CITATION: BM v. Ontario, 2025 ONSC 4575
COURT FILE NO.: CV-22-00691039-00CP
DATE: 20250825

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: BM and CA, Plaintiffs

– and –

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

BEFORE: Justice E.M. Morgan

COUNSEL: *Harold Cochrane, K.C., David Sterns, Mohsen Seddigh, Maria Arabella Robles, and Angela Bespflug,* for the Plaintiffs

Victoria Yankou, Waleed Malik, Hera Evans, Spencer Nestico-Semianiw, Sarah Pottle, and Adrienne Ralph, for HMK in Right of Ontario

Sonja Pavic, Carolyn Phan, and Travis Henderson, for the Attorney General of Canada

HEARD: May 27-30, 2025

CERTIFICATION MOTION

I. Breadth of the claim

[1] The Plaintiffs seek to certify this action pursuant to section 5(1) of the *Class Proceeding Act, 1992*, SO 1992, c. 6 ("CPA").

[2] The Plaintiffs have brought this case as representatives of all Indigenous children who live off-reserve and who have been through Ontario's child welfare system, along with their caregiving parents and grandparents. They also present themselves as representatives of a putative class that has used other social service programs in Ontario such as education and health services, and that has experienced gaps and delays in coverage.

[3] To be clear, the claim does not challenge any one aspect of these programs or services, nor does it seek damages for any specific incidents of harmful conduct alleged to have been perpetrated by identified actors in the system; rather, it impugns the operation of the entire child welfare system and the overall system of social services as having led to overrepresentation of Indigenous children in provincial care and undue hardships accessing other services. The claim seeks to hold both the provincial and federal governments liable to the class as a whole for the design, funding, and implementation of the child welfare and other social service systems in Ontario.

[4] The claim can only be described as a sweeping indictment of Ontario and Canadian society. The Plaintiffs contend that Ontario and Canada provide insufficient funding and services to Indigenous communities. They further claim that Ontario has put in place a child welfare system which prioritizes removal of the child over other means of prevention of harm, and that the system is designed in a way that creates social and cultural disconnection as well as poor health and education outcomes for Indigenous children and communities.

[5] Counsel for the Plaintiffs discuss these issues as falling into two categories: (a) the removed child claim, and (b) the essential services claim, as follows:

> (a) Ontario's child welfare machinery, which has systemically prioritized the removal of Indigenous children (an act sometimes called 'apprehension' or 'protection') from their families and communities over the delivery of culturally appropriate prevention services and supports aimed at keeping the children in their homes. As a result, thousands of Indigenous children were severed from their families and communities, causing widespread harm to these individuals.
>
> (b) The provision of health and social services in the province, which have routinely been denied to Indigenous families and children—or provided after significant delays. This category of claims is recognized under the name 'Jordan's Principle' in the First Nations context. This case seeks to apply the same equality rights underlying Jordan's Principle to all Indigenous children in Ontario who faced the same systemic barriers and deprivations, whether they are First Nations, Inuit or Métis.

[6] There is no denying that Indigenous children comprise a proportion of Ontario's children in care that is far beyond their percentage of the population. The statistics supporting this are not contested by the two government Defendants. Citing both the federal government's expert, Christiane Guay of the Université du Québec en Outaouais, and the former Minister of Indigenous Services, Seamus O'Regan, Plaintiffs' counsel in their factum set the numbers very starkly:

> About 7.7% of the children under 15 in Canada are Indigenous. Yet, they represent 52.2% of children in Canada's child services system. This over-representation, aptly called a crisis, is witnessed all over Canada. As stated by the Minister of Indigenous Services during parliamentary debate, '[m]ore Indigenous children are

> in care now than at the height of the operation of residential schools' [citations omitted].

[7] In the next paragraph, Plaintiffs' counsel identify what they submit is the source of the problems at issue here. Citing the Quebec Court of Appeal in its review of that province's child welfare system, the Plaintiffs state that ultimate cause of the harms alleged to be perpetrated by child welfare and other social services across Canada comes from the long history of colonial practices:

> The over-representation of Indigenous children in care is the result of colonial policies and practices established in the 19th century and maintained throughout the decades, the purpose of which was to assimilate Indigenous individuals [citation: *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185(QCCA Opinion), at paras. 74-93].

[8] The Plaintiffs submit that the current child welfare system, along with the balance of the province's social services systems, is built on the residual harms and unfortunate legacy of residential schooling imposed on Indigenous communities in past generations. Plaintiffs' counsel highlight that "[t]he federal government has issued an apology to former residential school students and has acknowledged that it has an important role to play in remedying the harm done."

[9] And therein lies not only the matter sought to be addressed by the present claim, but the difficulty in certifying the claim. Governments and legislatures have a role to play in steering the course of Canadian policy in respect of Indigenous children, parents, and other caregivers. The courts arguably do not – at least, not in the generalized policy sense in which this claim is presented.

[10] I say this with great respect to the Plaintiffs and their counsel, and with acknowledgment of the seriousness of the policy issues covered in the Plaintiffs' claim. But I also say it out of great respect for the judicial function and the parameters of its role in righting wrongs. The courts are institutionally constrained in a way that would make the task of adjudicating and addressing the society-wide impact of all government social policies beyond their legitimate reach.

[11] To be clear, the Plaintiffs do not seek a remedy for any specific wrongs perpetrated by specific government actors to any specific Indigenous children. Rather, their claim seeks to have the court embark on a course that can redirect the trajectory of Canadian social policy.

[12] Every institution has its area of competency. Legislatures and public inquiries can debate history and social policies along with the wisdom of maintaining or changing them; courts, on the other hand, cannot litigate policy issues in the absence of a pleading of specific harms by and to identifiable persons. Courts are designed to right wrongs, but not to revise and devise policies over multiple subject areas or to engage the society-wide political and economic judgments that a revised child welfare or health and education policy would demand.

[13] The societal context in which the present claim arises is simply too multi-faceted and broad for a court to competently handle. The fact that its subject matters – overall child welfare policy and adjacent health and education policies – are considered core legislative subject areas, which engage distinctly political and economic decision-making, points to the claim's fundamental lack of justiciability: see Sossin, Lorne. *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999), at p. 200.

II. The off-reserve claim

[14] Plaintiffs' counsel frame their argument in a lengthy recitation of previous and ongoing cases dealing with Indigenous child and family policies in an effort to put the present litigation into legal context. The class actions in this area start with the redress provided to survivors of residential schools, a deliberately assimilationist and particularly cruel policy that has been properly characterized as "one of the darkest, most troubling chapters in our nation's history": *Final Report of the Truth and Reconciliation Commission of Canada*, vol. 1, Part 1, p. VII.

[15] As Justice Winkler described it in *Baxter v. Canada (Attorney General)* (2006), 83 OR (3d) 481, at para. 2, "For over 100 years, Canada pursued a policy of requiring the attendance of Aboriginal children at residential schools, which were largely operated by religious organizations under the supervision of the federal government." Following the closure of the last so-called Indian residential school, survivors commenced class proceedings seeking redress: *Cloud v. Canada (Attorney General)*, 2004 CanLII 45444, at para. 47 (Ont CA). These legal efforts resulted in compensation paid to residential school survivors.

[16] Plaintiffs' counsel go on to describe the next set of claims in the area as focusing on what is often referred to as the "Sixties Scoop". In *Frame v. Riddle*, 2018 FCA 204, at para 1, Justice J.B. Laskin described this phenomenon as "the practice by… child welfare authorities for many years of taking Indigenous children into care and placing them with non-Indigenous parents, where those children were not raised in accordance with their cultural traditions or taught their traditional languages."

[17] Again, the survivors of this policy sought redress in a class action. In *Brown v. Canada (Attorney General)*, 2017 ONSC 251, Justice Belobaba held the federal government liable for harms imposed by the Sixties Scoop on Indigenous children over a two-decade period ending in the mid-1980s. Having been found liable for these harms, the government of Canada ultimately agreed to compensate survivors in a settlement approved in both this Court and the Federal Court: *Brown v. Canada (Attorney General)*, 2018 ONSC 3429; *Riddle v. Canada*, 2018 FC 641.

[18] Among other things, the courts have determined that the Sixties Scoop policy was administered contrary to the principles now entrenched in section 35(1) of the *Constitution Act, 1982*. The Supreme Court has described those legal principles as "provid[ing] a constitutional framework for the protection of the distinctive cultures of aboriginal peoples, so that their prior occupation of North America can be recognized and reconciled with the sovereignty of the Crown": *R. v. Sappier*; *R. v. Gray*, [2006] 2 SCR 686, at para. 22.

[19] With resolution of the residential schools and Sixties Scoop actions, the litigation across the country has come to focus on present-day social welfare programs. For example, the class action with respect to Indigenous children and the child welfare system on reserves across Canada has resulted in a settlement with the federal government: *Moushoom v. Canada (Attorney General)*, 2023 FC 1466. The policies that pertain to Indigenous children and families living on reserves are federally funded and self-contained; and the claims relating to those policies are not at issue in the present action.

[20] What is now at issue in a series of class actions across the country is the child welfare and other related social services and systems as they apply to Indigenous children and their families and caregivers living off reserve. There are currently multiple cases in different jurisdictions in Canada raising similar claims to those in the present action. Despite their similarities, each of those cases presents a slightly different perspective on the issues and presents itself as sitting in a slightly different relationship to the earlier generation of cases; and the results have likewise been varied from jurisdiction to jurisdiction.

[21] The British Columbia Supreme Court has recently certified a class action in respect of the child social welfare policies of that province as they apply to off-reserve Indigenous children and families: *Neal v. Canada (Attorney General)*, 2025 BCSC 1498. The B.C. court characterized the claim as being a direct descendent of the earlier generation of court challenges to discriminatory treatment of Indigenous children. It doing so, it characterized the British Columbia policies at issue as "the most recent example of the Crown's systemic, discriminatory conduct since the 19th century toward Indigenous children, beginning with Indian residential schools, then with the Sixties Scoop…": *Ibid.*, at para. 5.

