage and culture, and measures to prevent out of province adoptions.

36. The AJI Report was the result of the Aboriginal Justice Inquiry commenced in the aftermath of the death of Indigenous leader J. J. Harper and the Helen Betty Osborne case. The inquiry was initiated to examine the relationship between Indigenous peoples in Manitoba and the administration of justice. The AJI Report concluded, similar to the Kimelman Report, that the mainstream child and family services system in Manitoba had failed Indigenous peoples.

37. In response to the reports, Manitoba stopped "exporting" children, and made other cosmetic changes to the child and family services system, including the creation of seventeen Indigenous Agencies between 1981 and 1991, but did not resolve any of the problems discussed below.

C. Structure of Child and Family Services During the Class Period

(i) Pre-Devolution (1992 – 2006)

38. In 1991, Canada introduced the FNCFS Program, funding Indigenous child services on Reserves to supplement Manitoba services off Reserves.

39. Initially, the FNCFS Program was administered directly by Canada. Over the next decade, Canada gradually transferred responsibility for those services to Indigenous Agencies but continued providing funding and oversight.

40. Jurisdictional issues emerged between, on the one hand, Indigenous CFS Agencies funded by and reporting to Canada, and on the other hand, non-Indigenous Agencies funded by and reporting to Manitoba. Each one targeted Indigenous children, but they largely did not communicate with each other to ensure continuity of care when a child moved from one Agency to another. There were disputes about which CFS Agency, and so which level of government, should be financially responsible for each child, before providing services.

41. These jurisdictional issues had tragic consequences, the archetype of which was the story of Jordan River Anderson, particularized below.

42. In 1999, Manitoba announced its plan to implement certain recommendations in the AJI Report (1991), establishing an AJI Implementation Commission, which advised that the child welfare recommendations in the AJI report be addressed as a priority. This process came to be known as "**Devolution**".

43. Devolution involved the following:

(a) Creating 4 CFS Authorities, which were joint ventures of Canada and Manitoba, funded by both and reporting to both;

(b) Assigning each CFS Agency to 1 of the CFS Authorities; and

(c) With limited exceptions, allowing families to choose which CFS Authority they wanted to work with, after the initial intake step.

44. By October 2005, when Devolution was completed, more than three quarters of all children in care were Indigenous. Thus, 3 of the 4 CFS Authorities – the Northern Authority, the Southern Authority, and the Métis Authority (the "**Indigenous CFS Authorities**") – were responsible for administering and providing for the delivery of child and family services to Indigenous children, both on Reserves and off Reserves.

45. The General Authority was responsible for administering and providing for the delivery of child and family services to all persons not receiving services from another CFS Authority. This meant that the General Authority provided and provides services primarily to non-Indigenous children and families. Its board is appointed by the Minister of Families and its largest CFS Agencies are departments of the Government of Manitoba.

46. Staff from the CFS Agencies in the General Authority were transferred to the CFS Agencies in the 3 Indigenous CFS Authorities. This was a recognition that Indigenous children were heavily overrepresented in care and should have been a warning sign that the system was taking too many Indigenous children into care. Both Canada and Manitoba ignored this warning sign.

(ii) Post-Devolution (2006 – 2019)

47. Since Devolution, three Indigenous CFS Agencies – Animikii Ozoson Child and Family Services, Métis Child, Family and Community Services, and Michif Child and Family Services – have been funded solely by Manitoba.

48. All other Indigenous CFS Agencies are funded jointly by Canada and Manitoba, though Canada paid Indigenous CFS Agencies directly whereas Manitoba paid Indigenous CFS Authorities, who in turn paid Indigenous CFS Agencies.

49. In theory, Canada's contributions represent the share of Maintenance Costs and Operating Costs to provide services to Indigenous children who are eligible for status under the *Indian Act* and have at least one parent living on a Reserve when they are taken into care; Manitoba's contributions represent the share of Maintenance Costs and Operating Costs for providing services to all other Indigenous children in care. Even in theory, these amounts are a function of the number of children taken into care, such that CFS Agencies are incentivized to apprehend more children to increase their funding.

50. In practice, as described in more depth below, neither Canada nor Manitoba adequately funds prevention services, as opposed to child removals. Moreover, the overwhelming focus of the defendants' funding models has been on the number of children taken into care, rather than substantively equal and culturally appropriate prevention services. They do not fund all types of Maintenance Costs and Operating Costs necessary to providing the basic needs of Removed Child Class members and their families.

51. Manitoba does not even fully fund the categories of Maintenance Costs and Operating Costs that it recognizes and commits to funding:

(a) With respect to Maintenance Costs, it has refused 1.5% of Maintenance Cost reimbursement requests by Indigenous CFS

Agencies. Meanwhile, it has never refused a similar request from either of the two largest non-Indigenous CFS agencies.

(b) With respect to Operating Costs, it has occasionally clawed back 4% of Operating Costs because it assumes that Indigenous CFS Agencies have 4% vacancy rates for staff positions. The clawbacks applied even to Indigenous CFS Agencies that had vacancy rates far lower than 4%.

52. In September 2018, the Legislative Review Committee published the results of the child welfare legislative review, entitled *Manitoba, Report of the Legislative Review Committee, Transforming Child Welfare Legislation in Manitoba: Opportunities to Improve Outcomes for Children and Youth*. The report outlines various recommendations with respect to Indigenous child welfare, noting:

> The current funding structure for child welfare services provides incentives in the wrong places by providing funding based on the number of open cases and children in care.

53. The report goes on to recommend:

> a new funding structure that is focused on reunification [which] must be equitable (e.g., south versus north, reserve versus urban, Indigenous versus non-Indigenous, newcomer versus non-newcomer, and large versus small organizations). Equity in programming must be a core principle of service delivery.

(iii) SEF Formula (2019 – Present)

54. On April 1, 2019, Manitoba stopped calculating its contribution as a direct function of the number of children in care. Instead, it now provides a single block

grant to each CFS Authority, calculated based on the following algorithm (the single envelope funding formula, or "**SEF Formula**"):

(a) For each CFS Agency, Manitoba estimates its Maintenance Costs by multiplying the allowed Maintenance Costs per child per day by the number of children in care and days in care in the 2018/2019 fiscal year, less any amounts that Manitoba refuses to reimburse;

(b) For each CFS Agency, Manitoba estimates its Operating Costs;

(c) For each CFS Agency, Manitoba estimates the amount of CSA Benefits it would receive;

(d) For each CFS Agency, Manitoba adds (a) and (b) and subtracts (c); and

(e) Each CFS Authority gets the sum of the amounts Manitoba calculates at (d) for each of the CFS Agencies within the CFS Authority's purview.

