Federal Court Cour fédérale

Date: 20250326

Docket: T-213-23

Citation: 2025 FC 561

Ottawa, Ontario, March 26, 2025

PRESENT: Madam Justice McDonald

PROPOSED CLASS PROCEEDING

BETWEEN:

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

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

Table of Contents

I. Overview

[1] On this contested Motion, the Representative Plaintiffs–ten (10) Chiefs acting on behalf of their respective First Nations—ask the Court to certify a class proceeding pursuant to Rule 334.16(1) of the *Federal Courts Rules*, SOR/98-106 [*Rules*]. This proposed class proceeding is on behalf of the First Nations communities themselves for harms suffered by the communities.

[2] In the Amended Statement of Claim (Claim), the Representative Plaintiffs allege that First Nations communities suffered losses related to culture, tradition, and spiritual practices when First Nations children were separated and removed from their communities because of Canada's operation of child welfare programs. They claim that as of 1991, on-reserve children were removed from communities as the result of the First Nations Child and Family Services Program (FNCFS Program), and Jordan's Principle. They claim that programs for off-reserve children were delegated, or children were abandoned by Canada. This Claim is not brought on behalf of individuals and the Representative Plaintiffs acknowledge that those claims are addressed in other proceedings.

[3] The Claim seeks declaratory relief, non-pecuniary and pecuniary general damages, special damages, damages under the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], aggregate damages, restitution and disgorgement, and punitive and exemplary damages.

[4] Canada opposes the certification of this Action as a class proceeding and argues that the claim cannot proceed because the damages claimed have already been compensated for in other proceedings. They also argue that the Representative Plaintiffs cannot satisfy any of the certification criteria under Rule 334.16.

[5] On a motion for certification, the Court does not assess the merits of the proposed claims or assess if they will ultimately be successful. Rather, the task of the Court is to assess if the proposed claim can move forward as a class proceeding based upon the criteria outlined in the *Rules* and the relevant jurisprudence.

[6] I recognize that this claim is somewhat novel, and I also acknowledge that there may be evidentiary challenges for the Representative Plaintiffs to carve out or isolate the "harm" to their communities related specifically to the child welfare system implemented in 1991 as distinct from the harms caused to First Nations communities from the other historical wrongs. Nonetheless, I am satisfied that this claim can move forward as a class proceeding with the Representative Plaintiffs and the proposed class definition. Apart from the common question regarding aggregate damages, I am certifying the other common questions.

II. Background

A. *The Action*

[7] In the Amended Claim filed on July 18, 2023, which spans 60 pages, the Representative Plaintiffs explain the background to the Claim in paragraph 1 as follows:

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

[8] The Claim is not advanced for individuals, as noted in paragraph 3:

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

[9] The scope of this claim is described at paragraph 4 as:

> This claim relates to the devastating impact of Canada's conduct on First Nations themselves. It seeks remedies for breaches of rights held by the community, and for harms suffered at the community level.

[10] Canada's operation, or failure to operate child welfare services for on-reserve and off-reserve children is the factual backdrop of this claim, described as follows:

> "**FNCFS**" or "**FNCFS Program**" means Canada's First Nations Child and Family Services Program, which funded, and continues to fund public services, including Prevention Services, Protection Services and Post-Majority Services, to First Nations children and communities and which Program delegated or abandoned the provision of First Nations Child and Family services to First Nations children brought into care while ordinarily resident off-Reserve.

[11] The claim period dates to April 1, 1991, when the FNCFS was enacted:

> 60. Directive 20-1, which came into effect on April 1, 1991, and marks the beginning of the Class Period, was a cabinet-level spending measure that established uniform funding standards for First Nations children and families who were unilaterally considered by Canada to be "ordinarily resident on-reserve". It governed and controlled federal funding to FNCFS Agencies for child and family services to First Nations where an agreement did not exist between Canada and the relevant province or territory.
>
> 61. Canada designed its funding channels, including Directive 20-1, based on assumptions that failed to take into account and adhere to Canada's constitutional and other legal responsibilities, and without regard to the realities of First Nations communities, which were vastly affected by discriminatory practices and cultural genocide in the Residential Schools and the Sixties Scoop.

[12] The operation of the FNCFS Program is described in the claim as:

> 54. Canada chose to operate First Nations child welfare services in a federal legislative vacuum filled by the statutory provisions below with respect to First Nations children and families ordinarily resident on a Reserve:
>
> (a) section 4 of the *Department of Indian Affairs and Northern Development Act*, R.S.C., 1985, c. I-6, gave the Minister of Indian Affairs and Northern Development authority over all "Indian affairs" and "Yukon, the Northwest Territories and Nunavut and their resources and affairs"; and
>
> (b) section 88 of the *Indian Act* provided for the application of provincial or territorial child welfare legislation to First Nations as provincial or territorial "laws of general application"–those services were funded by Canada.
>
> 55. Canada chose to altogether ignore its constitutional and other legal responsibilities with respect to the First Nations who do not meet Canada's definition of ordinary residence

> on a Reserve, and simply left those children and families to their fate at the hands of highly discriminatory provincial child welfare services.

[13] The Representative Plaintiffs claim that the operation of the FNCFS Program led to children being taken from their communities, causing harm to the communities through the loss of language, culture, and tradition.

[14] Although the claim relates to Canada's modern child welfare policies through the FNCFS Program, the historical context of the Residential Schools, and the "Sixties Scoop" are also addressed in the claim as they form part of the historical and social context. The claim situates the FNCFS Program, also known as the "Millennium Scoop", within this context.

[15] The claim relies on the findings in *First Nations Child and Family Caring Society of Canada v Canada (Minister of Indian Affairs and Northern Development)*, 2016 CHRT 2, where the Canadian Human Rights Commission (CHRC) found that Canada systemically discriminated against First Nations children on-reserve and in the Yukon as noted on the claim:

> 69. On January 26, 2016, the Tribunal rendered a 176-page decision (2016 CHRT 2), finding that Canada systemically discriminated against First Nations children on-Reserve and in the Yukon in providing services contrary to section 5 of the *Canadian Human Rights Act*.
>
> 70. Since then, the Tribunal has retained jurisdiction over the complaint and has issued multiple non-compliance orders against Canada. On September 6, 2019 (2019 CHRT 39), the Tribunal made "an order for compensation to address the discrimination experienced by vulnerable First Nation Children and families in need of child and family support services on reserve." However, the Tribunal process is

> concerned with individuals only and does not include compensation for the plaintiff nations or the Class herein.

[16] The claim states that Canada's operation of the FNCFS Program was a breach of Jordan's Principle. Jordan's Principle is a child-first principle that ensures First Nations children can access essential public services available to all other children without delays, denials, or disruptions caused by jurisdictional disputes between federal and provincial governments or departments (*Canada (Attorney General) v First Nations Child and Family Caring Society of Canada*, 2021 FC 969 at para 12).

