Court File No.:

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

BELLA RACHEL MCWATCH and CHRISTINE EUNICE EVELYN ANGNETSIAK

Plaintiffs

and

HIS MAJESTY THE KING IN RIGHT OF ONTARIO and ATTORNEY GENERAL OF CANADA

Defendants

Proceeding commenced under the *Class Proceedings Act, 1992*, SO 1992, c 6

STATEMENT OF CLAIM

TO THE DEFENDANTS

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

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

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.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date _____ Issued by _____
Local Registrar

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TO: His Majesty the King in right of Ontario
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CLAIM

I. OVERVIEW

1. Indigenous children and their families in Ontario bring this claim against the governments of Ontario and Canada, seeking justice for decades of discrimination and harm inflicted on them by a discriminatory child welfare system and the lack of other essential health and social services.

2. These governments perpetuated and worsened a dark history of cultural genocide aimed at Indigenous children and families in Ontario. This claim covers one aspect of that cultural genocide: the defendants' design and operation of child welfare services and other essential health and social services for Indigenous children in Ontario since 1992.

3. Ontario systemically prioritized the apprehension of Indigenous children from their families over culturally appropriate prevention services aimed at keeping Indigenous children within their homes and families. Ontario effected that prioritization through its discriminatory funding models and risk factors, which aggravated the disproportionate apprehension of Indigenous children.

4. Canada, for its part, left these Indigenous children and families to their fate at the hands of Ontario. Despite its constitutional, legal, and historic obligations to Indigenous peoples, Canada adopted a policy of abandonment, avoidance, and apathy. Canada arbitrarily restricted its funding of services to some subsets of Indigenous peoples (*e.g.*, First Nations children ordinarily resident on-Reserve, where Canada has also failed for decades to provide non-discriminatory services, although Canada's on-Reserve discrimination is not the primary subject of this action).

5. Canada and Ontario's conduct directly and foreseeably resulted in the dramatic overrepresentation of Indigenous children in state care in Ontario during the Class Period.

6. Canada and Ontario's discrimination did not stop at the child and family services program. During the Class Period, the defendants failed to comply with their constitutional and legal obligations to Indigenous children in Ontario who needed an essential service. The defendants gave such children the runaround with a variety of excuses, such as underfunding, lack of jurisdiction, or the existence of a jurisdictional dispute between Canada and Ontario or other governments or governmental departments. As a result, Indigenous children faced unreasonable delays, denials, and services gaps with respect to the essential services that they needed.

7. Canada and Ontario have been aware of the worsening chronic problems that have plagued the child and family services and the issues that Indigenous children faced in accessing essential services. Over the course of the Class Period, numerous independent reviews, parliamentary reports, and audits identified these deficiencies and described their increasingly devastating impact on Indigenous children and families.

8. Canada and Ontario's conduct violated Indigenous children and families' rights under the *Canadian Charter of Rights and Freedoms*, and breached these governments' fiduciary duties and duty of care owed to Indigenous children and families in Ontario.

9. The plaintiffs seek to end the systemic discrimination perpetrated by Canada and Ontario in the provision of child welfare services and other essential services to Indigenous children and their families, and seek to recover compensation for the harm caused to the victims.

II. DEFINED TERMS

10. In addition to any terms defined elsewhere herein, the following terms have the following meanings:

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

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

(ii) The former Indian and Northern Affairs Canada;

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

(iv) Indigenous Services Canada;

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

(vi) Health Canada;

(b) "**CAS"** means every "society" designated under either the CFS Act or the CYFS Act;

(a) "**CFS Act**" means the former *Child and Family Services Act*, RSO 1990, c C.11;

(b) "***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;

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

(d) "**CHRT Decision**" means the decision of the CHRT in 2016 CHRT 2 (in CHRT File number: T1340/7008), and subsequent CHRT decisions and orders related thereto;

(e) "**Class**" and "**Class Members**" means:

(i) First Nations not ordinarily resident on-Reserve, Inuit, and Métis individuals in Ontario who were taken into out-of-home care:

(1) during the Class Period; and

(2) while they were under the age of 18 (the "**Removed Child Class**" or "**Removed Child Class Members**");

(3) excluded from the Removed Child Class are the claims of individuals who meet the definition of the Removed Child Class certified by the Federal Court of Canada in *Moushoom et al v Canada*, 2021 FC 1225 (Federal Court File Nos. T-402-19 / T-141-20) ("***Moushoom***");

(ii) Indigenous individuals in Ontario who:

(1) during the Class Period;

(2) while they were under the age of 18;

(3) had a confirmed need for an essential service (inclusive of essential products); and

(4) 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 government, level of government, or another governmental department (the "**Essential Services Class**" or "**Essential Services Class Members**");

(5) excluded from the Essential Services Class, only with respect to Canada, are the claims of individuals who meet the definition of the Jordan's Class certified by the Federal Court in *Moushoom* 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) ("***Trout***"), to the extent that those claims are captured by *Moushoom* or *Trout*;

(iii) the caregiving parents or caregiving grandparents of all members of the Removed Child Class or the Essential Services Class (the "**Family Class**");

(f) "**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 determines to be appropriate;

(g) "***CPA***" means the *Class Proceedings Act, 1992*, SO 1992, c 6;

(h) "**CYFS Act**" means the *Child, Youth and Family Services Act, 2017*, SO 2017, c 14, Sch 1, which came into effect on April 30, 2018, replacing the CFS Act;

(i) "**CYFS Regulation**" means *General Matters under the Authority of the Minister*, O Reg 156/18;

(j) "**Impugned Conduct**" means the defendants' unconstitutional and unlawful conduct particularized in paragraphs 12 to 105;

(k) "**Indigenous**" means First Nations, Inuit, and Métis;

(l) "**Ministry**" means:

(i) The former Ministry of Community and Social Services and Minister of Community and Social Services;

(ii) The former Ministry of Children and Youth Services and Minister of Children and Youth Services; and

(iii) The Ministry of Children, Community and Social Services;

(m) "**Ontario**" means the government of Ontario named in this proceeding as the defendant, His Majesty the King in right of Ontario, pursuant to section 14 of the *Crown Liability and Proceedings Act,* 2019, SO 2019, c 7, Sched 17, and his agents, including but not limited to:

(i) The Ministry;

(ii) The Ministry of Health; and

(iii) The Ministers of both of those ministries;

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

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

III. RELIEF SOUGHT

11. The plaintiffs, on their own behalf and on behalf of the Class, claim:

(a) An order certifying this action as a class proceeding and appointing them as representative plaintiffs for the Class;

(b) A declaration that the Impugned Conduct breached section 15 of the *Charter* and that breach was not justified under section 1 of the *Charter*;

(c) A declaration that the Impugned Conduct breached section 7 of the *Charter*;

(d) In the alternative and only if the Court determines that any of the Impugned Conduct was permitted or mandated by a provision of the CFS Act, CYFS Act or any other Ontario statute or regulations, a declaration that any such provisions

permitting or mandating that Impugned Conduct unjustifiably infringe the rights of the Class under sections 7 and 15 of the *Charter* and are of no force and effect;

(e) Damages under section 24 of the *Charter*;

(f) Special, general, and aggravated damages against Ontario and Canada, jointly and severally, for breach of fiduciary duty, breach of the honour of the Crown, and negligence;

(g) Equitable compensation and disgorgement in the amount that the defendants ought to have spent to avoid breaching their fiduciary duty and the honour of the Crown;

(h) Punitive and exemplary damages;

(i) The costs of notice and distribution pursuant to sections 17(3)(a), 22(1), and 26(9) of the *CPA*;

(j) The costs of this proceeding on a substantial indemnity basis, plus applicable taxes;

(k) Pre- and post-judgment interest pursuant to sections 127-129 of the *Courts of Justice Act*, RSO 1990, c C.43; and

(l) Such further relief as this court may deem just.

IV. THE LEGACY OF CULTURAL GENOCIDE

12. This claim addresses harms caused by Canada and Ontario since 1992. To assess the nature of those harms, and understand how they exacerbated intergenerational trauma, it is necessary to place them in their historical context.

A. Residential Schools

13. Starting in the 19th Century, Canada systemically separated Indigenous children from their families and placed them in the so-called Indian residential schools. In Ontario, these institutions operated continuously between 1838 and 1991.

