**SUPERIOR COURT**
(Class actions division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No : 500-06-001177-225

DATE : April 30th, 2024

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**IN THE PRESENCE OF THE HONOURABLE MARIE-CHRISTINE HIVON, J.S.C.**

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**A. B.**
- and -
**Tanya Jones**
Petitioners

vs.

**Attorney General of Canada (AGC)**
- and –
**Attorney General of Québec (AGQ)**
Respondents

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RULING ON AN APPLICATION FOR AUTHORIZATION
TO INITIATE A CLASS ACTION

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## OVERVIEW

[1] On September 1st, 2022, the Petitioners filed a modified application for authorization to initiate a class action and to be appointed as representatives[1] (hereinafter, the "**Application for Authorization**"). The class referred to in the Application for Authorization (hereinafter, the "**Class**") is defined as follows:

> A. All Inuit persons ordinarily resident in Nunavik and registered or entitled to be registered as a beneficiary under The James Bay and Northern Québec Agreement ("JBNQA") or registered with an Inuit land claim organization who between November 11, 1975 and the date of authorization of this action:
>
> a ) Were under the age of 18; and
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> b ) Were reported to, or otherwise brought to the attention of the Directors of Youth Protection in Nunavik (recevoir le signalement), including, but not limited to, all persons taken in charge, apprehended, and placed in care, whether through a voluntary agreement, by court order or otherwise (the "**Nunavik Child Class**")
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> B . All Inuit persons ordinarily resident in Nunavik and registered or entitled to be registered as a beneficiary under the JBNAQ or registered with an Inuit land claim organization who between November 11, 1975 and the date of authorization of this action:
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> a ) Were under the age of 18; and
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> C . Needed an essential service but did not receive such service or whose receipt of the service was delayed by either respondent or their departments or agents, on grounds including, but not limited to, lack of jurisdiction or a gap in services (the "**Essential Services Class**").
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> D . All parents and grandparents who were providing care to a member of the Nunavik Child Class or the Essential Services Class (the **Nunavik Family Class**).
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> E . All indigenous persons ordinarily resident in Québec who:
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> a ) Were taken into out-of-home care between January 1, 1992 and the date of authorization of this action,
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> b ) While they were under the age of 18,
>
> c ) While they were not ordinarily resident on a Reserve;
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> d ) By the federal Crown or the provincial Crown, or any of their agents; and

[1] This Court authorized the modifications on January 19, 2023.

e ) Are not members of the Nunavik Child Class (the **Québec Child Class**);

F . All parents and grandparents who were providing care to a member of the Québec Child Class when that child was taken into out-of-home care (the **Québec Family Class**).

[2] The class action the Petitioners intend to introduce against the Respondents corresponds to a claim for damages based on repeated misconduct and failures. It is alleged, in fact, that the Respondents systematically and arbitrarily underfunded the youth and family services the members of the Class should have benefited from.

[3] For the purpose of this ruling, the Court will refer as follows to the subclasses governed by the Application for Authorization:

3.1 The "Nunavik Child Class" shall correspond to the "**Enfants du Nunavik**" subclass;

3.2 The "Québec Indigenous Child Class" shall correspond to the "**Enfants Autochtones du Québec**" subclass;

3.3 The "Essential Services Class" shall correspond to the "**Services Essentiels**" subclass;

3.4 The "Nunavik Family Class" shall correspond to the "**Familles du Nunavik**" subclass;

3.5 The "Québec Family Class" shall correspond to the "**Familles du Québec**" subclass.

[4] The facts and circumstances the Petitioners blame the Respondents for can be summarized as follows:[2]

4.1 By underfunding on a systemic basis, acting negligently, and failing to fulfil their legal and constitutional obligations, the Respondents betrayed several generations of indigenous children who were abandoned by institutions whose mission was to ensure their well-being – including by:

4.1.1 Failing to provide sufficient funding so indigenous children would be protected as well as non-indigenous children;

4.1.2 Failing to tailor the required funding to the specific circumstances of indigenous individuals (including Inuit people living in Nunavik), such as distance, intergenerational trauma, and historical shortcomings;

4.1.3 Failing to provide adequate support to indigenous children who were subjected to abuse;

[2] Refer, among other things, to paragraphs 1.6 to 1.11 of the Application for Authorization.

4.1.4 Withdrawing indigenous children (some of which were Inuit) from their families and communities, which brought about an overrepresentation of indigenous children within Québec's youth protection structure.

4.2 The Respondents effectively deprived Inuit children of essential services materially similar to those offered to non-indigenous children who resided in Québec and elsewhere in Canada. They declined any and all liability by accusing each other while blatantly disregarding the needs and requirements of Inuit children;

4.3 The Respondents adopted a discriminatory pattern of behaviour by constantly depriving service providers of the funding they needed in order to properly meet the needs of indigenous people. In fact, such systemic and chronic underfunding was but a part of the racist and apathetic policy the Respondents maintained towards indigenous people;

4.4 Both Petitioners suffered from the Respondents' negligence and systemic underfunding, having been taken away from their families and entrusted to foster homes in which they were subjected to physical, psychological, and sexual abuse.[3]

[5] The class action the Petitioners intend to initiate rests on the following causes of action[4]:

5.1 Repeated failures to fulfil the fiduciary duties and obligations the Respondents were allegedly bound by towards indigenous individuals (including Inuit people who resided in Nunavik as well as Metis citizens and other First Nations who lived elsewhere in Québec);

5.2 Repeated violations of sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*[5] (hereinafter, the "**Canadian Charter**") and of sections 1, 4, and 10 of the *Charter of Human Rights and Freedoms*[6] (hereinafter, the "**Québec Charter**") allow the Petitioners to claim punitive damages as well as compensatory damages based on subsection 24(1) of the Canadian Charter;

5.3 Civil misconduct that triggers the Respondents' liability pursuant to section 1457 of the *Civil code of Québec* (hereinafter, the "**C.c.Q.**");

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[3] Application for Authorization, par. 1.

[4] Application for Authorization, par. 4.80 et seq.

[5] Appendix B to the *Canada Act 1982* (U.K.), 1982, ch. 11.

[6] RLRQ, ch. C-12.

[6] The Petitioners, relying on such failures and violations, request that the Respondents be ordered to pay the following amounts (to be recovered on a collective basis):

6.1 Compensatory damages ranging from 40 000 $ to 300 000 $ for each member of the class, depending on the extent of the harm they have suffered;

6.2 Exemplary and punitive damages based on subsection 24(1) of the Canadian Charter, whose amount shall be determined by the trial judge.

[7] The Respondents challenge the Application for Authorization on the ground that the criteria of common issues (575(1) C.c.p.), colour of right (575(2) C.c.p.), and adequate representation (575(4) C.c.p.) are not met in this particular case.

[8] In the end, the Court is asked to determine whether or not the Application for Authorization the Petitioners filed meets all the requirements defined in section 575 C.c.p.

## ANALYSIS

### 1 . FACTUAL BACKGROUND

[9] The Application for Authorization refers to a factual, historical, and social background whose review is crucial to our analysis of the criteria set forth in section 575 C.c.p.

[10] Previous and current proceedings are referred to by both parties, who claim they are relevant to the present case. Several exhibits have been filed on both sides. The Respondents, following a ruling made on July 18, 2023, were allowed to file adequate evidence and to examine the Petitioners in writing.[7] In the end, the following exhibits were filed in support of the Respondents' challenge of the Application for Authorization:

10.1 By the AGC:

10.1.1 Exhibit AGC-1: Sixties Scoop Agreement (hereinafter, the "**Riddle Agreement**");

10.1.2 Exhibit AGC-2: Ruling made by the Federal Court on June 21st, 2028 in the *Riddle vs. Canada* case (2018 FC 641);

10.1.3 Exhibit AGC-3: Ruling made by the Federal Court on August 2nd, 2018 in the *Riddle vs. Canada* case (2018 FC 901);

[7] The answers the Petitioners provided to the written examinations have been filed as Exhibits PGQ-14 (A.B.) and PGQ-15 (Tanya Jones).

