Federal Court Cour fédérale

Date: 20190528

Docket: T-402-19

Montréal, Quebec, May 28, 2019

PRESENT: Madam Justice St-Louis

BETWEEN:

XAVIER MOUSHOOM and JEREMY MEAWASIGE (by his litigation guardian, Maurina Beadle)

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

ORDER

UPON Motion by the Plaintiff for pleadings amendment and appointment of litigation Guardian, based on Rules 3-4, 75-76, 78-79, 115, 200-202, 334.11, 334.39 of the *Federal Courts Rules*, SOR/98-106;

HAVING READ the Motion record of the Plaintiff, and noted that the Defendant does not oppose the Motion;

CONSIDERING the grounds for the Motion;

THIS COURT ORDERS that:

1. The Plaintiff is granted leave to serve and file the Amended Statement of Claim substantially in the form attached hereto as Schedule "A", within five (5) days of the date of the present Order;
2. Jeremy Meawasige is added as a Plaintiff to this action;
3. Maurina Beadle is appointed as representative and litigation guardian for Jeremy Meawasige;
4. The style of cause is amended accordingly.

"Martine St-Louis"
Judge

Schedule "A"

Court File No. T-402-19

FEDERAL COURT

PROPOSED CLASS PROCEEDING

BETWEEN:

(Court Seal)

XAVIER MOUSHOOM and JEREMY MEAWASIGE (by his litigation guardian, Maurina Beadle)

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT:

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

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the *Federal Courts Rules* serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served 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 for serving and filing your statement of defence is sixty days.

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

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

Date:_____ Issued by _____
(Registry Officer)

Address of local office: 30 McGill Street
Montréal, Québec
H2Y 3Z7

TO: **ATTORNEY GENERAL OF CANADA**
National Litigation Sector
Department of Justice Canada
50 O'Connor Street
Ottawa ON K1A 0H8

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I. DEFINED TERMS

1. In this Fresh as Amended Statement of Claim, in addition to the terms that are defined elsewhere herein, the following terms have the following meanings:

(a) "**1965 Agreement**" means the Memorandum of Agreement Respecting Welfare Programs for Indians of 1965, a cost-sharing agreement between the **Crown** and the Province of Ontario for the provision of certain services to **First Nations** in Ontario, including but not limited to child and family services, child care, and social assistance.

(b) "***Child and Family Services Act***" means the *Child and Family Services Act*, R.S.O. 1990, c. C.11.

(c) "***CHRA***" means *Canadian Human Rights Act*, R.S.C., 1985, c. H-6.

(d) "**Class**" means the **On-Reserve Class, the Family Class** and the **Jordan's Principle Class**, collectively.

(e) "**Class Period**" means the period of time beginning on April 1, 1991 and ending on March 1, 2019.

(f) "**Crown**" means Her Majesty in right of Canada as defined under the *Crown Liability and Proceedings Act*, R.S.C., 1985, c. C-50 and the agents of Her Majesty in right of Canada, including the various federal departments responsible for the funding formulas, policies and practices at issue in this action relating to **First Nations** children in Canada during the **Class Period**, as follows: the Department of Indian Affairs and Northern Development using the title Indian and Northern Affairs Canada

("**INAC**") until 2011; Aboriginal Affairs and Northern Development Canada ("**AANDC**") from 2011 to 2015; Indigenous and Northern Affairs Canada ("**INAC**") from 2015 to 2017; and Indigenous Services Canada and Crown-Indigenous Relations and Northern Affairs Canada, following the 2017 dissolution of **INAC**.

(g) "**Directive 20-1**" means **INAC**'s national policy statement on the **FNCFS Program**, establishing **FNCFS Agencies** under the provincial or territorial child welfare legislation and requiring that **FNCFS Agencies** comply with provincial or territorial legislation and standards.

(h) "**EPFA**" means the Enhanced Prevention Focused Approach, which the **Crown** implemented in 2007 in response to criticisms of **Directive 20-1**, starting in Alberta and later adding Saskatchewan, Manitoba, Quebec, Nova Scotia, and Prince Edward Island.

(i) "**Family Class**" means an individual who is the brother, sister, mother, father, grandmother or grandfather of a member of the **On-Reserve Class**.

~~(i)~~(j) "**First Nation(s)**" means Indigenous peoples in Canada who are neither Inuit nor Métis, including individuals who have Indian status pursuant to the ***Indian Act***, are eligible for such status, or are recognized as citizens by their respective **First Nation** community, including **First Nations** in the Yukon and the Northwest Territories.

~~(j)~~(k) "**FNCFS Agencies**" means agencies that provided child and family services, in whole or in part, to the **Class** members pursuant to the **FNCFS Program** and other

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

~~(k)~~(l) "**FNCFS**" or "**FNCFS Program**" means **INAC**'s First Nations Child and Family Services Program which funded, and continues to fund public services, including **Prevention Services** and **Protection Services**, to **First Nations** children and communities.

~~(l)~~(m) "**Impugned Conduct**" means the totality of the **Crown**'s discriminatory practices, including unlawful underfunding and the breach of **Jordan's Principle** as pleaded at paragraphs 12-~~57~~62, below.

~~(m)~~(n) "***Indian Act***" means the *Indian Act*, R.S.C., 1985, c. I-5.

~~(n)~~(o) "**Jordan's Principle**" means a child-first principle intended to ensure that all **First Nations** children living on **Reserve** or off **Reserve** receive needed services and products that are substantively equal, taking into account their best interests and cultural rights, free of adverse differentiation.

~~(o)~~(p) "**Jordan's Principle Class**" means all **First Nations** individuals who were under the applicable provincial/territorial age of majority and who during the **Class Period** were denied a public service or product, or whose receipt of a public service or product was delayed or disrupted, on the grounds of lack of funding or lack of jurisdiction, or as a result of a jurisdictional dispute with another government or governmental department.