[17] The Representative Plaintiffs argue that Canada breached Jordan's Principle by failing to provide essential health and social services, resulting in children dying from a lack of care or families being forced to leave their communities to access necessary services elsewhere. This, in turn, aggravated the communal harm by undermining the community's ability to pass on its language, culture, spirituality, and identity—the basis of the underlying claim.

[18] The Representative Plaintiffs rely upon the CHRC's findings relating to Jordan's Principle to support the claim as follows:

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

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

[19] The claim describes the "impugned conduct" as the totality of Canada's conduct and practices as outlined in paragraphs 45 to 91 of the claim. This includes Canada's conduct and practices involved with (a) the Residential Schools program; (b) the "Sixties Scoop"; (c) the FNCFS Program; (d) the conduct wherein the CHRT found that Canada systemically discriminated against First Nations children on-reserve and in the Yukon contrary to the Canadian Human Rights Act, RSC, 1985, c H-6.

[20] In their written submissions, the Representative Plaintiffs explain the nature of the community as distinct from an individual claim as follows:

> 32. In addition to child welfare, First Nations lost children due to the discriminatory lack of access to essential health and social services in their communities.
>
> 33. This claim is not for the communal impact of discriminatory lack of access to essential health and social services and breaches of Jordan's Principle *per se*, but rather the consequence of children dying for lack of essential services or children and families having to abandon their communities to access such essential services elsewhere, thus aggravating the communal impact on the community's ability to pass on its language, culture, spirituality, and identity. [Footnotes omitted.]

[21] Against this historical context, the claim is described as follows:

> 90. Canada's apathy and avoidance of duty directly resulted in the overrepresentation of First Nations children in child welfare both on and off-Reserve. This overrepresentation

> and the mass scooping of First Nations children from their families and being placed in a patchwork of systemically broken child welfare placements around the country, made it impossible for those children to maintain their connection to their families and First Nations communities.
>
> 91. As a result, Canada's discriminatory conduct not only adversely impacted the plaintiff nations and the Class, it also adversely impacted the Class by disconnecting even more First Nations children from their communities, cultures and languages.

[22] Canada has not filed their Statement of Defence.

B. *Proposed Representative Plaintiffs*

[23] The Representative Plaintiffs are Chiefs of ten (10) First Nations. They have each provided an Affidavit in support of the Motion as follows:

(a) Affidavit of Chief David Crate, affirmed August 17, 2023;

(b) Affidavit of Chief Vera Mitchell, affirmed July 24, 2023;

(c) Affidavit of Chief Wilfred Hooka-Nooza, affirmed July 31, 2023;

(d) Affidavit of Chief Roderick Willier, affirmed July 31, 2023;

(e) Affidavit of Chief Lee Twinn, affirmed August 3, 2023;

(f) Affidavit of Chief Ramona Horseman, affirmed August 4, 2023;

(g) Affidavit of Chief Albert Thunder, affirmed August 8, 2023;

(h) Affidavit of Chief Michael Yellowback, affirmed August 8, 2023;

(i) Affidavit of Chief Jennifer Bone, affirmed August 8, 2023;

(j) Affidavit of Chief Dennis Pashe, affirmed August 17, 2023;

(k) Affidavit of Elizabeth Fast, affirmed August 16, 2023; and

(l) Affidavit of Harold (Sonny) Cochrane, KC, affirmed August 17, 2023.

[24] In their Affidavits, each Chief explains how their First Nation was impacted and damaged by the removal of children from their community. For illustration, I will highlight the information from some of those Affidavits.

[25] Chief Crate states as follows in his Affidavit:

> 17. As a Nation, we were strong in our cultural practices, especially when it came to our children. Every stage of childhood development was celebrated through ceremony – their naming, the Walking Out ceremony for toddlers, and puberty rites.
>
> 18. Our ancestors understood the importance of children to our community – they are the central pillar to our community life. Our children are the future, the inheritors of our culture, spirituality, language, and traditions. As such, they were educated in practical every day and specialized skills by our Elders so that they could support themselves and contribute to the larger community.
>
> 19. Further, children would participate in community activities with their families, such as berry picking, the gathering of plant foods and medicines, small animal hunting and trapping, fishing, and ceremonies. All of this was crucial to their upbringing, to ensure the longevity and survival of our culture.
>
> …
>
> 21. Many of our young people do not understand or speak our language. While some young people understand bits and pieces, or are making attempts to learn our language, it is becoming more and more noticeable in our younger generations that knowledge of our language has significantly declined.
>
> …
>
> 23. From our Nation's perspective, the loss of our culture, traditions, spirituality, and language, is a direct result of the child

> welfare system. That system, which has taken many forms throughout history, has sought to colonize and assimilate our people. With the removal of our children from our community, the bond between those children and our community has been severed.
>
> …
>
> 27. In some cases, we see situations where children who belong to our Nation but were apprehended at a young age and placed in a foster home off-reserve, have no knowledge of our language or culture. Further, some of these children do not even know they are Indigenous, let alone members of our Nation.

[26] Chief Vera Mitchell states as follows in her Affidavit:

> 27. This is also the case with respect to our traditional language, as individuals under the age of 40 who are living on-reserve have been encouraged throughout their lifetime to learn and speak English, rather than our language. This is especially evident amongst individuals who have been involved in the child welfare system and removed from our community, as they have lost all connection to our culture, traditions, spirituality, and language.
>
> …
>
> 31. Of the approximately 2,400 members of Poplar River First Nation, the breakdown of our members currently involved with the child welfare system is as follows:
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> a. Children-in-care (on-reserve): 83;
>
> b. Children-in-care (off-reserve): 126;
>
> c. Family enhancement files: 42; and,
>
> d. Young adults at age of majority files: 7.
>
> …
>
> 37. As a community, we recognize the harm caused not only to the children and their families, but also to our community as a whole when a child is apprehended. Ultimately, our goal has been, and continues to be, to bring our children back to our community.

…

44. The impacts of this can be seen throughout our Nation – we no longer have a Medicine Man; those who held sacred bundles have buried them as they did not have any one knowledgeable in the traditions to pass the bundles on to; our language is becoming lost.

45. Amongst the members of our Nation living on-reserve, our language is essentially lost. It is only the older generations - those over the age of forty - that know and understand our traditional language. Our younger generations have been taught to learn and speak English, and have received little to no exposure to our traditional language.

…

49. Further, by removing children from our community, the Nation is deprived of the ability to raise a generation of young people; to teach our traditions, language, and practices; and to establish continuity of our Nation. This has caused unimaginable harm to our Nation, the families, and the children involved. Harm that will take generations to repair.

[27] Chief Dennis Pashe states as follows in his Affidavit:

Our Nation's Future

21. The impacts of the child welfare system on our Nation are profound. Although we have made progress in repairing some of the damage caused to our cultural practices, traditions, and language, there is still significant work to be done.

22. For many generations, practicing our traditional ceremonies and language were strongly discouraged and frowned upon as a result of the influence of the church and Residential Schools. Then, even when attempts were made to bring these practices back, the removal of our children through the Millennium Scoop made it nearly impossible to consistently pass down our traditions through the generations. This led to entire generations of people having little to no knowledge of our culture, traditions, spirituality, and language.