14. From 1920, the *Indian Act* required all Indigenous children between the ages of 7 and 15 to attend a designated school. Parents were given no say in the matter and were generally not allowed to see their children, because the entire residential school system was conceived as a means to break down familial, community, and cultural ties.

15. In June 2008, as part of a settlement of class proceedings relating to the Indian residential schools, Canada set up a commission of inquiry – the Truth and Reconciliation Commission ("**TRC**") – to hear from witnesses and report on the full horrors of residential schools. In brief, the TRC concluded that:

(a) Roughly 150,000 Indigenous children were forced to attend residential schools, many 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 Indigenous 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"; and

(e) Overall, residential schools were 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."

16. The persistence of these institutions for over a century has created intergenerational trauma for Indigenous families across Canada.

17. Ontario's last residential school closed in 1991. By that time, Canada and Ontario had devised a new way to take Indigenous children away from their families, communities, and cultures: child and family services, which is the subject of this litigation.

B. Sixties Scoop

18. Prior to 1951, neither Canada nor Ontario provided significant child and family services to Indigenous people. They used the Indian residential schools as a replacement for child and family

services. Canada did not want to pay for child and family services; but it has exclusive jurisdiction over "Indians, and Lands reserved for the Indians", so it was unclear if Ontario had jurisdiction to serve Indigenous children.

19. In 1951, Canada clarified that Ontario could provide child services to Indigenous children. At that time, Ontario already had child and family services programs applicable to non-Indigenous Ontarians. Therefore, Ontario extended those programs to Indigenous children.

20. By the 1970s, these programs and analogous programs across the country removed more than 1 in 3 Indigenous children from their families, placing approximately 70% of them in non-Indigenous households. This practice has become known as the "**Sixties Scoop**".

21. In Ontario, the number of Indigenous children removed from their families per year increased dramatically from 1956 through the 1970s.

22. The Sixties Scoop proceeded from the same racist, stereotypical premise as the Indian residential schools: that Indigenous parents were unfit to raise their children. It thus perpetuated intergenerational trauma. For example, in a decision reported at *Brown v. Canada (Attorney General)*, 2017 ONSC 251, the Ontario Superior Court of Justice found that "scooped" children "lost contact with their families. They lost their aboriginal language, culture and identity", all of which "resulted in psychiatric disorders, substance abuse, unemployment, violence and numerous suicides". That claim was only against Canada, and Canada was found liable for negligently causing these harms.

23. The period commonly known as the Sixties Scoop did not in fact end until 1991. Some class proceedings, including *Brown*, successfully advanced claims with respect to the Sixties Scoop. The time period covered by settlements that were eventually reached in those cases finished at the end of 1991. But the defendants' conduct persisted and continues to the present day.

V. THE STRUCTURE OF CHILD SERVICES DURING THE CLASS PERIOD

24. Since 1965, Ontario has administered Indigenous child and family services both on Reserves and off Reserves. This claim covers provincial child welfare in Ontario (*i.e.*, typically off-Reserve services) outside the Federal First Nations Child and Family Services Program (*i.e.*, typically on-Reserve services with respect to First Nations), but services both on Reserves and off Reserves are explained below given their overlap in Ontario. They are both subject to the same legislation and administered through the same ministry and by the same Minister.

25. Throughout the Class Period, Indigenous child services have been governed by one of two statutes: the CFS Act before April 30, 2018, and the CYFS Act thereafter.

26. Under these statutes, the Ministry is responsible for all aspects of child and family services. The Ministry, in turn, delegates authority to CASs, while retaining control and oversight.

27. Under the statutes, CASs must apprehend children if the statutory criteria are met. But the Ministry sets the criteria for apprehensions under the legislation, and procedures for how CASs should assess cases.

28. There are Indigenous-run CASs, several of which service Indigenous people both on and off Reserves.

29. The Ministry also provides and decides the funding to CASs. In turn, the Ministry gets reimbursed for most of the costs of providing child services on Reserves by Canada, pursuant to the *Memorandum of Agreement Respecting Welfare Programs for Indians between Canada and Ontario* (also known as the "1965 Agreement"). Indigenous-run CASs are systemically underfunded given the proportion of their service volume, and the added costs of service delivery to Indigenous Ontarians.

VI. ONTARIO PRIORITIZED APPREHENSION OVER PREVENTION

A. Apprehension vs. Prevention Services

30. Two different models of child and family services may apply with respect to a child whose circumstances implicate the involvement of a CAS.

31. "**Apprehension**", "**removal**" or "**protection services**" refers to taking a child away from their family and placing them in out-of-home care. Apprehension should always be a last resort, as it uproots the child from their family and community. If done in a culturally unsafe manner, apprehension can also cut children off from their cultures, languages, and the value systems and spiritual beliefs derived therefrom.

32. Overreliance on apprehension was at the heart of the Sixties Scoop. When applied to Indigenous children, apprehension perpetuates the intergenerational trauma inflicted by residential schools and the Sixties Scoop. It also relies on and perpetuates the racist premise that Indigenous parents are unfit to raise their own children.

33. "**Prevention**" refers to child and family services short of apprehension. Prevention aims to allow Indigenous caregivers to care for their children at home, and includes, but is not limited to:

(a) services provided to parents to:

(i) directly help them care for their children, such as daycare services, access to medical care, parenting skills courses, disability supports and training, and tools to identify warning signs of malnourishment, depression, suicidality, and substance abuse;

(ii) help them get into a better financial state so that they can better care for their children, such as help in finding employment or housing; and

(iii) help parents get into a better emotional and mental health state so that they can better care for their children, such as cultural or spiritual guidance, counselling, and addiction recovery services;

(b) services provided to children to:

(i) proactively build community and friendship ties, such as mentorship, opportunities to connect with elders, and training in the history, language, or culture of the cultural or racial group with which the child is affiliated; and

(ii) respond to trauma, such as counselling, mental health care, and addiction recovery services;

(c) services targeted at the community to prevent hardship to children, such as a hotline for reporting exploitation and human trafficking.

34. Prevention should always be prioritized over apprehension, for at least three reasons:

(a) Prevention is more effective in securing the best interests of children than apprehension;

(b) Apprehension of Indigenous children is discriminatory, perpetuating the inter-generational cycle of child removals and trauma, and the stereotype that Indigenous children are unfit to raise their own children; and

(c) Prevention, when done properly, has lower budgetary and societal costs than apprehension.

B. Ontario's Operation of Child Welfare Prioritized Apprehension of Indigenous Children

(i) Punishing Intergenerational Trauma

35. Prior to 1998, one of the main purported purposes of the CFS Act was to prioritize the "least restrictive or disruptive course of action". The CFS Act notionally forbade CASs from making temporary care agreements or residential placements, respectively, if there was a "less restrictive" alternative. The CFS Act required advisory committees to consider and document whether there was a "less restrictive" alternative, and if so, recommend that over a residential placement. These statutory requirements required CASs to consider providing prevention before

resorting to apprehension. These directives were rarely followed with respect to Indigenous children, but at least they were theoretically required.

36. In 1998, Ontario claimed that this language resulted in children "being kept in dangerous situations" – *i.e.*, living with their own families. Thus, Ontario passed Bill 73, which removed almost all of the above semblance of prioritizing prevention over apprehensions for the Class. As a result of Bill 73, apprehension or "protection" became part of the "paramount purpose" of the CFS Act, while consideration of the "least disruptive" course of action was relegated to secondary status. The statute expressly prioritized apprehension over prevention.

37. This statutory change was one part of a broader campaign to replace the "least restrictive" model of child services with a new "child safety focused model". This new model came with a new tool – the Ontario Risk Assessment Model (the "**Risk Factor Model**").

38. Ontario introduced the Risk Factor Model without consultation with Indigenous people in the province.

39. The Risk Factor Model formalized existing prejudices and stereotypes that adversely affect the Class because of their indigeneity. Embedded in the Risk Factor Model are numerous existing problematic assumptions. It requires CASs to look for "risk factors", but many of those risk factors are, in practice, proxies for poverty and the lasting effects of intergenerational trauma inflicted on Indigenous people by the Indian residential schools and the Sixties Scoop. The factors were as follows:

(a) **Overcrowding**: Ontario set minimum standards for the size of a home and the number of bedrooms per child. The standards disproportionately adversely impact Indigenous families, who are more likely to live in areas where they cannot be met because of, amongst others, elevated poverty levels, housing crises, and larger family sizes in Indigenous families. For example, in 2018, the rate of investigations with overcrowding as a risk factor per 1,000 children was 18.38 for Indigenous families compared to 3.35 for non-Indigenous families.