~~(p)~~(q) "**On-Reserve Class**" means all **First Nations** individuals who:

(i) were under the applicable provincial/territorial age of majority at any time during the **Class Period**; and

(ii) were taken into out-of-home care during the **Class Period** while they, or at least one of their parent(s), were ordinarily resident on a **Reserve**.

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

~~(r)~~(s) "**Prevention Services**" means three categories of "least disruptive" services intended to secure the best interests of children, while promoting the distinct cultural and linguistic needs of **First Nations** children, without disrupting the bond between these children and their families and communities. **Prevention Services** include:

(i) services aimed at the community as a whole, such as public awareness and educational initiatives to promote healthy families and prevent or respond to child maltreatment;

(ii) services responding to emerging child maltreatment risks; and

(iii) services that target specific families where a crisis or risks to a child have been identified.

~~(s)~~(t) "**Protection Services**" means those services that are triggered when the safety or the well-being of a child is reported to be at risk. These services include the receipt and

assessment of child maltreatment reports, development of plans to remediate the risk to the child, if possible, and the removal of children from their families into out-of-home care where the risk to the child cannot be remediated by least disruptive measures.

~~(t)~~(u) "**Provincial/Territorial Funding Agreements**" means funding agreements signed by the **Crown** with a province or territory, other than Ontario, or with a non-**First Nations** operated child and family service entity, for the provision of child and family services in whole, or in part, to **First Nations** children.

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

~~(v)~~(w) "**Residential Schools**" means schools for **First Nations**, Métis and Inuit children funded by the **Crown** from the 19th century until 1996, which had the objective of assimilating children into Christian, Euro-Canadian society by stripping away their **First Nations**, Metis and Inuit rights, cultures, languages, and identities, a practice subsequently recognized as "cultural genocide".

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

~~(x)~~(y) "**Tribunal**" means the Canadian Human Rights Tribunal.

II. RELIEF SOUGHT

2. The Plaintiff, on behalf of the Class, claims:

(a) an order certifying this action as a class proceeding and appointing the ~~P~~plaintiffs as representative plaintiffs for the On-Reserve Class, Family Class and Jordan's Principle Class and any appropriate sub-class thereof;

(b) a declaration that the Crown breached its common law and fiduciary duties to the ~~P~~plaintiffs and the Class;

(c) a declaration that the Crown breached section 15(1) of the *Charter of Rights and Freedoms* ("***Charter***"), and that such breach was not justified under section 1 of the *Charter*;

(d) aggregate damages for breach of fiduciary duty, negligence, and under section 24(1) of the *Charter* in the amount of $~~3~~6,000,000,000, and an order that any undistributed damages be awarded for the benefit of Class members, pursuant to rule 334.28 of the *Federal Courts Rules*;

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

(f) punitive and exemplary damages of $50,000,000 or such other sum as this Honourable Court deems appropriate;

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

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

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

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

III. NATURE OF THE ACTION

3. For decades, the Crown has systematically discriminated against First Nations children on the grounds of race and national or ethnic origin. The discrimination has taken two forms.

4. **First,** the Crown has knowingly underfunded child and family services for First Nations children living on Reserve and in the Yukon. This underfunding has prevented child welfare service agencies from providing adequate Prevention Services to First Nations children and families. The underfunding persists despite the heightened need for such services on Reserve due to the inter-generational trauma inflicted on First Nations peoples by the legacy of the Residential Schools and the Sixties Scoop, and despite numerous calls to action by several official, independent fact-finders. The Crown has known about the severe inadequacies of its funding formulas, policies, and practices for years, but has not adequately addressed them.

5. At the same time that the Crown has underfunded Prevention Services to First Nations children and families living on Reserve and in the Yukon, it has fully funded the costs of care for First Nations children who are removed from their homes and placed into out-of-home care. This practice has created an incentive on the part of First Nations child welfare service agencies to remove First Nations children living on Reserve and in the Yukon from their homes and place

them in out-of-home care. Because of these funding formulas, policies, and practices, a child on Reserve must often be removed from their home in order to receive public services that are available to children off Reserve.

6. The removal of a child from their home necessarily causes severe and, in some cases, permanent trauma to that child and his or her family. It is therefore only used as a last resort for children who do not live on a Reserve. Because of the underfunding of Prevention Services and the full funding of out-of-home care, however, First Nations children on Reserve and in the Yukon have been removed from their homes as a first resort, and not as a last resort. The funding incentive to remove First Nations children from their homes accounts for the staggering number of First Nations children in state care. There are approximately three times the numbers of First Nations children in state care now than there were in Residential Schools at their apex in the 1940s.

7. The incentivized removal of First Nations children from their homes has caused traumatic and enduring consequences to First Nations children and their families. Many of these children already suffer the effects of trauma inflicted by the Crown on their parents, grandparents and ancestors by the Residential Schools and Sixties Scoop. This action seeks individual compensation for on Reserve First Nations children and their family members who were victims of this systemic discrimination.

8. **Second**, the Crown has failed to comply with Jordan's Principle, a legal requirement designed to safeguard First Nations children's substantive equality rights. Jordan's Principle aims to prevent First Nations children from suffering gaps, delays, disruptions or denials in receiving necessary services and products while governments determine which level (federal, provincial or territorial) or which governmental department will pay for such services or products. Jordan's

Principle is admitted by the Crown to be a "legal requirement" on it and thus a duty that carries civil consequences. However, the Crown has essentially ignored Jordan's Principle and thereby denied crucial services and products to tens of thousands of First Nations children in breach of Jordan's Principle. This action seeks compensation for those First Nations children who suffered or died while awaiting the services or products that the Crown was legally required to provide but did not provide, in breach of Jordan's Principle.

9. Both forms of discrimination were directed at the Class because they were First Nations ~~and because they were children~~.

10. In a landmark decision released in 2016, the Tribunal found that the Crown had systematically discriminated against First Nations children on both of the above grounds, contrary to the *CHRA*.