[22] The Quebec Superior Court has recently produced a mixed result in respect of a similar class action by representatives of off-reserve Indigenous children and families. The Court authorized the portion of the proposed class action applicable to Quebec's child welfare system, but refused authorization for the part of the action applicable to Quebec's other essential services such as health and education: *A.B. c. Procureur general du Québec*, no. 500-06-001177-225 (30 avril 2024). It perceived the child welfare claim as meeting the minimal evidentiary standards required for class action authorization under Quebec law; at the same time, it refused authorization of the essential services claim which presented an unsupportable challenge to a wide array of social policies – including "education, infrastructure, equipment or medical supply, medical transportation, relief care, dental care, and vision care services": *Ibid.*, at para. 149.

[23] The Federal Court of Appeal has recently denied certification in a proposed national class action likewise pertaining to child welfare policies across the country as they apply to off-reserve Indigenous children and their families and caregivers: *Canada v. Stonechild*, 2025 FCA 105. The Court was concerned that the subject matter of child welfare for off-reserve Indigenous children was entirely in the respective provinces' hands and was thus better suited for adjudication in the superior courts of the provinces: *Ibid*., at para. 17.

[24] Moreover, the Federal Court of Appeal took note that the plaintiffs' allegations of systemic harm were, like those made by the Plaintiffs in the present claim, put forward in a way which focused on overall policy but failed to allege or address the wrongfulness of any specific government actions. In view of that lack of specificity in the pleading, the Court saw the claim as more of a policy exercise than that an adjudicative one. It therefore refused to certify the action since the plaintiffs had raised issues that could not be judicially answered. As the Court put it, "the proposed class action asks a question – but does not give the Court the tools to answer the fundamental questions about how a child came to be placed in care, in what circumstances, by whom, what alternatives were considered and who was consulted": *Ibid*., at para. 4.

III. **The policy environment**

[25] As indicated, the Plaintiffs' claim is directed, broadly speaking, at two contexts: a) child welfare services in Ontario; and b) essential services (health, education, and others) in Ontario. It alleges systemic barriers and deprivations in respect of Indigenous children and families in each of these areas. As the policies and procedures governing these areas are distinct, the discussion of each of them will proceed separately and in parallel with the way the claim has been framed.

a) Child welfare services in Ontario

[26] The Ontario legislature enacts child welfare policy for the province, but the government of Ontario does not deliver those services. The Ministry of Children, Community and Social Services (the "Ministry") provides high-level oversight for the independently governed Children's Aid Societies ("CASs"). It is the CASs that are responsible for administering the child welfare system and delivering child welfare services: *G.G. v. Ontario*, 2025 ONSC 3011, at paras. 8-11. The province's role includes establishing strategic policy, developing legislation and regulations, allocating funding, and licensing and inspecting the CASs pursuant to applicable legislation and regulations. The Ministry is not involved in child protection investigations or case management decisions, including decisions about whether any given child is in need of protection.

[27] A CAS's intervention on behalf of a child may or may not result in the removal of the child from parental care, although if a child is to be removed without the parents' or guardians' consent it is through a court process. It is therefore a judge, and not a CAS employee or any government official, who is the one who determines whether a placement is authorized under the *Child, Youth and Family Services Act, 2017* ("CYFSA") and its predecessor (from 1985 to 2018), the *Child and Family Services Act* ("CFSA"). Under s. 1(1) of the CFSA and s. 1(2) of the CYFSA, the objective of the legislation, and the lens through which any intervention is to be analyzed, is to promote the best interests, protection, and well-being of children.

[28] The Plaintiffs have made a focus of their claim that Ontario has struck the wrong balance between prevention initiatives and intervention or risk-based action. Ontario's counsel explains that, in fact, the policy debate between those two objectives has vacillated as the legislature has stressed one or the other during the course of the class period.

[29] The record shows that in the late 1990s, several inquests into child deaths resulted in recommendations to amend the CFSA to include neglect and emotional harm to the grounds for deciding that a child was in need of protection. Legislative amendments at that time also were enacted to include past parenting issues as a factor potentially leading to intervention, and lowering the test of harm from "substantial harm" to "risk of likely harm". These legislative, funding, and policy reforms introduced a more interventionist and risk-focused approach to protecting the child's best interests.

[30] This emphasis was then re-considered a decade later in the mid-2000s, when a collaborative initiative between the Ministry and CASs launched a new agenda that transformed the policy focus. The recast approach struck a more balanced position, giving equal weight to family preservation and child protection. This approach included the introduction of situational assessments that directed the CASs to consider family strengths as well as family risks in deciding on the appropriate child welfare approach.

[31] Counsel for Ontario also stress that the legislative and policy framework for child welfare has taken into account the particular needs of Indigenous children and families. Thus, a stated purpose of the CFSA is to entitle First Nations to provide their own child and family services, and to do so in a manner that recognizes their culture and traditions. The mid-2000s reforms took this a step further by acknowledging the importance of customary care and by increasing the requirements for community consultation and participation in devising child protection plans.

[32] Along with these reforms, amendments to the CFSA allowed, where appropriate, for extended families and community members to be involved in providing services to children, and stipulated that child services were to take into account the child's cultural background and emotional character. This approach was further extended in the CYFSA, that provided that where an Indigenous child's family could not provide the necessary care, the relevant CAS was to engage in a kin-finding exercise to seek out extended family and engaged community members with a mandate to support the child in maintaining connections important to the child.

[33] Furthermore, in 2013, the Ministry and representatives of First Nations, Inuit, and Métis communities worked together to develop the Ontario Indigenous Children and Youth Strategy. The province's affiant, Kevin Morris, a retired senior Ministry official with 30 years of experience working in policy analysis, funding policy, and other core areas of the child welfare field, has deposed that this strategy aimed at improving services for Indigenous children and empowering Indigenous communities with increased autonomy and authority over child and family services. This, in turn, was augmented in 2020 with the Ministry's released of its Child Welfare Redesign Strategy. Mr. Morris explains that this policy initiative further enabled Indigenous-led service delivery and stressed prevention approaches and services.

[34] Mr. Morris goes on to depose that Ontario also has put in place policies and standards to guide CASs in carrying out their functions. Moreover, these standards are not stagnant; they have been continually reviewed and revised to incorporate ongoing child welfare experience.

[35] The starting point for the policies and standards implemented during the class period is the Risk Assessment Model, which was developed by the Ontario Association of Childrens Aid Societies along with the Association of Native Child and Family Services Agencies of Ontario and the Ministry. It contained three components: the Ontario Child Welfare Eligibility Spectrum, the Safety Assessment Tool, and the Risk Assessment Tool. This Model was revised in 2000 and was in place until the development of the Child Protection Standards and Child Protection Tools Manual in 2007. These Standards provide direction to CAS workers from receipt of a referral and eligibility determination, through investigation, case transfer, ongoing service case management, and the closing of a child protection case. The guidance package was updated in 2006 after broad input from CASs and other professionals, and further revised to reflect further input and experience in 2019, 2021, and 2024.

[36] The Child Welfare Eligibility Spectrum component of the guidance package was created by the Association of CASs, not by the Ministry or any other branch of Ontario government. It provides the set of criteria to determine a child's eligibility for protection and to provide uniform measures for CAS workers in making decisions about eligibility for protection services. The content of the Spectrum is what is generally referred to as "the grounds for protection", and include situations of physical, sexual, or emotion abuse, neglect of a child, or risk of abuse or neglect.

[37] Counsel for Ontario emphasize that not only was the Spectrum not prepared by Ontario; it is not implemented or acted upon by government. No branch or official of Ontario government directs decisions made pursuant to Spectrum criteria. In particular, no one in government has input into any determination as to whether there are risk factors are present with respect to a child. That determination is made independently by a CAS, which is then responsible for removing the child from the risk-creating conditions if the determination is made. The guidance provided by the existing policies and standards supports the CAS caseworkers, but the determination as to how and when to provide services or remove the child from a family home is left to CAS staff in their professional capacity to exercise clinical judgment.

[38] To the extent that the Plaintiffs impugn not only the operation of the child welfare system in the province but its funding, it is noteworthy that funding decisions for child welfare services are made at Cabinet level. The funding decision for child welfare services is part and parcel of the division of tax dollars to the various Ontario ministries, and is thus an integral component of the annual budget process. It is, accordingly, directed by Cabinet and approved by Treasury Board along with the rest of the provincial budget. Budgetary allocations of this nature cannot be assessed on their own or on a stand-alone basis, but rather are part of the complex process of funding for all public services in the province.

[39] An adjudication of whether the funding for any aspect of child welfare system is "sufficient" would entail measuring that funding against the available funds in the province's treasury, and weighing the priorities to be given to health, education, transportation, infrastructure, policing, and other provincial responsibilities overall. Counsel for Ontario submit, accurately, that the level and allocation funding, as a budgetary matter for the province, is a policy decision that is and can only be made at the highest level of government.

b) Essential services in Ontario

[40] In argument, counsel for the Plaintiffs characterized the essential services part of the present claim as being "on the edge" of what can be certified as a class action. Before determining whether the claim falls off that precipice it is necessary to determine what services, exactly, are included in the impugned essential services.

[41] Unfortunately, it is not easy to make that precise determination. The phrase remains only amorphously defined in the Plaintiffs' materials, and the Plaintiffs' expert witness, Nico Trocmé, the Director of the School of Social Work at McGill University, confirmed in cross-examination that although a description of essential services exists in various reports or studies, no working definition has been formulated specifically for the purpose of this action.

[42] What the Statement of Claim does contain is a list of examples of essential services. These services are said by the Plaintiffs to be denied to Indigenous children, or their provision to Indigenous children is delayed, as a result of underfunding and/or jurisdictional disputes between the provincial and federal governments. This is repeated, with an introductory explanation, in Plaintiffs' counsel's factum [citations omitted]:

> 56. Indigenous children's lack of access to essential health and social services, 'while not strictly a child welfare concept … is relevant and often intertwined with the provision of child and family services'. The plaintiffs plead that these access barriers affect, for example, Indigenous children's access to special education, medication, medical equipment, medical transportation, mental healthcare, respite care, oral healthcare, and vision care.
>
> 57. The common, systemic thread is that, for decades, Indigenous children have been unable to access essential services, or have faced delays in accessing those services, despite Indigenous children's heightened needs.