(b) **Lack of Money**: Of Indigenous families investigated by CASs, 18.3% ran out of money for food (compared to 5.6% of white families), 8.2% ran out of money for utilities (compared to 3.9% for white families), and 6.3% ran out of money for housing (compared to 4.2% for white families).

(c) **Being on Social Assistance**: In 1993, 50% of investigations were of people on social assistance, while the rate of social assistance in the general population was only 23%. This targets Indigenous families, which are more likely to be on social assistance. Specifically, in 2018, the percentage of investigations with "being on social assistance" as a risk factor was 48% for Indigenous families compared to 23% for non-Indigenous families.

(d) **Substance Abuse**: In 2008, 14% of substantiated investigations were of people suspected of alcohol abuse, and 12% were of people suspected of drug abuse. This targets Indigenous families, which are more likely to suffer from substance abuse

> as a result of, amongst others, intergenerational trauma from the Indian residential schools and the Sixties Scoop. Specifically, in 2018, the percentage of investigations with alcohol abuse as a risk factor was 22% for Indigenous families compared to 6% for non-Indigenous families; the percentage of investigations with drug abuse as a risk factor was 15% for Indigenous families compared to 7% for non-Indigenous families.

40. When these "risk factors" are present, CASs are far more likely to apprehend a child, even though these are precisely the types of circumstances that prevention is best at addressing.

41. The reference to substance abuse is especially pernicious given how CASs tested for it: They sent hair samples to Motherisk Laboratory at Toronto's Hospital for Sick Children. This was a notoriously unreliable pseudo-scientific practice that was much more likely to result in false findings of substance abuse for people with darker hair. Indigenous families represented 14.9% of people tested while being only 2.8% of Ontario's population.

42. In 2000, Ontario amended the CFS Act to formally facilitate a child's removal if there was only "a risk that the child is likely" to suffer harm, or based on a caregiver's "failure to adequately care for, provide for, supervise or protect the child" or "pattern of neglect in caring for, providing for, supervising or protecting the child".

43. The term "neglect" is charged in the Indigenous context, dripping with cultural misunderstanding and racism that significantly contributed to the Sixties Scoop:

(a) 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 one example of "**Customary Care**".

(b) CASs failed to properly recognize Customary Care as a legitimate form of child-rearing, and instead viewed it as a sign of neglect.

(c) In 2003, 40% of substantiated investigations of Indigenous children were for neglect, while the rate for non-Indigenous children was only 26%.

44. The above problems have persisted throughout the Class Period and have exacerbated the historical disadvantage of Indigenous children and families in Ontario.

45. Several Ontario government reports have raised the alarm about an Indigenous child welfare system perpetually in crisis, for example:

(a) In its 2016 report titled "Indigenous Justice: Examining the Over-Representation of Indigenous Children and Youth" (the "**LSUC Report**"), the Law Society of Upper Canada's Action Group on Access to Justice found the following common themes:

> System fails to account for and understand cultural differences; for example, procedures fail to consider the community's ability to care for the child…
>
> System is quick to apprehend children without any consideration of root causes for apprehension, such as mental health, addiction and

> poverty…
>
> Belief that more money is spent on apprehension and protection than prevention…
>
> Inadequate consideration of customary care options before apprehension—failure to prioritize 'family first'.

(b) In its 2018 report titled "Harmful Impacts: The Reliance on Hair Testing in Child Protection" (the "**Motherisk Report**"), the Motherisk Commission found:

> Participants told us that the underlying issue in many child protection cases before the court is poverty. They pointed out the double standard related to economic status and CAS involvement. Wealthier parents who use alcohol and drugs are much less likely to encounter CAS intervention…
>
> Failure on the part of the Laboratory to account for 'hair colour bias' may have exacerbated the representation of Indigenous and racialized communities among people affected by the Motherisk hair testing….
>
> The stigma around substance use means that it is often equated with inadequate parenting, particularly among people who are poor….
>
> Cutting hair strands is disrespectful of Indigenous spiritual beliefs and it shamed some of the people who were tested.

(c) In its 2018 report titled "Interrupted childhoods: Over-representation of Indigenous and Black children in Ontario child welfare" (the "**OHRC Report**"), the Ontario Human Rights Commission found:

> In Ontario, children who are the subject of a child welfare investigation whose families run out of money for food, housing or utilities face approximately double the odds of being placed into care…

> The OHRC is also concerned that negative assumptions about poverty, race and risk could lead to child welfare referrals…
>
> [S]tandards around the number of children allowed per bedroom are too onerous for Indigenous families living in poverty, and may not reflect a real risk to children. We were told that these standards can affect what is seen as acceptable in a home and contribute to CAS decisions to intervene.
>
> [T]ools and standards, coupled with individual workers' conscious or unconscious racial bias, may lead to incorrect assumptions about the level of risk children are exposed to….
>
> [R]acialized child welfare workers characterized the culture of the agencies they worked at as 'White-normed environments' where workplace racism exists.

(ii) Punishing the Use of Prevention Services

46. Section 15(1)(a) and (c) of the CFS Act and section 35(1)(a) and (c) of the CYFS Act require CASs to provide both apprehension and prevention services. Thus, the same people who provide prevention are also tasked with judging whether Indigenous parents who need or request prevention help are fit to raise their children. Additionally, they are allowed – even encouraged – to see requests for prevention as evidence that children need to be apprehended. Unsurprisingly, this causes many Indigenous parents to avoid seeking prevention services for fear of opening the door to their child being taken away by the state.

47. The situation is especially bad for substance abuse services. Parents are routinely forced to allow CASs to apprehend their children to access such services. The following illustrations show how Ontario systemically chastises Indigenous parents who are seeking prevention services to enable them to care for their children at home:

(a) CASs often refer Indigenous parents to residential treatment facilities, even when there are non-residential options available that would be more effective. Residential treatment facilities rarely allow parents to keep their children with them while they are in treatment, so referring parents to these facilities results in the child's removal.

(b) Section 29(6) of the CFS Act and section 75(6) of the CYFS Act place strict time limits on the length of a temporary care agreement. These time limits cannot be extended to match a recovery timeline. Thus, once a parent goes into residential treatment, it is almost inevitable that their child will be apprehended.

(iii) Limiting Customary Care

48. Although the CFS Act and the CYFS Act require CASs to consider Customary Care, the availability of Customary Care is considerably more limited in Ontario:

(a) Section 208 of the CFS Act limited availability of Customary Care to an "Indian or native child", excluding Inuit and Métis families and those without Indian status.

(b) Section 212 of the CFS Act allowed CASs to not provide any funding to customary caregivers. Due to funding constraints, CASs often chose not to provide any funding, thus placing customary caregivers in financial stress and making it more likely that the children would have to be removed and placed where funding was statutorily protected.

(c) Section 80(b) of the CYFS Act limits Customary Care to situations where the child cannot be returned to their parent, which differs from traditional Customary Care, where the parents are often still involved but in a limited capacity.

(d) According to the 2010 report of the Minister of Children and Youth Services titled "Report on the 2010 Review of the *Child and Family Services Act*" (the "**Minister's Report**"), non-Indigenous CFS Agencies only followed the statutory requirement to prepare a customary care plan 20% of the time. Staff providing Customary Care only followed statutory requirements for Indigenous children 57% of the time.

(e) Even when customary care is made available, the form of customary care is defined by the Ontario Permanency Funding Guidelines. These placements are more akin to Western adoption than to true traditional Customary Care. As described by the Ontario Association of Children's Aid Societies ("**OACAS**") in its 2010 report titled "Review of the *Child and Family Services Act*" (the "**OACAS Report**"):

> The Guidelines presuppose that a Children's Aid Society will oversee the placement to adulthood … there is a fundamental disconnect between the policy intent and the cultural practices of customary care.