10.2 By the AGQ:

10.2.1 Exhibit PGQ-1 : Document entitled *Convention sur la prestation et le financement des Services de santé et sociaux au Nunavik (2009-2016)*;

10.2.2 Exhibit PGQ-2 : Document entitled *Convention sur la prestation et la financement des Services de santé et sociaux au Nunavik (2018-2025)*;

10.2.3 Exhibit PGQ-3 : Document entitled *Cadre financier de la Convention du Nunavik (2018-2025)*;

10.2.4 Exhibit PGQ-4 : Document entitled *Plan d'action régional en santé publique de la Régie (2003-2012)*;

10.2.5 Exhibit PGQ-5 : Document entitled *Plan d'action régional en santé publique de la Régie (2016-2020)*;

10.2.6 Exhibit PGQ-6 : Document entitled *Rapport annuel de la Régie (2020-2021)*;

10.2.7 Exhibit PGQ-7 : Document entitled *Enquête et rapport de la Commission des Droits de la Personne et des Droits de la Jeunesse* (as it was revised on January 16, 2023);

10.2.8 Exhibit PGQ-8 : CBJNQ – Non-consolidated version (French text);

10.2.9 Exhibit PGQ-9 : CNEQ – Non-consolidated version (French text)

10.2.10 Exhibit PGQ-10 : Document entitled *Orientations relatives aux standards d'accès, de continuité, de qualité, d'efficacité et d'efficience (2017-2012)*;

10.2.11 Exhibit PGQ-11 : Document entitled *Orientations ministérielles relatives au Programme-Services destiné aux jeunes en difficulté (2017-2022)*;

10.2.12 Exhibit PGQ-12 : Resolutions passed by the National Assembly on March 20th, 1985 and May 30th, 1989 in order to acknowledge the existence of eleven (11) indigenous nations;

10.2.13 Exhibit PGQ-13 : Memorandum dated November 11, 2016 and subsequently released by the Metis National Council.

[11] The facts the Petitionerss allege in their Application for Authorization can be summarized as follows.

### 1.1 Parties involved

[12] Petitioner A.B. is an Inuit who currently resides in Nunavik. She was taken away from her mother right after she was born and subsequently entrusted to an adoptive family;

[13] Petitioner Tanya Jones is an Inuit. She was taken away from her mother at the age of three (3) and subsequently entrusted to a foster home;

[14] The AGC is the legal representative of the federal Crown. The federal government's power to legislate over the Inuit people is provided in subsection 91(24) of the *Constitution Act (1867)*.[8]

[15] The AGQ is the legal representative of the provincial Crown as well as of the province of Québec's Department of Justice and Department of Health and Social Services. Said departments are in charge of implementing the *Youth Protection Act*[9], the *Act respecting health services and social services*[10], and the *Youth Criminal Justice Act*[11].

### 1.2 Historical and social context alleged in support of the Petitioners' personal claim[12]

[16] The Petitioners' class action is based on the fact that the Respondents adopted a chronic and systemic policy of discrimination against indigenous children. The proceedings in question would cover a limited portion of the lives of the members of the class, namely the failure of services dedicated to indigenous children (1) since 1992 (whenever residing outside of a reservation), or (2) (whenever residing in Nunavik) since 1975.

[17] The Petitioners, from a strictly historical standpoint, allege the following:

17.1 Since the 19th century, the federal Crown has systematically taken indigenous children away from their families in order to entrust them to residential schools;

17.2 The horrors indigenous children have endured within such schools have been described in the *Rapport final de la Commission de vérité et réconciliation du Canada*, released in 2015[13]. Among other things:

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[8] 30 & 31 Victoria, ch. 3 (U.K.)

[9] RLRQ, ch. P-34.1 (hereinafter, the "**YPA**").

[10] RLRQ, ch. S-4.1.

[11] L.C. 2022, ch. 1

[12] Application for Authorization, par. 4.1 et seq.

[13] Exhibit R-1 (hereinafter, the "**CVRC Report**").

17.2.1 More than 150 000 indigenous children were sent to residential schools against their will;

17.2.2 Negligence and abuse (whether it be physical or sexual) were rampant, whereas death rates among children were abnormally high;

17.2.3 Every single residential school operated on the assumption that indigenous parents were unfit;

17.2.4 The mission entrusted to residential schools was not to educate indigenous children but rather to uproot them from their family and customs – which, from a practical standpoint, amounted to cultural genocide.

17.3 Even though the last residential school operated in the province of Québec was closed in 1991, the federal Crown continued to apply the same racist principles and to inflict similar harm under the guise of so-called youth and family services.

17.4 Between 1951 and 1991, youth and family services (now known as the *Sixties Scoop*) were implemented. Since they targeted indigenous families, they withdrew one (1) out of three (3) children from their family, and entrusted seventy percent (70%) of such children to non-indigenous families.

17.5 Québec's Court of Appeal, in the context of the rather recent *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*, stated that "the overwhelmingly strong adoption of indigenous children [as it occurred throughout the period known as the Sixties Scoop] was eventually the main cause of major identity and behavioral issues";[14]

17.6 Nowadays, the racist principles that supported the operation of residential schools as well as the Sixties Scoop are still present in youth and family services that prioritize the apprehension of children instead of preventive interventions – which, in the end, perpetuates and worsens the intergenerational trauma so many indigenous people are suffering from;

17.7 Practically speaking, youth services belong to one (1) of two (2) categories:

17.7.1 Apprehensions, which consist in withdrawing a child from their family and entrusting them to a foster home;

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[14] 2022 QCCA 185 (Hereinafter, the "**2022 Referral**"), par. 17. It was emphasized that on February 9, 2024, the Supreme Court of Canada issued a ruling (2024 SCC 5) according to which it dismissed the AGQ's appeal and granted the AGC's appeal. The Court of Appeal referred to said ruling in paragraphs 10 and 11 of its own decision.

According to the Petitioners[15]:

This is meant to be a last resort, as it uproots the child from their family and community. If done in a culturally unsafe manner, it can also cut them off from their cultures, languages, and the value systems and spiritual beliefs derived therefrom.

17.7.2 Preventive interventions: any intervention that does not involve an apprehension is assimilated to preventive measures – including community services, parental guidance geared toward the identification of problems and solutions, parental and youth services meant to provide support in times of crisis, assistance with the special needs of children, and help provided to children who are ill or experience suicidal thoughts;

17.8 Preventive interventions, because they are cheaper and more effective than apprehensions, should always be contemplated first. Relying too often on the apprehension of indigenous children amounts to discrimination;

17.9 In addition to such a discriminatory conduct (which still endures toward indigenous children), Inuit people residing in Nunavik were persecuted in many other ways by both the federal and provincial Crowns – so much so that they eventually became Canada's most disregarded and marginalized community.[16] The Petitioners, in support of their allegations in that respect, filed several documents pertaining (among other things) to the life expectancy, education, poverty status, employment ratings, housing conditions, and social inadequacy of Inuit people living in Nunavik – including:

17.9.1 The study entitled *Rapport final de la Commission d'enquête sur les relations entre les Autochtones et certains services publics : écoute, réconciliation et progrès*, published in 2019 (hereinafter, the "**Viens Report**");[17]

17.9.2 The study entitled *Rapport de consultation Parnasimautik, réalisé auprès des Inuits du Nunavik en 2013*, published in November 2014 (hereinafter, the "**Parnasimautik Report**");[18]

17.9.3 The study entitled *Nunavik : Rapport, conclusions d'enquête et recommandations*, published in April 2007 (hereinafter, the "**Gagnon Report**");[19]

17.9.4 Data published by Statistics Canada[20] and pertaining (among other things) to life expectancy, education, poverty status, employment ratings, housing conditions, and social inadequacy;

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[15] Application for Authorization, par. 4.11.