11. The Crown's discriminatory policies and practices alleged herein breached section 15(1) of the *Charter*, the Crown's fiduciary duties to First Nations~~ children,~~ and constituted negligence. ~~No individual~~Full compensation for the victims of these discriminatory practices has not resulted nor will it result from the Tribunal ~~decision~~proceeding. This action seeks compensation for First Nations individuals who were victims of the Crown's systemic discrimination while they were under the age of majority and for family members who suffered the break-up of their families when their children were removed from their homes.

IV. THE PARTIES

A. The Plaintiffs

i. ~~The Plaintiff,~~ **Xavier Moushoom, - Member and Proposed Representative of the On-Reserve Class and Family Member Class**

12. Xavier Moushoom was born in Lac Simon in 1987 and is a member of the Anishnabe Nation. Both of his parents are Residential Schools survivors. From 1987 to 1995, Mr. Moushoom lived with his mother—who suffered from alcohol abuse—and his brother on the Lac Simon Reserve. Mr. Moushoom's father also battled alcohol abuse problems and sought treatment in Montreal, away from the family. As a child, Mr. Moushoom spoke Algonquin fluently with his grandmother.

13. In 1996, Mr. Moushoom was removed from his home and placed in out-of-home care in Lac Simon. To this day, he does not know the reason for his apprehension. Mr. Moushoom's brother was also apprehended and placed in a different foster home. Mr. Moushoom was thus entirely isolated from his family.

14. In 1997, Mr. Moushoom was moved to a different foster family outside of his community in Val D'Or. From the age of 9 until 18, Mr. Moushoom was moved from one foster family to another. In total, he lived in fourteen different foster homes in Val D'Or.

15. Mr. Moushoom was rarely granted access to his mother and family. As a result, Mr. Moushoom gradually lost his native Algonquin language, his culture, and his ties to the Lac Simon community.

16. By the time he became an adult, Mr. Moushoom had lost his roots, his culture, and his language. At 18, Mr. Moushoom was forced to leave his foster family because the Crown did not

fund Post-Majority Services for First Nations individuals like Mr. Moushoom. He felt completely lost and unprepared for life.

17. After staying with his foster family for an additional three months without financial support, Mr. Moushoom returned to live with his mother in Lac Simon. In the years that followed, Mr. Moushoom suffered from anxiety attacks and developed substance abuse problems that he would eventually overcome through his own determination with the help of his community.

ii. Jeremy Meawasige (by his litigation guardian, Maurina Beadle) - Member and Proposed Representative of the Jordan's Principle Class

18. Jeremy Meawasige is a member of the Pictou Landing First Nation in Nova Scotia. He was born in 1994, and has suffered from multiple disabilities and high care needs throughout his life. As a child, Mr. Meawasige was diagnosed with hydrocephalus, cerebral palsy, spinal curvature, and autism. During the relevant time and up to this day, he can only speak a few words and cannot walk unassisted. He requires total personal care, and depends on the assistance of others for showering, diapering, dressing, spoon feeding, and all other personal hygiene needs.

19. Mr. Meawasige lives on the Pictou Landing Indian Reserve.

20. Maurina Beadle is Mr. Meawasige's mother and proposed litigation guardian. She has been his primary caregiver for most of his life. Ms. Beadle was able to care for her son in the family home without government support or assistance until she suffered a stroke in 2010. At that point, the Pictou Landing Band Council stepped in and started providing necessary services to Mr. Meawasige.

21. However, the funding that the Council received from the Crown was insufficient to meet Mr. Meawasige's needs. The Council applied for funding from the Crown for Mr. Meawasige under Jordan's Principle. The Crown refused that application on the ground that Mr. Meawasige did not meet the test, particularized below, that the Crown had established for Jordan's Principle. The Council and Ms. Beadle sought judicial review of the refusal decision. In April 2013, the Federal Court granted *certiorari*, quashed the refusal decision and ordered the Crown to pay for the services under Jordan's Principle.

22. The Crown's improper interpretation of Jordan's Principle caused the denial, delay and disruption of the receipt of public services and products that were essential to Mr. Meawasige. While Mr. Meawasige received funding for certain services after the Federal Court's 2013 decision, he has not received some other essential public services and products to this date.

B. The Defendant

~~18.~~23. The Defendant, the Attorney General of Canada, represents the Crown, and is liable and vicariously liable for the Impugned Conduct.

~~19.~~24. In particular, the Crown is liable and vicariously liable for the acts and omissions of its agents—INAC and its predecessors and successors—which funded the services provided to the Class members by the FNCFS Agencies or the province/territory. In this claim, INAC and its predecessors or successors, are referred to interchangeably as the Crown, unless specifically named.

V. THE CROWN'S TREATMENT OF FIRST NATIONS CHILDREN

~~20.~~25. Pursuant to section 91(24) of the *Constitution Act, 1867*, the Crown has jurisdiction over First Nations peoples. Provinces and territories have jurisdiction over child and family welfare generally. Each province and territory has its own child and family services legislation.

~~21.~~26. Child and family services, also referred to as "child welfare", consist of a range of services intended to prevent and respond to child maltreatment and to promote family wellness.

~~22.~~27. Starting in the 19th century, the Crown systematically separated First Nations children from their families and placed them in Residential Schools. Among other things, the Crown used the Residential Schools as child welfare care providers for the First Nations children who allegedly needed child and family services.

~~23.~~28. Following the closure of the Residential Schools, the Crown undertook the provision of child and family services for First Nations children and their families. However, Parliament did not pass federal legislation regarding First Nations child and family services.

~~24.~~29. Rather, the Crown chose to operate child welfare services in a federal legislative vacuum filled by two statutory provisions:

(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", with funding for those services from the Crown.

~~25.~~30. The Crown, through INAC and its predecessors and successors, required that FNCFS Agencies use provincial/territorial child welfare laws as a condition of funding. The funding itself was provided on the basis of formulas crafted by the Crown.