49. In its 2014 report titled "A Collaborative Submission Regarding The *Child and Family Services Act*" (the "**MNO Report**"), the Métis Nation of Ontario explained:

> [A]s currently structured, the option of customary care is available only to children holding Indian status and living on–reserve. Even in this limited arena, customary care is used with shocking infrequency in practice...

> [K]inship care … is not funded, and funding of customary care … is at the discretion of the CAS, resulting in impediments to kinship and customary care arrangements in those communities and families which experience higher than average rates of poverty…
>
> In its current approach to kinship and customary care, it is unclear why the government would choose to fund the break-up of families over the maintenance of these ties when it would not incur an increase in cost relative to foster care and would protect the rights of the child to her or his family and cultural relationships, while providing an opportunity for better outcomes by maintaining family ties.

(iv) Failing to Train CAS Employees

50. Under the CFS Act and the CYFS Act, CAS employees are required to consider various factors and alternatives before apprehending an Indigenous child. The factors include the impact on an Indigenous child of taking them away from their families and cultures. The alternatives include Customary Care. If these statutory requirements were fulfilled, it would reduce the rate of apprehension.

51. In practice, according to the Minister's Report in 2010, CAS employees systemically ignore these statutory requirements. As the OHRC Report illustrated:

> Some CASs used terms that are outdated and may be perceived as offensive, such as 'Eskimo,' 'Mulatto,' 'Gypsy' and 'Native.' Some used the category 'Canadian' only for White children and not for Indigenous children or children of other racial backgrounds.

52. Despite the clear indication that CASs were not following the law and lack proper Indigenous cultural training, and despite having had more than a decade to address this problem, Ontario has not increased the level of training on these requirements.

(v) Exploiting Intergenerational Trauma

53. When arguing in court for apprehension, CASs often impugn Indigenous parents for having themselves been apprehended as a child. As exampled in the Motherisk Report:

> We read hundreds of affidavits from CASs that began with statements about how long the family had been involved with the CAS or about how the mother had herself been a Crown ward. These narratives immediately drew the court's attention to the family's history, suggesting that the mother did not have the background to be a good parent. They did not provide the context necessary to understand the difficulties the family was facing or the systemic issues that may have contributed to their problems.

54. In other words, CASs regularly suggest to the court that Ontario's actions caused so much harm to their former wards that their former wards cannot raise their own children, so the state must repeat those actions against their former wards' children. This is intergenerational trauma being used to justify more intergenerational trauma, with pernicious aggravating impact on Indigenous people in Ontario.

C. Ontario's Funding Models Prioritized Apprehension

(i) Using a Volume Structure for Funding

55. After continuing the same negligent funding approach that underlay the Sixties Scoop until 1998, Ontario formally introduced a "Funding Framework" pursuant to which the budgets of CASs would be a function of the number of children in care. This is precisely the type of Volume Structure for Funding used by Canada for First Nations ordinarily resident on a Reserve, which the CHRT has found to be discriminatory, as further explained below.

56. In 2005, Ontario replaced the Funding Framework with a new "Multi-Year Child Welfare Funding Model". The new funding model purported to give CASs more flexibility to shift costs between years, but retained the Volume Structure for Funding, a model that the CHRT has found to be discriminatory.

57. In 2009, Ontario established an independent Commission to Promote Sustainable Child Welfare (the "**CPSCW**"), with a mandate to review the child welfare system and make recommendations. The CPSCW produced three reports, all three of which found serious deficiencies in the treatment of Indigenous children. Two of those reports found that the Funding Framework forced CASs to prioritize apprehension over prevention:

(a) In 2011, the CPSCW published "A New Approach to Funding Child Welfare in Ontario" (the "**CPSCW Report (2011)**"). It found that, under the Funding Framework, CASs faced a "perverse incentive" to maximize apprehensions:

> Connection between funding and internal costs and activities creates 'perverse incentives' for CASs to maximize volumes of higher cost services (e.g. foster care) in order to ensure positioning for next year's funding.

(b) In 2012, the CPSCW published "Realizing a Sustainable Child Welfare System in Ontario" (the "**CPSCW Report (2012)**"), which came to a similar conclusion:

> This cost and activity-based funding model is weighted in favour of funding more expensive out-of-home care and hence, it inadvertently provides disincentives for agencies to engage in activities that support children at home and help preserve families.

58. In 2013, Ontario introduced another funding model that allocated funding half based on socio-economic statistics for the CAS's region, and half based on the number of children in care. The latter meant that the new funding model retained the Volume Structure for Funding that the CHRT has found to be discriminatory.

(ii) CHRT's Findings on Volume Structure for Funding

59. In the CHRT Decision, the CHRT held that Canada had discriminated against First Nations children on Reserves and in the Yukon, in breach of section 5 of the *Canadian Human Rights Act*, RSC 1985, c H-6. There were multiple breaches, but the following conclusions are especially relevant:

(a) Canada's funding formula for Indigenous child services on Reserves was a function of the number of children and days in care – in other words, the more children in care and the longer they spent in care, the more funding the agencies would receive (a "**Volume Structure for Funding**"); and

(b) Having a Volume Structure for Funding forced agencies to prioritize apprehension over prevention, which was discriminatory to Indigenous children as it exacerbated the legacy of residential schools and the Sixties Scoop.

(iii) Inadequate Funding

60. Indigenous families in Ontario are systemically investigated several times more frequently than non-Indigenous Ontarians. Throughout the Class Period, Ontario's funding has never been sufficient to provide the full range of prevention services that the Class has needed. The LSUC

Report and the Motherisk Report noted the woefully inadequate availability of prevention to address substance abuse, mental health, trauma counselling, finding employment and housing, medical and dental care, mentorship, community building, and tools to navigate the child services system.

61. In a 2010 report titled "2010-11 Pre-Budget Consultation" (the "**OACAS Submission**"), the OACAS explained:

> Much of CAS work is not funded in the funding model. … The 'children in care' caseload represents approximately 10% of cases served by CASs. The other 90% of cases … includes teaching parenting skills, reducing risks that lead to abuse and neglect, providing counseling and sometimes even material support to families…
>
> [M]ore children are protected, more children are kept with their families, but these outcomes are not fully funded.

62. Additionally, Ontario's funding model was insufficient to provide the statutorily required level of apprehension services. This forced CASs to divert money away from prevention – most of which is not statutorily mandated – towards apprehension. In short, whenever there is a budget shortfall for either type of service, prevention programming takes the biggest hit.

63. This was exacerbated by yet another funding model in 2013, which capped budget increases at 2% per year and 10% over 5 years. Additionally, in-year funding variations – which had accounted for 2% of total funding – were abolished. As a result, the budgets of almost half of CASs fell in 2013, and many CASs had to lay off staff providing prevention services to the Class.

64. By 2019, 42% of CASs were in deficit, which almost invariably meant that they had to divert resources away from prevention and towards apprehension. Ontario prevented CASs from retaining surpluses to pay off past deficits or prepare for future deficits, exacerbating these problems.

(iv) Not Considering the Higher Cost of Service

65. The cost to serve Indigenous families exceeds the cost to serve non-Indigenous Ontarians, in part due to the intergenerational trauma that the defendants inflicted on Indigenous communities through the Indian residential schools and the Sixties Scoop. As a result, the budget deficits faced by CASs serving Indigenous children are more acute.

66. In 2010, the CPSCW published "Towards Sustainable Child Welfare in Ontario" (the "**CPSCW Report (2010)**"), which noted that "Aboriginal children have different and complex needs" due to intergenerational trauma from residential schools and the Sixties Scoop. Some Indigenous people also face "additional complexities associated with remoteness". These differences "translate into very different service trends for Aboriginal child welfare compared to child welfare for the province's other children".

67. Similarly, the OACAS Submission explained:

> There are serious gaps for aboriginal children … Despite this awareness, agencies serving Aboriginal people and First Nations communities were most seriously affected, facing shortfalls of 9% to 30% of their budgets.
>
> As noted in many reports, the Ontario model is not sensitive to factors such as lack of services in urban and northern communities, cost of living, and cost of providing services in fly-in communities. Aboriginal CASs have repeatedly reported that they cannot provide the type of service needed nor

> can they meet the child protection standards set by Ontario. This issue was confirmed by the Federal Auditor General in her 2008 report.

68. The OACAS Submission recommended that Ontario "introduce a funding model which ensures that children in First Nations northern and remote communities and in urban centres can have the same child welfare services as those in mainstream society".