[16] Application for Authorization, par. 4.15.

[17] Exhibit R-2.

[18] Exhibit R-3.

[19] Exhibit R-4.

[20] Exhibits R-5 and R-6.

[18] When it comes to youth and family services provided to indigenous children who resided in the province of Québec, the Petitioners report the following:[21]

18.1 Several reports released by task forces and investigation commissions emphasized that the services provided to indigenous children living in Québec were plagued with numerous issues and problems that, for the most part, could be traced back to a culture of assimilation and cultural genocide – namely:

18.1.1 The study entitled *Rapport du groupe de travail sur le régime québécois de l'adoption*, published on March 30th, 2007 under the direction of Carmen Lavallée (hereinafter, the "**Lavallée Report**");[22]

18.1.2 A report released by the Commission de la Santé et des Services Sociaux des Premières Nations du Québec et du Labrador, entitled *Analyse des trajectoires des jeunes des Premières Nations assujettis à la Loi sur la protection de la jeunesse*;[23]

18.1.3 A report released by the Commission Spéciale sur les Droits des Enfants et la Protection de la Jeunesse, entitled *Instaurer une société bienveillante pour nos enfants et nos jeunes*, published in April 2021 (hereinafter, the "**Laurent Report**");[24]

18.2 Among the conclusions reached in those reports, one notes that employees assigned to youth services are 4.4 times more likely to investigate a complaint that involves an indigenous child than a complaint that does not involve such a child and 6 times more likely to determine that the complaint is sound, and that the child referred to in the complaint is 7.9 times more likely to be taken away from their family and entrusted to a foster home;

18.3 The reasons invoked (or at least acknowledged) in support of such discrepancies reportedly include:

18.3.1 An obvious bias against indigenous people makes it likely that parents will not be believed – assuming they are not deemed to have been negligent;

18.3.2 The poverty of the child's family weighs too heavily in the balance, which results in a discriminatory process;

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[21] Application for Authorization, par. 2.17 et seq.

[22] Exhibit R-7.

[23] Exhibit R-8.

[24] Exhibit R-9.

18.3.3 None of the resources that were used by youth services were approved by indigenous people (whose respective cultures are often misunderstood and/or misinterpreted), which in the end results in decisions being ill-informed and taken arbitrarily;

18.3.4 The indigenous notion of “customary care”, which implies that a child can be raised by their community as a whole, is misunderstood. Although it was officially recognized in 2017, said notion is often dismissed in favor of the so-called “attachment theory”, which in practice does not align with indigenous realities;

18.3.5 Members of the child’s indigenous kin who welcome the latter in their midst are not compensated financially (unlike traditional foster homes), which increases the risks of the child not being supported properly and being eventually subjected to a foster placement;

18.3.6 A total lack of preventive services makes it more likely that children will be entrusted to foster homes;

18.3.7 Some of the policies in place either prevent or impede the placement of indigenous children with members of their own family rather than with complete strangers;

18.3.8 Once a child has been entrusted to a foster home, the various conditions their parents must meet in order to visit them (assuming they are allowed to do so) eventually sever all ties between the child and their family, community, culture, values, native language, and spiritual beliefs;

18.3.9 Human resources are scarce, insufficiently trained, and often do not speak the child’s (or their family’s) native language.

[19] The Petitioners have the following to say with respect to the youth services Nunavik children benefit from:[25]

19.1 The standard rules and principles that govern the youth services provided in Nunavik, even though they are the same as elsewhere in the province of Québec, are managed in accordance with treaties that only apply to residents of Nunavik – including the CBJNQ.

[25] Application for Authorization, par. 4.21 et seq.

19.1.1 The CBJNQ was signed and executed in 1975 by the federal and provincial Crowns, the Grand Council of the Crees, the Northern Quebec Inuit Association, and three (3) corporations that were related to Québec's Crown;[26]

19.1.2 The CBJNQ states the following in regards to youth services provided to children residing in Nunavik:[27]

> These [Inuit and other Indigenous] people are inhabitants of the territory of Québec. It is normal and natural for Québec to assume its responsibilities for them, as it does for the rest of the population. And that is what the Québec Government will be in a position to do as a result of this Agreement […]. It will be the guarantor of the rights, the legal status and the well-being of the native peoples of its northern territory. […]
>
> The inhabitants of Québec's North, like everybody else, have to have schools. They have to be able to depend on health services. They have to have the security of justice and a system of law enforcement. This Agreement responds to these needs, and provides the structures through which they can be met. There will be local school boards, health and social services boards, police units, fire brigades, municipal courts, public utilities, roads, and sanitation services. And all of these agencies will answer to the appropriate ministry of the Québec Government. The proper jurisdiction of all ministries, such as, for example, the Ministry of Education, will remain intact. The services will all be provided through structures put in place by the Government of Québec. […]
>
> In implementing the Agreement, Québec should recognize and allow to the maximum extent possible for the unique difficulties of operating facilities and services in the North.
>
> In recruiting and retaining staff, generally; working conditions and benefits should be sufficiently attractive to encourage competent personnel from outside Region 1 OA to accept posts for periods of time ranging from three (3) to five (5) years;
>
> a ) In providing employment and advancement opportunities for Native people in the fields of health and social services, and in providing special educational programs to overcome barriers to such employment and advancement […]
>
> b) In budgeting for the development and operating of health and social services and facilities so as to compensate for the disproportionate impact of northern costs, including transportation, construction and fuel costs.
>
> [Emphasis added]

[26] Exhibit R-11.

[27] Exhibit R-11, pages 5 and 6, and chapter 15.

19.1.3 Such principles effectively reassert the right to equal treatment provided for in the Canadian Charter, Québec's Charter, and the Canadian Bill of Rights.[28]

19.1.4 Nothing in the treaty refers to a funding formula that would guarantee that the federal and provincial Crowns will fulfil their obligations. Quite to the contrary, it would seem that both Crowns follow a pattern of behaviour according to which they purposely circumvent their legal and constitutional duties and practice negligence toward Inuit people;

19.1.5 In 1990, the federal Crown and the *Makivik* corporation entered into an agreement according to which the CBJNQ (hereinafter, the "**Implementation Agreement**")[29] was introduced. Pursuant to said Implementation Agreement, the federal Crown must provide adequate services to Inuit people who reside in Nunavik unless the provincial Crown already provides similar services. In the absence of such provincial services, Inuit residents of Nunavik must have access to all relevant health and social services of federal jurisdiction;[30]

19.2 As regards youth protection services in Nunavik:

19.2.1 The Director of Youth Protection (DYP), who must report to Québec's Department of Health and Social Services, ensures youth protection within the province in accordance with the YPA and the *Act respecting health services and social services*;

19.2.2 Sections 4 and 5 of the YPA read as follows:

> 4 . Every decision made under this Act must aim at ensuring continuity of care as well as the stability of the child's relationships and of living conditions appropriate to his needs and age. Therefore, keeping the child in his family environment should be favoured, provided it is in the child's interest.
>
> If keeping the child in his family environment is not in his interest, priority must be given to entrusting the child to the persons most important to him, in particular the grandparents or other members of the extended family.
>
> If it is not in the interest of the child to entrust him to such persons, the child must then be entrusted to a living environment most closely resembling a family environment.