55. At (a), the allowed Maintenance Costs per child per day are lower than the amounts paid for prisoners' food. They do not even include the cost of diapers. They have not been adjusted since 2012.

56. At (a), by using the same allowed Maintenance Cost per child per day for each CFS Agency, the SEF Formula exacerbates the disparity between Indigenous CFS Agencies and non-Indigenous CFS agencies. Indigenous CFS Agencies deal with more complicated cases on average, such that their average actual costs per child per day in care are higher than the average actual costs per child per day of

non-Indigenous CFS agencies. Giving the agencies the same amount means that Indigenous CFS Agencies systemically receive less than their needs.

57. At (a), by deducting amounts refused for reimbursement, the SEF Formula provides less funding than it knows Indigenous CFS Agencies incurred for Maintenance Costs. The deficiency is at least $20 million per year.

58. At (b), the SEF Formula's estimate of Operating Costs does not include salaries for necessary employees, such as foster care managers.

59. At (c) and (d), by deducting CSA Benefits – benefits granted by Canada only where Canada has determined that basic needs are not being met – the SEF Formula renders CSA Benefits worthless, guaranteeing that those basic needs continue to be unmet.

60. Finally, the SEF Formula does not include costs for prevention services, particularized below. Manitoba provides a separate stipend of $1,300 per family for prevention, but for reasons described in more depth below, that amount is woefully inadequate.

61. Indigenous children and youth continue to be overrepresented in the child welfare system in Manitoba at a staggering rate. In March 2021, Manitoba Families reported that there were 9,850 children in care, with 379 additional children in own-home placements and 24 children in non-paid care supervised adoption placements.

62. Of the 9,850 children in care, 91% are Indigenous, while Indigenous peoples make up only 18% of the province's population.

D. The Two Models of Child Services

63. Child welfare services are traditionally broken into two categories: “child removals” and “prevention”.

(a) “**Child removal**”: When the Crown takes a child away from their family and places them in out-of-home care. This measure is meant to be a last resort, as it traumatizes a child, uproots them from not only their family, but also their community and, often, their culture. This model of child welfare services is also called “protection services” or “apprehension”.

(b) “**Prevention**”: Anything short of the removal of a child from their home is called “prevention services” or “family enhancement”. This includes but is not limited to:

(i) Services targeted at the community to prevent hardship to children, such as a hotline for reporting sexual exploitation and human trafficking;

(ii) Public awareness campaigns to help parents identify potentially problematic circumstances, such as when a child may be malnourished;

(iii) Culturally-appropriate counselling, mental health services, and addiction services for both parents and children;

(iv) Services provided directly to parents to enabling them to better care for their children, such as parenting skills courses, daycare

services, or help finding employment, housing, or cultural or spiritual guidance; and

(v) Services provided directly to children, such as special needs education, fitness classes, language training, cultural supports, and mentorship.

64. Prevention services should always be the first preferred option because, amongst others:

(a) Prevention is cheaper and more effective than child removals, as it minimizes disruptions to family, community, and cultural ties for the children; and

(b) Excessive use of child removals, especially when applied to Indigenous children, is cruel, discriminatory, and inflicts lasting harm on the children and their families.

65. The removal of children under the guise of protection relies on the same assimilationist premise as residential schools: that Indigenous parents are unfit, and will always be unfit, to care for their children. Thus, Indigenous child services systems that rely too heavily on child removals perpetuate and exacerbate intergenerational trauma.

66. Both Canada and Manitoba have known that excessive use of child removals is discriminatory. In the CHRT Decision, the CHRT held that Canada's funding formula for Indigenous child services on Reserves and in the Yukon breached section 5 of the *Canadian Human Rights Act*, RSC 1985, c H-6 because it prioritized

child removals over prevention services. Specifically, the CHRT rested many of its findings on the fact that by funding protection services for child removals at cost while underfunding prevention services, the funding formula incentivized agencies to take children into care to provide them with services. As shown in the next section, the funding formulae of both Canada and Manitoba for Indigenous child and family services in Manitoba are rooted in the same discriminatory funding approach.

E. Funding Prioritized Apprehension

67. In the following sections, the plaintiff pleads against "the Crown", meaning both Canada and Manitoba. In the period before Devolution, those pleadings are made primarily against Manitoba with respect to the CFS Agencies it funded and operated that provided Indigenous child welfare services off Reserves. The pre-Devolution pleadings are also made against Canada for failing to fix or supplement the shortcomings of those CFS Agencies. In the period after Devolution, those pleadings are made against Canada and Manitoba jointly and severally with respect to all CFS Agencies that provided Indigenous child welfare services off Reserves.

(i) Insufficient and Discriminatory Funding

68. Manitoba and Canada have consistently failed to fund the basic necessities of children at actual, or even realistic, rates. Since CFS Agencies have statutory obligations to remove children, but no corresponding obligation to provide prevention services, CFS Agencies have had to prioritize removals over prevention services when allocating scarce funding.

69. The Crown currently provides a flat $1,300 stipend per family for prevention services. The rate does not change if the family has more children, or the family has

more complex issues. This flat stipend adversely impacts Indigenous children and families, who on average face higher levels of mental illness, addiction, and abuse, in large part due to the intergenerational trauma inflicted by the Crown on Indigenous peoples. Thus, a flat rate is not equitable to them, and results in substantive inequality between the average Indigenous child and the average non-Indigenous child.

70. For most of the Class Period, the Crown has funded Indigenous child services for Removed Child Class members and their families based on the number of children in care, rather than based on the actual cost of providing basic necessities. This was the very same type of funding structure that was found to be discriminatory in the CHRT Decision.

71. Due to both lack of funding and the funding structure, CFS Agencies have failed to provide prevention services to Indigenous families unless and until those families agree to “voluntarily” leave their children in care. This again was the same practice that was found to be discriminatory in the CHRT Decision.