69. Similarly, the CPSCW Report (2011) recognized that providing services to Indigenous children was more expensive than providing equivalent services to non-Indigenous children. As a result, CASs serving higher proportions of Indigenous children faced worse budget constraints than those serving smaller proportions of Indigenous children. To remedy this, the CPSCW Report (2011) recommended that the funding formula be tied to the proportion of children served who were Indigenous: CASs serving higher proportions should receive more funding. Ontario did not follow these recommendations, as confirmed in the CPSCW Report (2012).

70. In 2015, the Auditor General of Ontario conducted an audit of the child welfare system (the "**AGO Report**") on the effectiveness of the current funding model. The AGO Report concluded that it does not provide funding "based on service needs". In particular, the share of Indigenous people in a region is "vastly understated", the "remoteness factor does not adequately capture the costs of delivering services in less dense, rural areas", and it does not consider "the occurrence of domestic violence, mental health issues and addictions, and the availability of services to address these issues".

D. Indigenous Children in Ontario Are Increasingly Overrepresented in Care

71. As a result of the issues listed above, Indigenous children are overrepresented in care, and the situation has been rapidly worsening during the Class Period. For example:

(a) In 2012, Indigenous children made up only 2% of the youth population but made up 15% of children in care.

(b) In 2016, Indigenous children made up only 3.4% of the youth population but made up 25.5% of children in care.

(c) In 2018, Indigenous children made up only 4.1% of the youth population but made up 30% of children in care.

72. In 2018, 6.11 Indigenous children were placed in foster care per 1,000 Indigenous children in the population. The comparable rate for non-Indigenous children was 93% lower at 0.40. In other words, Indigenous children are more than 15 times more likely to be placed in foster care than non-Indigenous children.

73. The causes of overrepresentation exist at all stages of the process:

(a) **Substantiation**: In 2008, for every 1,000 children within their purview, CASs found 60.91 complaints substantiated for Indigenous children, but only 14.86 substantiated for non-Indigenous children (75% lower).

(b) **Considering Apprehension**: In 2003, CASs considered apprehension for 25% of Indigenous children with substantiated claims, but only 12% of non-Indigenous children with substantiated claims (52% lower).

(c) **Apprehension**: In 2003, CASs apprehended 12% of Indigenous children with substantiated claims, but only 6% of non-Indigenous children with substantiated claims (50% lower).

74. All of the figures in this section are listed in the Ontario Incidence Study of Reported Child Abuse and Neglect (the "**Incidence Reports**"), which were published and brought to the defendants' attention every five years between 1993 and 2018.

VII. APPREHENSION WAS UNSAFE

75. Once Indigenous children were taken into care, they were routinely cut off from their families, communities, and cultures:

(a) When deciding where to place an Indigenous child, the CFSA Act and the CYFSA Act require CAS employees to consider cultural appropriateness. The Minister's Report found that they do not comply with this requirement 45% of the time.

(b) In 2008-2009, only 22% of Indigenous crown wards were placed with Indigenous families.

(c) Indigenous children have been routinely placed in separate homes from their siblings.

(d) Indigenous children, especially those in northern Ontario, are often placed in homes farther and farther from their communities.

(e) Before 2003, Canada provided some funding for band representatives to provide culturally appropriate services, but that funding fell short of the actual costs of providing those programs. In 2003, Canada stopped providing any funding.

(f) The LSUC Report, the Motherisk Report, and the OHRC Report all noted the need for more cultural services for Indigenous children. In particular, the LSUC Report recommended expanding the Heart Spirit Program. Ontario did not accept the recommendation.

(g) The OHRC Report added that many CFS Agencies do not even bother to ask what Indigenous communities children are affiliated with, making it impossible for them to provide those children with culturally appropriate services:

> Approximately half of CASs had so much missing or unknown data that it seriously compromises their ability to do a proper analysis of racial disparity across their decision-making process (*e.g.* from referrals to decisions to investigate to placing children into care)….
>
> It is difficult to see how CASs could adequately provide culturally-specific services and show that Indigenous and racialized children and youth are getting the services they are entitled to if they do not actively keep track of their clients' Indigenous identities or racial backgrounds.

(h) In 2017, the OACAS issued an official apology for this conduct, saying:

> Indigenous children continue to be overrepresented in our system.

> They continue to be placed in homes and institutions far from their families and communities. Even in 2017, these placements are not culturally safe. The children tell us this in their words and through their actions of suicide and self-harm.

76. The situation in for-profit group homes is not only culturally unsafe but also physically unsafe, commonly using physical restraints on Indigenous children:

(a) Between June 2020 and May 2021, there were over 1,000 reports of serious injuries and over 2,000 reports of physical restraints in Ontario group homes.

(b) Between January 2021 and May 2021, Enterphase, one of the largest group home providers, reported having 3.7 uses of physical restraints per bed.

VIII. ESSENTIAL SERVICES AND JORDAN'S PRINCIPLE

77. Separate and apart from the broken child and family program particularized above, the defendants failed to provide substantively (or even formally) equal essential services—with examples such as allied health, special education, infrastructure, medical equipment and supplies, medical transportation, medications, mental wellness, oral health, respite care, and vision care—to Indigenous children in Ontario.

78. Instead, Indigenous children in Ontario routinely faced unreasonable delays, denials or gaps in the receipt of such essential services.

(i) History

79. For decades, both defendants knew or ought to have known that their funding formulas as well as their approach to jurisdictional barriers systemically denied Indigenous children the

essential services they needed contrary to those children's constitutional equality and human 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.

80. 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]

81. 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]

82. 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.

83. The Royal Commission on Aboriginal Peoples (1996) called on governments, including the defendants, 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.

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

> [The former Department of Indian Affairs and Northern Development], 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.

85. In 2005, *Wen:De: We are Coming to the Light of Day* ("***Wen:De***") reported on a survey of First Nations Child and Family Services 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".

(ii) Jordan's Principle

86. *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 Manitoba in 1999. Jordan had a serious medical condition, and due to lack of services his 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 the hospital. They were still arguing about jurisdiction when Jordan passed away in 2005, at the age of five, having spent his entire life in the hospital.

87. *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 governments' 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.

88. 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 federal and provincial governments' 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.

89. Canada and Ontario did nothing to address these long-standing problems. They opted instead for neglect and avoidance.

90. In 2016, the CHRT Decision held that Canada had discriminated against First Nations children throughout Canada 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 Ontario.

91. The CHRT held that the equality protections owed 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 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.

92. 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 a Reserve.

93. Ontario has done nothing in this regard during the Class Period altogether.

(iii) Scope of Essential Services Claims

94. *Moushoom* and *Trout* hold 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.

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

96. Ontario has faced no accountability for the delays, denials and service gaps that Indigenous children faced in Ontario in the receipt of essential services during the Class Period. The plaintiffs and the Essential Services Class Members seek to hold Ontario accountable for its joint and several liability to the Class.

IX. THE EXPERIENCE OF THE PLAINTIFFS

A. Bella Rachel McWatch

97. The plaintiff, Bella McWatch, was born in 1993 in the Greater Toronto Area. Ms. McWatch's father is a member of the Cote First Nation. Her mother is a member of the Pic Mobert First Nation, but had to move away from her First Nation as a child to access essential health care services in Toronto.

98. In 1998, Ms. McWatch was apprehended from her mother in Toronto on account of neglect and placed in foster care in Beaverton, Ontario. Ms. McWatch and her family received no prevention services to allow them to avoid apprehension and stay together.

99. Ms. McWatch was in two foster homes with non-Indigenous families until she turned 17, at which point she returned to live with her mother.

100. During her time in foster care, Ms. McWatch suffered physical abuse. She started suffering from mental health issues as early as when she was 11 years old. She did not receive appropriate mental wellbeing support or counselling to help her cope with the trauma of being separated from her mother and suffering abuse.

B. Christine Eunice Evelyn Angnetsiak

101. The plaintiff, Christine Angnetsiak, is an Inuk, and member of the Pond Inlet Inuit in Nunavut. She was born on September 2, 2003 in Iqualuit, Nunavut.