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[28] 1960, ch. 44 C-12.3.

[29] *Agreement respecting the implementation of the James Bay and Northern Quebec Agreement between her Majesty the Queen in right of Canada and Makivik Corporation* (Exhibit R-13).

[30] Implementation Agreement, section 11.

> If returning the child to his family environment is not in his interest, the decision must, on a permanent basis, ensure continuity of care and the stability of his relationships and of living conditions appropriate to his needs and age.
>
> […]
>
> 5 . Persons having responsibilities regarding a child under this Act and persons called upon to make decisions with respect to a child under this Act must inform him and his parents as fully as possible of their rights under this Act and in particular, of the right to consult an advocate and of the rights of appeal provided for in this Act.
>
> In the case of an intervention under this Act, a child as well as his parents must obtain a description of the means and stages of protection and rehabilitation envisaged towards ending the intervention.
>
> [Emphasis added]

19.2.3 Sections 3 and 4.4 of the YPA specify that whenever measures must be taken in the best interest of a child, the latter's family environment, socio-economic condition, and other relevant aspects of their individual situation must be taken into account. One must also keep in mind the specifics of ethnocultural communities at times where removing a child from their usual environment is contemplated. Whenever an indigenous child is concerned, the necessity of preserving their cultural identity must be given due consideration – which might involve, if at all required, relocating them with their extended family or kin or members of their nation or community;

19.3 Because the youth protection services provided in Nunavik were unable to respond to the state of crisis the territory was dealing with, the Respondents subjected Inuit people to acts of negligence, chronic underfunding, and a constant lack of adequate essential services;

19.4 The systemic underfunding of youth and family services within the Nunavik territory prevented the Respondents from providing identical or materially similar services. Human resources were insufficient, inexperienced, and inadequately trained. Intervention plans and follows-ups in regards to children whose safety had been declared compromised were never provided. No prevention program was ever put in place;

19.5 Published in 2007, the Gagnon Report[31] focuses on 139 cases involving Inuit children who, while they lived in Nunavik, benefited from youth protection

[31] Gagnon Report (Exhibit R-4).

services. It also draws specific conclusions about the various discrepancies and deficiencies that appeared to plague such services – including:

> As a result of its investigation, the Commission declares that the rights of the Inuit children and young people of Nunavik, as recognized in the Youth Protection Act and the Youth Criminal Justice Act, have been infringed.
>
> In addition, the Commission declares that the fundamental rights of the children and young people, as recognized in sections 1, 4 and 39 of Québec's Charter of human rights and freedoms, have been infringed, in particular the right to personal inviolability, to the safeguard of their dignity, and to the protection, security and attention that their parents or the persons acting in their stead are capable of providing.
>
> [Emphasis added]

19.6 The Respondents never rectified such a situation;

19.7 The Commission updated the Gagnon Report in 2010.[32] It concluded, among other things, that despite some substantial efforts the situation remains critical and urgent measures must be taken;

19.8 The Commission followed suit in 2014, 2018, and 2019 by reminding government authorities that problems endured and urgent interventions were required;[33]

19.9 Published in 2019, the Viens Report[34] emphasized that youth and family services needed to be funded better and made available on a grander scale;

[20] The Petitioners also point out the Respondents' failure to provide essential services to the indigenous children and families concerned by the class action.[35] They insist on the fact that no children residing in Nunavik was ever offered essential services that were equivalent or materially similar to those offered to other children.

[21] The Petitioners, in support of their allegations, filed three (3) reports released by the House of Commons of Canada[36] - each of which emphasized a lack of coordination between the public entities in charge of providing services and

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[32] *Nunavik : Rapport de Suivi des recommandations de l'enquête portant sur les services de protection de la jeunesse dans la baie d'Ungava et la baie d'Hudson*, June 2010 (hereinafter, the "**Sirois Report**") (Exhibit R-14).

[33] See Exhibit R-15.

[34] Exhibit R-2.

[35] Application for Authorization, par. 4.56 et seq.

[36] *Report of the House of Commons' Special Committee on the Disabled and the Handicapped titled Obstacles* (Exhibit R-16), chapter 18. *Follow-Up Report – Native Population* (Exhibit R-17), and *Report of the House of Commons' Standing Committee on Human Rights and the Status of Disabled Persons* (entitled "Completing the Circle: A Report on Aboriginal People with Disabilities") (Exhibit R-18).

called upon the federal government to break down the jurisdiction-based fences that prevented it from dealing efficiently with the provincial government.

[22] The Petitioners suggest that a similar issue inspired the *Jordan* principle[37], several rulings of the Canadian Human Rights Tribunal according to which essential services provided to indigenous children since November 2nd, 2017 had to be free and devoid of any and all discrimination, and the implementation of the *Inuit Child First* program in September 2018.

[23] In the end, however, the Viens Report concludes that despite the introduction of the *Inuit Child First* program, the road to adequate health services remains paved with major obstacles.[38]

### 1.3 Specific situation of the Petitioners

[24] A.B.'s particular situation is summarized as follows:[39]

24.1 She was born an Inuit. She is registered with the *Inuit Land Claim Organization* and currently resides in Nunavik;

24.2 Born in 1975, she was immediately taken away from her mother and entrusted to an adoptive family. She suffered from meningitis while she was still a toddler and had to be hospitalized in Montréal, where she was left alone and without any kind of support for several months;

24.3 Her adoptive mother abused her physically, whereas her adoptive brother assaulted her sexually until she reached the age of eight (8). One of her teachers molested her as well;

24.4 She resided in the municipality of Val-d'Or until the age of seventeen (17), without being able to benefit from any support, therapy, or essential services. She eventually found solace in drugs and alcohol. She was forced to provide for herself from the age of eighteen (18);

24.5 She recalls having had two (2) indigenous friends who, just like her, were abused in school. They reportedly committed suicide;

24.6 She has done her best to overcome the abuse and other difficulties of her past. She still resides in Nunavik and is now a mother of five (5). She is unable to work. Considering the poverty she lives in and the

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[37] *Indigenous Services Canada regarding the implementation and content of Jordan's Principle* (ICS Report) (Exhibit R-19).

[38] Application for Authorization, par. 4.62. Also refer to Exhibit R-2.

[39] Application for Authorization, par. 4.64 et seq.

trauma she has endured, one of her underage children has been entrusted to a foster home and her youngest son, now nine (9), is currently undergoing a similar process.

24.7 Whether it be as a newborn, a child, or an adult, Petitioner A.B. never benefited from any of the essential or preventive services she (and her parents) would have needed in order to live a decent life;

24.8 It is only within the year that followed the filing of these proceedings that Petitioner A.B. was made aware of the systemic underfunding of the youth and family services available in Nunavik and of its causal relationship with the numerous relocations and severe trauma she has endured.

[25] Ms. Jones's personal situation, for its part, is summarized as follows:[40]

25.1 She was born an Inuit, in 1984. She is registered with the *Inuit Land Claim Organization* and currently resides in the municipality of Lasalle (province of Québec);

25.2 She lived with her mother until the age of three (3). She and her brother were then entrusted to a foster home. She was relocated more than ten (10) times, both within and outside of Nunavik. She was also, on several occasions, reunited with her mother, her sister, and her brother, only to be removed and relocated again;

25.3 She suffered sexual abuse from the father and brother who were part of her first foster family. Both men were eventually found guilty of acts of paedophilia committed against other children;

25.4 She never benefited from any kind of services that would have allowed her to deal with the intense post-traumatic stress she experienced later on. She, too, found solace in drugs and alcohol. She still suffers from anxiety and panic attacks;

25.5 It is only within the year that followed the filing of these proceedings that Ms. Jones was made aware of the systemic underfunding of the youth and family services available in Nunavik and of its causal relationship with the several relocations she experienced.