72. Due to both lack of funding and the funding structure, the employees of CFS Agencies tasked with providing prevention services are also required to remove children. This breaks down trust with families seeking prevention services, undermining the effectiveness of those services.

73. Due to both lack of funding and the funding structure, to the extent that CFS Agencies provide prevention services, those services have not been culturally safe or responsive to the unique needs of Indigenous children.

74. Due to both lack of funding and the funding structure, there is even less prevention services available to Indigenous children in rural and remote areas where the cost of providing services is higher.

(ii) Failure to Fund Recommended Prevention Programs

75. Manitoba commissioned 11 reports from 1985 to 2021, which found that Indigenous child services required more funding for prevention programs such as:

(a) Medical diagnoses for Indigenous children, which are prerequisites to getting funding for other healthcare services;

(b) Addiction supports for Indigenous parents and children;

(c) Mental health supports, especially counselling after abuse and other forms of trauma for Indigenous children;

(d) Family counselling services, provided by family preservation units, for Indigenous parents and children;

(e) Day care and homemaker services for Indigenous parents, especially for those who have children with special needs;

(f) Opportunities for Indigenous children to participate in traditional cultural ceremonies, including but not limited to, smudging, sweat lodges, and healing camps;

(g) Opportunities for Indigenous children to learn Indigenous histories, languages, cultures, and healthcare practices; and

(h) Opportunities for Indigenous parents to learn about safe parenting.

76. Those reports further recommended that those resources be integrated into existing networks of service provisions; including public schools, hospitals, income and housing assistance programs, community centres, and various Indigenous-led organizations.

77. The Crown did not fix the shortcomings in its funding. In fact, as shown in the next section, the Crown was hostile to prevention services.

(iii) Failure to Expand Successful Prevention Programs

78. Certain CFS Agencies developed innovative prevention programs, including:

(a) A program by the Children's Aid Society of Eastern Manitoba that actively reached out to Indigenous communities to provide prevention services first, which reduced both the number of removed children and the overall cost of providing child services;

(b) A program by the Nisichawayasihk Cree Nation Family and Community Wellness Centre that provided a broad range of prevention services centered around the holistic teachings of the medicine wheel, which allowed Indigenous families to access child services, healthcare services, daycare services, parenting classes, early childhood education, youth groups, and mentorship with elders all in one place;

(c) A program run by the Nisichawayasihk Cree Nation Family and Community Wellness Centre that removed abusive Indigenous parents

from homes, rather than removing their children, allowing the children to retain ties with their communities and cultures; and

(d) StreetReach, Winnipeg Outreach Network under Tracia's Trust, which reduced sexual exploitation and the trafficking of Indigenous children.

79. Manitoba commissioned four reports that identified these programs as successes and recommended that they be supported and expanded. The Crown not only failed to support and expand these successful programs, but also gradually reduced the funding available for the first three.

80. Through all of its funding decisions, the Crown has demonstrated that it prioritizes child removals over prevention services for the Class, which is discriminatory.

F. Policies Prioritized Child Removals

81. In addition to the funding incentive, the Crown's formal and informal policies further prioritized child removals over prevention services.

(i) Birth Alerts

82. Until July 2020, the Crown issued birth alerts on "high risk" women – a term applied disproportionately to Indigenous women. These alerts informed the Crown when those women delivered babies. The Crown would then remove those children from those mothers immediately or shortly after their births, without fully assessing whether removing the infant was warranted. As a result, expecting Indigenous women have avoided going to hospitals in fear that their children will be removed.

(ii) Failure to Recognize Customary Care

83. In many Indigenous cultures, the raising of children is seen as a communal responsibility with the immediate and extended family carrying the primary responsibility. A child may eat at or sleep in any of their extended family's homes, and a non-parent may primarily oversee the child's development, but the child does not lose contact with their parents. This is called "custom adoption" or "Customary Care".

84. The Crown and its agents often fail to recognize Customary Care as a legitimate form of child-rearing. The Kimelman Report (1985) urged the Crown to recognize Customary Care, which it explained with the following stylized example based on numerous real-life incidents:

> For example, a Native mother may leave her infant child with a relative for an extended period of time with the full confidence that the child will have the same care, love, and security that she herself would give it. A worker who did not understand the Indian concept of the child as a member of the total community, rather than as the exclusive property of a single set of parents. might perceive that child to be abandoned when it is, in fact, residing within its own 'family'.

85. Despite having had 37 years to act on this recommendation and the repeated follow-up recommendations in reports that Manitoba commissioned, the Crown still does not provide employees of CFS Agencies comprehensive training on Customary Care.

86. Additionally, the definition of "family" in the CFS Act is still limited to a small set of close family, preventing Crown agents from recognizing certain Customary Caregivers. Manitoba's Legislative Review Committee recommended a broader

definition that included extended family and family of choice in 2018, but Manitoba did not fix the shortcoming.

87. Even when the Crown and its agents recognize Customary Care, they do not always consider the customary caregiver as the child's legal guardian. This can limit access to preventive services, which sometimes had tragic results. For example, this problem contributed to the death of Tina Fontaine in 2014.

(iii) Failure to Coordinate Services

88. The Crown has failed to coordinate prevention services not only with Indigenous communities, but also between Crown agents. As a result, even where prevention services were theoretically available, it was often not practically available to the Class.

89. This problem is especially pronounced in the provision of mental health services. Even where mental health counselling is funded, it is only available if the child is diagnosed with a mental illness and can reach the facility; but there is no funding for diagnosis or for transportation from a rural area to the facility. As explained in 2 reports commissioned by Manitoba:

> School systems are disconnected from mental health systems, which are disconnected from other mental health systems, which are disconnected from other mental health systems. Nobody seems to want to work with multiple systems to work with these kids to get them while they are young; prevent things from happening before they get older…
>
> [O]nce a First Nation child with medical needs comes into care, it often takes many hours and a great deal of patience on their part to try and determine which level of government is responsible for both the provision and

> payment of necessary services. This is both frustrating and time-consuming, and often results in the worker having less time to spend with other children on her/his caseload.

90. Through all of the policy decisions listed above, the Crown has demonstrated that it prioritized child removals over prevention services, which is discriminatory.