[43] Ontario's counsel point out that these examples of essential services touch on virtually every facet of the health care system in the province. In an effort to better explain how the "essential services" operate, Ontario has led evidence describing the funding and delivery of the broad spectrum of health, social and educational services referenced by Plaintiffs' counsel. What follows is a very brief, high-altitude review of a large and complex legislative, policy and funding environment.

[44] As set out in the affidavit of Robert Francis, the Acting Deputy Minister for Strategic Policy, Planning, and French Language Services at the Ontario Ministry of Health, the Ministry of Health does not provide the health or social services impugned in the Statement of Claim. Health services are provided by physicians and other medical professionals or by hospitals, clinics, care homes, and other independent agencies who contract with health service providers. The province's role is to fund and regulate the health care system.

[45] The evidence of Mr. Francis also establishes that within Ontario's universal health care system there are exclusions and limits on access to certain services. The publicly funded medical system in the province provides insurance coverage for identified, medically necessary health services. There is nothing in the record that evidences the government having caused the Plaintiffs or anyone else delays, denials, or service gaps in receiving insured and fully funded health services. Rather, much of what the Plaintiffs identify as essential services that they have been denied are services that are not fully funded for anyone in the province.

[46] One example of an exclusion from this coverage is in the field of mental health services, of which some services are fully funded, some only partially funded, and some not funded at all for anyone in Ontario. Mental health services are provided by family physicians and psychiatrists, either in physicians' offices or in hospitals, and paid for through OHIP. In addition, child and youth mental health services are delivered by more than 230 community-based, not-for-profit organizations across Ontario, including First Nations, Inuit and Métis organizations. Those organizations provide services not fully funded and thus not covered by OHIP, and so their services, while offered across the province, are not guaranteed like fully government-funded services.

[47] Ontario has also submitted an affidavit of Claudine Munroe, the Assistant Deputy Minister of the Indigenous Education and Well-Being Division of the Ontario Ministry of Education. Ms. Munroe deposes that under the *Education Act*, independently elected school boards, and not the government itself, are responsible for providing education at large as well as special education services. Like CASs, school boards are independently governed, separate legal entities, and are not agents of the provincial Crown.

[48] The Ministry of Education is responsible for developing the statutory framework within which provincially-funded elementary and secondary education is delivered, and for various policy-oriented functions such as setting curriculum standards and publishing school rules and policies. As Ms. Munroe explains it, it is school boards, schools, principals, and, to some extent, teachers, who are responsible for making decisions concerning individual students, including any special education needs.

[49] The evidence in the record shows that most First Nations, Métis and Inuit students in Ontario who live off-reserve attend provincially funded elementary or secondary schools. In this respect, they are able to access the same educational and social services, and the same supports, as other students in the provincial school system. School boards' responsibilities for providing services to students in need of special education programs include a requirement to identify exceptional students, to assess their educational needs, and to deliver appropriate special education programs and services.

[50] Again, Indigenous students in off-reserve public schools have access to the same special education programs if they require it as all other Ontario students. In fact, Ms. Munroe explains in her affidavit, in its role as funder of the education system the Ontario government does support the unique needs of Indigenous students. It offers funding specifically targeted toward Indigenous

students and has developed policies and programs, and promulgated regulations under the *Education Act*, to support the success of Indigenous students in public schools: see O. Reg. 261/19 ("Reciprocal Education Approach").

[51] Finally, in their factum the Plaintiffs' counsel submit that "the province treats Indigenous children as assimilated and its essential service systems do not account for class members' indigeneity or substantive equality rights." While it is true that all health, education, and other social services are available to Indigenous children on an equal basis as all other Ontarians, the evidence in the record demonstrates that that is not the complete picture. In addition to the targeted education programs for Indigenous students referenced above, the evidence also contains examples of government funding for Indigenous organizations, service providers and Indigenous-focused health services to support culturally appropriate care.

[52] Robert Francis deposes that this funding is allocated for the specific purpose of enhancing access to social services for Indigenous communities. He indicates that the province allocates to First Nations, Metis, and Inuit communities roughly $48 million annually as a Child and Youth Mental Health Program budget. In addition, Mr. Francis describes a number of programs administered or funded by the province that are particularly geared to Indigenous communities and that counter the assimilationist portrayal that is put forward by the Plaintiffs. While I hesitate to quote from the evidence at length, Mr. Francis' experience with these issues has given him a facility for elucidating them that makes his evidence worth repeating [exhibits omitted]:

> 43. MOH's Child and Youth Mental Health program also supports Indigenous youth life promotion/suicide prevention initiatives. These initiatives include land-based/cultural programming; mental health and addictions workers and supports in First Nations schools; enhancements to the CYMH Tele-Mental Health Service to reach more Indigenous communities; and 20 Mental Wellness Teams (jointly funded with Indigenous Services Canada). Indigenous partners have designed these initiatives. Funding for Indigenous youth life promotion/suicide prevention initiatives is provided directly to First Nations communities or urban Indigenous organizations who determine how funding is actually distributed.
>
> 44. The Child and Youth Tele-Mental Health Service addresses the shortage of child and adolescent psychiatrists in Ontario by supporting access to psychiatric consultation for more effective community-based service delivery for children and youth in rural, remote and underserved areas of Ontario. The Service provides publicly funded, community-based mental health service providers access to psychiatric consultation, via videoconferencing and without the need for a primary care referral. While psychiatric consults are not always provided by an Indigenous clinician, the Tele-Mental Health Services is focused on better serving children and youth in under-served areas of the province, including in Indigenous communities. The service can be accessed through one of seven coordinating agencies (three of which are Indigenous). These coordinating agencies are: Hands the Family Help Network, Woodview Mental Health and Autism Services, Algoma Family

Services, Strides Toronto, Dilico Anishnabek Family Care, Wichi-it-te-win, Family Services, and the Southwestern Ontario Aboriginal Health Access Centre.

45. Since 2006, the Ontario Telemedicine Network ("OTN") has facilitated telemedicine services to improve access to specialists for northern and Indigenous communities. Through a partnership agreement with the federally funded North Network, people located in northwestern Ontario can access telemedicine equipment (either through telemedicine equipment or simply a dedicated computer with videoconferencing) to see a specialist provider located anywhere in the province. Telemedicine can be accessed through numerous sites located both on and off-Reserve. Virtual care can also be delivered by telephone and computer, without using the OTN infrastructure. Attached as Exhibit "I" to this affidavit is an overview of OTN telemedicine services in Indigenous communities in Ontario.

46. Furthermore, MOH collaborates closely with Indigenous partners in assessing, planning, and delivering public health programs and services that reflect the diverse needs of Indigenous Peoples in Ontario. In this regard, Ontario has partnered with First Nations organizations such as the Chiefs of Ontario, health service providers such as the Indigenous Primary Health Care Council, local health authorities, such as the Sioux Lookout First Nations Health Authority, and urban Indigenous communities such as the Métis Nation of Ontario and Tungasuvvingat Inuit. Attached as Exhibit "J" to this affidavit is the Population and Public Health Division of the Ministry of Health and Long-Term Care (as it then was) Relationship with Indigenous Communities Guideline, 2018.

47. Ontario supports First Nations-led public health models throughout the province. For example, MOH is providing financial support for the implementation of the Sioux Lookout First Nations Health Authority's Approaches to Community Wellbeing public health model for the Sioux Lookout area. This model aims to improve and increase public health nursing, service delivery and planning for 31 remote First Nation communities within the health authority's catchment area.

IV. The certification criteria

[53] The test for certification set out in section 5(1) of the CPA represents what is by now a well-known set of analytic steps. The ensuing analysis will follow that familiar pattern.

a) Section 5(1)(a) – cause of action

[54] The Statement of Claim pleads a number of causes of action: breaches of section 7 and 15 of the Charter, breach of fiduciary duty, and systemic negligence. These are pleaded as applying to both the child welfare/removed child claim and the essential services claim. The question for each of those is whether it is "plain and obvious" that the claim cannot succeed, or "has no

reasonable prospect of success": *Wright v. Horizons ETFS Management (Canada) Inc.*, 2020 ONCA 337, at para 58(f).

i. Charter claims

[55] The Plaintiffs' claims advanced under sections 7 and 15 of the Charter all present a fundamental difficulty: they take aim at general health and social policies, not at specific laws or government actions.

[56] In terms of the child welfare system and its interventions in and removals from the family home, the Plaintiffs argue that Ontario has struck the wrong balance between prevention and apprehension, and that, overall, Ontario has not provided sufficient funding for prevention services in the child welfare system. In terms of the essential services claim, the Plaintiffs argue that the virtually the entire health care sector in the province is at fault since the substantial budgetary allocations directed to health and social programs do not meet a requisite level of health and social services.

[57] In *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852, at para. 33, the Court of Appeal critiqued the "diffuse and broad nature of the claims" put forward with respect to policies aimed at sheltering the homeless. It went on to hold that "there is no judicially discoverable and manageable standard for assessing in general whether housing policy is adequate or whether insufficient priority has been given in general to the needs of the homeless." One can say much the same thing about child welfare or education and health policy.

[58] As the Court of Appeal put it, "[T]he Court is not asked to engage in a 'court-like' function but rather to embark on a course more resembling a public inquiry into the adequacy of…policy": *Ibid*. To be clear, the overall problem with the claim is not its complexity but rather the breadth and nature of its subject matter and its lack of focus on actual legal rights and identifiably wrongful acts. In impugning policy at large, "the issue is one of institutional competence. The question is whether there is a sufficient legal component to anchor the analysis": *Ibid*., at para. 35.

[59] Given the extent to which the Plaintiffs' claim emphasizes access to mental health care, the British Columbia Court of Appeal's decision in *KO v. British Columbia (Ministry of Health)*, 2023 BCCA 289 is an apt comparison. The decision addresses a proposed class action alleging "failure on the part of the [province] to address the stigmatization of individuals suffering from mental illness in the provincially-funded healthcare system": *Ibid*., at para. 2.