~~26.~~31. Thus, Parliament did not enact laws to govern the way essential services were to be provided to Class members and to ensure that they were provided fairly and adequately.

~~27.~~32. The Crown provided funding during the Class Period through four channels that worked on the basis of uniform policies, objectives, and short-comings common to the Class:

(a) the 1965 Agreement;

(b) Directive 20-1;

(c) the EPFA; and

(d) the Provincial/Territorial Funding Agreements.

~~28.~~33. Directive 20-1, which came into effect on April 1, 1991, was a cabinet-level spending measure that established uniform funding standards for the On-Reserve Class and Family Class members. It governed and controlled federal funding to FNCFS Agencies for child and family services to On-Reserve Class and Family Class members where an agreement did not exist between the Crown and the province or territory.

~~29.~~34. The Crown designed its funding channels, including Directive 20-1, based on assumptions ill-suited to the Crown's stated objectives and without regard to the realities of First Nations communities.

~~30.~~35. This approach directly and foreseeably resulted in systemic shortcomings, ultimately assuring the chronic under-provision of essential services on which the On-Reserve Class and Family Class members relied. These shortcomings included the following:

(a) funding models that incentivized the removal of On-Reserve Class members from their homes and placed them in out-of-home care;

(b) inflexible funding mechanisms that could not account for the particular needs of diverse First Nations communities on Reserves and in the Yukon, and the operating costs of an agency delivering services therein;

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

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

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

(f) a self-serving, parsimonious interpretation by the Crown of Jordan's Principle, leading to Jordan's Principle Class members receiving delayed or inadequate public services or products or none at all.

~~31.~~36. In 2007, the Crown admitted these systemic deficiencies, and sought to rectify them in some provinces by implementing the EPFA. The Crown announced that the EPFA was designed to allow for a more flexible funding formula and an allocation of funds for Prevention Services.

~~32.~~37. Nonetheless, the implementation of the EPFA failed to remedy the systemic discriminatory funding of services to On-Reserve Class and Family Class members. The EPFA suffered from the same shortcomings and false underlying assumptions that plagued Directive 20-1 and the Crown's other funding formulas.

~~33.~~38. These longstanding, systemic failures of the Crown's funding formulas effectively paralyzed the FNCFS Program and harmed generations of First Nations children and families, whose care the Crown undertook to provide.

~~34.~~39. In some instances, the Crown's funding methods and practices imposed on First Nations families what is known as "Care by Agreement", which follows provisions in provincial and territorial child-welfare legislation that allow for parents to voluntarily place their children in child-welfare custody often while maintaining parental guardianship. Care by Agreement became another mechanism through which On-Reserve Class members were separated from their families and placed in out-of-home care to receive the essential services that they required.

~~35.~~40. The Crown was well aware of these chronic problems. Over the course of the Class Period, numerous independent reviews, reports, and audits, including two reviews by the Auditor General

of Canada and a joint review by INAC and the Assembly of First Nations, identified these deficiencies and decried their devastating impact on First Nations children and families.

~~36.~~41. The Report of the Truth and Reconciliation Commission of Canada also called on the Crown to adequately fund child and family services and fully implement Jordan's Principle. In so doing, the Truth and Reconciliation Commission found, ~~amongst others~~among other things, that:

(a) 3.6% of all First Nations children under the age of 14 were in out-of-home care, compared with 0.3% of non-Aboriginal children;

(b) the rate of investigations involving First Nations children was 4.2 times the rate of non-Aboriginal investigations, and maltreatment allegations were more likely to be substantiated in the cases of First Nations children;

(c) investigations of First Nations families for neglect were substantiated at a rate eight times greater than for the non-Aboriginal population;

(d) the Crown's child-welfare system simply continued the assimilation that the Residential Schools system started; and

(e) First Nations children are still being taken away from their parents because their parents are poor.

~~37.~~42. These reviews, reports, and audits fell largely on deaf ears.

~~38.~~43. Faced with the Crown's inaction and apathy, the First Nations Child and Family Caring Society, an umbrella service organization, and the Assembly of First Nations, a national First Nations political organization, filed a complaint with the Canadian Human Rights Commission in

February 2007. The complaint alleged that the Crown discriminated against First Nations peoples on Reserve and in the Yukon in the provision of child and family services and by its failure to properly implement Jordan's Principle, in violation of section 5 of the *CHRA*.

~~39.~~44. In 2008, the Canadian Human Rights Commission referred the complaint to the Tribunal.

~~40.~~45. On January 26, 2016, the Tribunal rendered a 176-page decision, finding that the Crown systematically discriminated against First Nations children on Reserve and in the Yukon in providing services contrary to section 5 of the *CHRA*.

~~41.~~46. Since then, the Tribunal has retained jurisdiction over the complaint and has issued no fewer than five non-compliance orders against the Crown.

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

~~42.~~47. The Tribunal found that, despite changes made to the FNCFS Program, the following systemic flaws plagued the delivery of child and family services:

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

(b) While the Crown systematically underfunded Prevention Services, it fully funded out-of-home care by reimbursing all such expenses at cost with the exception of Post-Majority Services.

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

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

(e) The Crown failed to adjust Directive 20-1 funding levels, since 1995, along with funding levels under the EPFA since its implementation, to account for inflation and cost of living.

(f) The Crown failed to update the 1965 Agreement in Ontario to ensure that on Reserve child and family services comply fully with the *Child and Family Services Act*.

(g) The Crown failed to coordinate the FNCFS Program and the Provincial/Territorial Funding Agreements with other federal departments and government programs and services for First Nations children on Reserve, resulting in service gaps, delays, and denials for First Nations children and families.

D. Tribunal's Findings Regarding the Application of Jordan's Principle

~~43.~~48. Jordan's Principle is a child-first legal rule that guides the provision of public services and products to First Nations children. The Crown has admitted that Jordan's Principle is a legal rule, not merely a principle or aspiration. Jordan's Principle incorporates the Crown's longstanding obligations to treat Class members without discrimination and with a view to safeguarding their substantive equality.