C. *Evidence*

[28] In addition to the Affidavits listed above, the Representative Plaintiffs also filed an Expert Report of Elizabeth D. Fast, MSW, PhD. Her report of August 16, 2023, titled "Report submitted to Fisher River First Nation Class Counsel Regarding an opinion on the similar and consistent impacts of the impugned conduct collectively on First Nations" states at paragraph 12 as follows:

> Yes, in my opinion and based on my education, research and professional experience, First Nations have been similarly and consistently impacted by child removals. Through my work as coordinator of the First Nations component of the Canadian Incidence Study from 2007-2011, I visited and spoke with dozens of First Nations professionals and community members who spoke about the devastating impacts of child removals from their communities. Although the degree and extent to which communities have been impacted may vary, all of the First Nations communities and individuals that I have spoken with over the course of my professional and research career have cited the harmful impacts of child welfare on their communities' loss of language, culture and spirituality. [Footnotes omitted.]

[29] Canada filed the following Affidavits:

A. Affidavits of Jayson Dinelle affirmed February 28, 2024, and March 1, 2024;

B. Affidavit of Marc Roy affirmed August 15, 2024.

III. Issues

[30] The issue on this Motion is whether this claim should be certified as a class proceeding. R*ule* 334.16(1) sets out the 5 conditions that must be met for a proceeding to be certified as a class proceeding as follows:

A. Do the pleadings disclose a reasonable cause of action?

B. Identifiable class

C. Common questions

D. Preferable procedure, and

E. Representative plaintiffs

[31] When these 5 conditions are met, Rule 334.16(1) states that the Court "shall" certify the proceeding as a class proceeding.

IV. Analysis

A. *Do the pleadings disclose a reasonable cause of action?*

[32] In assessing if the pleadings disclose a reasonable cause of action, the Court assumes the facts outlined in the Claim are true. In assuming the facts are true, the plaintiff satisfies the reasonable cause of action requirement unless, it is plain and obvious that the plaintiff's claim cannot succeed (*Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 63 [*Pro-Sys Consultants*]).

[33] Canada takes the position that the Claim cannot succeed and that the pleadings fail to disclose a reasonable cause of action on several grounds which I will address below.

(1) Section 9 of the Crown Liability and Proceedings Act, RSC, 1985, c C-50 [*CLPA*]

[34] Canada argues that the facts and circumstances relied upon by the Representative Plaintiffs to support this claim have been litigated and compensation has been paid. They also highlight several funding programs that support Indigenous language, culture and traditions. Thus, according to Canada, by virtue of section 9 of *CLPA*, the claims are barred.

[35] Section 9 of *CLPA* states:

> **9** No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.

[36] Canada points to the following settlements where releases have been signed to support their argument that the issues raised in this claim have been litigated and resolved:

A. Indian Residential Schools – Canada argues that it has settled several class actions claiming harms to First Nations, and their members, for loss of Indigenous culture, languages, and traditions, as well as for abuse. Canada notes that it provided over $3.5 billion for communal remedies, including funding for First Nations-led initiatives for the restoration of Indigenous languages, traditions, and culture. The Indian Residential School Settlement Agreement released any and all actions "whether asserted directly by the Class Member … or by any other person, group or legal entity on behalf of or as a representative for the Class

Member." The Residential School Band Class Settlement released the claims of each Band Class Member in relation to Residential Schools (*Tk'emlúps te Secwépemc* at Settlement Agreement, Art. 10.01).

B. Sixties Scoop – Canada points out that it settled class actions relating to the harms of the Sixties Scoop and provided over $500 million in individual compensation and an additional $50 million to establish an independent charitable foundation to support healing, wellness, education, languages, culture, and commemoration. The Sixties Scoop settlement agreement released Canada against claims from "the Releasor or by any other person, group or legal entity on behalf of or as representative for the Releasor," (*Riddle v Canada*, 2018 FC 901 at Settlement Agreement, s. 10.01(i) [*Riddle*]).

C. FNCFS Program – In 2023, Canada entered into a $23.34 billion settlement to resolve claims related to the FNCFS Program and the provision of essential services. This included $50 million for First-Nations led initiatives to support community unification, reunification, connection, and reconnection for youth in care and formerly in care and access to culture-based, community-based and healing-based programs. Additionally, Canada is undertaking long-term reform of the FNCFS Program and Jordan's Principle and has entered into an agreement in principle to provide approximately $20 billion, over five years. Separate from the settlements, Canada has also committed over $542 million to support First Nations in building capacity to exercise jurisdiction over child and family services. The FNCFS settlement agreement released "all actions, causes of

> action, claims, and demands of every nature or kind available, whether or not known or anticipated, which the Releasers had, now have or may in the future have against the Releasees in respect of the claims asserted or capable of being asserted in the Actions," (*Moushoom v Canada*, 2023 FC 1466 at Settlement Agreement, s. 10.01(1) [*Moushoom*]).

[37] The claim advanced in *Tk'emlúps te Secwépemc First Nation v Canada*, 2023 FC 327 [*Tk'emlúps te Secwépemc*] was for communal harms relating to Residential Schools. The claim in *Riddle* was for individual harms to all Indian and Inuit persons who were removed from their homes in Canada during the Sixties Scoop. The settlement in *Moushoom* was for individuals impacted by the FNCFS program.

[38] The Representative Plaintiffs argue that the claims they advance here have not been the subject of other proceedings for which Releases have been provided. Specifically, they point out that this proposed class proceeding addresses a different timeframe from that in *Tk'emlúps te Secwépemc* and *Riddle*. Further, the settlement in *Moushoom* and class proceeding in *Stonechild v Canada*, 2022 FC 914 relate to individuals and not First Nations as collective entities.

[39] The background of this Claim, by necessity, addresses factual matters covered in other actions, such as those discussed above. However, I agree that the Claim as drafted is for a different plaintiff class, namely, the First Nations themselves as distinct from *Moushoom* and *Stonechild*. Further, it covers a different timeframe from that covered in *Tk'emlúps te Secwépemc* and *Riddle.*

[40] Proving the claim may be challenging. Specifically, the Representative Plaintiffs may face evidentiary challenges in proving harm to their communities because of the operation of child welfare programs as distinct from other historical harms. However, further consideration of this issue would require the Court to assess the merits of the claim, which is not the role of the Court on certification.