[60] As in the present case, "The amended notice of civil claim [i.e. the pleading] does not identify any specific acts, legislative or otherwise, that are said to infringe the Charter…": *Ibid*. Rather, the claim centred on the government's allegedly misguided priorities in funding health care and contended, in essence, that people suffering from the stigma of mental health problems have a legally enforceable right to compel the government and legislature to enact measures to their benefit.

[61] The B.C. court, at para. 59, rejected the claim as demanding a weighing of priorities and a policy analysis that lack justiciability, along much the same lines as the Ontario court did in *Tanudjaja*:

> [T]here is no judicially discoverable and manageable standard for assessing, in general, whether the government's response to mental health stigma is adequate, or whether insufficient priority has been given in general to the needs of those diagnosed with mental illness. These are not questions that can be resolved by application of law. They engage the accountability of the legislatures.

[62] The removed child claim and the essential services claim both fit this description. They are policy arguments that confront multiple aspects of the child welfare, health care, educational, and social services systems in the province. The removed child claim is essentially a statistical claim that, although demonstrating a dramatic impact on Indigenous children in terms of their proportion of cases, does not allege a class-wide prevalence of wrongful decisions; and the essential services claim represents a diffuse policy argument that engages a complex weighing of numerous policy priorities and a specific re-ordering of funding resources without consideration of all of competing uses for those resources.

[63] In all, the claim before me demands that I impose my views on those policy options – a task which a judge and a court is not institutionally suited to take on. The decision is, in essence, "a question of policy and choice to be determined by the legislative process": *Toronto (City) v. Ontario (Attorney General)* (2018), 142 OR (3d) 481, at para. 19 (CA). As Justice Wilson explained in *Operation Dismantle v. The Queen*, [1985] 1 SCR 441, at para. 52, "these kinds of issues are to be treated as non-justiciable not simply because of evidentiary difficulties but because they involve moral and political considerations which it is not within the province of the courts to assess."

[64] Turning from the overall justiciability question to the specific Charter claims, the removed child claim is bound to fail under both sections 7 and 15. The decisions whether to investigate child protection matters, or to apprehend or place a child in another home are not made by either tier of government. They are made by independently governed and suable CASs. The CASs in Ontario exercise state power and, for constitutional law purposes, their acts amount to state action in their own right and in their own name: *Children's Aid Society of London and Middlesex v. H(T)*, 1992 CanLII 4042, at para. 24 (SCJ).

[65] It is well established that CASs are subject to potential Charter action and can be held directly liable for damages under section 24 of the Charter: *Stolove v. Waypoint Centre for Mental Health Care,* 2024 ONSC 3639, at para 325. The Courts have specifically held, and the Court of Appeal has confirmed, that CASs are independently responsible actors under the Charter and that "HMQ is not liable for the actions of these various entities": *C.R. v. Her Majesty the Queen in Right of Ontario*, 2019 ONSC 2734, at para. 110, aff'd *J.B. v. Ontario (Child and Youth Services)*, 2020 ONCA 198. The acts of discrimination and mistreatment alleged against CASs and their personnel were committed not by the Defendants but by separate legal entities; their actions and

discretion must be exercised in accordance with the Charter, and that duty is enforceable directly against them: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 SCR 1120, at para. 133.

[66] Furthermore, the government is not liable for a failure to prevent any harm suffered at the hands of CAS staff. "[I]t is plain and obvious there is no constitutional obligation on Ontario to prevent other government actors from violating…constitutional rights": *Foley v. Victoria Hospital London Health Sciences Centre*, 2023 ONSC 7155, at para. 155. The fact that CASs act under statutory authority does not make government ultimately responsible for their actions. CASs "acting under public authority are to be held accountable in their own right under section 32 of the Charter, as respondents distinct from the Government: *Zaugg v. Ontario (Attorney General)*, 2019 ONSC 2483, at para. 50, citing *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624, at paras. 29-30.

[67] In addition to all of this, much of the claim made on behalf of the removed child class, and the specific claims put forward by the two representative Plaintiffs themselves, relate to their own removal from their respective families' care and the Crown Ward orders authorizing those removals and placing them in CSA care: see CFSA, section 57(1). This type of claim is a collateral attack on those court orders; as such, it is an abuse of process and must be struck. It cannot succeed: *C.R.*, supra, at para 100, aff'd *J.B.*, *supra*, at para 77.

[68] The collateral attack rule prevents the Plaintiffs from challenging previous Court orders, including removal and Crown ward orders, unless the orders have been overturned on appeal or otherwise set aside: *Garland v Consumers' Gas Co*, [2004] 1 SCR 629, at paras 71-72. At the same time, the rules regarding abuse of process prevent the Plaintiffs from relitigating the facts underlying the orders that they now impugn: *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 SCR 77, at para 37, citing *Canam Enterprises Inc v Coles*, 2000 CanLII 8514, at para. 55 (Ont CA). It has been held that it is an abuse of process, and that it cannot succeed as a claim, where a plaintiff asserts that existing court orders made in another proceeding are wrong and that they give rise to damages or alleges a binding court order is a "miscarriage of justice" and seeks damages as a result: *C.R.*, at para 100, aff'd *J.B.* at para 77.

[69] Turning to the section 15 Charter claim, the Plaintiffs argue that that the child welfare system in Ontario infringes section 15 of the Charter because Indigenous children living off-reserve are subject to the same child welfare system already found to be discriminatory by the Canadian Human Rights Tribunal in *First Nations Child and Family Caring Society of Canada v. Attorney General of Canada*, 2016 CHRT 2. In that case, the Tribunal considered a challenge to the child welfare system experienced by First Nations children on reserve, and found that the system was deficient in comparison with that experienced by Indigenous children off reserve.

[70] In other words, the province's off-reserve system provided more services than the federal on-reserve system. The reverse argument – that the off-reserve system is also discriminatory in comparison with the on-reserve system – makes no logical sense.

[71] Like the present case, the *Caring Society* case focused on the funding and other policy aspects of the federal on-reserve system. By way of illustration, at para. 392, the Tribunal found that,

> [The on-reserve federal system] does not account for changes made over the years to provincial legislation for such things as mental health and other prevention services. This is further compounded by a lack of coordination amongst federal programs in dealing with health and social services that affect children and families in need, despite those types of programs being synchronized under Ontario's *Child and Family Services Act*. The lack of surrounding services to support the delivery of child and family services on-reserve, especially in remote and isolated communities, exacerbates the gap further. There is also discordance between Ontario's legislation and standards for providing culturally appropriate services to First Nations children and families through the appointment of a Band Representative and AANDC's lack of funding thereof.

[72] In their factum, Plaintiffs' counsel make the generic comment that "Aboriginality-residence is an analogous ground", and that "discrimination of Indigenous people based on on- or off-reserve residency violates section 15." As a statement of law in the abstract, those observations are, of course, accurate: see *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, at para 6. But the Plaintiffs fail to explain how that discrimination possibly plays out in a context where the Canadian Human Rights Tribunal has found that the on-reserve system did not meet the higher standard of the off-reserve system in Ontario.

[73] And although it is equally true that a section 15 plaintiff need not identify a specific group that is treated better, there must be some sense that the plaintiff is part of a group that is distinguishable in a way detrimental to them: *R v Sharma*, 2022 SCC 39, at para 41. The Plaintiffs' only way of distinguishing Indigenous children from anyone else is by means of statistics. They repeatedly emphasize in both their factum and their Statement of Claim that "Indigenous children are grossly overrepresented in state care in Ontario." But they never specifically say that the provision of state care is wrongful in a disproportionate number (or *any* number) of cases.

[74] To put the matter at its most basic, the Plaintiffs contend that a preventative approach would reduce the number of removals. That assumes, of course, that a preventative approach could be successfully devised and implemented; otherwise, it is simply a circular assertion, much like saying that a crime prevention approach would reduce arrests and incarcerations of minorities, or that increased driver education would save more lives of urban residents, or that increased emphasis on nutrition in schools would reduce heart disease in vulnerable communities, etc.. With respect, that kind of bald, unparticularized social commentary is appropriate in a parliamentary committee debate; but it is not a juridical argument about equality and cannot form the basis of a section 15 Charter claim.

[75] For all of these reasons, it is plain and obvious that claims under ss. 7 and 15 of the Charter have no reasonable prospect of success.

ii. Fiduciary duty

[76] The Plaintiffs plead that the Crown at both the provincial and federal levels has breached a *sui generis* and/or an *ad hoc* fiduciary duty owed to Indigenous children. They submit that the relationship with Indigenous communities entails the honour of the Crown at all times, which intensifies the duties owed to Indigenous children: *Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39, at para 154.

[77] More specifically, the Plaintiffs state that the ability "to protect Aboriginal children", to "pass on their distinctive cultural values" to their children, and to "ensure their connection to the distinctive culture of their Aboriginal community" are each "an essential aspect of the survival of Aboriginal peoples as distinct peoples": *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185, at para 476. They plead that these features of Indigenous life have been undermined by the policies in issue.

[78] Both levels of government dispute this assertion as a matter of fact, and, more importantly for this stage of the certification analysis, submit that it is incorrect as a matter of law. They state that while the relationship between the Crown and Indigenous peoples is generally a fiduciary one, not all specific dealings between them fall within the ambit of fiduciary obligations: *Manitoba Metis Federation Inc. v. Canada (Attorney General),* [2013] 1 SCR 623, at para. 48. They further submit that the ingredients necessary for either a *sui generis* or an *ad hoc* fiduciary duty are missing from the relationship between the Crown and Indigenous children and communities embodied by the policies in issue.