~~44.~~49. In the mid-2000s, this existing legal rule was named Jordan's Principle to honour the memory of Jordan River Anderson, a First Nation child who died in a hospital bed while officials from the governments of Canada and Manitoba bickered over who should pay for his specialized care close to his hospital. The Tribunal summarized Jordan's life story as follows:

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

~~45.~~50. Jordan's Principle mandates that all First Nations children should receive the 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 the Crown's practice of denying, delaying or disrupting services to First Nations children due to, among other reasons, jurisdictional payment disputes within the federal government or with provinces or territories.

~~46.~~51. Jordan's Principle reaffirms existing *Charter* and quasi-constitutional rights of First Nations children to substantive equality, and seeks to ensure substantive equality and the provision of culturally-appropriate services. For that purpose, the needs of each individual child must be considered and evaluated, including by taking into account any needs that stem from historical disadvantage and the lack of on Reserve or surrounding services.

~~47.~~52. Jordan's Principle preserves human dignity by providing First Nations children with essential services and products without adverse differentiation including denials, disruptions or delays because of intergovernmental/interdepartmental funding squabbles. Jordan's Principle requires the government (federal, provincial or territorial) or department that first received the request to pay for the service or product. Once it has paid and the child has received the service or product, the payor can resolve jurisdictional issues about who was responsible to pay.

~~48.~~53. In October 2007, the House of Commons formally supported Jordan's Principle, unanimously passing a motion to the effect that "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".

~~49.~~54. In breach of the letter and spirit of Jordan's Principle and the rights that underlie it, the Crown's bureaucratic arm unilaterally restricted its application to cases that could meet the following three criteria:

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

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

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

~~50.~~55. The Tribunal found that the processes set up by the Crown (via memorandums of understanding between Health Canada and AANDC) to respond to Jordan's Principle requests made delays inevitable: the processes included a review of policy and programs, case conferencing and approvals from the Assistant Deputy Minister, before interim funding was provided. These processes exacerbated the very delay and disruption that Jordan's Principle was designed to prevent.

~~51.~~56. Not surprisingly, the Crown's narrow interpretation of Jordan's Principle resulted in no cases meeting its stringent criteria for Jordan's Principle. The Tribunal found that the Crown's stringent definition and its layered assessment of each case "defeats the purpose of Jordan's Principle and results in service gaps, delays and denials for First Nations children on reserve".

~~52.~~57. In fact, the Crown's application of Jordan's Principle was so stingy that an $11-million fund set up by the Crown with Health Canada to address Jordan's Principle requests was never accessed. In essence, the Crown interpreted away Jordan's Principle, leaving tens of thousands of First Nations children to suffer or to be placed in out-of-home care in order to receive the public services or products that they needed and that they relied on the Crown to provide.

~~53.~~58. The Crown's wrongful application of Jordan's Principle further exacerbated the numbers of First Nations children in out-of-home care. Due to a lack of public services on Reserve, many

First Nations children were placed in out-of-home care in order to access the services and products that they needed.

~~54.~~59. In light of the above, the Tribunal ordered the Crown to cease its discriminatory practices, reform the FNCFS Program, and take measures to implement the full meaning and scope of Jordan's Principle.

E. The Binding Effect of Tribunal Findings

~~55.~~60. The Tribunal made numerous factual findings against the Crown. Neither the Crown nor the complainants sought judicial review of the Tribunal's decision. The decision became final on March 2, 2016. Accordingly, the Crown is estopped in this action from re-litigating or denying the Tribunal's findings.

~~56.~~61. Prior to the Tribunal's decision and subsequent orders, the Crown took the position that no Jordan's Principle cases were made out. The Crown's Jordan's Principle fund was never accessed. After the Tribunal's decision and subsequent orders, the Crown issued over 165,000 remedial orders to address its previous failures to comply with Jordan's Principle and the fundamental substantive equality rights that underlie it.

~~57.~~62. None of the children whose necessary services were delayed, disrupted or denied as a result of the Crown's disregard for Jordan's Principle or who were denied access to Prevention Services due to the design of the Crown's funding formulas, policies, and practices have received, or will receive, ~~any individual~~full compensation, if any, as a result of the Tribunal proceedings. It is only through the mechanism of this action that full and fair compensation ~~will be provided~~is possible.

VI. THE CROWN'S DUTIES TO THE CLASS

A. The Crown Owes a Common Law Duty of Care to the Class

~~58.~~63. The Crown owes a duty of care to all Class members. Section 91(24) of the *Constitution Act, 1867* gave Parliament exclusive jurisdiction over Indians, including the Class.

~~59.~~64. The Crown had full control over the provision of public services and products to the Class members throughout Canada by virtue of the application of its funding formulas and by its application of Jordan's Principle.

~~60.~~65. The Crown chose to not legislate on child and family and other public services provided to the Class members, but instead used various funding formulas, policies, and practices that were established bureaucratically. Using these funding mechanisms, the Crown created, planned, established, operated, financed, supervised, controlled and/or regulated the provision of services and products to the Class members throughout Canada.

~~61.~~66. The Crown has known for decades that its funding formulas and policies were wholly insufficient for the provision of essential services and products to the Class members. The Crown knew or ought to have known that its policies and practices were having a devastating impact on the Class members~~,~~ and their ~~families, and~~ communities.

~~62.~~67. This was especially true because all of the On-reserve Class and Jordan's Principle Class members are, or were at the relevant time, vulnerable children at the mercy of the Crown for essential services. The Crown's duty of care to the On-Reserve Class and the Family Class included a duty to adequately fund Prevention Services and least disruptive measures in the best interests of the children.

~~63.~~68. Furthermore, Jordan's Principle prescribed the content of the Crown's duty of care to the Class—and particularly the Jordan's Principle Class. This included the duty to ensure substantive equality for First Nations children, provide culturally appropriate services, and avoid gaps, delays, disruption, and denial of services to these children.