102. On September 3, 2013, when she was 10 years old, she was apprehended from her mother in Ottawa, Ontario. She was first placed in an emergency foster home, and then a temporary foster home in Ottawa for 8 months. Ultimately, she was moved to a permanent foster home in Ottawa, where she has remained for the past 8 years. In each case, Ms. Angnetsiak was placed with non-Indigenous foster parents with no connection to her Indigenous community.

103. At no point did Ontario make any meaningful effort to place her in her Indigenous community, despite the fact that she had a sister and family there who had cared for her in the past.

For years she expressed the desire to return to her community, but CAS ignored her requests, claiming that she wanted to continue living in Ontario.

104. During her time in care, Ms. Angnetsiak's only opportunity to connect with her family and Indigenous community was with her mother, though she was only permitted to see her for a couple of hours a week with limited phone calls, which made it difficult to maintain the relationship. With no help from either defendant, she was later through her own efforts online able to make some limited connections with her family and community.

105. As a result of being apprehended and placed in care, Ms. Angnetsiak suffered harm. She was the victim of inappropriate behaviour by her temporary foster father before she was moved after her mother's boyfriend made a complaint. She has also experienced difficulty dealing with her CAS and her long-time social worker, who repeatedly disregarded her privacy and disclosed sensitive personal information to third parties and in public settings. Overall, the experience of being in care has taken a severe toll on her mental health and she has experienced loneliness and disconnection from her community. Her time in care has broken her connection to her family, with whom she used to be close.

106. The plaintiffs bring this action on their own behalf and on behalf of the Class.

X. THE DEFENDANTS' DUTIES TO THE CLASS

A. Constitutional Duties

107. Both defendants are responsible for Indigenous children and families in the Province of Ontario:

(a) Canada has jurisdiction over "Indians" under section 91(24) of *The Constitution Act, 1867*, 30 & 31 Vict, c 3, which imposes a constitutional duty to all Indigenous people.

(b) Ontario exercises jurisdiction over child services under section 92(13) of *The Constitution Act, 1867*. It designed, managed, operated, administered, and funded the Ministry, and exercises control over all CASs. Ontario controls all aspects of the lives of Indigenous children in its care following apprehension, and acts *in loco parentis* or pursuant to *parens patriae* powers.

108. Both defendants are bound by the *Charter*.

B. International Duties

109. Canada has ratified many treaties containing obligations relating to the rights of the Class, including, without limitation:

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

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

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

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

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

(f) the *International Covenant on Civil and Political Rights*.

110. These instruments codify the rights:

(a) of Indigenous children not to be separated from a parent through discrimination;

(b) of Indigenous children separated from their parents, to maintain personal relations and direct contact with their family on a regular basis;

(c) of Indigenous families and communities to retain shared responsibility for the upbringing of their children;

(d) of children to preserve their identity; and

(e) of all people not to be subjected to forced assimilation or destruction of culture.

111. These international duties clarify and inform the contents of the defendants' fiduciary duties and duty of care to the Class.

C. Statutory Duties

112. Recognizing that their actions have been discriminatory, Canada and Ontario have passed legislation undertaking to act in the best interests of the affected Indigenous children and to reduce the number of Indigenous children in care, and maintain family, community, and cultural ties:

(a) Canada and Ontario have undertaken to ensure that Indigenous children are not apprehended without considering the effect of such a decision on the child's connections with their family, community, and culture. This commitment is enshrined in section 10(3) of the *An Act respecting First Nations, Inuit and Métis*

children, youth and families, SC 2019, c 24 ("**Minimum Standards Act**") and sections 74(3)(b)-(c), 80, 179(2)(b)-(c), and 187(1) of the CYFS Act.

(b) Canada and Ontario have committed to prioritizing Customary Care over adoptions. Customary Care is a unique Indigenous institution where a community takes care of a child. This commitment is enshrined in section 16(2.1) of the Minimum Standards Act and section 80 of the CYFS Act.

(c) Canada and Ontario have committed to prioritizing placements with a parent first, then with another family member, then another person belonging to the same Indigenous group, then with another Indigenous person, and only then considering placements with non-Indigenous persons. This commitment is enshrined in section 16(1) of the Minimum Standards Act and section 101(5) of the CYFS Act.

(d) Canada has committed to ensuring that siblings who are apprehended are not separated. This is enshrined in section 16(2) of the Minimum Standards Act.

(e) Ontario has committed to providing Indigenous children in care with access to their culture, heritage, and traditions. This is enshrined in section 4(3), 4(5)(f)(ii), 6(1), and 6(2) of the CYFS Regulation.

(f) Canada has committed to ensuring that all services provided to Indigenous children in care take into account the child's culture. This is enshrined in section 11 of the Minimum Standards Act.

(g) Ontario has committed to ensuring that services provided to Indigenous children are, if possible, provided by Indigenous people or organizations with Indigenous representation. This is enshrined in sections 1(2)6 and 36(1) of the CYFS Act.

(h) Jordan's Principle informed the defendants' duty of care regarding essential services.

113. These statutory duties clarify and inform the contents of the defendants' fiduciary duties and duty of care to the Class, further described below.

D. Fiduciary Duties

114. Both defendant crowns are in a continuing fiduciary relationship with the Class.

115. Furthermore, the circumstances of this case gave rise to a fiduciary duty on both defendants with respect to the Class.

116. The defendants control all aspects of the lives of Indigenous children in their care following apprehension as well as the lives of Indigenous children who need other essential services. The defendants' support for the Indian residential schools and the Sixties Scoop made Indigenous families even more dependent on these governments for child and family, and other essential services.

117. The Class was at all times vulnerable to the defendants' exercise, or failure to exercise, their discretion and the power that the defendants had over them as fiduciaries.

118. Both defendants specifically undertook—amongst others, through the statutory, international and other documents particularized herein—to act in the best interests of the Class, particularly the Indigenous children.

119. Furthermore, the honour of the Crown is at stake in every dealing with Indigenous peoples. It requires that the defendants act honourably and in good faith in each such dealing. The honour of the Crown and the crown's fiduciary duties owed to Indigenous peoples are not in competition. The court may find that Canada and Ontario simultaneously breached the honour of the Crown and their respective fiduciary obligations in their dealings with the Class.

E. Duty of Care

120. Canada and Ontario had the responsibility of designing, funding and overseeing the services at issue during the Class Period. Under the defendants' 1965 Agreement, Ontario was the party who designed, managed, operated, administered, and funded the province's child welfare system, and was responsible for the development of policies, procedures, programs, operations, and management relating to the provision of Indigenous child and family services in the Province of Ontario.

121. Throughout the Class Period, the defendants owed a common law duty of care to the plaintiffs and the other Class Members to take steps to sufficiently fund and operate Indigenous child and family services and the operational and other costs of child and family and other essential services, including by ensuring that reasonable appropriate preventative measures, child and

family services, and other essential services were made available and provided to the Class Members.

122. **Ontario:** The CFS Act, the CYFS Act and the 1965 Agreement, amongst others, imposed a statutory duty of care on Ontario with respect to the Class. The CYFS Act codifies the duty that "all services to First Nations, Inuit and Métis children and young persons and their families should be provided in a manner that recognizes their cultures, heritages, traditions, connection to their communities, and the concept of the extended family."

123. Ontario's duty is, amongst others, "to promote the best interests, protection and well being of children". This duty permeates throughout the CFS Act and the CYFS Act and underpins Ontario's duty of care to the Class. Similarly, consistent with the duties underlying Jordan's Principle, Ontario was required to adopt a child-first approach and not avoid its responsibilities with respect to the essential services needed by Indigenous children. This is a high standard, requiring Ontario to exercise a degree of care akin to a careful parent.

124. In addition, a common law duty of care arises by virtue of the proximity of Ontario to the Class. The Class Members' indigeneity and the defendants' obligations in that respect specifically inform this proximity. Ontario has directly undertaken to administer child and family services for the Class. This relationship is paternalistic and involves significant and direct interference in the lives of the Class Members.

125. It is reasonably foreseeable that, as a result of Ontario's operation of Indigenous child and family services, harm might come to both the Indigenous children and their families. It is further reasonable for the Class to rely on Ontario to execute this duty with a considerable level of care.