[79] The Supreme Court of Canada has instructed that a *sui generis* fiduciary relationship toward Indigenous people arises where there is a level of "economic, social and proprietary control and discretion asserted by the Crown over them" and where there is a specific and recognizable Indigenous interest that is "sufficiently independent of the Crown's executive and legislative functions to give rise to responsibility in the nature of a private law duty": *Ontario (Attorney General) v. Restoule*, 2024 SCC 27, at paras. 233, 236 [citations omitted]. Citing the Quebec Court of Appeal in the *First Nations, Inuit, and Metis Youth Reference*, *supra*, at para. 476, which dealt with issues relating to self-government, the Plaintiffs submit that protecting Indigenous children and passing on and connecting children to Indigenous culture constitute the specific and recognizable Indigenous interest required for a fiduciary duty to exist.

[80] That statement on its own, however, does not satisfy the legal test of a recognizable Indigenous interest. In determining such an interest, more than just a bald and generic statement like 'preserving culture' is required. The Supreme Court has indicated that to make out a claim of fiduciary duty, the Plaintiffs must plead material facts that would allow the court to "[d]etermine 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…[and] [d]etermine whether the claimed modern right is "demonstrably connected to, and reasonably regarded as a continuation of, the pre-contact practice": *R. v. Desautel*, [2021] 1 SCR 533, at paras. 51(b) and (c).

[81] To be clear, the pleading must contain facts that would establish an actual "practice, tradition or custom" that is distinct to the culture, not just a universal human activity or a generalized value for culture held by virtually every society. Thus, in *R. v. Van der Peet*, [1996] 2 SCR 507, at para. 17, the Supreme Court indicated that "the mere existence of an activity in a particular aboriginal community prior to contact with Europeans is not, in itself, sufficient foundation for the definition of aboriginal rights."

[82] By way of illustration, in *R. v. Sparrow*, [1990] 1 SCR 1075, at 1099, the Court found that fishing for food did not satisfy the test, although fishing for ceremonial purposes did:

> The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes but also consumption of salmon on ceremonial and social occasions.

[83] Counsel for Ontario submit that the "practice, tradition or custom" argued for here – i.e. the practice of having children raised by their parents – is not, and could not be, proven to "inhere in the very meaning of aboriginality": *Van der Peet*, at para. 19, quoting Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R.* v. *Sparrow*" (1991), 29 *Alta. L. Rev.* 498, 502. What the Plaintiffs put forward is really little more than a general, non-concretized statement of a value held by human society at large, and not a practice that can be delineated, acted upon, and, consequently, entrenched as a right and protected as a *sui generis* fiduciary duty.

[84] Turning to the question of whether the relationship at issue here forms the basis of an *ad hoc* fiduciary duty, it is noteworthy that, generally speaking, such duties arise only in rare circumstances. The Supreme Court described those situations in *Alberta v. Elder Advocates of Alberta Society*, [2011] 2 SCR 261, at para. 31, where it observed that "[t]he party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake."

[85] It is obvious that acts done in the public interest – as opposed to the private or exclusive interest of a beneficiary – will not be able to meet this test. Thus, for example, the conduct of government in fashioning child welfare policies and essential services does show an intention to benefit Indigenous children, but "it does not demonstrate an undertaking to act in their best interests, in priority to other legitimate concerns": *Ibid*., at para. 32. In fact, the discretion exercised by the legislature to determine the priorities and conditions of child welfare policy, or any of the essential services policies, is much like most other public policies: it "belies a duty of loyalty and an intention to act in the best interests of the beneficiary, forsaking all other interests": *Manitoba Metis Federation*, *supra*, at para. 62.

[86] To be clear, vulnerability of the Plaintiffs and proposed class is not in itself sufficient to establish a fiduciary relationship. In exercising its public law powers, government is responsible

to all groups in society and must weigh its priorities and resources accordingly. "In matters of public law, discretion and vulnerability can exist without triggering a fiduciary standard. There would have to be special circumstances, other than those created by the legislation, to justify the imposition of a fiduciary duty on the Crown": *Drady v Canada (Minister of Health)*, 2007 CanLII 27970, at para. 28 (SCJ), aff'd 2008 ONCA 659, quoting *Squamish Indian Band v. Canada* (2001), 207 FTR 1, at para 521 (FC TD).

[87] The "special circumstances" creating a fiduciary duty owed by government to one sector of the public would have to be something more than the exercise of discretion in allocating resources, directing law enforcement, etc. According to the Court of Appeal, a fiduciary duty would only arise where the situation is the equivalent to of "the direct administration of a specific private law interest to which the person has a pre-existing distinct and complete legal entitlement": *Grand River Enterprises Six Nations Ltd. v. Attorney General (Canada)*, 2017 ONCA 526, at para. 194.

[88] There is no indication of a pre-existing distinct and complete legal entitlement here. The Plaintiffs plead that "the class was peculiarly vulnerable to and at the mercy of the exercise of the defendants' discretion". But there are no material facts pleaded to support the assertion of complete dependency. Like all Ontarians, the Plaintiffs and proposed class were dependent on various public services being in place – e.g. for the funding of CASs, the licensing of the CASs, and overall oversight of the system and the CASs. However, much like the government's relationship with long-term care homes and their vulnerable residents, those functions fall considerably short of dependence on government in a system where it is the separately governed entities that carry out the actual work: *Robertson v. Ontario*, 2022 ONSC 5127, at para. 70, aff'd 2024 ONCA 86.

[89] It is plain and obvious on the face of the Plaintiffs' pleading that the claim cannot succeed.

iii. Negligence

[90] In their factum, Plaintiffs' counsel introduce the claim in negligence as follows:

> 111. The plaintiffs allege that the defendants structured Ontario's Indigenous child welfare and other essential services systems in a systemically negligent manner. There is no allegation against child welfare professionals or children's aid societies for conduct in individual cases.

[91] Not only is there no allegation against CASs or their professionals, there is no allegation against any particular government actor or agent. The claim is presented solely as one of direct liability. Throughout their pleading, the Plaintiffs allege simply that "Ontario" owed them, and breached, a duty of care.

[92] Appellate courts have reiterated a number of times that the Crown is immune from any and all claims in direct tort liability, and that it can only be sued on the basis of vicarious liability for tortious acts perpetrated by its officers, employees, or agents. Thus, for example, in *Hinse v. Canada (Attorney General)*, [2015] 2 SCR 621, at para. 92, the Supreme Court opined:

> The trial judge erred in approaching the issue of the federal Crown's civil liability from the perspective of a fault of institutional inertia or indifference. She should instead have analyzed the individual conduct of each of the successive Ministers acting in his or her capacity as a servant of the federal Crown.

[93] Likewise, in *Ontario v. Madan*, 2023 ONCA 18, at para. 52, the Court of Appeal held:

> Under the [CLPA], Ontario is liable for torts committed by an officer, employee or agent of the Crown and Ontario's liability in tort extends only to acts or omissions attributable to an officer, employee or agent of the Crown. Finally, the Crown is liable in tort for an act or omission, only if a proceeding in tort in respect of that act or omission could be brought against an officer, employee or agent of the Crown. Ontario's tort liability is vicarious and depends on the plaintiff's ability to prove the tortious conduct or omission of an officer, employee or agent of Ontario.

[94] Ignoring this flaw in their pleading, the Plaintiffs go on to cite a number of cases where they contend that the Crown has been found to owe a systemic duty of care. The specific cases referenced by Plaintiffs' counsel are: *Brown*, *supra* (Indigenous children removed from Indigenous life and deprived of their culture), *Papassay v. The Queen (Ontario)*, 2017 ONSC 2023 (Crown wards for whom the Crown neglected to claim compensation from Criminal Injuries Board), *Rumley v. British Columbia*, 2001 SCC 69 (children physically abused in school run by the province), and *Rumley v. British Columbia*, 2001 SCC 69 (inmates held for lengthy periods in administrative segregation).

[95] In comparing these cases to the present, it is helpful to recall the essence of the present claim. The Plaintiffs put forward allegations on behalf of both the removed children class and the essential services class that are fundamentally different than any of the certified systemic negligence cases. Not only is there no specific allegations against CASs or their personnel, but there is no allegation of wrongdoing against any specific class member. The claim here is literally that the system is designed badly, and not that the system is administered badly or that it harms many individual participants.

[96] The removed child class, for example, sues government not for specific wrongful removals but for any removals – wrongful or rightful – under the existing legislation; including even where the removal may have saved the child's life. The same is true – in fact, to an even more extreme extent – with respect the essential services class. That class brings a claim not just on behalf of those who may have experienced a substandard education, but for those who received a typical public education; it also brings a claim for those who may have received either substandard health care or who experienced the universal health care available to all Ontario residents.

[97] More to the point, the Plaintiffs' claim impugns a number of policy decisions. Those include the allegation that child and family services have been underfunded, that essential health and education services have been underfunded to an extent that accounts for service delays, gaps,

and denials, and that removal of children has been prioritized over prevention of harm. As indicated above, it is the policies themselves, and only the policies, that are the subject of the claim; wrongful conduct in the usual tort sense is not in issue.

[98] There can be no prospect of success in these claims as they do not allege actionable conduct. Policy decisions such as those challenged here are shielded from liability in negligence. The rationale for the law's shielding of such policy matters was concisely expressed by the Supreme Court of Canada in *Nelson (City) v. Marchi*, [2021] 3 SCR 55, at paras. 42, 67:

> The primary rationale for shielding core policy decisions from liability in negligence is to maintain the separation of powers. Subjecting those decisions to private law duties of care would entangle the courts in evaluating decisions best left to the legislature or the executive.
>
> . . .
>
> Core policy decisions are immune from negligence liability because the legislative and executive branches have core institutional roles and competencies that must be protected from interference by the judiciary's private law oversight.

[99] At common law, in order for the within claim to be outside the core policy immunity described by the Supreme Court, the policies impugned in the claim would have been adopted either irrationally or in bad faith: *R. v. Imperial Tobacco Canada Ltd*., [2011] 3 SCR 45, at para. 90. There is nothing pleaded to suggest that either of these two ingredients were present in formulating child welfare policy or essential services policy. Not only were they formulated at the highest level of government, but they were made deliberatively by cabinet after considerable policy input.

[100] Furthermore, the policy decisions put in issue in the pleading concern budgetary needs for different departments and programs, and reflect value judgments weighing competing interests: *Nelson*, *supra*, at paras. 63-65. The claim alleges that, with all of that, the factors and resources going into the impugned policies should have been weighed and concluded differently.