[41] Canada also argues that there are various programs that have been implemented that address the claims advanced in this proposed class proceeding and highlights the following programs:

a. **Cultural Spaces in Indigenous Communities Program** – From 2021 to 2023, Canada provided $120 million in funding to re-establish and revitalize Indigenous cultural spaces, including facilities to support cultural ceremonies and teachings, powwow grounds and cultural centres. The Program seeks to help address colonial harms by creating and revitalizing Indigenous cultural spaces across the country. For instance, Fisher River Cree Nation received funding to build and launch the Red Turtle Lodge Cultural Centre.

b. **First Nations and Inuit Cultural Education Centres Program** – Starting in 1971, this program provides funding "to support First Nation and Inuit communities in expressing, preserving, developing, revitalizing and promoting their culture, language and heritage, through the establishment and operation of First Nation and Inuit Cultural Education Centre Programs." It also ensures that culturally relevant programming and services are available to First Nation and Inuit students through Cultural Education Centres. The level of funding is determined on a case-by-case basis.

c. **Indigenous Languages and Cultures Program** – Starting in 1998, this program supports the efforts of Indigenous communities to reclaim, revitalize and maintain Indigenous languages, including funding under ss. 8 and 9 of the *Indigenous Languages Act* (ILA) to implement First Nation-led language plans.

> d. **Listen, Hear Our Voices** – This program, launched in 2019 and led by Library and Archives Canada, supports Indigenous governments and organizations in digitizing their heritage and building the skills and knowledge to digitize and preserve their documentary heritage. Small projects can receive up to $24,999, while large projects can receive up to $100,000. All projects are to be completed in 12 months. Applications for funding are assessed by an external Indigenous review committee.
>
> e. **We Are Here: Sharing Stories** – Since 2018, Library and Archives Canada has been digitizing hundreds of thousands of documents, photographs, maps and other materials of importance to Indigenous communities and is creating online content to ensure the accessibility of these resources. [Footnotes omitted.]

[42] Additionally Canada also points to legislation enacted by Parliament to address the issues and harms raised in the claim, including the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 and *An Act respecting First Nations, Inuit and Métis children, youth, and families*, SC 2019, c 24.

[43] Canada argues that, based upon the totality of the above, this proposed class proceeding is barred by section 9 of the *CLPA*. Canada relies on *Sarvanis v Canada*, 2002 SCC 28 [*Sarvanis*] to argue that, although this claim is framed as seeking relief for First Nations as a collective rather than for individuals, it is based on the same factual basis for which compensation has already been paid to First Nations for the "loss of language, culture and traditions". *Sarvanis* at paragraph 28 states:

> In my view, the language in s. 9 of the *Crown Liability and Proceedings Act*, though broad, nonetheless requires that such a pension or compensation paid or payable as will bar an action against the Crown be made on the same factual basis as the action thereby barred. In other words, s. 9 reflects the sensible desire of Parliament to prevent double recovery for the same claim where

> the government is liable for misconduct but has already made a payment in respect thereof. That is to say, the section does not require that the pension or payment be in consideration or settlement of the relevant event, only that it be on the specific basis of the occurrence of that event that the payment is made. [Emphasis in original.]

[44] Based upon *Sarvanis*, in assessing the application of section 9, the question is if Canada, by having settled litigation and funded initiatives, has already paid or is paying compensation for the same "factual basis" as outlined in this proposed class proceeding. At this stage, while I accept that the factual basis may share similarities, I cannot definitively conclude that Canada has paid compensation for *this* harm. In my view, that is a question that goes to the merits of the Claim and will have to be answered with the benefit of a full evidentiary record.

[45] The result is that at this stage, I cannot agree that section 9 of the *CLPA* is a bar to the proceeding and I cannot conclude that it is plain and obvious that the claims are barred by section 9 of the *CLPA*.

[46] I will now turn to consider the specific causes of action outlined in the pleadings against Canada to assess if they disclose a reasonable cause of action for the purposes of certification.

(2) Section 2(a) *Charter* claim

[47] Section 2(a) of the *Charter* provides:

> **Fundamental freedoms**
>
> Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

[48] The Representative Plaintiffs detail this claim as follows:

> 103. All parents have the right to disseminate their religious beliefs to their children under section 2(a) of the *Charter*, unless and until such beliefs cause real physical or psychological harm to the children. First Nations are the collection of all parents in the nation, and representatives of all parents in the nation, and on both bases, are entitled to claim rights to freedom of conscience and religion on behalf of all First Nations parents in their nations.
>
> 104. Additionally, First Nations, including the Class Members, are entitled to freedom of conscience and religion in their own right under section 2(a) of the *Charter*.
>
> 105. First Nations, and First Nations parents, sincerely believe in religious and spiritual practices that are communal in nature, requiring participation from their children if their children so choose. Canada has a duty not to prevent First Nations children from participating in these religious and spiritual practices by removing them from their families, communities, nations, and Reserves or traditional lands.
>
> 106. First Nations, and First Nations parents, have a constitutionally protected right to pass on their religious and spiritual practices to their children. Canada has a duty not to prevent First Nations and First Nations parents from passing on their religious and spiritual practices by removing their children from their families, communities, nations, and Reserves or traditional lands.
>
> 107. Canada previously breached these duties through Residential Schools and the Sixties Scoop, which Canada has admitted were designed to perpetrate a cultural genocide to "kill the Indian in the child" – that is, to end First Nations religions by preventing their transmission to the next generation. Having done so, by the start of the Class Period, Canada had a further duty to remedy the harms that it had caused by actively enabling First Nations to pass on their religious and spiritual practices to their children.

[49] The section 2 *Charter* breach is also the basis for the *Charter* damages claim advanced.

[50] The Representative Plaintiff First Nations have particularized their spiritual practices or religion in the claim, for illustration I will highlight a few paragraphs:

> 23. Sioux Valley Dakota Nation has historically given significant primacy to its culture, language, and traditions. That has not prevented the devastating impact of the Impugned Conduct on the survival, everyday use and longevity of its culture, language, and traditions.
>
> …
>
> 29. The Nation is a part of the Kee Tas Kee Now Tribal Council, and Treaty 8 First Nations. The people of the Whitefish Lake First Nation have exercised their traditional culture and language in their traditional territories since before contact. They have lived the trauma and separation of their children through the Residential Schools, Sixties Scoop, and now the Impugned Conduct. As a result, the Whitefish Lake First Nation's communal rights to their language, culture and traditions have suffered at the hands of Canada.
>
> …
>
> 36. Since time immemorial, the people of this First Nation have lived in their traditional territory, spoken their language, Dene Dháh, and practiced their culture and traditions. The Dene Thá people place a high value on their traditional way of life. Hunting and trapping have always been a staple of the Dene Thá people. They have been said to "live everywhere" on their land without boundaries. It has only been recently, in relation to the rich Dene Thá history, that formal settlements have been created.

[51] The legal test to establish an infringement of section 2(a) of the *Charter* is: (1) the claimant sincerely believes in a belief or practice that has a nexus with religion; and (2) the impugned measure interferes with the claimant's ability to act in accordance with his or her

religious beliefs in a manner that is more than trivial or insubstantial (*Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 32).

[52] The Plaintiffs allege that Canada violated the Class members' rights to freedom of conscience and religion by preventing First Nations communities from engaging in religious and spiritual practices that included the participation of their children. By removing First Nations children, Canada interfered with these practices and the communities' ability to pass them down to future generations. Although the beliefs vary among the First Nations, the Representative Plaintiffs claim that it is the removal of children from their communities that has impeded their ability to transmit their respective religious or spiritual beliefs regardless of the differences.