[26] The information provided about the Petitioners was eventually completed by the answers they gave during the written examinations this Court allowed the Respondents to conduct.[41] Said examinations revealed the following:[42]

26.1 The various placements A.B. was subjected to from 1975 to 1992 (which involved indigenous as well as non-indigenous families), the location of such placements, and their respective duration;

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[40] Application for Authorization, par. 4.72 et seq.

[41] Exhibits PGQ-14 and PGQ-15.

[42] Exhibits AGC-4 and AGC-5.

26.2 The various placements Tanya Jones was subjected to from 1987 to 2000 (which involved indigenous as well as non-indigenous families), the location of such placements, and their respective duration;

26.3 The fact that A.B. was never the object of any request for care, since "there was no place to ask for therapy and support";[43]

26.4 The fact that Ms. Jones required therapy and psychological support but was never offered any.[44]

## 2 . GOVERNING LAW

### 2.1 Legal principles upon which the Petitioners are relying

[27] As previously pointed out, the Petitioners' class action is based on the following causes of action:

27.1 Failure to fulfil the fiduciary duties and obligations the Respondents were allegedly bound by towards indigenous individuals (including Inuit people who resided in Nunavik as well as Metis citizens and other First Nations who lived elsewhere in Québec);

27.2 Repeated violations of sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* and of sections 1, 4, and 10 of the *Charter of Human Rights and Freedoms*;

27.3 Civil misconduct within the meaning of section 1457 C.c.Q.

[28] The Crown's fiduciary duties and obligations may arise in two (2) separate sets of circumstances:

28.1 With respect to a particular (or at least identifiable) indigenous interest over which the Crown exercises some measure of discretion (i.e., a so-called *sui generis* duty or obligation);

28.2 Whenever the general conditions required to establish an *ad hoc*, private fiduciary relationship are satisfied (i.e., a so-called *ad hoc* duty or obligation).

[29] The Supreme Court of Canada explained that any interest likely to give rise to a *sui generis* duty or obligation must be (1) a common indigenous concern which is (2) either particular or identifiable and (3) independent enough from the government's executive and legislative powers that the duty or obligation can actually take form.[45]

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[43] Exhibit AGC-4, answer given to question 3.1.

[44] Exhibit AGC-5, answer given to question 3.3.

[45] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 CSC 14, par. 51, 53, 56, and 59; *Nation Haïda v. British Columbia (Department of Forests)*, 2004 CSC 73, par. 18; *Williams Lake Indian Band v. Canada (Indigenous and Northern Affairs Canada)*, 2018 CSC 4, par. 52.

[30] An *ad hoc* fiduciary duty or obligation, for its part, will arise whenever three (3) conditions are met:[46]

30.1 The trustee, by means of a private accord, agreed to act loyally and in the best interest of the beneficiaries;

30.2 The beneficiaries are vulnerable under the trustee's control;

30.3 The beneficiaries have a substantial legal or practical interest on which the exercise of the trustee's control or discretionary powers might have detrimental consequences.

[31] The relevant provisions of the Canadian Charter read as follows:

> 7 . Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 15 . (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> 24 . (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[32] The following provisions of Québec's Charter are also relevant to this case:

> 1 . Every human being has a right to life, and to personal security, inviolability and freedom.
>
> He also possesses juridical personality.
>
> 4 . Every person has a right to the safeguard of his dignity, honour and reputation.
>
> 10 . Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, gender identity or expression, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

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[46] *Alberta Elder Advocates of Alberta Society*, 2011 CSC 2011 24, par. 36. See also *Manitoba Metis Federation*, supra, note 45, par. 49, 50, and 61.

> Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.
>
> 49 . Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.
>
> In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.

[33] Last but not least, we must consider section 1457 of the C.c.Q. in our assessment of the Application for Authorization:

> 1457 . Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another.
>
> Where he is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature.
>
> He is also bound, in certain cases, to make reparation for injury caused to another by the act, omission or fault of another person or by the act of things in his custody.

### 2.2 Criteria one must meet in order to be authorized to initiate a class action

[34] Section 575 of the C.c.p. defines the criteria one must meet before a court of law can authorize a class action:

> 575 . The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that
>
> (1) the claims of the members of the class raise identical, similar or related issues of law or fact;
>
> (2) the facts alleged appear to justify the conclusions sought;
>
> (3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and
>
> (4) the class member appointed as representative plaintiff is in a position to properly represent the class members.

[35] The Supreme Court of Canada defined the few principles one must observe while reviewing such criteria.

[36] In the case known as *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*[47], the Supreme Court had the following to say in regards to the purposes of the authorization process:

> [7] At the authorization stage, the court plays a "screening" role. It must simply ensure that the applicant meets the conditions of art. 575 *C.C.P.* If the conditions are met, the class action must be authorized. The Superior Court will consider the merits of the case later. This means that, in determining whether the conditions of art. 575 *C.C.P.* are met at the authorization stage, the judge is ruling on a purely procedural question. The judge must not deal with the merits of the case, as they are to be considered only after the application for authorization has been granted.
>
> [8] The Court has given "a broad interpretation and application to the requirements for authorization [of the institution of a class action], and 'the tenor of the jurisprudence clearly favours easier access to the class action as a vehicle for achieving the twin goals of deterrence and victim compensation'". In other words, the class action is *not* an "exceptional remedy" that must be interpreted narrowly. On the contrary, it is "an ordinary remedy whose purpose is to foster social justice". [Emphasis added]

[37] When it comes to colour of right, the Supreme Court determined that the Plaintiff has the onus of demonstrating the existence of an arguable case:

> [59] Furthermore, at the authorization stage, the facts alleged in the application are assumed to be true, so long as the allegations of fact are sufficiently precise: *Sibiga*, at para. 52; *Infineon*, at para. 67; *Harmegnies*, at para. 44; *Regroupement des citoyens contre la pollution v. Alex Couture inc.*, 2007 QCCA 565, [2007] R.J.Q. 859, at para. 32; *Charles*, at para. 43; *Toure*, at para. 38; *Fortier*, at para. 69. Where allegations of fact are "vague", "general" or "imprecise", they are necessarily more akin to opinion or speculation, and it may therefore be difficult to assume them to be true, in which case they must absolutely "be accompanied by some evidence to form an arguable case": *Infineon*, at para. 134. It is in fact strongly suggested in *Infineon*, at para. 134 (if not explicitly, then at least implicitly), that "bare allegations", although "insufficient to meet the threshold requirement of an arguable case" (emphasis added), can be *supplemented* by "some evidence" that — "limited though it may be" — must accompany the application in order "to form an arguable case".[48] [Emphasis added]

[38] The Honourable Yves-Marie Morrissette, speaking on behalf of the Court of Appeal, recently commented as follows the excerpt found above:[49]

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[47] 2019 CSC 35 hereinafter, "**Oratoire Saint-Joseph**"), in which were quoted *Infineon Technologies AG v. Option Consommateurs*, 2013 CSC 59 (hereinafter, "**Infineon**") and *Vivendi Canada Inc. v. Dell'Aniello*, 2014 CSC 1 (hereinafter, "**Vivendi**").

[48] Oratoire Saint-Joseph, supra, note 47, par. 59.

[49] *Homsy v. Google*, 2023 QCCA 1220, par. 22 (hereinafter, "**Homsy**").