[101] Moreover, section 11(4) of the *Crown Liability and Proceedings Act, 2019*, SO 2019, c. 7, sch. 17 ("CLPA") provides:

> **Policy decisions**
>
> (4) No cause of action arises against the Crown or an officer, employee or agent of the Crown in respect of any negligence or failure to take reasonable care in the making of a decision in good faith respecting a policy matter, or any negligence in a purported failure to make a decision respecting a policy matter.

[102] The policy matters covered by this section are precisely the matters in issue in the Plaintiffs' claim. Section 11(5) of the CLPA sets this out in some detail:

(5) For the purposes of subsection (4), a policy matter includes,

(a) the creation, design, establishment, redesign or modification of a program, project or other initiative, including,

(i) the terms, scope or features of the program, project or other initiative,

(ii) the eligibility or exclusion of any person or entity or class of persons or entities to participate in the program, project or other initiative, or the requirements or limits of such participation, or

(iii) limits on the duration of the program, project or other initiative, including any discretionary right to terminate or amend the operation of the program, project or other initiative;

(b) the funding of a program, project or other initiative, including,

(i) providing or ceasing to provide such funding,

(ii) increasing or reducing the amount of funding provided,

(iii) including, not including, amending or removing any terms or conditions in relation to such funding, or

(iv) reducing or cancelling any funding previously provided or committed in support of the program, project or other initiative;

(c) the manner in which a program, project or other initiative is carried out, including,

(i) the carrying out, on behalf of the Crown, of some or all of a program, project or other initiative by another person or entity, including a Crown agency, Crown corporation, transfer payment recipient or independent contractor,

(ii) the terms and conditions under which the person or entity will carry out such activities,

(iii) the Crown's degree of supervision or control over the person or entity in relation to such activities, or

(iv) the existence or content of any policies, management procedures or oversight mechanisms concerning the program, project or other initiative;

> (d) the termination of a program, project or other initiative, including the amount of notice or other relief to be provided to affected members of the public as a result of the termination;
>
> (e) the making of such regulatory decisions as may be prescribed; and
>
> (f) any other policy matter that may be prescribed.

[103] Sections 11(7) through (10) of the CLPA confirm that the Plaintiffs' claim simply cannot be argued in the ongoing action. The entire claim, based as it is on policy issues rather than on wrongdoing by any particular government actor, is to be dismissed:

> **Proceedings barred**
>
> (7) No proceeding may be brought or maintained against the Crown or an officer, employee or agent of the Crown in respect of a matter referred to in subsection (1), (2), (3) or (4).
>
> **Proceedings set aside**
>
> (8) A proceeding that may not be maintained under subsection (7) is deemed to have been dismissed, without costs, on the day on which the cause of action is extinguished under subsection (1), (2), (3) or (4).
>
> **Common law defences unaffected**
>
> (9) Nothing in this section shall be read as abrogating or limiting any defence or immunity which the Crown or an officer, employee or agent of the Crown may raise at common law.
>
> **No inference of policy matters as justiciable**
>
> (10) Nothing in this section shall be read as indicating that a matter that is a policy matter for the purposes of subsection (4) is justiciable.

[104] Funding decisions and related policy issues are squarely within the statutory and common law immunities from suit enjoyed by government. This Court has rejected similar negligence claims relating to the building and management of the bail system in Ontario. As it was explained in *Cirillo v Ontario*, 2019 ONSC 3066, at para 23, aff'd 2021 ONCA 353, "to assess whether adequate resources have been spent on building courthouses across the Province, one would need to understand the Provincial budget overall."

[105] In much the same way, for a litigant and a court to assess whether the government's resource decisions and policy focus in developing the child welfare system and/or the system of essential services, one would need to weigh the factors going into the Provincial budget overall.

That exercise is clearly beyond a court's institutional competency and within the ambit of Crown immunity.

[106] In addition to all of that, a large part of the alleged systemic negligence and the conduct for which the Plaintiffs claim damages encompasses the enactment of legislation that, according to the Statement of Claim, prioritizes apprehension over prevention. This contention is, in effect, a pleading of negligence in the enactment of legislation. That purported tort claim cannot succeed. Actions arising from the passage of legislation are expressly barred by operation of sections 11(1), 11(2), 11(7) and 11(8) of the CLPA.

[107] Finally, although this legislative immunity is enough to show that the Crown at both levels cannot be subject to the Plaintiffs' negligence claim, it is worth noting that there is no legally sustainable private law duty set out in the Plaintiffs' pleading. The only duty that can be discerned from the claim is one to the public at large rather than to any members or segment of the putative class.

[108] When the relationship between government actor and plaintiff occurs in the context of a statutory scheme, the governing legislation must establish that there is actionable proximity between the parties. The Supreme Court instructs that, "Factors giving rise to proximity must be grounded in the governing statute when there is one": *Syl Apps Secure Treatment Centre v. B.D.*, [2007] 3 SCR 83, at para. 27, quoting *Edwards v. Law Society of Upper Canada*, [2001] 3 SCR 562, at para. 9.

[109] In other words, to present a tenable claim in negligence, the Plaintiffs must plead facts establishing that Crown officers, employees, or agents could owe a duty of care – not to the public at large, but to the Plaintiffs. In a tort claim against government actors, "[f]or the duty of care arising from the statutory scheme, courts have consistently held that the enactment of a general licensing scheme does not give rise to liability for economic losses that may arise from [it]": *Metro Taxi Ltd. v. City of Ottawa*, 2024 ONSC 2725, at para. 79, citing *Eisenberg v. Toronto (City)*, 2019 ONSC 7312, at paras. 107-08, aff'd 2021 ONSC 2776 (Div. Ct.).

[110] In fact, courts have expressly rejected arguments to the effect that a statutory scheme setting out duties aimed at protecting the public interest, and giving that interest priority over any duties that may be owed to a particular class of people could give rise to a private law duty of care: *Trillium Power Wind Corporation v. Ontario (Natural Resources)*, 2012 ONSC 5619 at para 57. It is clear not only from the legislation and policy schemes relating to the child welfare system and essential services, but from the Plaintiff's framing of the claim itself, that the purpose of the legislation in issue was and is to protect the public and not to take special aim at the Plaintiffs and proposed class.

[111] The very essence of the present claim is that the government has devised a system that treats Indigenous children and families living off reserve as members of the undifferentiated public, and nothing more. That allegation, separate from being part and parcel of an inactionable

policy argument, creates no proximity between government actor and claimant on which to base a duty of care in tort: *J.B. v. Ontario (Child and Youth Services)*, 2020 ONCA 198, at para. 53.

[112] As with the Charter claims and the fiduciary duty claim, it is plain and obvious that there is no prospect of success for the Plaintiffs' negligence claim.

iv. The claim against the government of Canada

[113] The deficiencies in the pleaded causes of action discussed above apply equally to both tiers of government. However, there is an obvious reason that the arguments are for the most part directed against and responded to by the government of Ontario: the child welfare and social programs targeted by the Plaintiffs' claim are creations of, and are administered and controlled by, the province of Ontario. The government of Canada plays no role in formulating those policies, in enacting them, or in carrying them out.

[114] The federal government's absence from the programs targeted in the Statement of Claim is to a great extent obscured by way the case has been presented. First, the Plaintiffs focus to a great extent on Canadian historical mistreatment of Indigenous communities and the remedies that have been fashioned in respect of past mistreatment. Coupled with this is the fact that the claim does not directly target any one incident or series of incidents and does not challenge any specific, current legislative or regulatory provision.

[115] The child welfare, health, education and other social welfare programs generally put in issue in the claim pertain to off-reserve Indigenous children; and those policies and programs are entirely within provincial constitutional jurisdiction. The federal government plays no part in them, either under the federal power in section 91(24) of the *Constitution Act, 1867* ("Indians and the Lands reserved for Indians") or otherwise. Indeed, no facts or allegations are pled that Federal Crown servants or agents have had any dealings with these programs or interactions with the proposed class members in respect of these programs that would ground a cause of action.

[116] There are, however, three areas of argument canvassed by the Plaintiffs which specifically address federal involvement: the place of the present challenge within Canada's historic treatment of Indigenous children and families, the application of "Jordan's principle" to Indigenous children caught in a federal-provincial jurisdictional contest, and the federal funding contribution to provincial programs through transfer payments. These arguments deserve special attention above and beyond the specific doctrinal issues that arise in the causes of action pleaded.

[117] As reviewed in part II of these reasons, the Plaintiffs portray this claim as the successor to the residential schools and the Sixties Scoop actions. As Plaintiffs' counsel put it in their factum, "Although this case concerns a class period from January 1, 1992 to the present, it follows decades of state discrimination and trauma caused to many generations of Indigenous children in Ontario and the rest of Canada." The relationship between historical wrongs and the present claim is said to be temporal or sequential; but the suggestion below the surface is that the relationship is causative, and that the present system and the historic ones are really of a kind.

[118] Both government Defendants disagree with that characterization. They point out that those historic cases provided redress for what is now acknowledged as wrongful treatment of Indigenous children and families in that the state action at issue was discriminatory, oppressive, and designed to suppress Indigenous life and culture.

[119] By contrast, the policies in issue in the present claim, although called the "Millennial Scoop" by the Plaintiffs, do not repeat the oppressions of a past era; they are designed to be egalitarian in that all children are protected in the same way. Indeed, a central point of the Plaintiffs' claim is to show how applying the same policies to Indigenous children living off-reserve as are applied to non-Indigenous children in the province has produced a numerically lopsided result: 7.7% of the child population comprising 52.2% of the children in the child services system.

[120] Plaintiffs' counsel submit that what this statistic illustrates is that there is a "gross overrepresentation of Indigenous children in state care", and with that they characterize the child welfare system in Ontario as the oppressive successor to historically oppressive policies. Counsel for Canada responds that this reading of the system inaccurately "conflates Canada's role in historic policies, including those in respect of Indian Residential Schools and the Sixties Scoop, with modern child welfare policies that the Province of Ontario has enacted, controlled and operationalized in recent decades."