[53] Canada argues that these claims cannot succeed because it is impossible to distinguish between the religious or spiritual beliefs of individual parents and children against the broader religious and spiritual beliefs or practices of First Nations as communities.

[54] That, in my view, is too narrow an interpretation of the section 2 claim advanced. The claim articulates that religious and spiritual practices are inherently communal in nature and that the removal of children from their communities has disrupted the transmission of those practices. In other words, a First Nation community cannot pass down their beliefs and practices to the next generation if that generation has been removed from the community.

[55] Based upon my reading of the pleadings, the Representative Plaintiffs have sufficiently established that they have religious and spiritual beliefs that are communally held, practiced, and

shared with the intention of passing them onto future generations. Accordingly, it can be inferred that if the operation of the child welfare programs by Canada removed children from their communities, then the absence of children did disrupt or interfere with the Representative Plaintiffs' abilities to transmit their communal beliefs and practices onto the next generation.

[56] Accepting, as I must, that the facts pleaded in the claim are true—and recognizing that the question of whether a First Nation, as a *collective,* can advance a section 2(a) claim may be novel—I am satisfied, for the purposes of certification, that the Representative Plaintiffs have pled sufficient material facts to support a reasonable cause of action. I do not find it is not plain or obvious that this cause of action would fail.

(3) Breach of fiduciary duty

[57] In *Wewaykum Indian Band v Canada*, 2002 SCC 79 [*Wewaykum*], the Supreme Court of Canada identified two conditions that must be met for a Crown obligation to be considered a fiduciary duty: (1) the identification of a cognizable [Aboriginal] interest; and (2) the Crown's undertaking discretionary control in relation thereto in a way that invokes responsibility "in the nature of a private law duty" (*Wewaykum* at para 85).

[58] The following paragraphs in the claim outline the breach of fiduciary duty claim, with emphasis added:

> 113. Canada controlled all aspects of the lives of First Nations children in state care through the FNCFS Program as well as those First Nations children needing essential services. The […] FNCFS made First Nations children and families even more dependent on

> Canada for child and family, and other essential services. The First Nations children and families whom Canada abandoned on account of constraints based on arbitrary jurisdictional boundaries such as "ordinary residence on a Reserve" were equally vulnerable to, and suffered greatly from, Canada's failure to perform its duties.
>
> 114. First Nations children and families were at all times vulnerable to Canada's exercise, or failure to exercise, its discretion, and the power that Canada had over them as a fiduciary. First Nations are the collection of all children and parents in the nation, and representatives of all children and families in the nation, and on both bases, are entitled to claim breaches of fiduciary duties on behalf of all First Nations children and parents in their nations.
>
> 115. All First Nations were similarly vulnerable to Canada's exercise of its discretion with respect to their specific affected interests: i.e., their Aboriginal rights, freedom of religion rights, and right to the honour of the Crown described above. First Nations could only pass on their histories, religions, spiritual practices, customs, and languages to their children if they were allowed to raise their children.
>
> 116. Canada's fiduciary obligation to First Nations peoples arose from its discretionary control over the specific Indigenous interests at issue here, i.e., the right to culture and language, amongst others (a *sui generis* fiduciary duty).

[59] Without considering the merits of this claim, I am satisfied that for the purposes of certification that the Representative Plaintiffs have identified a "cognizable [Aboriginal] interest" by referencing their Aboriginal rights being infringed. They have outlined material facts that demonstrate the Crown undertook discretionary control in a way that creates a responsibility in the nature of a private law duty, i.e., by administering the FNCFS Program.

[60] In applying the plain and obvious standard, I am satisfied that the Representative Plaintiffs have demonstrated that breach of fiduciary duty is a reasonable cause of action for certification.

(4) Systemic negligence

[61] The Representative Plaintiffs' claim that Canada's "Impugned Conduct" regarding the FNCFS Program, in particular its operational components, breached Canada's duty of care to the Class. They assert that Canada's conduct was inadequate to protect the Class from harms and amounted to a breach of the standard of care, causing damage to the Class.

[62] The Supreme Court in *Mustapha v Culligan of Canada Ltd*, 2008 SCC 27 outlined the test for negligence at paragraph 3: "A successful action in negligence requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach."

[63] Negligence amounts to systemic negligence when the conduct in question is "not specific to any one victim but rather to the class of victims as a group" (*Rumley v British Columbia*, 2001 SCC 69 at para 34).

[64] The systemic negligence claims outlined in the Claim are as follows:

> 119. Throughout the Class Period, Canada owed a common law duty of care to the plaintiff nations and the other Class Members to take steps to sufficiently fund and operate First Nations child and

> family services and the operational and other costs of child and family and other essential services, including by ensuring that reasonably appropriate Prevention Services, child and family services, and other essential services were made available and provided to First Nations children and families.
>
> 120. Canada owes a duty of care to the Class in funding and otherwise administering child and family services and other essential services. This duty arises out of Canada's unique constitutional relationship detailed above, which creates a close and trust-like proximity between Canada and First Nations peoples.
>
> 121. It is reasonably foreseeable that Canada's failure to take reasonable care might harm First Nations children and families, as well as the Class. It is also reasonably foreseeable that Canada's inaction and avoidance of its duties would harm the Class, particularly with respect to the Class's cultural, traditional, and linguistic rights.

[65] During oral submissions, Canada conceded that the Representative Plaintiffs have disclosed a reasonable cause of action in systemic negligence, albeit subject to their section 9 *CLPA* submissions and their argument that the claims are brought out of time. I have addressed section 9 of *CLPA* above. On the applicable limitation periods, at this stage without the benefit of evidence, I cannot conclude that the proposed negligence claims are caught by a limitation period.

[66] Based upon the material facts pleaded, I am satisfied that they support a reasonable cause of action in systemic negligence. The material facts pleaded that Canada owed the Class members a duty of care, that Canada breached that duty of care, that Class members suffered damage, and that the damage they suffered was caused, in fact and in law, by Canada's breach of their duty of care.

(5) Aboriginal rights: section 35(1) of the *Constitution Act, 1982*

[67] The section 35 claim is detailed in paragraphs 94 through 102 of the Claim. The following paragraphs frame the claim:

> 96. Section 35(1) of the *Constitution Act, 1982* constitutionalized existing Aboriginal rights: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Canada's Constitution does not define Aboriginal rights under section 35, but these Aboriginal rights have been recognized to include cultural and social rights, and rights associated with and dependent on land rights and the right not to be separated from First Nations lands.
>
> …
>
> 101. Canada has a constitutional duty not to interfere with these Aboriginal rights, such as by taking First Nations children away from their families, communities, nations, and other purveyors of their nation's history, religions, spiritual practices, customs, and languages.
>
> 102. This is also how the mass scooping of First Nations children and disconnecting them from their communities has systemically prevented the teaching and passing on of First Nations practices, religions, customs, languages, and traditions.