126. Regardless of the source, the content of Ontario's duty may be informed by the provisions in the CFS Act and the CYFS Act, which reaffirm and list a variety of existing principles that must inform Ontario's administration of child and family services. These duties can be broadly summarized as requiring Ontario to:

(a) Provide the Class with substantively equal child and family services respectful of their indigeneity;

(b) Recognizes Indigenous cultures, heritages, traditions, connection to community, and the concept of the extended family;

(c) Ensure that Indigenous families and communities are involved in the upbringing of First Nations children living off-Reserve, and Métis, and Inuit children, and that those children were able to remain in their communities and to learn about and practice their traditions, culture, and language; and

(d) Ensure that Indigenous children receive their needed essential services.

127. **Canada:** Canada owes a duty of care to the Class in funding and otherwise administering child and family services and other essential services. This duty arises out of Canada's obligations

under the 1965 Agreement as well as the unique statutory and constitutional relationship detailed above, which creates a close and trust-like proximity between Canada and Indigenous peoples.

128. It is reasonably foreseeable that Canada's failure to take reasonable care might harm the Class. It is also reasonably foreseeable that Canada's inaction and avoidance would harm the Class.

129. Canada was required to fund provincial child and family services and other essential services in a manner that: (i) does not discriminate against Indigenous children; and (ii) prioritizes support for and preservation of Indigenous traditions, culture and language.

130. Ontario's discrimination and problematic operation of child welfare did not absolve Canada of the standard of care that it was required to meet.

131. In summary, the following, amongst others, underlay and informed the defendants' duty of care with respect to the Class:

(a) The 1965 Agreement and the defendants' arrangement thereunder with respect to the Class; and

(b) The defendants' other duties to the Class, including their historical, constitutional, statutory, fiduciary and international duties towards Indigenous people in Ontario.

XI. CAUSES OF ACTION

A. The Impugned Conduct Breached Section 15 of the *Charter*

132. During the Class Period, the defendants breached the section 15(1) rights of the plaintiffs and other Class Members under the *Charter* and denied the Class substantively equal protection and equal benefit of the law.

133. The Impugned Conduct discriminated against the plaintiffs and other Class Members solely because of their status as Indigenous people.

134. The defendants' Impugned Conduct created and contributed to a disproportionate impact on the Class because of the Class's indigeneity compared to non-Indigenous Canadians.

135. The historical and social context of the Class, including the legacies of cultural genocide through the Indian residential schools, the Sixties Scoop, and the child welfare system particularized above, made the Class acutely vulnerable to the Impugned Conduct and its adverse impact on Indigenous people.

136. The disproportionate adverse impact of the Impugned Conduct reinforced, perpetuated, and exacerbated the Class's disadvantage as Indigenous people in Canada.

137. As a result of the Impugned Conduct, Canada and Ontario perpetuated and aggravated the overrepresentation of Indigenous children in the child welfare system in Ontario, and delayed or denied them other life-saving essential services, further worsening their historical disadvantage.

138. The Impugned Conduct has been rooted in the same stigmatization and stereotyping against Indigenous parents and children, which underlay the residential schools and the Sixties Scoop: *i.e.*, the false and racist bias that Indigenous people are incapable of properly caring for their children simply because they are Indigenous.

139. To the extent that the Impugned Conduct may be found to be permitted or mandared by any provision(s) of the CFS Act, the CYFS Act, or any other Ontario statute or regulations, such provision(s) infringes the Class Members' rights under section 15 for the reasons particularized herein.

140. The Impugned Conduct cannot be justified under section 1 of the *Charter*. The Impugned Conduct has had no pressing or substantial objective. It has worked counter to and frustrated Ontario's professed objectives in the provision of child welfare and other essential services to the Class, *i.e.*, to act in the best interests of the Indigenous children and their families.

141. Canada has simply chosen to abandon the Class Members to Ontario's discrimination, even though the Class is constitutionally within Canada's jurisdiction and sphere of responsibility. In doing so, Canada has also disregarded international treaties it has signed, which require it to act in the best interests of Indigenous children and families.

142. Nor does any rational connection exist between the Impugned Conduct toward the Class on the one hand and their objectives in this respect. The defendants' conduct has disproportionately disadvantaged the Class and has not advanced any of the defendants' professed objectives regarding the Class. There has been no clear legislative goal to be attained by the Impugned

Conduct, which has been contrary to the defendants' constitutional and fiduciary obligations to the Class Members. Therefore, the Impugned Conduct falls outside a range of reasonable alternatives available to Ontario and Canada. Only one alternative has been constitutionally available to the defendants: to provide non-discriminatory child welfare and other essential services to Class Members consistent with their historic, constitutional, and statutory obligations to Indigenous children and their families. The defendants failed to do that.

143. Further, the defendants' conduct has detrimentally impacted the *Charter*-protected equality rights of the Class Members, many of whom are or were children and were affected because they were children. Children who are denied essential services, who receive deficient care, and/or who are separated from their families suffer detrimental effects often far more serious and lasting than adults. Similarly, family members of apprehended children and of the children who face delays, denials or service gaps with respect to essential services suffer serious and lasting harm. The defendants' conduct has had a disproportionate effect on the equality rights of the Class.

B. The Impugned Conduct Breached Section 7 of the *Charter*

144. The defendants did not provide adequate child welfare services, and in particular prevention services, to Removed Child Class Members in Ontario throughout the Class Period.

145. Ontario prioritized apprehension over prevention services for Removed Child Class Members in circumstances when Indigenous children did not have to be removed from their families. Once the Class Members were in state care, the defendants systemically obstructed their access to their families, communities, cultures, languages, and the value systems and spiritual

beliefs derived therefrom. As a result, the Impugned Conduct aggravated the intergenerational trauma inflicted by the Indian residential schools and the Sixties Scoop and left permanent physical, emotional, spiritual, and psychological scars on the Class.

146. Nor did the defendants adequately provide other services and products that were essential to the life and wellbeing of the Essential Services Class; the defendants instead subjected Class Members to undue delays, denials and service gaps. The defendants 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.

147. Compounding the harm caused to the Class, the lack of those essential services often ensured that the Class would be removed from their families. The effects are properly characterized as violence against the Class and caused the Class to suffer abuse and exploitation.

148. In breach of section 7 of the *Charter*, the Impugned Conduct directly or indirectly jeopardized the life, liberty, and security of the person of the Class Members, and in some instances caused the death of Indigenous children in Ontario.

149. The Impugned Conduct 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 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*.

150. To the extent that the Impugned Conduct may be found to be permitted or mandared by any provision(s) of the CFS Act, the CYFS Act, or any other Ontario statute or regulations, such provision(s) infringes the Class Members' rights under section 7 for the reasons particularized herein.

151. None of the above deprivation was in a manner that accords with the principles of fundamental justice.

152. The Impugned Conduct was arbitrary and overbroad with respect to the Class: Ontario's purpose of prioritizing apprehensions over culturally-safe prevention services arbitrarily and overbroadly singled out Indigenous children and families and disproportionately impacted their life, freedom and security of the person.

153. The Impugned Conduct is overbroad because the limits imposed by the Impugned Conduct on Indigenous children and families in Ontario do not have a rational connection to the defendants' stated purposes or their duties to the Class as particularized above.

154. The Impugned Conduct is arbitrary because the effect of the Impugned Conduct on the Class has no connection with the defendants' stated purposes and obligations towards Indigenous children and families in Ontario.

C. Breach of Duty of Care and Systemic Negligence

155. To the extent that the Impugned Conduct may relate to matters of policy, the plaintiffs limit their negligence claim to operational aspects of the Impugned Conduct.

(i) Ontario's Negligence

156. Through the Impugned Conduct, Ontario breached its duty of care to the Class, including by:

(a) Providing discriminatorily deficient services to the Class;

(b) Underfunding child and family services to the Class;

(c) Failing to provide appropriate prevention services to meet legislated requirements;

(d) Prioritizing apprehensions over culturally appropriate prevention services;

(e) Failing to properly train staff in Indigenous culture, and in particular on custom adoptions and Customary Care; and

(f) Failing to provide essential services to Indigenous children free of delays, denials, and service gaps.

(ii) Canada's Negligence

157. Through the Impugned Conduct, Canada breached its duty of care to the Class, including by:

(a) Completely abandoning the Class to their fate at the hands of Ontario;

(b) Failing to cure the discriminatory deficiencies in Ontario's child and family services to the Class even years after Canada had started making efforts to do so for

Indigenous child services on-Reserve, contrary to repeated reports and judicial findings;

(c) Failing to fund non-discriminatory Indigenous child and family services off-Reserve; and

(d) Failing to provide substantively equal access to essential services.