[121] It is Canada's position that by leaving child welfare policies toward off-reserve Indigenous children to the province, the historic discrimination has ceased. As the Federal Court of Appeal has most recently confirmed, the government of Canada has no obligation to legislate or otherwise implement policy for off-reserve Indigenous children, and the fact that the province has filled that policy area is not a dereliction of the federal government's duty: *Stonechild*, *supra*, at para. 39.

[122] Moreover, since the claim argues that the policy emphasis should change from removal to prevention, but does not claim that the removals are themselves wrongful or unnecessary for protection of the child in any given circumstance, the statistical predominance of Indigenous children receiving services does not itself convey wrongful state conduct. That is, it may equally demonstrate a high level of care rather than any harmful treatment of the proposed class members.

[123] Counsel for Canada further submit that the Plaintiffs' invoking of Jordan's Principle under the circumstances is out of place. They point out that, as a legal doctrine, that principle flows from Motion 296, passed in 2007, in which the House of Commons adopted a child-first principle to resolve jurisdictional disputes involving the care of First Nations children. The Motion, in turn, prompted policy reform by Canada in setting aside new funding for the implementation of Jordan's Principle in respect of Indigenous children living on reserve. Those children were subject to federal jurisdiction and an on-reserve child welfare system that is not in issue in the present claim.

[124] Canada acknowledges that in 2019-2020, the Canadian Human Rights Tribunal found in a series of decisions that the federal on-reserve child welfare programs – the First Nations Child and

Family Services program ("FNCFS") – had applied too narrow a definition of Jordan's Principle that allowed some First Nations children to fall between jurisdictional cracks: *First Nations Child & Family Caring Society of Canada v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39; 2020 CHRT 20; 2020 CHRT 36. Those tribunal decisions then formed the basis for class actions against the federal government with respect to its on-reserve child welfare programs.

[125] Those actions are separate from the present action and address different policies, programs, and claims; neither the FNCFS nor any other federal program or services are at issue here. As Canada's counsel describe it, in a spirit of reconciliation, but with no finding of liability, the on-reserve class actions have been certified on consent and the overall settlement of them has been negotiated and approved: *Moushoom*, *supra*.

[126] The Plaintiffs' Statement of Claim, at para. 24, expressly states that, "This claim covers provincial child welfare in Ontario (i.e. typically off-reserve services) outside of the Federal First Nations Child and Family Services program." Canada's on-reserve child welfare system, the way in which Jordan's Principle applies to that system, and the *Moushoom* settlement in respect of that system, have nothing to with the present claim. They set no precedent and establish no principle in respect of the Ontario system at issue here.

[127] Like the detour into historic policies and settlements, the Plaintiffs' emphasis on the federal on-reserve system serves more to obscure the issues with respect to the Ontario off-reserve system than to illuminate them. The federal on-reserve system is substantively distinct from the Ontario system, and a challenge to or settlement of one does not speak to an action making claims in respect of the other.

[128] Furthermore, there is no competition between jurisdictions at issue with respect to the Ontario child welfare system as it applies to persons off reserve. Accordingly, Jordan's Principle, while important to on-reserve policy and its potential collision with provincial policy, plays no role here. The emphasis on Jordan's Principle placed by the Plaintiffs in their argument sheds no light on the issues that the Plaintiffs' claim actually raises. The Plaintiffs do not, in fact, claim that off-reserve Indigenous children have fallen through some gap that exists between competing federal and provincial jurisdictions. Their pleading is aimed entirely at an Ontario program which they say should be reformed and improved by Ontario.

[129] The one specific role that the Plaintiffs allege Canada plays in putting in place Ontario's off-reserve child welfare system is in the area of funding. As discussed earlier in these reasons, the Ontario programs at issue are funded as part of the Ontario budgetary process in which the federal government plays no role. However, federal funds do find their way into the Ontario budget through the inter-governmental mechanism of transfer payments. Thus, Canada's only role (if it can be called a role at all) in regard to the child and family services delivered off-reserve under the CYFSA has been the general federal transfer payments made to Ontario to fund social programs.

[130] As explained in the affidavit of Kimberley Ford, a manager in the in the Litigation and Resolution Directorate within Crown-Indigenous Relations and Northern Affairs Canada, prior to 1995 the federal transfer funding was via the Canada Assistance Plan. Currently, Canada provides funding to Ontario and other provinces under the Canada Social Transfer and administered in accordance with the *Federal-Provincial Fiscal Arrangements Act*, RSC 1985, c F-8. Pursuant to s. 24.3(1)(a) of that statute, these payments are for "financing social programs in a manner that provides provincial flexibility." Accordingly, it is the province that has full discretion as to how to allocate and use the funds.

[131] The Federal Court of Appeal has specifically held that "funding and resource allocations do not establish a duty of care, as the relationship that they engage lacks sufficient proximity': *Rebello v. Canada (Justice)*, 2023 FCA 67, at para. 22. The Ontario Court of Appeal has been more blunt and to the point, stating, "Underfunding is not a cause of action": *Ontario v. Phaneuf* (2010), 104 OR (3d) 392, at para. 13. The logical corollary of this is, of course, that non-funding is equally not a cause of action.

[132] The Court of Appeal has gone on to indicate that a plaintiff suing any level of government "must have an arguable personal cause of action against identifiable defendants. Funding or institutional shortcomings… do not in their own right provide the basis for a lawsuit": *Ibid.* And what is true for specific program funding is all the more true for general transfer funds that are not earmarked for any particular provincial program or use. It would be impossible to "demonstrate, through evidence, some sort of nexus between a particular action of the state, such as legislation [or general transfer funding], and an infringement of a Charter right or freedom": *R. v. Sharma*, 2022 SCC 39 at para. 43.

[133] In all, the Plaintiffs assert in their factum that, one way or another, the government of Canada has "the power and duty" to fix the problems resulting from Ontario's alleged prioritization of removal of Indigenous children over culturally appropriate prevention services. The Plaintiffs do not, however, plead or even argue what it is that Canada could do to intervene in the province's child welfare and social policy-making, and under what authority Canada might act.

[134] In fact, the Plaintiffs do not specifically say that any particular Ontario legislation or policy initiative is discriminatory and in need of federal correction. When it comes to funding, they essentially speculate that devoting more resources to undefined prevention measures in Ontario's child welfare system would likely help reduce incidents of removal. Presumably what this amounts to is an argument that Canada be ordered to increase transfer payments to Ontario, and for Ontario to be ordered to limit its discretion over those funds so that their use is put to new but unspecified policies that conform with the overall goals of the Statement of Claim.

[135] In their factum, counsel for Canada submit that the Plaintiffs' claim goes no further than to make "vague assertions regarding broad social issues and policy choices over a period of 30 years that are unsuitable for judicial determination. With no specific law or policy to ground the Claim, the proposed action would devolve into a public inquiry into the entire child welfare system in Ontario." In my view, that characterization is entirely accurate. The claim seeks judicially

formulated and mandated social policy in place of government formulated and legislatively mandated social policy, together with judicially calculated and court ordered funding and budgeting.

[136] In other words, what the Plaintiffs seek is simply not justiciable. Along with the claim against Ontario, the claim against Canada – an uninvolved governmental party – is plainly and obviously bound to fail. The causes of action as pleaded do not pass the threshold test under section 5(1)(a) of the CPA.

b) Section 5(1)(b) – identifiable class

[137] Having determined that there is no viable cause of action pleaded by the Plaintiffs, there is, strictly speaking, no need to proceed through the other stages of the section 5(1) analysis. To be certified as a class action, a claim must meet each of the section 5(1) criteria. The failure to meet the cause of action requirement in section 5(1)(a) defeats the claim on its own.

[138] Having said that, it is worth proceeding on at least a cursory review of the other criteria in order to see how the cause of action problems reverberate through the other class action requirements. Starting first with the section 5(1)(b) requirement, the Supreme Court of Canada has explained: "The definition [of the proposed class] should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation": *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 SCR 534, at para. 38.

[139] The class proposed by the Plaintiffs includes three sub-classes: a Removed Child Class, an Essential Services Class, and a Family Class.

[140] The Removed Child Class is defined as children who are (a) Indigenous; (b) were taken into out-of-home care; (c) while they were not ordinarily resident on a reserve; (d) while they were under the age of 18; (e) during the class period; and (f) not in the on-reserve class already settled with the Federal government.

[141] The Essential Services Class is defined as children who are (a) Indigenous; (b) had a confirmed need for an essential service; (c) faced a delay, denial, or service gap in the receipt of that service; (d) while they were under the age of 18; (e) during the class period; and (f) not in the already settled with the federal government.

[142] Assuming that one can identify who is and who is not an off-reserve Indigenous child – a task with which Indigenous communities and other societal institutions have grappled over the years, but which is not engaged in the materials before me – the Removed Child Class is overall an objectively defined and finite class. Counsel for Ontario point out that the phrases "out-of-home care" and "in-home care" do not correspond with the legislation governing CAS interventions, and that there are some children who are in an in-between situation and have been placed partly in out-

of-home care and partly in-home. Those criticisms, however, focus on the margins of the class definition but ignore the core. The Removed Child Class is, overall, objectively defined and determinable. Using common sense, one can tell a child who has been taken out of his or her family home from one who remains in his or her family home.

[143] The Essential Services Class is more problematic. In the first place, the list of possible "essential services" includes, but is not limited to, health, special education, infrastructure, medication, medical equipment and supplies, medical transportation, mental healthcare, respite care, oral healthcare, and vision care – and all of that is described by the Plaintiffs as a non-exhaustive list. These services reflect features of life of which every child in Canadian society makes use and is in need. The span of the services makes the class unlimited.

[144] Moreover, the definition encompasses any child meeting those (virtually universal) criteria who faced a delay, denial or service gap in receipt of the given service on grounds including, but not limited to, lack of funding or lack of jurisdiction. That presents two separate difficulties. The first is that causation in embedded in the definition. One first has to make a considered determination of the cause of a class member's problems before determining their membership because the cause is not readily apparent. That means that the definition is not an objective one: see *Cirillo v. Ontario*, 2021 ONCA 353, at para. 54. The causation issue itself will be matter of interpretation rather than perception.