~~64.~~69. The Crown's proximity to the Class members is reinforced by the fiduciary relationship that exists between them, and by the fiduciary obligations it owes to the Class members in respect of their specific interests, including their health and welfare, and their essential connection to their First Nation histories, cultures, languages, customs, and traditions. Moreover, the Crown assumed an obligation towards First Nations peoples regarding the provision of child and family and other public services by virtue of its funding formulas, policies and practices.

B. The Crown Owed Fiduciary Obligations to the Class

~~65.~~70. The Crown stands in a special, fiduciary relationship with First Nations in Canada.

~~66.~~71. The Crown has exclusive constitutional and common law jurisdiction in respect of the Class, and has been specifically entrusted to recognize and affirm the rights of Aboriginal peoples in Canada, under section 35(1) of the *Constitution Act, 1982*.

~~67.~~72. The Crown has assumed and maintains a large degree of discretionary control over First Nations peoples' lives and interests in general, and the care and welfare of the Class members in particular.

~~68.~~73. Under section 18 of the *Indian Act*, the Crown holds Reserve lands for the use and benefit of First Nations for whom they were set apart. The Crown has discretionary authority over the use of such lands for the purpose of the administration of First Nations affairs including, but not limited to, early childhood, education, social and health services.

~~69.~~74. Moreover, the Crown has expressly and impliedly undertaken to protect specific First Nations interests in the provision of child and family and certain other services and products to the Class members. These undertakings require the Crown to act loyally and in the best interests of First Nations, particularly children, on Reserve, in the Yukon and in The Northwest Territories.

~~70.~~75. The Crown's duties toward First Nations in general, and Class members specifically, are grounded in the honour of the Crown, which require the Crown to act at all times honourably, fairly, and in good faith in the exercise of its discretion towards the Class members.

~~71.~~76. The Crown's constitutional and statutory obligations, policies, and the common law required the Crown to take steps to monitor, influence, safeguard, secure, and otherwise protect the vital interests of First Nations, including the Class members. These obligations required particular care with respect to the interests of children and their families, whose wellbeing and security were vulnerable to the Crown's exercise of its discretion.

~~72.~~77. The Crown's fiduciary duties as described in this claim are non-delegable in nature and continue notwithstanding any agreements between the Crown and its agents, or agreements with other levels of government.

VII. THE CROWN BREACHED ITS DUTIES TO THE CLASS

A. The Crown Breached *Charter* Equality Rights of the Class

~~73.~~78. Section 15(1) of the *Charter* entrenches equality rights for every individual:

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

~~74.~~79. The Crown's Impugned Conduct violated section 15(1) of the *Charter* and is not saved by section 1 of the *Charter*. The Impugned Conduct was directed exclusively to First Nations ~~children~~people and therefore discriminated on an enumerated ground, *i.e.*, race, national or ethnic origin. This distinction created a disadvantage for the Class by perpetuating historical prejudice caused by the legacy of the Residential Schools and Sixties Scoop. The distinction was substantively discriminatory. No pressing or substantial concern justified the Impugned Conduct under section 1 of the *Charter*.

i. The Impugned Conduct Created a Distinction Based on Race, National or Ethnic Origin

~~75.~~80. The Class members, as First Nations, possessed the enumerated characteristics of race, national and ethnic origin. The Impugned Conduct had a prejudicial effect on the Class members based on their membership in that group.

~~76.~~81. Through its funding formulas, policies, and practices, the Crown played an essential role in the provision of child and family services ~~provided~~and other public services and products to the Class members.

~~77.~~82. Child and family services under the FNCFS Program and the Provincial/Territorial Funding Agreements were aimed at the members of the On-Reserve Class and Family Class because they were First Nations. The determination of the persons to whom the services were offered was based entirely on the racial, national or ethnic identity of the On-Reserve Class~~,~~ and Family Class.

~~78.~~83. Likewise, the members of the Jordan's Principle Class qualified for public services or products under Jordan's Principle expressly on the ground that they were First Nations children who needed a public service or product. The racial, national or ethnic identity of the Jordan's

Principle Class members was the very reason for which Jordan's Principle and its substantive equality purpose applied to them.

~~79.~~84. The Tribunal found as a fact that the Crown's underfunding and other Impugned Conduct differentiated and adversely impacted First Nations children in the provision of certain services because of their race and national or ethnic origin. The Crown is estopped from challenging that finding.

ii. The Impugned Conduct Reinforced and Exacerbated Disadvantages

~~80.~~85. First Nations in Canada have historically suffered from the continuing effects of colonialism, systemic discrimination, and other disadvantages often directly linked to the Crown's legislation, policies, and practices. This discrimination has manifested itself in numerous ways, including the tragic history of the Residential Schools and the Sixties Scoop.

~~81.~~86. The social and economic context in which the claims of the Class members have arisen further aggravated the negative impact of the Impugned Conduct on the Class members. The Impugned Conduct widened the gap between the historically disadvantaged group of the Class members on the one hand, and the rest of society on the other, rather than narrowing it. The Crown added to the historical disadvantages suffered by the Class, and condemned many children to separation from their families, communities, and cultural identity.

~~82.~~87. More specifically, the Crown's design, management and control of the FNCFS Program, its funding formulas, and its restrictive interpretation of Jordan's Principle resulted in delays, disruptions, and denials of services and products, and created adverse impacts to the Class. For example:

(a) The structure and implementation of the Crown's funding formulas created built-in incentives to remove the On-reserve Class members from their homes as a first, not a last, resort. This practice had the opposite effect of provincial/territorial child welfare legislation and standards, which focus on prevention and least disruptive measures. The Impugned Conduct had a devastating impact on ~~Class members who were separated from~~these children and their families~~and communities~~.

(b) The Crown directed funding based on flawed assumptions about children in out-of-home care and population thresholds that did not accurately reflect the ~~service~~ needs of the Class members.