[68] Section 35(1) Aboriginal rights are the inherent rights belonging to the Aboriginal peoples of Canada by virtue of their historic occupation and use of the land before European contact. Aboriginal rights, in general, derive from "historic occupation and use of ancestral lands by the natives and do not depend on any treaty, executive order or legislative enactment" (*R v Van der Peet*, [1996] 2 SCR 507 at para 112 [*Van der Peet*]).

[69] Section 35(1) Aboriginal Rights—among other statutory and constitutional provisions protecting the interests of Aboriginal peoples—are to be interpreted purposively, meaning the courts must take a generous, liberal interpretation (*Van der Peet* at para 24). Although they are often exercised by individuals, Aboriginal rights recognized by section 35 are generally understood as being collective in nature and as belonging to a group (*Behn v Moulton Contracting Ltd*, 2013 SCC 26 at paras 33–36).

[70] The *Van der Peet* framework for section 35(1) Aboriginal rights requires that "an activity must be an element of a practice, custom, or tradition integral to the distinctive culture of the aboriginal group claiming the right" (*Van der Peet* at para 46).

[71] At paragraph 51 of *R v Desautel*, 2021 SCC 17 [*Desautel*], the Supreme Court of Canada restates and summarizes the *Van der Peet* framework as follows:

> [51] The analysis under *Van der Peet* was restated by this Court in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535, at para. 46:
>
> (a) Characterize the right claimed in light of the pleadings and evidence (*Van der Peet*, at para. 53; *Gladstone*, at para. 24; *Mitchell* at paras. 14-19).
>
> (b) Determine whether the claimant has proven that a relevant pre-contact practice, tradition or custom existed and was integral to the distinctive culture of the pre-contact society (*Van der Peet*, at para. 46; *Mitchell*, at para. 12; *Sappier*, at paras. 40-45).
>
> (c) Determine whether the claimed modern right is "demonstrably connected to, and reasonably regarded as a continuation of, the pre-contact practice" (*Lax Kw'alaams*, at para. 46).

[72] Once an Aboriginal right has been identified, to sustain a cause of action for damages for breach of an Aboriginal right under section 35(1), a claimant must plead the following (*R v Gladstone*, [1996] 2 SCR 723 at para 20 [*Gladstone*]):

1) that the claimant or others were acting pursuant to an existing Aboriginal right;

2) that the right had not been extinguished prior to the enactment of s. 35(1);

3) that the right has been infringed; and

4) that the Crown has failed to show that the infringement was justified

[73] The Representative Plaintiffs allege that Canada's operation of the child welfare program breached their section 35(1) Aboriginal Rights which they characterize as "cultural and social rights, and rights associated with and dependent on land rights and the right not to be separated from First Nations lands" and their "communal cultural, traditional, religious, spiritual, and linguistic rights". The Representative Plaintiffs claim that the right to language and culture includes a right for each nation to pass on its histories, religions, spiritual practices, customs, and languages and culture to its next generations, and thus keeping those rights alive. The Representative Plaintiffs state that Aboriginal rights are collective rights of distinctive Indigenous societies flowing from their status as the original peoples of Canada, and that while any individual member of a First Nation enjoying an Aboriginal right can take advantage of that right, the right itself belongs to the nation.

[74] Canada argues that the Representative Plaintiffs have failed to plead the elements required to support a cause of action for breach of section 35(1) Aboriginal rights and say they

have failed to plead the material facts to establish either the scope of the rights or a *prima facie* infringement by Canada.

[75] Despite Canada's submissions, based upon the pleadings, I am satisfied that the Representative Plaintiffs have pleaded sufficient facts to support a section 35(1) Aboriginal right claim within the *Van der Peet* and *Desautel* framework. The Representative Plaintiffs' reference their right to "culture, spirituality, and language", and pleaded materials facts that these rights are integral to the distinctive cultures of their respective pre-contact societies. Indeed, it is hard to imagine anything as "integral" or of "central significance" to a First Nation than the unique cultures, spiritualties, and languages that constitute day-to-day life in their respective societies. I am satisfied that this Aboriginal right to culture, spirituality and language is demonstrably connected to, and reasonably regarded as a continuation of pre-contact practices.

[76] Regarding damages for breach of an Aboriginal right—separate and distinct from establishing the existence of an Aboriginal Right—the test is whether or not the government has interfered with an Aboriginal right. If it has interfered, that represents a *prima facie* infringement of section 35(1) (*Gladstone* at paras 20 and 39).

[77] Establishing the link between infringement of the Representative Plaintiffs' Aboriginal Rights by removing children from communities will be a matter that will have to be addressed through evidence. However, for the sake of the certification, I am satisfied that the pleadings provide a reasonable basis to find a cause of action for infringement of section 35(1) Aboriginal Rights.

(6) Conclusion on reasonable cause of action

[78] Overall, I am satisfied that the Claim articulates reasonable causes of action. I state this acknowledging that I must accept the claims pleaded as being true and I must err on the side of permitting a novel, but arguable, claim to proceed (*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 21).

B. *Identifiable class*

[79] The question here is whether there is "some basis in fact" to establish if there is "an identifiable class of two or more persons". This does not require evidence on a balance of probabilities nor the resolution of conflicting facts and evidence (*Pro-Sys Consultants* at paras 102).

[80] As it relates to identifiable class criteria, "all that is required is 'some basis in fact' supporting an objective class definition that bears a rational connection to the common issues and that is not dependent on the outcome of the litigation" (*Salna v Voltage Pictures, LLC*, 2021 FCA 176 at para 94 citing *Brake v Canada (Attorney General)*, 2019 FCA 274).

[81] Class proceedings require an identifiable class to (1) identify persons who have a potential claim for relief against the defendants; (2) define the parameters of the lawsuit in order to identify those who are bound by the result; and (3) describe who is entitled to notice for certification (*Paradis Honey Ltd v Canada*, 2017 FC 199 at para 22 [*Paradis Honey FC*]).

[82] Three criteria must be met to determine if there is an identifiable class of persons: (1) the class must be defined by objective criteria; (2) the class must be defined without reference to the merits of the action; and (3) there must be a rational connection between the common issues and the proposed class definition (*Paradis Honey FC* at para 23). The burden is on the proposed representative plaintiff to show that the class is sufficiently narrow such that it meets these criteria. This burden is, however, not an onerous one: the Court must be convinced that the class is not unnecessarily broad, but not that everyone in the class shares the same interest in the resolution of the common issues (*Paradis Honey FC* at para 24).

[83] In their Notice of Motion, the Representative Plaintiffs propose the following class definition:

> the plaintiffs, and every other First Nation (excluding individuals) in Canada that opts into this proceeding in the manner and within the time period approved by the Court, where "First Nation" means a "band" as defined in section 2(1) of the *Indian Act*, RSC, 1985, c I-5, or First Nations peoples with a modern treaty or land claims agreement (the "Class"; and each a "Class Member");"

[84] The Representative Plaintiffs submit that the definition is objective and clear, not unnecessarily broad, and that there is a rational connection between the definition and the proposed common questions.