[145] Furthermore, all delays or denials of services are, in one way or another, a result of a lack of funding or jurisdiction. Unlimited funding and universal jurisdiction would, of course, be impossible to achieve given economic and political/constitutional realities; but theoretically, if the limits of funding and the limits of jurisdiction were taken out of the equation, virtually all service gaps or delays would also be eliminated.

[146] To use relatively common examples, anyone covered by OHIP who waits months for a hip replacement experiences a delay that at some level is a result of limited funding. Likewise, anyone who has moved out of Ontario and cannot therefore access OHIP coverage experiences a gap in services that is a result of limited jurisdiction. To define the Essential Services Class as children who cannot access (or who are delayed in accessing) universally required services due to funding or jurisdictional issues, is to impress the definition with no limitations at all.

[147] Finally, the proposed Family Class is defined as including persons who are the caregiving parent or caregiving grandparent of a member of the Removed Child Class or the Essential Services Class. While the identification of a caregiver is objectively discernable, the Family Class definition relies on the viability of the other two class definitions. Given the difficulties of the Essential Services class definition, the Family Class definition is in that respect equally problematic.

[148] The class definition does not pass the test for a properly defined class under section 5(1)(b) of the CPA.

c) Section 5(1)(c) – common issues

[149] It is well established that the burden is on the Plaintiffs to show that there is some basis in fact to pose each common issue and that the resolution of the proposed common issues will advance the adjudication of the action: *Hollick v. Toronto (City),* [2001] 3 SCR 158, at para. 25; *Dutton, supra,* at paras. 39-40. Furthermore, the proposed common issues cannot be framed in a way that makes their determination dependent on individual findings for each class member: *Ferhringer v Sun Media Corp,* 2003 CanLII 22598, at para. 6 (Div Ct).

[150] The first 7 proposed common issues all address liability questions and are specific to the claims in breach of the Charter, breach of fiduciary duty, and negligence. They all suffer from a common defect which prevents them from being proper common issues questions: they refer to, and are in a sense premised on, the Defendants' having engaged in wrongful conduct.

[151] To illustrate the point, each of first 7 questions begins: "Did the Impugned Conduct impose a burden or deny a benefit in a manner…", or "Did the Impugned Conduct deprive the Removed Child Class of their life, liberty, or security of the person…", or "Did defendants, or either of them, owe a fiduciary duty to the Class…If so, did the Impugned Conduct breach those duties?" The Statement of Claim defines "Impugned Conduct" as "unlawful and unconstitutional conduct as particularized in paragraphs 12 to 105..."

[152] The Plaintiffs' affiant, Amber Crowe, an experienced First Nations CAS director, conceded in cross-examination (Qs. 147-150) that for the Removed Child Class, there will have to be a determination on a case-by-case basis, with no overarching methodology, whether the conduct in issue was unlawful – i.e. whether the child was (or was not) in need of protection and removal and in the best interests of the child. Ms. Crowe acknowledges, and it is only logical, that not every removal of a child was wrongful or harmful to the child.

[153] Those questions, so framed, do not advance the litigation in a helpful way. They are posed at such a broad level of generality that they add nothing that would not be accomplished by, and do not short-circuit in any way, a trial of each individual child's circumstance. In effect, they ask whether conduct, if already determined to be wrongful, was a Charter or common law breach of a child's rights.

[154] The questions addressing the Essential Services Class are even more general and, as such, beside the point. This is due to the fact that the claim itself is fashioned in a way that is so broad as to be incapable of an analysis that is meaningful for the class.

[155] Before answering each of the proposed common issues questions about how the essential services were designed, there would have to be a determination on a case-by-case basis as to whether a given service was required and whether it was denied, delayed or inadequate, and why that occurred under the circumstances. Needless to say, the thousands of individual decisions that

would make up this exercise would each have its own specific factual background such that a finding on any one would not prove or advance anything for the others. The cause of one child's delay in having their education needs met would not expedite the need to determine the cause of another's delay in having their mental or physical health needs met, etc.

[156] In addition, nothing in the expert evidence adduced by the Plaintiffs demonstrates commonality of cause for the Essential Services claim. The evidence of Dr. Nico Trocmé of McGill University's Department of Social Work indicates that there are multiple contributing factors that are responsible for the disparate outcomes it describes, including geographic location and the specific conduct and attitudes of individual service providers. Again, there is no basis for concluding that answering the proposed common issues questions will advance the litigation or short-circuit the need for each and every claim to be tried on its own facts.

[157] The Court of Appeal has stated that in order for there to be commonality in a Charter claim, the evidence must show that "[t]he Charter questions arise from a single course of conduct": *Cirillo*, at para. 65. That is not the case here, either for the Charter issues or, for that matter, for the common law issues, which also must arise from a course of conduct applicable class-wide. There is no basis in fact for any of the proposed common issues addressing liability.

[158] Since the liability issues are framed in a way that defies commonality, it stands to reason that the damages questions will be similarly lacking in commonality. The aggregate damages question is impossible to answer as there is nothing in the record to demonstrate a class-wide baseline of harms.

[159] In fact, there is no evidence, and no basis in fact, to show that the putative class members have undergone a common experience such that a base level of damages could possibly be established. Aggregate damages can only be determined as a common issue where there is "evidence before the court of a base amount that would be determined without evidence from any individual class member based on evidence of a core experience suffered by all or part of the class who suffered damages…": *Richard v. Attorney General of Canada*, 2024 ONSC 3800, at para 364. That is simply not the case here.

[160] The same can be said for the proposed common issue dealing with punitive damages. Nothing in the record amounts to a basis in fact for the kind of high-handed and malicious conduct that would have to ground a claim for punitive damages: *Whiten v Pilot Insurance Co.*, [2002] 1 SCR 595, at para. 36. At its highest, the claim asserts that the Plaintiffs and class should have received a larger proportion of finite taxpayer funds than they received, with the corollary that other expenses of society should have been correspondingly reduced. With all due respect, that is not the kind of allegation or evidentiary base that suggests that punitive damages are in order.

[161] In any case, punitive damages cannot be determined separate and apart from compensatory damages. Since under the circumstances compensatory damages, if awarded, will necessarily be

determined on an individual basis, punitive damages should follow suit and be assessed individually as well.

[162] The proposed common issues all lack sufficient basis in fact and/or sufficient commonality to be certified as common issues under section 5(1)(c) of the CPA.

d) Section 5(1)(d) – preferable procedure

[163] With no viable cause of action and insufficient commonality even if there were a cause of action, it is obvious that a class action is not the preferable procedure. A revamped claim based on individualized wrongdoing rather than policy issues or global funding of the child welfare, health, education, and other social systems, would be the preferable way for this claim to be put forward. And even then, it would likely have to be pursued on an individualized basis for each plaintiff rather than as a class.

[164] In addition, the Removed Child claimants would have to fashion a way of avoiding the hazard of collateral attack, since their removals may have been authorized by prior court order. In all, the claim needs a fundamental re-conception in order to become viable.

[165] As it stands, I can describe the entire case no better than the way the Essential Services claim was described in the parallel Quebec action: instead of a judicial procedure, it is fashioned as "a veritable commission of inquiry": *A.B.*, *supra*, at para. 150. It does not qualify as the preferable procedure under section 5(1)(d) of the CPA.

e) Section 5(1)(e) – representative Plaintiffs

[166] The two Plaintiffs are, in general, suited for the role as representative Plaintiffs. They do not appear to have any conflict with class members, and there is no reason to think that they are anything but capable of providing client instructions to counsel and of working with counsel in a representative capacity. On a personal level, there is no reason to object to their stepping into the role for which they have put themselves forward.

[167] There is, however, a problem with the two Plaintiffs, and that problem is a microcosm of the problem with the claim more generally. The pleading does not set out material facts on which either of them has a cause of action against Ontario or Canada. Those paragraphs of the Statement of Claim that describe wrongful conduct done to them do not ascribe the conduct to the actual Defendants in the action. Rather, the allegations of wrongfulness toward the two individual Plaintiffs are directed at the conduct of a CAS or foster parents with whom they were placed. They had no interaction with government and thus have no personal claim against government.

[168] Their contention against government is that the system itself is not designed in a way they experienced as beneficial. There are policy options relating to prevention that they claim the government did not opt for or fund. Those contentions are no doubt sincere, but they are not legally

cogent. Neither the federal nor the provincial government owes a duty to private citizens to legislate in a certain way or to allocate funding in a certain way. In addition, private citizens do not have a claim against government resulting from their dissatisfaction with core policy decisions.

[169] Finally, both Plaintiffs base their claim on having been removed from their families by a CAS and placed in foster care. Under s. 57 of the CFSA, a court issued an Order for each of them making them wards of the Crown and placing them into the care of a CAS. Those Orders are not under appeal here, and the Plaintiffs are not moving to quash them or set them aside. The present claim is therefore not a direct challenge to those valid court Orders, but rather is a collateral attack on those Orders.

[170] As discussed in Part IV(a)(i) above, a claim such as the present one that amounts to a collateral attack on a valid court Order must be struck: *C.R.*, *supra*, at para. 100. To the extent that the Statement of Claim sets out a cause of action at all on behalf of the two Plaintiffs, the cause of action flows from their removal from the care of their families and from the Crown Ward Orders authorizing the removal. By seeking damages for having been subject to those Orders, the Plaintiffs are challenging the validity of the Orders in the wrong forum, or "in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review)": *Garland, supra*, at para. 71.

[171] Since the Plaintiffs each bring a claim that cannot succeed and that must be struck, they do not qualify as representative Plaintiffs under section 5(1)(e) of the CPA.

V. Disposition

[172] The Motion for certification is dismissed.

[173] I would ask counsel for each of the Defendants to email my assistant with brief cost submissions within two weeks of today, and for Plaintiffs' counsel to email my assistant with their brief cost submissions within two weeks thereafter.

Date: August 25, 2025 **Morgan J.**