G. Culturally Unsafe Child Removals

91. The fact that the Crown has prioritized child removals over prevention services during the Class Period is not only discriminatory in and of itself, but also discriminatory because child removals—when deployed inappropriately and as a first resort—are culturally unsafe. Proceeding on the same racist assumptions behind residential schools and the Sixties Scoop, the Crown takes a disproportionate number of Indigenous children into care, and then cuts those children off from family, community, and cultural ties while they are in care. The goal is to break the links Indigenous children had to their families and cultures. Again, this is cultural genocide.

(i) Screening Process

92. When deciding whether an Indigenous child needs to be removed, the Crown utilizes discriminatory screening and risk assessment tools, does not sufficiently consider the importance of family ties, community ties, cultural ties, or the fact that the removal of the child perpetuates and exacerbates the intergenerational trauma inflicted on Indigenous communities by residential schools and the Sixties Scoop.

93. In particular, Customary Care is rarely considered before the child is removed. When deciding if the child's removal is warranted, the fact that the removal would

cut a child off from their community, culture, and language is irrelevant. In many cases, Indigenous children are removed merely on the basis of poverty or cultural bias.

(ii) Placement Process

94. Once the Crown determines that a child needs to be removed from home, it does not sufficiently consider the importance of family ties, community ties, or cultural ties in deciding with whom to place the child.

95. In particular, Indigenous children are often:

(a) Placed with non-family members, even though family members would be willing and able to help;

(b) Placed with non-Indigenous foster parents, even though Indigenous foster parents would be willing and able to help;

(c) Placed with foster parents who have negative attitudes towards Indigenous cultures, or who prevent the children from learning about Indigenous histories, cultures, or languages; and

(d) Separated from their Indigenous siblings, even though there are foster parents willing and able to take all of the siblings.

(iii) Services While in Care

96. Once an Indigenous child has been placed, the Crown does not provide the child with sufficient access to their family or community, or sufficient exposure to their Indigenous language and culture.

97. In particular, CFS Agencies are not able to consistently:

(a) Inform Indigenous children of the identities of their biological parents, and their parents' cultures, when those children ask for that information;

(b) Allow Indigenous children to have access to their parents; or

(c) Provide programs to children or foster parents to teach them about the child's Indigenous histories, cultures, and languages.

(iv) Reunification

98. Once an Indigenous child has been placed, the Crown does not provide the biological parents or the child a realistic opportunity for reunification.

99. Several barriers target cultural differences, imposing hurdles. A particularly insensitive hurdle is described in the Kimelman Report (1985):

> [I]n order to regain custody of her child, [an Indigenous mother must] establish her own independent domicile. This demand goes against the Native patterns of child care. In the Native tradition, the need of a young mother to be mothered herself is recognized. The grandparents and aunts and uncles expect the demands and the rewards of raising the new member of the family. To insist that the mother remove herself from the supports of her family when she needs them most is unrealistic and cruel.

100. To regain custody of their children, parents must also prove that their houses have a minimum square footage per child, private bedrooms for each child, and running water – requirements that cannot realistically be satisfied in multi-generational or extended Indigenous family homes.

101. In the rare cases where reunification occurs, the Crown takes it as an opportunity to cut off prevention services to parents and families.

(v) Cultural Training for Employees

102. All the problems discussed above are compounded by the fact that CFS Authorities and CFS Agencies during the Class period were not able to consistently:

(a) Require employees to get sensitivity, cultural awareness, anti-bias, or anti-racism training;

(b) Provide employees with training on residential schools, the Sixties Scoop, intergenerational trauma caused by both, and the fact that these can result in poverty, poor housing, substance abuse, and other factors that social workers consider when assessing child neglect; or

(c) Provide meaningful opportunities for Indigenous people to become employed as child service workers or advance within the organizations.

103. Through these failures, the Crown has not committed to fostering family, community, cultural, or linguistic ties for Indigenous children. In many cases, the Crown actively destroys those ties, on the basis of the same assumptions that led to residential schools, the Sixties Scoop, and the associated intergenerational trauma that put these children into the position where child removal was necessary in the first place.

H. Impacts on the Removed Child Class and Families

104. Indigenous peoples have suffered historic injustices because of, among other things, colonization, and dispossession of their lands, territories, and resources. Indigenous peoples and Indigenous children have been subject to systemic racism and discrimination, and they have been denied their inherent right to self-determination, including inherent rights with respect to their children. It is because of the unaddressed historic disadvantage and vulnerability of Indigenous peoples that Indigenous children are so vastly overrepresented in Manitoba's child welfare system.

105. The Crown's funding and policies have caused excessive removals of Removed Child Class members, making them 800 times more likely to be removed than non-Indigenous children in Manitoba. It then cut those unnecessarily removed children off from their families, communities, cultures, languages, and the value systems and spiritual beliefs derived therefrom.

106. Placing children in care increases their vulnerability. Children in care experience disadvantages that violate human dignity. For example:

(a) Indigenous children in care in Manitoba have limited adult supports, which is especially crucial as they move closer to aging out of care;

(b) Indigenous children in care in Manitoba did not receive adequate post-majority services to help them transition into adulthood;

(c) Children in care are more likely to experience poor education outcomes;

(d) Children in care are more likely to experience poverty, homelessness, and child trafficking; and

(e) Current and former children in care are over-represented in the criminal justice system.

107. The Crown's funding was not predictable, stable, sustainable, needs-based, or consistent with the principle of substantive equality such that it prevented, rather than secured, long-term positive outcomes for off-reserve Indigenous children, their families, and their communities.

108. In 2016, in response to a public outcry about Canada's treatment of Indigenous peoples, Canada established a Royal Commission into Missing and Murdered Indigenous Women and Girls. Its report, published in 2019 (the "**MMIWG Report (2019)**"), assessed the failings of Indigenous child services in depth. It found that:

> The Canadian state has used child welfare laws and agencies as a tool to oppress, displace, disrupt, and destroy Indigenous families, communities, and Nations. It is a tool in the genocide of Indigenous Peoples.
>
> The apprehension of a child from their mother is a form of violence against the child. … Apprehension disrupts the familial and cultural connections that are present in Indigenous communities, and, as such, it denies the child the safety and security of both.
>
> There is a direct link between current child welfare systems and the disappearances and murders of, and violence experienced by, Indigenous women, girls, and 2SLGBTQQIA people.
>
> The child welfare system fails to meet the needs of Indigenous children and youth and fails to protect them from abuse and exploitation. State failure to protect has

assisted human traffickers in targeting children and youth in care for sexual exploitation.