(c) The Crown provided inadequate fixed funding for operation and Prevention Service costs, hindering the ability of FNCFS Agencies to provide provincially/territorially mandated services to the Class.

(d) The Crown's inadequate funding deprived the Class members of culturally appropriate services.

(e) The structure and implementation of the Crown's funding formulas perpetuated the adverse impacts of Directive 20-1 on Class members and their communities.

(f) The Crown failed to adjust Directive 20-1 funding levels for decades, and failed to adjust funding levels under the EPFA, since its implementation, to account for inflation and cost of living.

(g) The Crown failed to update the 1965 Agreement in Ontario to ensure on Reserve communities could comply fully with the *Child and Family Services Act* and meet the needs of children in the context of their distinct First Nations cultures and realities.

(h) The Crown failed to coordinate the FNCFS Program and other related funding formulas with other federal departments and government programs and services for First Nations on Reserve, resulting in service gaps, delays and denials for First Nations children and families.

(i) The Crown failed to fund Post-Majority Services to Class members who were formerly in out-of-home care to assist them with the transition to adulthood.

(j) The Crown narrowly defined and inadequately implemented Jordan's Principle, resulting in public service and product gaps, delays and denials in the provision of services to the members of the Jordan's Principle Class, causing them harm. As Jordan's Principle aims at its core to ensure the substantive equality guaranteed by section 15 of the *Charter*, the Crown's emasculation of Jordan's Principle was a direct affront to the Class members' section 15 equality right.

~~83.~~88. The discriminatory impact on the Class members was and is apparent and immediate. As a result of the Impugned Conduct, the Crown differentiated adversely in the provision of child and family, and other public services and products to the Class members compared to non-First Nations children and families, and children and families in similar circumstances off Reserve. The members of the Class were denied equal child and family services because of their First Nations race, national or ethnic origin.

iii. Section 15 Violation Was not Justified Under Section 1

a. No Pressing or Substantial Objective for the Impugned Conduct

~~84.~~89. The Impugned Conduct had no pressing or substantial objective. It worked counter to and frustrated the Crown's professed objectives in the provision of ~~child and family~~essential services and products to the Class members.

~~85.~~90. The objectives of the FNCFS Program and other related funding formulas were to "ensure", "arrange", "support" and/or "make available" child and family services to First Nations children. More specifically, the principles of Directive 20-1 included a commitment to "expanding First Nations Child and Family Services on-reserve **to a level comparable to the services provided off reserve in similar circumstances** [...] in accordance with the applicable provincial child and family services legislation" [emphasis added].

~~86.~~91. In 2005, INAC issued the "First Nations Child and Family Services National Program Manual" in which the Crown listed the following objectives for the FNCFS Program:

(a) to support culturally appropriate child and family services for First Nations children, in the best interest of the child, in accordance with the legislation and standards of the reference province;

(b) to protect children from neglect and abuse;

(c) to manage the FNCFS Program in accordance with provincial or territorial legislation and standards;

(d) to provide to First Nations child and family services that are culturally relevant and comparable to those offered by the reference province or territory to residents living off Reserve in similar circumstances;

(e) to increase the ability and capacity of First Nations families to remain together and to support the needs of First Nations children in their parental homes and communities; and

(f) to ensure that the First Nations children receive a full range of child and family services reasonably comparable to those provided off Reserve by the reference province or territory.

~~87.~~92. The Impugned Conduct was counter to these objectives and other objectives announced by the Crown for the betterment of public services and products provided to the Class members. The Crown methodically implemented funding formulas and interpreted Jordan's Principle in ways that it knew, or ought to have known, would hinder these objectives and perpetuate the systematic, historic disadvantages suffered by the Class members.

b. The Means Adopted Were Not Proportional or Minimal

~~88.~~93. The Crown chose not to legislate on the provision of public services and products to Class members. Instead, the Crown filled the federal statutory vacuum that ensued with funding formulas, policies, and practices that gave rise to the Impugned Conduct.

c. No Rational Connection Between the Discriminatory Distinction and Any Valid Objective

~~89.~~94. No rational connection existed between the Impugned Conduct toward the Class members on the one hand and the Crown's objectives in this respect. The Impugned Conduct disadvantaged the ~~P~~plaintiffs and the Class, and did not advance any of the stated objectives of the Crown regarding ~~child and family~~the provision of public services and products to Class members.

d. Impugned Conduct Did Not Fall Within a Range of Reasonable Alternatives

~~90.~~95. There was no clear legislative goal to be attained by the Impugned Conduct. The Crown's conduct was contrary to its stated policy goals ~~with respect to the provision of public services to the Class members~~. The Crown's conduct was also contrary to its constitutional and fiduciary obligations to the Class members. Therefore, the Impugned Conduct falls outside a range of reasonable alternatives available to the Crown.

~~91.~~96. Only one alternative was constitutionally available to the Crown: to provide non-discriminatory public services and products to Class members consistent with its historic,

constitutional, and statutory obligations to First Nations children, and their families. The Crown failed to do that.

e. Detrimental Effects of Impugned Conduct on Equality Rights Disproportionate to Any Legislative Objective

92.97. The Impugned Conduct has detrimentally impacted the *Charter*-protected equality rights of the Class members, ~~who~~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 suffer serious and lasting harm. The Impugned Conduct has had a disproportionate effect on the equality rights of the Class members.

VIII. THE CROWN BREACHED ITS FIDUCIARY DUTIES AND DUTY OF CARE

93.98. The Crown's Impugned Conduct during the Class Period, including the following particulars, constituted a systematic breach of its common law duty of care and its fiduciary duties to the Class:

(a) The Crown's funding formulas incentivized, and foreseeably caused, the removal of On-Reserve Class members from their homes as a first resort rather than as a last resort, by covering maintenance expenses at cost and providing insufficient fixed budgets for Prevention Services and least disruptive measures.

(b) The Crown failed to ensure that an appropriate child welfare program for the Class members, as First Nations children, was delivered in the provinces and territories.