[85] Canada disagrees and argues that the class of "First Nations (excluding individuals)" does not bear a rational connection to the common issues and argues that individual interests, and not collective interests, are at the core of the claim.

[86] I do not agree with Canada's position that individual interests will overwhelm the common interests, I further do not agree with Canada's contention that the Class definition is unnecessarily broad. In my view there is a rational connection between the class period starting in 1991 and the events anchoring the common issues. Further the proposed class definition is clearly and objectively defined.

[87] I am satisfied that for the purposes of certification, the Representative Plaintiffs have provided some basis in fact supporting the existence of an identifiable class.

C. *Common questions*

[88] When assessing the proposed common questions/issues the overriding consideration is that "Success for one class member must mean success for all" (*Pro-Sys Consultants* at para 108). In *Jensen v Samsung*, 2023 FCA 89 at paragraph 78 [*Jensen*], the Federal Court of Appeal describes this as having two components:

> first that the putative class members must have a claim, or at the very least some minimal evidence supporting the existence of a claim, and second some evidence that the common issue is such that its resolution is necessary to the resolution of each class member's claim.

[89] In their Motion, the Representative Plaintiffs seek to certify the following common questions:

> a. Did the defendant's Impugned Conduct, through the establishment, administration, funding, operation, supervision, and control of the First Nation Child and Family Services ("FNCFS") Program, breach the Aboriginal rights of the Class contrary to section 35 of the

Constitution Act, 1982, resulting in the defendant's liability to the plaintiffs and the Class?

b. Did the defendant's Impugned Conduct, in its abandonment of those First Nations individuals not captured by the FNCFS Program (collectively, "Off-Reserve Children") — breach the Aboriginal rights of the Class contrary to section 35 of the *Constitution Act, 1982*, resulting in the defendant's several liability to the plaintiffs and the Class?

c. Did the defendant owe a fiduciary duty to the plaintiffs and the Class?

d. If yes, did the defendant's Impugned Conduct breach that fiduciary duty?

e. Did the defendant's Impugned Conduct breach the honour of the Crown with respect to the plaintiffs and the Class?

f. Did the defendant owe a duty of care to the plaintiffs and the Class?

g. If yes, did the defendant's Impugned Conduct breach that duty of care?

h. Did the defendant owe duties to the Class Members located in the Province of Quebec under the *Civil Code of Quebec*?

i Did the defendant's Impugned Conduct constitute a fault under the *Civil Code of Quebec*?

j. Did the defendant's Impugned Conduct impinge on the Class's fundamental freedom of conscience and religion under section 2(a) of the *Charter*?

k. If yes, was the defendant's infringement of the Class's freedom of conscience and religion justified in a free and democratic society?

l. Are damages under section 24 of the *Charter* an appropriate and just remedy?

m. Can the Court make an aggregate assessment of damages suffered by the Class as part of the common questions trial and, if so, in what amount?

n. Is disgorgement an appropriate and just remedy?

o. Does the defendant's Impugned Conduct justify an award of punitive damages?

p. If yes, what amount of punitive damages ought to be awarded against the defendant? [Footnotes omitted.]

[90] On the common issues, the *Jensen* test requires (1) evidence of a claim and (2) some evidence that the common issues are such that their resolution is necessary to the resolution of each class member's claim. On the first prong, I have already found that the Plaintiffs have pleaded material facts to demonstrate reasonable causes of action.

[91] In opposing the existence of common questions, Canada argues that each First Nation is unique, and the assessment of the claims will inevitably break down into individual proceedings. Further, Canada notes that each First Nation would be subject to their respective provincial or territorial child welfare legislation, necessitating a consideration of the specific circumstances of each proposed First Nation class member in relation to their specific child welfare agency or authority.

[92] With respect to the provincial or territorial child welfare legislation, as noted by the Representative Plaintiffs at paragraph 45 of the claim: "Pursuant to section 91(24) of the Constitution Act, 1867, Parliament has jurisdiction over First Nations peoples." Further, at paragraph 92 of the claim the Representative Plaintiffs confirm that they are only claiming against Canada stating: "…the plaintiffs solely seek Canada's several liability."

[93] Going back to the common questions, the question on certification is if the answers to the questions are common to the Class as a whole. Questions (a) and (b) relate to the section 35 Aboriginal rights claim and the answers to the questions posed would be common to all Class members. Questions (c), (d) and (e) relate to the Fiduciary Duty claims and focus on whether Canada had a fiduciary duty to the Class in its operation of the FNCFS Program. Put plainly, if the Crown had a fiduciary duty to First Nations by virtue of the Crown-First Nations relationship, then the questions to be resolved are necessary to the resolution of each Class member's claim.

[94] Questions (f) and (g) on systemic negligence focus on whether Canada was negligent in its operation of the FNCFS Program. If the Crown had a duty of care in administering the FNCFS Program, then potential First Nations Class members subject to the program would require these questions to be resolved in order to advance their claim.

[95] Questions (h) and (i) on liability under *Civil Code* relate to potential Class members in the province of Quebec and would be a common question to those First Nations.

[96] Questions (j) and (k) on the breach of section 2(a) *Charter* rights are framed in a manner that is common to all Class members. If it can be resolved that the FNCFS breached theses rights, then all First Nations who were subject to the FNCFS Program would require these questions to be resolved to advance their claim.

[97] The questions posed at (l), (m), (n), (o), and (p) speak to damages sought on a class wide based on the causes of actions that have been alleged. On questions (l), (n), (o), and (p), I accept that if the Representative Plaintiffs can establish a claim on the merits, then it can be inferred that the conduct would attract damages including *Charter* damages. There is some basis in fact to support the damages claimed.

[98] Common question (m), however, relating to "aggregate damages" is problematic. Canada argues that without a methodology to establish a loss on a class wide basis, this common question cannot be certified. The Federal Court of Appeal in *Canada v Greenwood,* 2021 FCA 186 at paras 188-189 and in *Canada (Attorney General) v Nasogaluak,* 2023 FCA 61 at paras 114-115 held that to advance an aggregate damage claim, a methodology for determining those damages must be provided. Although the Representative Plaintiffs rely upon Dr. Fast's report to support the aggregate damage claim, her report does not provide any direction on how those damages would be calculated in the aggregate. Accordingly, at this stage, I am not prepared to certify common question (m). The issue of aggregate damages can be addressed at the common issues trial if necessary.

[99] Aside from the aggregate damages common question (m), the other common questions can be certified. I am satisfied that the answer to these common questions will provide an appropriate means of moving the litigation forward and avoiding duplication of legal analysis.

D. *Preferable procedure*

[100] On the preferable procedure requirement, the burden of showing some basis in fact requires the Representative Plaintiffs to demonstrate that a class proceeding would: (1) be a fair, efficient and manageable method of advancing the claim, and (2) be preferable to any other reasonably available means of resolving the Class members' claims, including avenues of redress other than court actions (*AIC Limited v Fischer*, 2013 SCC 69 at para 48 [*Fischer*]).