I. The Crown Knew About These Failures

109. All the issues raised above were repeatedly brought to the attention of the Crown through publicly funded reports commissioned by the Crown.

110. Canada commissioned three relevant reports, including the MMIWG Report (2019) discussed above. The other two are as follows.

(a) In 2000, Drs. Rose-Alma McDonald and Peter Ladd presented a report titled *First Nations Child and Family Services: Joint National Policy Review* to DIAND. It was the final summary of a joint DIAND and Assembly of First Nations review of the FNCFS Program, prompted by the numerous concerns raised by First Nations across Canada about the program and Indigenous child services generally. Among other conclusions, the report found that Canada provided inadequate funding for Indigenous child services, especially for prevention services.

(b) In 2008, the Auditor General of Canada, Sheila Fraser, presented a report titled *Report of the Auditor General of Canada to the House of Commons* to the House of Commons. Among other conclusions, the report found that Canada provided inadequate funding for Indigenous child services, especially for culturally appropriate services.

111. Additionally, Canada enacted the *An Act respecting First Nations, Inuit and Métis Children, Youth and Families*, SC 2019, c 24, in 2019 to ensure that

Indigenous child and family services met minimum standards. It then chose not to satisfy those minimum standards with respect to the Removed Child Class.

112. Manitoba commissioned 14 relevant reports, including the Kimelman Report (1985) and AJI Report (1991) discussed above. These reports warned about the dire situation of Indigenous children and families in the Manitoba child and family system:

(a) In 2006, the Auditor General of Manitoba, Carol Bellringer, presented a report titled *Audit of the Child and Family Services Division, Pre-Devolution Child in Care Processes and Practices* to the Legislative Assembly of Manitoba. Among other conclusions, the report found that Manitoba funded Indigenous child service as a function of the number of children in care, and denied Indigenous-led CFS Agencies funding for night workers, direct service workers, and family preservation units, unlike non-Indigenous-led CFS Agencies. Further, the report concluded that the child welfare model did not ensure fair and equitable funding to CFS agencies consistent with the expected service.

(b) In 2006, the Office of the Children's Advocate ("**OCA**"), an officer of the Legislative Assembly of Manitoba, published *"Honouring Their Spirits"*. This report arose from a public outcry after the death of an Indigenous child, Phoenix Sinclair, while she was in need of prevention and protection services, which she did not receive. In March 2006, the Minister of Family Services and Housing tasked the OCA with preparing this report. Among other conclusions, the report found that

Manitoba provided inadequate funding for Indigenous child services, especially for mental health.

(c) In 2006, the Manitoba Ombudsman presented a report titled *Strengthen the Commitment: An External Review of the Child Welfare System* to Manitoba. This report arose from the same public outcry after the death of Phoenix Sinclair. Among other conclusions, the report found that Manitoba's amount of funding, funding structure, legislation, and formal and informal policies all prioritized child removals over prevention services.

(d) In 2013, Commissioner Ted Hughes presented a report titled *The Legacy of Phoenix Sinclair: Achieving the Best for All Our Children* to Manitoba (the "**Hughes Report (2013)**"). This report also arose from the public outcry after the death of Phoenix Sinclair. Among other conclusions, the report found that Manitoba's amount of funding, funding structure, formal and informal policies, and cultural bias all prioritized protection services and removals over prevention services.

(e) In 2018, the Legislative Review Committee appointed by Manitoba presented a report titled *Opportunities to Improve Outcomes for Children and Youth* to Manitoba in response to decades of complaints by Indigenous leaders. This report was requested by the Families Minister in December 2017. Among other conclusions, the report found that Manitoba's "child welfare funding models can inadvertently incentivize child apprehensions", and "children who grow up in care

have significantly worse life outcomes as adults, compared to children who grow up in forever families".

(f) In 2018, VIRGO, a consultant hired by Manitoba, presented a report titled *Improving Access and Coordination of Mental Health and Addiction Services: A Provincial Strategy for All Manitobans* to Manitoba's Ministry of Health, Seniors and Active Living Logistics Committee. This report was commissioned by the Minister of Health, Seniors and Active Living Logistics Committee in response to public outcry over Manitoba's mental healthcare system. Among other conclusions, the report found that Manitoba provided inadequate funding for prevention services, did not train mental health workers on non-residential options, and did not satisfy Jordan's Principle.

(g) Between 2018 and 2021, the Manitoba Advocate for Children and Youth ("**MACY**"), a successor to the OCA, published *In Need of Protection: Angel's Story* (the "**Angel Report (2018)**"); *Documenting The Decline: The Dangerous Space Between Good Intentions and Meaningful Interventions* (the "**Circling Star Report (2018)**"); *A Place Where It Feels Like Home: The Story of Tina Fontaine* (the "**Fontaine Report (2019)**"); and *Still Waiting: Investigating Child Mistreatment after the Phoenix Sinclair Inquiry* (the "**Phoenix Report (2021)**"). These reports were produced as part of MACY's ongoing mandate to investigate the deaths of children in state care. Among other conclusions, these reports found that Manitoba's amount of funding, funding structure, legislation, formal and informal policies, and cultural

bias contributed to the deaths of Angel, Circling Star, Tina Fontaine, and many other Indigenous children in the state's care.

113. The funding structure of the child welfare system in Manitoba has long proven inadequate to secure the well-being and cultural continuity of Indigenous children, youth, and families. Instead of taking action to resolve the crisis that the defendants were well aware of, they chose instead to knowingly continue to underfund and under-provide child welfare and other essential services to Indigenous peoples.

J. Essential Services and Jordan's Principle

114. The Crown failed to provide substantively (or even formally) equal essential services to the Indigenous children in Manitoba.

115. Indigenous children in Manitoba have been denied the essential services that they needed, or received them after unreasonable, harmful delays. These Indigenous children also needed but did not receive essential services due to service gaps. Such essential services and products needed by the Essential Services Class Members included, but were not limited to, services relating to allied health, special education, infrastructure, medical equipment and supplies, medical transportation, medications, mental wellness, oral health, respite care, and vision care.