> [24] […] I paraphrase: whenever the facts alleged are clear and specific enough, the plaintiff does not have to provide "some measure of evidence" in support of their allegations. Such a principle, in my opinion, lightens the burden of the party who wishes to have a class action authorized. It is, however, the current state of the law.
>
> [25] Whether or not some allegations are broad, vague, or unclear to the point they can hardly be assumed to be true, appears to be a matter of fact […]

[39] Whenever determining whether or not an arguable case exists, one must, in addition to reviewing the facts alleged, consider the legal and factual presumptions that can be derived from those facts.[50] Such is a rather low threshold.

[40] The plaintiff who elects to draft allegations which are broad, vague, unclear, incomplete, or akin to personal opinions shall pay the price of their casualness at the authorization stage.[51]

[41] The purpose of the filtering process is to prevent frivolous or undefendable cases from moving forward.[52] Should there remain any doubt on the sufficiency of the facts alleged, such doubt, while the colour of right criterion is under review, should be interpreted in favor of the plaintiff.[53]

[42] As the Court of Appeal pointed out in the *Tenzer* case, "the plaintiff does not have to prove that their application will most likely be granted; they simply have to demonstrate a "good colour of right" or a "prima facie case" ".[54]

[43] Last but not least, the colour of right criterion must be reviewed in the light of the plaintiff's personal situation.[55] Any reference to a fact which is specific to the plaintiff will be assumed to be true unless it is clearly implausible.[56]

[44] The "adequate representation" criterion, for its part, is a rather minimalistic one as it "does not imply a search for the perfect representative".[57] A plaintiff only has to demonstrate that they have the interest and competence required to act and that there exists no conflict of interests between them and the members of the class.[58]

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[50] *Oratoire Saint-Joseph*, supra, note 47, par. 24.

[51] *Li v. Equifax Inc.*, 2018 QCCS 1892, par. 86. (Application for authorization dismissed : 2018 QCCA 1560. Application for authorization to appeal to the Supreme Court dismissed : C.S. Can., 2022-03-24, no. 39863).

[52] *Infineon*, supra, note 47, par. 59 and 60. See also *Tenzer v. Huawei Technologies Canada Co. Ltd.*, 2020 QCCA 633 (hereinafter, "**Tenzer**"), par. 20.

[53] *Infineon*, supra, note 47, par. 59 and 60. See also *Tenzer v. Huawei Technologies Canada Co. Ltd.*, 2020 QCCA 633 (hereinafter, "**Tenzer**"), par. 20.

[54] *Tenzer*, supra, note 52, par. 20.

[55] *Abicidan v. Bell Canada*, 2017 QCCS 1198, par. 11.

[56] *Cozak v. Attorney General of Québec*, 2021 QCCA 1376, par. 7.

[57] *Tenzer*, supra, note 52, par. 30.

[58] *Tenzer*, supra, note 52, par. 30. See also *Oratoire Saint-Joseph*, supra, note 47, par. 32.

[45] As regards the criterion of identical or similar issues of fact or law, it must be emphasized that the existence of a single issue will be deemed sufficient insofar as it allows the proceedings to progress in a significant manner.[59]

[46] That being said, we must now review the relevant criteria in the light of the Application for Authorization, the exhibits filed in support of it, and the evidence the parties have been allowed to submit so far.

## 3 . THE CRITERIA DEFINED IN SECTION 575 C.C.P.

[47] The Respondents dispute that the colour or right (575(2) C.c.p.) and adequate representation (575(4) C.c.p.) criteria have been met in this particular case. The AGC also denies that the identical, similar, or related issues of fact or law criterion has been satisfied. Although the relevance of the criterion defined in subsection 575(3) of the C.c.p. has not been challenged, the Court shall also address it hereunder.

### 3.1 Identical, similar, or related issues of fact or law – 575(1) C.c.p.

[48] The Petitioners define as follows the common issues the Court would have to rule upon in the context of the class action:

48.1 In regards to the Nunavik Child Class and to the Québec Indigenous Child Class:

48.1.1 Do the Respondents have any kind of fiduciary duties or obligations toward the members of said classes when it comes to the creation, implementation, funding, and provision of youth and family services?

48.1.2 If so, did the Respondents fail to fulfil such fiduciary duties or obligations?

48.1.3 Were the Respondents guilty of misconduct while creating, implementing, funding, or providing youth and family services?

48.1.4 Did the Respondents, while creating, implementing, funding, or providing youth and family services, act in a discriminatory manner toward the members of these classes or otherwise violate fundamental rights guaranteed under sections 7 and 15 of the Canadian Charter and sections 1, 4, and 10 of Québec's Charter?

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[59] *Homsy*, supra, note 49, par. 12. See also *Desjardins Cabinet de Services Financiers Inc. v. Asselin,* 2020 CSC 30, par. 84 and 85; *Vivendi*, supra, note 47, par. 58.

48.1.5 In the event where the Respondents were guilty of misconduct or were found to have failed to fulfil their fiduciary duties or obligations, to have acted in a discriminatory manner, or to have violated the class members' constitutional rights, should they be held liable for the harm and damage said class members suffered over the years?

48.1.6 If the Respondents are ever held responsible for the payment of compensatory damages, can such damages be recovered on a collective basis on behalf of the class members?

48.2 In regards to the Nunavik Family Class and to the Québec Family Class:

48.2.1 Must the Respondents, in the course of the creation, implementation, funding, or provision of youth and family services, make sure that the withdrawal of a child from their family and community will be used only as a last resort?

48.2.2 Must the Respondents, in the course of the creation, implementation, funding, or provision of youth and family services, make sure that the members of a same family remain together whenever possible?

48.2.3 With respect to the Nunavik Family Class, must the Respondents make sure that Inuit children are provided with public goods and services in a timely fashion and regardless of jurisdictional disputes between the federal and provincial governments and of interdepartmental conflicts within specific levels of government?

48.2.4 If so, must the Respondents be found guilty of misconduct, to have failed to fulfil their fiduciary duties or obligations, to have acted in a discriminatory manner, and/or to have violated the class members' constitutional rights?

48.2.5 If so, should the Respondents be held liable for the harm and damage said class members suffered over the years?

48.2.6 If the Respondents are ever held responsible for the payment of compensatory damages, can such damages be recovered on a collective basis on behalf of the class members?

48.3 In regards to the Essential Services Class:

48.3.1 Must the Respondents make sure that the members of this class benefit from public goods and services in a timely fashion and regardless of jurisdictional disputes between the federal and provincial governments and of interdepartmental conflicts within specific levels of government?

48.3.2 Did the Respondents, in violation of the duties and obligations mentioned in question 48.3.1 above, deny or delay the provision of the health and social services the class members were entitled to?

48.3.3 Are the Respondents bound by fiduciary duties or obligations with respect to question 48.3.1 above?

48.3.4 If so, must the Respondents be found guilty of misconduct, to have failed to fulfil their fiduciary duties or obligations, to have acted in a discriminatory manner, and/or to have violated the class members' constitutional rights?

48.3.5 Must the Respondents be held responsible for the payment of compensatory and/or punitive damages, and, if so, how much should such damages amount to?

48.3.6 If the Respondents are ever held responsible for the payment of compensatory and punitive damages, can such damages be recovered on a collective basis on behalf of the class members?

48.4 In regards to all the classes referred to in this Section 48:

48.4.1 What interval of time should apply to each and every class?

48.4.2 What facts and circumstances (which must be common to the members of all classes) are likely to explain why the latter were unable to act sooner?