158. The reasonably foreseeable effects of the defendants' negligence include the harm and damages particularized below.

D. Breach of Fiduciary Duty

(i) Ontario's breaches of its fiduciary duties to the Class

159. Ontario's fiduciary duty required it to act loyally and in the best interests of the Class by, amongst others:

(a) respecting the Class Members' constitutional substantive equality rights as Indigenous people;

(b) not funding Indigenous child services off-Reserve substantively or formally at a level lower than it funded non-Indigenous child services, after accounting for the fact that serving the Class involves higher costs due in part to the intergenerational trauma caused through Indian residential schools and the Sixties Scoop, remoteness and Indigenous cultural differences;

(c) prioritizing access to adequate prevention services;

(d) not structuring its funding to require service providers to prioritize apprehension over preventive services; and

(e) not causing delays, denials or service gaps in the Essential Service Class Members' access to essential services.

160. The Class was adversely affected by Ontario's exercise of discretion and control. The Family Class's right to take care of their own children was undermined by Ontario's exercise of discretion and control under statute.

161. By engaging in the Impugned Conduct, Ontario breached its fiduciary duty owed to the Class. These actions amounted to Ontario putting its own interests ahead of those of the Class, and committing acts that harmed the plaintiffs and the Class in a way that amounted to betrayal of trust and to disloyalty.

162. As a result of Ontario's breach of fiduciary duty, the plaintiffs and the Class have suffered loss and damage as particularized herein.

(ii) Canada's breaches of its fiduciary duties to the Class

163. Canada's fiduciary duty required it to act loyally and in the best interests of the Class by, amongst others, the following:

(a) Canada is required not to abandon Indigenous children and families to their fate at the hands of Ontario.

(b) Canada has a positive duty to act in the best interests of Indigenous children and families to ensure the provision of substantively equal, adequate and culturally appropriate child welfare services off-Reserve. This includes responsibilities to: (i) protect off-Reserve Indigenous children and families from separation; (ii) take reasonable steps to prevent injury and loss to those off-reserve Indigenous children of their identity, culture, heritage, language, family, and federal benefits; (iii) protect removed off-reserve Indigenous children from harm when in state care; and (iv) not cause delays, denials and service gaps in the Essential Service Class Members' access to essential services.

(c) Canada's constitutional and statutory obligations, policies, and the common law empowered and required it to take steps to monitor, fund, influence, safeguard, secure, and otherwise protect the vital interests of the plaintiffs and the Class. These obligations required particular care with respect to the interests of children and their families, whose wellbeing and security were vulnerable to Canada's exercise of its discretion as well as to Canada's failure to exercise its discretion to act in the best interests of the Class.

(d) Canada had discretionary power to remedy inadequacies in Ontario's provision of child and family services. Accordingly, Canada was, at all material times, acting in its capacity as a fiduciary with respect to the Class.

164. Canada's fiduciary duties owed to the Class were not delegable to Ontario, through the 1965 Agreement or otherwise. It was empowered and obligated to monitor and remedy the many gaps in Ontario's provision of child and family services and other essential services.

165. The mere fact that Ontario was the party providing the discriminatory services did not absolve Canada of its own fiduciary obligations. Members of the Class were harmed by Canada's exercise, or lack thereof, of discretion or control in these circumstances.

166. As particularized herein, Canada was alerted numerous times to the discriminatory inadequacies of the provincial child and family services provided to the Class. Canada knew or reasonably ought to have known of all of the inadequacies of Ontario's services with respect to Indigenous children and families and, in breach of the honour of the Crown and its fiduciary duties, did nothing to intervene or meet its duties owed to the Class.

167. Canada adopted a policy of denial and avoidance. By deliberately failing or neglecting to remedy blatant inadequacies in Ontario's child and family services program and the delivery of other essential services with respect to Indigenous children and families, Canada breached the fiduciary duties it owed to the Class. Canada's deliberate inaction amounted to it putting its own interests ahead of those of the Class, and harmed the Class in a way that amounted to betrayal of trust and to disloyalty.

E. Damages

168. As a result of the Impugned Conduct, the Class suffered injuries and damages, including but not limited to:

(a) Class Members were denied non-discriminatory child and family services and other essential services;

(b) the Removed Child Class Members were removed from their homes and families to be placed in state care, with resulting, foreseeable harms and losses;

(c) the Removed Child Class Members and the Essential Services Class Members suffered physical, emotional, spiritual, and mental pain and disabilities;

(d) Removed Child Class Members and the Essential Services Class Members who were placed in state care suffered sexual, physical, and emotional abuse;

(e) Essential Services Class Members lost the opportunity to access essential public services and products in a timely manner;

(f) Essential Services Class Members and their associated Family Class Members had to fund out of pocket substitutes, where available, for public services and products delayed or improperly denied by the defendants;

(g) Family Class Members lost their children to a systemically discriminatory child welfare system;

(h) Family Class Members suffered loss of guidance, care and companionship, family bonds, language, culture, community ties, and resultant psychological trauma;

(i) Family Class Members suffered the loss and witnessed the pain and suffering of their children without receiving the most basic essential services to assist them in caring for their children at home or to meet the needs of their children for essential services; and

(j) Family Class Members have had to pay for or otherwise shoulder the provision of essential services that their children needed.

F. Section 24(1) *Charter* Damages

169. The plaintiffs and Class suffered loss as a result of the defendants' breaches of sections 7 and 15(1) of the *Charter*. An award of damages under section 24(1) the *Charter* is appropriate in this case because it would compensate the Class Members for the loss they have suffered. *Charter* damages would also vindicate the Class Members' protections under the *Charter* and deter future anti-constitutional and unlawful provision of child and family services and other essential services to Indigenous children in Ontario.

G. Equitable Compensation and Disgorgement

170. The Impugned Conduct toward Indigenous children and families in Ontario, particularly their failure to provide adequate and equal services and products to the Class Members constituted a breach of their fiduciary duties, through which the defendants inequitably obtained quantifiable monetary benefits over the course of the Class Period.

171. The defendants should be required to disgorge those benefits, plus interest.

H. Punitive and Exemplary Damages

172. The high-handed way that the defendants conducted their affairs warrants the condemnation of this Court. The defendants, including their agents, had complete knowledge of the fact and effect of their negligent and discriminatory conduct with respect to the provision of public services and products to Class Members.

173. For decades, Canada and Ontario commissioned, wrote, and received reports showing that the Ontario child welfare services resulted in disproportionately taking Indigenous children into care, and delayed or denied their access to other essential services. Canada and Ontario knew that many of these problems arose from the racist assumptions underlying the Indian residential schools and the Sixties Scoop, and that failing to fix these problems would exacerbate the intergenerational trauma inflicted by these institutions. More generally, Canada and Ontario's actions during the Class Period reflected, reinforced, and reinvigorated the cultural genocide inflicted on Indigenous communities through residential schools and the Sixties Scoop.

174. This warrants awards of punitive damages and exemplary damages.

XII. LEGISLATION

175. The plaintiffs plead and rely on various statutes, regulations, and international instruments, including:

(a) *An Act Respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24;

(b) *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;

(c) *Child and Family Services Act*, RSO 1990, c C.11;

(d) *Child, Youth and Family Services Act*, 2017, SO 2017, c 14, Sch 1;

(e) *Class Proceedings Act, 1992*, SO 1992, c 6;

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

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

(h) *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3;

(i) *Courts of Justice Act*, RSO 1990, c C.43;

(j) *Crown Liability and Proceedings Act*, RSC 1985, c C-50;

(k) *Crown Liability and Proceedings Act*, 2019, SO 2019, c 7, Sch 17;

(l) *Department of Indigenous Services Act*, SC 2019, c 29, s 336;

(m) *Family Law Act*, RSO 1990, c F.3;

(n) *Indian Act*, RSC 1985, c I-5;

(o) *International Convention on the Elimination of All Forms of Racial Discrimination*, 26 October 1966, 660 UNTS 195;

(p) *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14; and

(q) All other comparable and relevant acts and regulations and their predecessors and successors.

November 30, 2022

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