(i) History

116. For decades, the Crown knew or ought to have known that its funding formulas and policies as well as jurisdictional barriers systemically denied the Class essential services and products contrary to their constitutional equality rights. Prior to and over the course of the Class Period, independent reviews and parliamentary

reports identified these deficiencies and decried their devastating impact on Indigenous children and families. The House of Commons' Special Committee on the Disabled and the Handicapped issued a report in 1981 where it stated:

> **Jurisdictional Disputes Between Governments**
>
> The Federal Government delivers services to Status Indians on reserves, and is willing to pay for services for the first year for those individuals who leave the reserve. In recent times, because of greatly increased migration of Status Indians from the reserves to urban centres, a dispute has developed between the Federal and Provincial Governments regarding the responsibility for delivering services to those individuals who are away from the reserve for more than a year. Some provinces, for their part, are reluctant or unwilling to foot the bill for a service that they consider to be the responsibility of the Federal Government. … **The dispute over this matter of service to Status Indians away from the reserve leaves the Indians themselves confused since they are frequently left without any services while the two Governments are arguing over ultimate responsibility**. [emphasis added]

117. Twelve years later in 1993 when the *Charter* was in force and effect, the House of Commons' Standing Committee on Human Rights and the Status of Disabled Persons issued a follow-up report stating: "the situation of these [Indigenous] people has not improved during the past decade". The report further stated:

> Aboriginal people must not only contend with the fragmented nature of federal programs, but have to overcome the barriers imposed by federal/provincial jurisdictions. Like other disability issues, those related to Aboriginal people either cross federal/provincial boundaries or lie in an area of exclusive provincial responsibility.
>
> …
> **The federal/provincial jurisdictional logjam shows up most graphically in the provisions of health and social services to Aboriginal people…. 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**. [emphasis added]

118. The Committee made the following recommendation:

> The federal government should prepare, no later than 1 November 1993, a tripartite federal / provincial-territorial / band governmental action plan that will ensure ongoing consultation, co-operation and collaboration on all issues pertaining to Aboriginal people with disabilities. This action plan must contain specific agendas, realistic target dates and evaluation mechanisms. It should deal with existing or proposed transfers of the delivery of services to ensure that these transfers meet the needs of Aboriginal people with disabilities.

119. The Royal Commission on Aboriginal Peoples (1996) called on the Crown to resolve the "program and jurisdiction rigidities" plaguing the provision of services to the Class. The Royal Commission made the following recommendations, amongst others, in this respect:

> Governments recognize that the health of a people is a matter of vital concern to its life, welfare, identity and culture and is therefore a core area for the exercise of self-government by Aboriginal nations.
>
> Governments act promptly to
>
> (a) conclude agreements recognizing their respective jurisdictions in areas touching directly on Aboriginal health;
>
> (b) agree on appropriate arrangements for funding health services under Aboriginal jurisdiction; and
>
> (c) establish a framework, until institutions of Aboriginal self-government exist, whereby agencies mandated by Aboriginal governments or identified by Aboriginal organizations or communities can deliver health and social services operating under provincial or territorial jurisdiction.

120. In 2000, the Joint National Policy Review highlighted some of these issues and made the following recommendation:

> DIAND, Health Canada, the provinces/territories and First Nation agencies must give priority to clarifying jurisdiction and resourcing issues related to responsibility for programming and funding for children with complex needs such as handicapped children, children with emotional and/or medical needs. Services provided to these children must incorporate the importance of cultural heritage and identity.

121. In 2005, *Wen:De: We are Coming to the Light of Day* ("***Wen:De***") reported on a survey of FNCFS Program agencies regarding the jurisdictional and funding barriers faced by the Class. Survey responses "indicated that the 12 agencies had experienced 393 jurisdictional disputes this past year requiring an average of 54.25 person hours to resolve each incident".

122. According to *Wen:De*, First Nations children with special medical needs were apprehended from their homes to be primarily transferred to hospitals and institutions. Because of the government dysfunction particularized above, this extreme measure was often the only means of meeting their needs. Due to jurisdictional disputes, these First Nations children were not only taken out of their own homes but were often denied the chance to again live in a family environment. Inadequate funding and inter-jurisdictional dysfunction resulted in a situation where children with complex medical needs were either left to suffer on Reserve without the proper resources, or alternatively were institutionalized with little likelihood of ever having the opportunity to live in a home environment.

(ii) Jordan's Principle

123. *Wen:De* proposed a "Jordan's Principle" in honour of Jordan River Anderson, a child born to a family of the Norway House Cree Nation in 1999. Jordan had a serious medical condition, and due to lack of services on Reserve, Jordan's family

surrendered him to provincial care to get the medical treatment that he needed. After spending the first two years in a hospital, he could have gone into care at a specialized foster home close to his medical facilities in Winnipeg. However, for the next two years, Canada and Manitoba argued over who should pay for Jordan's foster home costs while Jordan remained in hospital. They were still arguing about jurisdiction when Jordan passed away in 2005, at the age of five, having spent his entire life in hospital.

124. *Wen:De* stated that despite section 15 of the *Charter* and international law requiring that First Nations children receive equal benefit under the law, the Crown's apathy and inaction denied them that protection:

> This continual jurisdictional wrangling results in program fragmentation, problems with coordinating programs and reporting mechanisms, gaps in service delivery - thereby leaving First Nations children to fall through the cracks. In short, neither the federal or provincial/territorial governments have effectively addressed the community needs of First Nations despite awareness of the impact of "policies of avoidance".
>
> … We recommend that a child first principle be adopted whereby the government (provincial or federal) who first receives a request for payment of services for a First Nations child will pay without disruption or delay when these services are otherwise available to non Aboriginal children in similar circumstances. The government then has the option of referring the matter to a jurisdictional dispute resolution process.
>
> … In Jordan's memory we recommend that this new child first approach to resolving jurisdictional disputes be called Jordan's Principle and be implemented without delay.

125. 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". This motion came about as a result of the Crown's persistent violation of the Class Members' equality rights described above. Motion 296 was not a statute that created statutory rights, but a motion affirming existing constitutional and quasi-constitutional equality rights to substantively equal access to essential services.

126. Canada and Manitoba did nothing to address these long-standing problems. They adopted a policy of neglect and avoidance.