[49] The AGC, who acknowledges the existence of common issues, recommends that the following questions be added to the list:

49.1 Does the Crown's immunity extend to the claims covered under the class action the Respondents are facing?

49.2 Can the AGC's liability be contemplated in connection with the creation, implementation, funding, and provision (within the Nunavik territory) of youth protection services and other essential services (if any) pursuant to the CBJNQ?

49.3 Is the liability of third parties in issue, and, if so, does it mitigate in any way the AGC's liability?

[50] The Petitioners reworded as follows the additional issues they agreed to submit:[60]

50.1 Does the Crown's immunity extend to the claims covered under the class actions the Petitioners intend to file against the Respondents?

50.2 Should the Court come to the conclusion that the Respondents are liable for any portion of the claims whatsoever, must liability be shared among the Respondents and/or third parties? If so, in what proportions?

[51] The AGC also requests that the grounds of defense to be invoked against each member's position be defined without further ado.

[52] The AGQ, for their part, denies that the Application for Authorization raises identical, similar, or related issues of fact or law. They allege, among other things, that:

52.1 The underfunding of child protection services is the only matter to which members of all the classes refer to, and dealing with such underfunding on a broad spectrum would not allow the parties to move the proceedings forward in any significant manner;

52.2 The material differences that exist between the classes (including the distinctive legal and factual circumstances of members living in Nunavik in relation to those of members residing elsewhere in Québec)[61] make it even less useful to identify common issues;

52.3 Since there does not seem to exist any kind of uniformity when it comes to the funding and provision of youth services in Nunavik and elsewhere in the province, clustering issues together within a single case would be inappropriate;

52.4 The Essential Services Class was created in relation to services that are defined a lot more broadly than those provided (or not provided) to members of the Nunavik Child Class or of the Québec Indigenous Child Class.

[53] This Court comes to the conclusion that the Application for Authorization raises issues that meet the relatively low threshold set forth in subsection 575(1) C.c.p., including:

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[60] *Plan or Argument of Petitioners' Reply*, par. 2.

[61] The AGQ, in support of their position, refers to documents whose filing has been authorized by the Court – namely, Exhibits PGQ-1, PGQ-2, PGQ-3, and PGQ-4.

53.1 The systemic and discriminatory underfunding of youth and family services is an issue of fact and law that is similar or related to all the classes created in the context of these proceedings;

53.2 The existence of fiduciary duties and obligations is an issue that is common to the Québec Indigenous Child, Nunavik Child, and Essential Services Classes. Although it does not seem to be of concern to the Québec Family and Nunavik Family Classes, the issue appears to be related to the first two (2) issues said classes are raising;

53.3 The violation of provisions of the Canadian Charter and of Québec's Charter also happens to be an issue which is common to all classes.

[54] This Court is of the opinion that any ruling on these matters would allow the proceedings to progress in a significant manner, which would benefit the members of all classes. The fact that Nunavik's situation is rather particular and requires us to keep a few specific parameters in mind is not enough, at this stage, to warrant a decision based on the absence of common issues. The arguments the AGQ submits in regards to separate and autonomous funding structures is a matter that should be reviewed by the trial judge.

[55] Anyhow, this Court believes that in addition to the common issues the Petitioners have identified, we must consider the issues submitted by the AGC – which are also likely to move the proceedings forward in a significative manner, for the benefit of the members all classes involved:

55.1 Does the Crown's immunity[62] extend to the claims covered under the class actions the Petitioners intend to file against the Respondents?

55.2 Can the AGC's liability be contemplated in connection with the creation, implementation, funding, and provision (within the Nunavik territory) of youth protection services and other essential services (if any) pursuant to the CBJNQ?

55.3 Should the Court come to the conclusion that the Respondents are liable for any portion of the claims whatsoever, must liability be shared among the Respondents and/or third parties? If so, in what proportions?

55.4 What grounds of defense will the Respondents oppose to each and every member of a class, on an individual basis?

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[62] Refer to paragraphs 62 to 74 of this ruling, which happen to deal with the motion for dismissal the AGQ based on the Crown's immunity at the authorization stage.

### 3.2 Colour of right – 575(2) C.c.p.

[56] We must now ask ourselves whether the facts alleged by the Petitioners appear to justify the conclusions they are seeking – in other words, whether or not the Petitioners have an arguable case to submit.

#### 3.2.1 The facts alleged by the Petitioners

[57] The Petitioners, in the context of their Application for Authorization, allege a series of facts and circumstances in addition to those listed in paragraphs 12 to 26 of this ruling – namely:

> **D. THE RESPONDENTS' LIABILITY**
>
> **I. Breach of Fiduciary Duty**
>
> 4.80. The respondents stand in a special, fiduciary relationship with Indigenous peoples across Québec, including the Inuit in Nunavik and, elsewhere across Québec, the Métis and First Nations.
>
> 4.81. The Respondents have assumed and maintain a large degree of discretionary control over Indigenous (…) lives and interests in general, and the care and welfare of the members of the class in particular.
>
> 4.82. The Respondents exercised this discretionary authority by undertaking (…) to fund, deliver, and/or maintain equality in the provisioning of child and family services to members of the class (…). They consequently assumed discretionary control over the interests of members of the class.
>
> 4.83. Class members were vulnerable to the Respondents' exercise of this authority, which failed to meet the needs of class members and failed to meet standards of care applicable to child and family services.
>
> 4.84. This failure has had well-documented adverse effects on the Nunavik Child Class (…) and the Québec Child Class who have been denied basic protection and prevention services, placed in care at alarming rates, removed from their families and their communities, often losing or being denied the opportunity to speak their language and practice their culture, and denied postmajority services once they reached the age of eighteen.
>
> 4.85. Further, the Respondents bore a responsibility and undertook to maintain substantively equal access to essential health and social services and products for Indigenous children regardless of which level of government or which government department had the ultimate spending responsibility.
>
> 4.86. It was in fact precisely disputes over the payment for services between levels of government or governmental departments that caused denials or delays in the provision of treatment and care as well as essential service gaps, which eventually led the Federal Crown to put a name to the injustice that Inuit children have endured, namely the Inuit Child First Initiative, and implement a program as of 2018 to address it.

4.87. The Inuit Child First Initiative is similar to and follows the footsteps of Jordan's Principle, in that it ensures that a child is not denied or delayed receipt of an essential public service as a result of a disagreement between the federal and provincial government or a dispute between departments within the same government over which is responsible for funding the service or product, and that an Inuit child does not suffer gaps in essential services.

4.88. Petitioners assert that the Provincial Crown bore a fiduciary duty toward the Essential Services Class to ensure that its essential service obligations set out in the JBNQA (as most recently recognized in the Inuit Child First Initiative) were met during the class period.

4.89. Despite the Federal Crown's recognition that Inuit children should not suffer because of these types of disputes, and despite the Provincial Crown being similarly bound by its fiduciary obligations to ascertain that Inuit children in Nunavik do not suffer delays, denials or gaps in the receipt of essential services, both Respondents have failed to meet their obligations in this respect.

4.90. The Respondents' breaches of their fiduciary duties toward class members have included:

4.90.1 Failure to deliver an appropriate child welfare program for the class members(…);

4.90.2 Maintaining funding formulas that were structured in such a way that they promoted negative outcomes for Indigenous children and families, namely the incentive to take children into out-of-home care. As a result, many Inuit children and their families were denied the opportunity to remain together or be reunited in a timely manner;

4.90.3 Failure to provide substantively, or otherwise, equal essential services factoring in the specific needs of the Inuit communities or the individual families and children residing therein;

4.90.4 Failure to adjust funding for increasing costs over time for items such as salaries, benefits, capital expenditures, cost of living, and travel for service providers to attract and retain staff and, generally, to keep up with provincial requirements;
4.90.5 Failure to consider the actual needs of the Inuit communities and class members, making provincial operational standards unattainable for them;

4.90.6 Failure by the Federal Crown to respect the class members' substantive equality rights underlying Jordan's Principle (…); and

4.90.7 Failure by the Provincial Crown to recognize its obligations similar to the Inuit Child First Initiative.

4.91. These breaches deprived the Essential Services Class members of their right to non-discriminatory essential services. The Petitioners, for example, needed mental wellness support as children to cope with their trauma, but did not receive adequate support.