[101] In assessing preferability, the Court looks at the common issues in the context of the action as a whole and considers the extent to which the proposed class action serves the goals of class proceedings: judicial economy, access to justice, and behavior modification (*Fischer* at para 22). The ultimate question is whether other available means of resolving the claim are preferable, not if a class action would fully achieve those goals.

[102] Canada suggests that the claim ought to be advanced in the provinces and territories where the events occurred. I do not accept that multiple proceedings at the provincial/territorial level – where there may be cost consequences – would be a preferable approach to this proposed class proceeding.

[103] Based on the above, and with due consideration to the specific common issues of fact or law raised by the Representative Plaintiffs, I am satisfied that a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact. Despite Canada’s suggestion that the claims are better advanced by individuals claims in the provinces

where the events occurred, the preferability requirement can be met, even in cases where there are substantial issues requiring an individualized assessment, if the resolution of the common issues would significantly advance the action (*Canada (Attorney General) v Jost*, 2020 FCA 212 at para 92).

[104] Here, I am satisfied that a class proceeding is the preferable procedure.

E. *Representative plaintiffs*

[105] Under subsection 334.16(1)(e) of the *Rules*, an appropriate plaintiff is one who would (1) fairly and adequately represent the interests of the class, (2) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying Class members as to how the proceeding is progressing, (3) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other Class members, and (4) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

[106] The proposed class are ten (10) Representative Plaintiffs, who are Chiefs acting on behalf of their respective First Nations. Each Representative Plaintiff First Nation acts through its elected Chief at the time the claim was commenced. Each of the proposed Representative Plaintiff has provided an Affidavit indicating a willingness and ability to vigorously prosecute this proceeding, and to fairly and adequately represent the interests of the Class members.

[107] When assessing the adequacy of the proposed Representative Plaintiffs, "the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally)" (*Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 41). The proposed representative need not be the best possible representative, but the court should be satisfied that it will prosecute the interests of the class in a vigorous and capable way.

[108] With the above in mind, I am satisfied the ten (10) proposed Representative Plaintiffs are appropriate for the purposes of certification.

(1) Litigation Plan

[109] A detailed Litigation Plan has been provided that contains the essential ingredients focused on the pre and post certification steps, setting a timetable for next steps, and details on the plan for notice to Class members and communications with Class members and plans with respect to oral and documentary discovery, retention of experts, and the assessment of damages.

[110] As noted at paragraph 103 of *Wenham v Canada (Attorney General)*, 2018 FCA 199, courts must recognize that litigation plans are a work in progress, they are "not cast in stone" and they can be amended as the litigation progresses.

[111] I am satisfied that the plan contains the core ingredients. While future refinements to the Litigation Plan may be necessary, at this stage, the Litigation Plan meets the minimum requirements.

(2) Conflict of interest

[112] In their Affidavits, each of the Representative Plaintiffs indicate they are not aware of any conflicts of interest with any of the other potential Class members and no such conflicts have been identified.

(3) Fees

[113] The Litigation Plan and each Affidavit confirms that the Representative Plaintiffs have entered into a contingency retainer agreement with their lawyers' respecting fees and disbursements, subject to Court approval.

V. Conclusion

[114] For the reasons outlined above, I am allowing this Motion for certification of this action as a class proceeding. I approve the proposed Class definition and class period. The proposed common questions are approved except for common question (m) on aggregate damages. Pursuant to Rule 334.39 (1) of the *Rules*, there will be no costs.

ORDER IN T-213-23

THIS COURT ORDERS that:

1. The Motion to certify this action as a Class proceeding is granted.

2. The Class is defined as:

> the plaintiffs, and "every other First Nation (excluding individuals) in Canada that is later added as a Plaintiff, or that opts into this proceeding in the manner and within the time period approved by the Court, where "First Nation" means a "band" as defined in section 2(1) of the Indian Act, RSC, 1985, c I-5, or First Nations peoples with a modern treaty or land claims agreement (the "Class"; and each a "Class Member");"

3. The following individuals are appointed as the Representative Plaintiffs for the Class:

    a. Chief David Crate on behalf of Fisher River Cree Nation;

    b. Chief Vera Mitchell on behalf of Poplar River First Nation;

    c. Chief Ramona Horseman on behalf of Horse Lake First Nation;

    d. Chief Lee Twinn on behalf of Swan River First Nation;

    e. Chief Jennifer Bone on behalf of Sioux Valley Dakota Nation;

    f. Chief Michael Yellowback on behalf of Manto Sipi Cree Nation;

    g. Chief Albert Thunder on behalf of Whitefish Lake First Nation;

    h. Chief Roderick Willier on behalf of Sucker Creek First Nation;

    i. Chief Wilfred Hooka-Nooza on behalf of Dene Thá First Nation, and

    j. Chief Dennis Pashe on behalf of Dakota Tipi First Nation.

4. The common questions are approved as follows:

Section 35(1) Aboriginal Rights

a. Did the defendant's Impugned Conduct, through the establishment, administration, funding, operation, supervision, and control of the First Nation Child and Family Services ("FNCFS") Program, breach the Aboriginal rights of the Class contrary to section 35 of the *Constitution Act, 1982*, resulting in the defendant's liability to the plaintiffs and the Class?

b. Did the defendant's Impugned Conduct, in its abandonment of those First Nations individuals not captured by the FNCFS Program (collectively, "Off-Reserve Children") — breach the Aboriginal rights of the Class contrary to section 35 of the *Constitution Act, 1982*, resulting in the defendant's several liability to the plaintiffs and the Class?

Fiduciary Duty

c. Did the defendant owe a fiduciary duty to the plaintiffs and the Class?

d. If yes, did the defendant's Impugned Conduct breach that fiduciary duty?

e. Did the defendant's Impugned Conduct breach the honour of the Crown with respect to the plaintiffs and the Class?

Systemic Negligence

f. Did the defendant owe a duty of care to the plaintiffs and the Class?

g. If yes, did the defendant's Impugned Conduct breach that duty of care?

Liability under *Civil Code of Quebec*

h. Did the defendant owe duties to the Class Members located in the Province of Quebec under the *Civil Code of Quebec*?

i. Did the defendant's Impugned Conduct constitute a fault under the *Civil Code of Quebec*?

Section 2(a) *Charter*

j. Did the defendant's Impugned Conduct impinge on the Class's fundamental freedom of conscience and religion under section 2(a) of the *Charter*?

k. If yes, was the defendant's infringement of the Class's freedom of conscience and religion justified in a free and democratic society?

Damages

l. Are damages under section 24 of the *Charter* an appropriate and just remedy?

n. Is disgorgement an appropriate and just remedy?

o. Does the defendant's Impugned Conduct justify an award of punitive damages?

p. If yes, what amount of punitive damages ought to be awarded against the defendant?

5. The Litigation Plan, including the Certification Notice and its proposed distribution, is approved. These documents shall be made available in both official languages.

6. Pursuant to Rule 334.39(1) of the *Rules*, there will be no costs.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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