127. In 2016, the CHRT Decision found that Canada had discriminated against First Nations children by not honouring Jordan's Principle. The reason why the CHRT Decision focussed on First Nations children as opposed to all Indigenous children was that the human rights complaint underlying that matter related to First Nations only. However, the same individual rights and state obligations applied and apply to Inuit and Métis individuals in Manitoba.

128. The CHRT held that the equality protections owed to First Nations under the rubric of Jordan's Principle include, amongst others, the following:

(a) The equality protections embedded in Jordan's Principle make it a child-first principle that applies equally to all First Nations children, whether resident on or off reserve. They are not limited to children with disabilities, or those with discrete short-term issues creating critical needs for health and social supports or affecting their activities of daily living.

(b) The equality protections embedded in Jordan's Principle address the needs of First Nations children by ensuring there are no gaps in government services to them. They can address, for example, but are not limited to, gaps in such services as mental health, special education, dental, physical therapy, speech therapy, medical equipment, and physiotherapy.

(c) When a government service, including a service assessment, is available to all other children, the government department of first contact should pay for that service to a First Nation child, without engaging in administrative case conferencing, policy review, service navigation or any other similar administrative procedure before the recommended service is approved and funding is provided. The government may only engage in clinical case conferencing with professionals with relevant competence and training before the recommended service is approved and funding is provided to the extent that such consultations are reasonably necessary to determine the requestor's clinical needs. Where professionals with relevant competence and training are already involved in a First Nation child's case, the government should consult those professionals and should only involve other professionals to the extent that those professionals already involved cannot provide the necessary clinical information. The government may also consult with the family, First Nation community or service providers to fund services. After the recommended service is approved and funding is provided, the government department of

first contact can seek reimbursement from another department/government.

(d) When a government service, including a service assessment, is not necessarily available to all non-First Nations children or is beyond the normative standard of care, the government department of first contact must still evaluate the individual needs of the First Nation child to determine if the requested service should be provided to ensure substantive equality in the provision of services to the First Nation child, to ensure culturally appropriate services to the child and/or to safeguard the best interests of the child.

(e) While the equality protections embedded in Jordan's Principle can apply to jurisdictional disputes between governments (*i.e.*, between federal, provincial or territorial governments) and to jurisdictional disputes between departments within the same government, a dispute amongst government departments or between governments is not a necessary requirement for the children's entitlement to substantively equal services.

129. 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 the Inuit children, although the Inuit have continued to suffer service gaps, denials and delays in essential services despite the Inuit Child First Initiative. Canada has done nothing to assist Métis children in this regard, unless they live on Reserve.

130. Manitoba has done nothing in this regard altogether. Bill 214, *The Jordan's Principle Implementation Act*, tabled in the 39th legislature, did not pass into law.

(iii) Scope of Essential Services Claims

131. *Moushoom* holds Canada accountable for its failure to provide essential services to First Nations children who had a confirmed need for an essential service but faced an unreasonable delay, denial or service gap between April 1, 1991 and November 2, 2017.

132. Canada has faced no accountability for discriminating against Inuit and Métis children in Manitoba who experienced the same deprivations of needed essential services. To the extent that Essential Services Class Members are not covered by *Moushoom*, the plaintiffs and the Essential Services Class Members advance those claims against Canada in this proceeding.

133. Manitoba has faced no accountability for the delays, denials and service gaps that all Indigenous children faced in Manitoba in the receipt of essential services during the Class Period, the most relevant example of whom is Jordan River Anderson. The plaintiffs and the Essential Services Class Members seek to hold Manitoba accountable for its joint and several liability to the Class.

134. Indigenous families in Manitoba have suffered the loss and witnessed the pain and suffering of their children without receiving the most basic child and family services and essential supports to assist them in caring for their children at home or to meet the needs of their children for essential services.

V. CAUSES OF ACTION

(i) Breach of Section 15 of the Charter

135. As described above, the Crown prioritized child removals over prevention services for off-Reserve Indigenous children and failed to provide culturally safe services to the Removed Child Class and their families. Further, the Crown deprived the Essential Services Class of substantively equal access to essential services that they needed.

136. The Crown's conduct created headwinds for the Class, and for Indigenous peoples generally. Among other adverse impacts:

(a) It exacerbated the overrepresentation of Indigenous children in care;

(b) It disproportionately separated the Family Class from their children;

(c) It disconnected the Class from their families, communities, cultures, languages, and the value systems and spiritual beliefs derived therefrom;

(d) It caused the Removed Child Class members to suffer violence, abuse, and exploitation, perpetuated the cultural genocide against Indigenous peoples, and inflicted further intergenerational trauma; and

(e) The Crown failed to provide substantively equal essential services (by, for example, narrowly defining and inadequately implementing Jordan's Principle for First Nations and by completely disregarding other Indigenous children), resulting in service gaps, delays and

denials in the provision of essential services and products to Indigenous children, causing them harm.

137. The Crown's conduct also constitutes an absence of accommodation for the Class for the problems inflicted on Indigenous peoples by the Crown, among other issues:

(a) Residential schools and the Sixties Scoop caused intergenerational trauma to Indigenous peoples, including the Class. Instead of remedying that problem and the resultant high levels of poverty, mental health issues, addictions, and abuse, the Crown retraumatized the Class by following the same assumptions, with the same effects, as those genocidal institutions.

(b) Residential schools and the Sixties Scoop were designed to destroy Indigenous cultures and languages, and the value systems and spiritual beliefs derived therefrom. Instead of remedying those problems and the resultant distress faced by the Class, the Crown doubled down on that destruction by preventing the Class from accessing their families, communities, cultures, and languages.

(c) The Crown effectively forced the Class into its care, purportedly on the basis that their parents were unable to provide them with the basic necessities of life – a situation partially caused by the Crown's historical actions. The Crown then failed to provide the Class with all the basic necessities of life.

138. The discriminatory impact on the Class members was and is apparent and immediate. As a result of the conduct particularized herein, the Crown differentiated adversely in the provision of child and family, and other essential services and products to the Class members compared to non-Indigenous children and families. The members of the Class were denied equal child and family services because of their Indigenous race, national or ethnic origin.