(c) By separating the On-Reserve Class members from their homes and communities, the Crown's funding formulas deprived Class members of their right to the non-discriminatory provision of essential services, denied many the On-Reserve Class

~~members~~and ~~their families~~ Family Class members the opportunity to remain together or be reunited in a timely manner, and further deprived On-Reserve Class members of their language and cultural identity.

(d) The Crown created funding formulas without consideration for the specific needs of the First Nations communities or the individual families and children residing therein.

(e) The assumptions built into the Crown's funding formulas, in terms of children in out-of-home care, families in need and population levels, did not reflect the actual needs of the Class members or their communities, making provincial or territorial operational standards unattainable for them.

(f) In cases where the Crown provided separate funding for Prevention Services, the Crown's static funding formula did not provide for the increasing operational costs of FNCFS Agencies, including the costs of salaries, benefits, capital expenditures, cost of living, and travel for FNCFS Agencies to attract and retain staff and, generally, to provide service levels in line with provincial or territorial requirements.

(g) The Crown did not fund Post-Majority Services to On-Reserve Class members who were formerly in out-of-home care to assist them with the transition to adulthood.

~~94.~~99. The Crown breached its common law and fiduciary duties to the Jordan's Principle Class through its narrow interpretation, and complete disregard, of Jordan's Principle. The Crown's approach deprived the Jordan's Principle Class members of essential protections on which they relied, and which the Crown undertook to provide.

~~95.~~100. Specifically, the Crown, through its adoption of Jordan's Principle, acknowledged its longstanding duty to protect the unique interests of First Nations children, including the Jordan's Principle Class. Its performance of this duty constituted a dishonourable exercise of discretion that critically affected these children, who it knew were eminently vulnerable.

~~96.~~101. In the aftermath of the Residential Schools and Sixties Scoop, the Crown undertook to assist ~~Canada's~~ First Nations in their journey ~~of~~toward reconciliation and recovery. In particular, it undertook to support their communities, culture and welfare, and protect them from further disadvantage and abuse. In so doing, it encouraged First Nations peoples, and particularly First Nations children in the Class, to repose trust in the Crown. The Impugned Conduct constituted a dishonest, disloyal and dishonourable betrayal of this trust, placing the interests of the Crown and others ahead of the interests of Class members.

~~97.~~102. At all times during the Class Period, the Crown retained a degree of supervisory jurisdiction over the Class. It did not, and could not, delegate its fiduciary and common law duties in respect of the important interests it undertook to protect.

IX. DAMAGES

B. Damages Suffered by the Plaintiffs and Class Members

~~98.~~103. As a result of the Crown's breach of its constitutional, statutory, common law, and fiduciary duties, including breaches by agents of the Crown, the ~~P~~plaintiffs and other Class members suffered injuries and damages, including but not limited to the following:

(a) the Impugned Conduct denied the Class members non-discriminatory child and family services;

(b) Class members were removed from their homes and communities to be placed in care and lost their cultural identity;

(c) Class members suffered physical, emotional, spiritual, and mental pain and disabilities;

(d) Class members suffered sexual, physical, and emotional abuse while being in out-of-home care;

(e) Class members lost the opportunity to access essential public services and products in a timely manner; and/or

(f) Class members had to fund out of pocket substitutes, where available, for public services and products delayed or improperly denied by the Crown.

C. Section 24(1) *Charter* Damages

~~99.~~104. The ~~P~~plaintiffs and Class members suffered loss as a result of the Crown's breach of section 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' equality rights under the *Charter* and deter future discriminatory funding of child and family services by the Crown.

D. Disgorgement

~~100.~~105. The Crown's failure to provide adequate and equal funding for services and products to the Class members constituted a breach of its fiduciary duties, through which the Crown inequitably obtained quantifiable monetary benefits over the course of the Class Period. The Crown should be required to disgorge those benefits, plus interest.

E. Punitive and Exemplary Damages

~~101.~~106. The high-handed manner in which the Crown conducted its affairs warrants the condemnation of this Court. The Crown, including its agents, had complete knowledge of the fact and effect of its negligent and discriminatory conduct with respect to the provision of public services and products to Class members. It proceeded in callous indifference to the foreseeable injuries that the Class members would, and did suffer. The Crown had already caused unimaginable harm and suffering to First Nations through Residential Schools and the Sixties Scoop, and knew, or should have known, that the Impugned Conduct would perpetuate and exacerbate those harms to First Nations children and their families.

X. *CIVIL CODE OF QUEBEC* AND STATUTES

107. In addition to the foregoing, the Impugned Conduct breached the Family Class members' rights under the *Family Compensation Act*, R.S.B.C. 1996, c. 126, *Fatal Accidents Act*, R.S.A. 2000, c. F-8, *Tort-Feasors Act*, R.S.A. 2000, c. T-5, *The Fatal Accidents Act*, R.S.S. 1978 c.F-11, *Fatal Accidents Act*, C.C.S.M. c. F150, *Family Law Act*, R.S.O. 1990, c. F.3, *Fatal Accidents Act*, R.S.P.E.I. 1988, c. F-5, *Fatal Accidents Act*, R.S.N. 1990, c. F-6, *Fatal Accidents Act*, R.S.N.B. 2012, c. 104, *Fatal Injuries Act*, R.S.N.S. 1989, c. 163, *Fatal Accidents Act*, R.S.Y. 2002, c. 86, *Fatal Accidents Act*, R.S.N.W.T., 1988, c. F-3, and *Fatal Accidents Act*, R.S.N.W.T. 1988, c. F-3, all as amended.

~~102.~~108. Where the actions of the Crown and its agents and servants took place in Quebec, the Impugned Conduct constituted a fault pursuant to Article 1457 of the *Civil Code of Quebec*. The Crown knew or ought to have known that the Impugned Conduct, including its denials of service and adverse impacts, would cause tremendous harm to the Class members. The Members of the On-Reserve Class sustained bodily and moral injuries as a direct and immediate consequence of