139. Throughout the Class Period, Indigenous children have been heavily overrepresented in Manitoba's child welfare system. Currently, they represent roughly 90% of all children in care. In effect, the Crown has created a system for Indigenous children – based on child removals as a first resort – and another system for non-Indigenous children. Thus, any shortcomings with the system as a whole creates headwinds and constitutes an absence of accommodation for the Class, and Indigenous peoples generally.

140. These headwinds and absence of accommodation disadvantaged and harmed the Class.

141. The relevant distinctions and adverse impacts are based on the enumerated grounds of race, ethnic origin, nationality and the analogous grounds of family status and Aboriginality-residence as it pertains to off Reserve band member status, in breach of section 15 of the *Charter*.

(ii) Breach of Section 7 of the Charter

142. As described above, the Crown did not provide adequate child services, and in particular prevention services, to Removed Child Class members in Manitoba

throughout the Class Period. As described in the Hughes Report (2013), the Angel Report (2018), the Circling Star Report (2018), the Fontaine Report (2019), the MMIWG Report (2019), and the Phoenix Report (2021), these failures directly or indirectly caused the deaths of Indigenous children off Reserves. Further, the delays, denials and service gaps in the provision of essential services to the Class caused the deaths of Indigenous children. This constituted a deprivation of life for the Estate Class, in breach of section 7 of the Charter.

143. The Crown prioritized child removals over prevention services for Removed Child Class members. As a result, Removed Child Class members were removed from their homes and placed into care of the state or its agents in circumstances when they did not have to be removed. This constituted a deprivation of liberty for the Removed Child Class, in breach of section 7 of the Charter.

144. The Crown did not provide the Class with access to essential services to heal physical health issues, mental health issues, addiction issues, and the psychological burden of intergenerational trauma. Denial of those services often ensured that the Class would be removed from their families. Once the Class was in the care of the Crown, the Crown prevented them from having access to their families, communities, cultures, languages, and the value systems and spiritual beliefs derived therefrom. All of that compounded the intergenerational trauma inflicted by residential schools and the Sixties Scoop and left permanent physical, emotional, spiritual, and psychological scars on the Class. The effects are properly characterized as violence against the Class and caused the Class to suffer abuse and exploitation. This constituted a deprivation of security of the person for the Removed Child Class, in breach of section 7 of the *Charter*.

145. The conduct described above during the Class Period relied on the same assumptions that underlay residential schools and the Sixties Scoop. It was therefore a continuation of that cultural genocide. The fact that this entire century-long endeavour was initially designed to, and ultimately had the effect of destroying or weakening Indigenous cultures constitutes a further deprivation of security of the person for the Class, in breach of section 7 of the *Charter*.

146. The above deprivations were not in accordance with the principles of fundamental justice.

(iii) Breach of Fiduciary Duty

147. Canada and Manitoba are in a fiduciary relationship with Indigenous peoples. That is founded both on Canada's fiduciary duty to all Indigenous peoples under section 91(24) of *The Constitution Act, 1867*, 30 & 31 Vict, c 3, and general principles of fiduciary law. The Crown controls all aspects of the lives of Indigenous children in need of prevention services, those in its care following the removal of a child, and those in need of essential services. The Crown's support for residential schools and the Sixties Scoop made Indigenous families even more dependent on it for child services.

148. That fiduciary duty required the Crown to:

(a) Provide the Removed Child Class with adequate access to prevention services;

(b) Not prioritize child removals over prevention services;

(c) Not provide culturally unsafe child removals; and

(d) Not cause service gaps, denials and delays in Indigenous children's access to essential services.

149. The circumstances of the Class gave rise to a fiduciary duty on Manitoba and Canada, both of whom were required to and undertook to provide adequate child and family services and other essential services to the Class. That fiduciary duty required them to:

(a) Not remove children of the Family Class if those children's needs could be met with prevention services;

(b) After removing a child, not create systemic barriers to family reunification; and

(c) Provide substantively equal access to essential services to those Indigenous who had a confirmed need for such services.

150. As particularized above, the defendants failed to comply with any of these obligations, and therefore breached their fiduciary duty to the Class.

(iv) Negligence

151. Canada and Manitoba had a duty of care to Indigenous children with the same contents as the Crown's fiduciary duty particularized above.

152. The standard of care required the Crown to remedy the problems repeatedly identified with the operation of the Manitoba child and family system, the operational inaccessibility of essential services, and the resulting adverse impact on the Class.

153. The Crown breached its duty of care by failing to address the issues that their conduct caused to the Class.

154. The reasonably foreseeable effect of these breaches included the effects on the Class described above.

(v) Punitive Damages

155. For decades, Canada and Manitoba commissioned and received reports showing that Indigenous child welfare services and the provision of essential services in Manitoba are discriminatory and cause harm and death to the Indigenous children. The defendants knew that these problems arose from racist assumptions such as those underlying residential schools and the Sixties Scoop. The Crown knew that failing to fix these problems would perpetuate the intergenerational trauma of those genocidal institutions and cause the Class to suffer violence, abuse, and exploitation. It knew that those solutions would be cheaper and more effective than inflicting harms on children and only then addressing those harms with child removals. Nevertheless, the Crown chose to not only ignore the recommendations outlined in the reports, but to create a system that failed to ensure that Indigenous children and families received substantive equal services to non-Indigenous children and families.

156. Indigenous children and families in Manitoba have experienced a policy of underfunding, neglect, and deprivation as a direct result of the actions undertaken by the Crown in relation to the provision of child welfare services and essential services and products. This has resulted in Indigenous children in Manitoba being deprived of adequate child welfare prevention and protection services, removed from

their homes in disproportionate numbers, cut off from familial and cultural connections, and denied services that were essential to their health and wellbeing. This warrants an award of punitive damages.

VI. STATUTES & INTERNATIONAL INSTRUMENTS TO BE RELIED UPON

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

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

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

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

(e) *The Court of King's Bench Act*, C.C.S.M. c. C280, s. 32

(f) *The Child and Family Services Act*, C.C.S.M. c. C80

(g) *The Child and Family Services Authorities Act*, C.C.S.M. c. C90

(h) *The Path to Reconciliation Act*, C.C.S.M. c. R30.5

(i) *The Proceedings Against the Crown Act*, C.C.S.M. c. P140

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

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

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

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

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

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

August 19, 2022

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