4.92. The breaches resulted in Essential Services Class members being deprived of access to essential public services.

**II. Breach of the Canadian Charter and of the Quebec Charter**

4.95. The Respondents' failure to provide adequate child and family services or essential services was directed exclusively to Indigenous children and families, therefore discriminated on an enumerated ground, i.e., race, national or ethnic origin.

4.96. The discriminatory underfunding of child and family, and other essential services (…) occurred because members of the classes were Indigenous and caught in the neglect and jurisdictional uncertainty of which the Respondents took advantage.

4.97. This discrimination exacerbated the disadvantages of members of the classes by perpetuating historical prejudice caused by the legacy of the Residential Schools and the Sixties Scoop.

4.98. In turn, this discriminatory treatment directly resulted in the violation of the class members' constitutional rights to life, liberty, security, inviolability and dignity provided by the Canadian Charter and the Quebec Charter in a way that violated the principles of fundamental justice. The Respondents' policies of neglect and avoidance particularized herein impinged on class members' life, liberty, security and dignity in an arbitrary and all-encompassing fashion, bearing grossly disproportionate consequences in light of the class members' situation as children and historically disadvantaged as Indigenous.

**III. Civil Liability**

4.99. The Respondents' conduct also constituted a fault within the meaning of Article 1457 of the Civil Code of Québec, CQLR c CCQ-1991.

4.100. The Respondents knew or ought to have known that their failure to provide services to class members on a substantively equal level to what nonIndigenous children receive would cause them tremendous harm.

4.101. Members of the classes sustained bodily and moral injuries as a direct and immediate consequence of the Respondents' conduct including, but not limited to, loss of language, culture, community ties and resultant pain and suffering, psychological trauma and substance abuse.

### 3.2.2 The preliminary means of defense raised by the Respondents

[58] The Respondents raised several means of defense against the causes of action the Petitioners rely upon in this case. They request that this Court grant such means of defense at the authorization stage so the class action (whether in whole or in part) can be dismissed without further ado.

[59] The AGC raises the following means of defense:

59.1 Authority of *res judicata* when it comes to the Québec Indigenous Child Class and more specifically to all cases involving Indian and Metis children who, while they did not have any particular status, were entrusted to non-indigenous parents within the province of Québec between January 1st, 1992 and February 1st, 2020 – the whole pursuant to the authorization ruling this Court issued in the *Ward* case.[63] Hence, an exclusion should be included in the definition of the Québec Indigenous Child Class on account of the *Ward* class action;

59.2 Authority of *res judicata* when it comes to the Nunavik Child Class, the Essential Services Class, and the family Classes, more specifically to all cases involving Inuit children who were entrusted to non-indigenous parents anywhere in Canada between November 11, 1975 and December 31st, 1991, which were settled, released, and discharged in the context of the *Riddle* class action in accordance with the terms and conditions of the Sixties Scoop Agreement[64] (including cases that dealt with psychological care and treatment);

59.3 The absence of any valid cause of action on the part of (i) members of the Nunavik Child Class who, although they were the object of a report, were not subsequently withdrawn from their families, and (ii) such children's families;

59.4 The absence of any valid cause of action on the part of members of the Essential Services Class insofar as the broad definition of "Essential Services" refers to anything other than essential psychological care meant to alleviate the trauma caused by apprehensions and so-called abuse;

59.5 The absence of a personal cause of action on the part of Ms. Jones, who intends to act as a representative of the Nunavik Family and Québec Family Classes;

59.6 The definition given to the Nunavik Child Class is much too broad and unclear for any potential member to identify with it;

59.7 The definition given to the Essential Services Class is much too broad and unclear for any potential member to identify with it. Because it is not related to the Petitioners' personal cause of action in any way, it would grant the latter the authority of investigative commissioners.

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[63] *Ward v. Attorney General of Canada*, 2023 QCCS 793 (hereinafter, the "**Ward Ruling**").

[64] Exhibit PGC-1.

[60] The AGQ, for their part, raises the following means of defense:

60.1 The definition given to the Nunavik Child Class is not grounded on objective criteria. It is also too broad, as it includes children who were either reported or entrusted to the DYP;

60.2 The definitions given to the Essential Services Class and the Québec Indigenous Child Class are also too broad;

60.3 The facts alleged and the evidence submitted are insufficient to suggest the existence of *sui generis* or *ad hoc* fiduciary obligations;

60.4 The government is given relative immunity with respect to political decisions and other decisions which, because they relate to funding, can be assimilated to operational choices. No allegations of carelessness or gross negligence allow the Court to ignore or circumvent such immunity in the present case;

60.5 The facts alleged and the evidence submitted are insufficient to suggest that the Respondents violated section 7 of the Canadian Charter and section 1 of Québec's Charter;

60.6 Parts of the Petitioners' proceedings that relate specifically to the Essential Services, Nunavik Family, and Québec Family Classes are prescribed;[65]

60.7 The authority of *res judicata* applies to parts of the proceedings on account of the Ward Ruling.

[61] It seems appropriate to deal with the Crown's immunity on a preliminary basis. We shall then discuss the existence of an arguable case in the light of the three (3) causes of action the Petitioners are relying upon. Last but not least, we shall address the means of defense based on the authority of *res judicata* and the statute of limitations.

### 3.2.3 The Crown's immunity

[62] The scope and extent of the Crown's immunity is a matter that is generally debated on its merits rather than at the authorization stage.[66]

[63] The AGQ relies on immunity as a ground for dismissal of the class action at the authorization stage. They are adamant that the Superior Court already confirmed that immunity can be invoked for that purpose.[67]

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[65] Plan submitted by the AGQ, par. 197 et seq.

[66] See *Carrier v. Québec (Attorney General of)*, 2011 QCCA 1231 (hereinafter, "**Carrier**"), par. 44 and 45.

[67] *Cilinger v. Centre Hospitalier de Chicoutimi*, 2004 CanLII 9657 (QC CS), par. 117. Appeal dismissed in 2004 CanLII 39136 (QC CA).

[64] The State may, in specific circumstances, benefit from limited immunity whose purpose is to provide the freedom to govern without being subjected to legal proceedings.[68]

[65] A clear distinction must be drawn between the political decisions and the operational decisions a government might have to take. Only political decisions will, in fact, benefit from relative immunity.[69]

[66] Prevalent caselaw acknowledges that, in most cases, decisions made "by legislators or officers whose official responsibility requires them to assess and balance public policy considerations", that involve "planning and predetermining the boundaries of [a government's] undertakin[g]", or that "concern budgetary allotments for departments or government agencies" will be classified as policy decisions.[70]

[67] The class action contemplated in the case at hand relies heavily on the underfunding of youth and family services provided to indigenous people. In the AGQ's opinion, the decisions under scrutiny were of a political nature, and, as such, were subject to relative immunity.

[68] The AGQ, in support of their position, filed a series of exhibits which demonstrate that decisions taken in regards to the funding of health services provided in Nunavik are governed by agreements negotiated and entered into by the government of Québec (represented by the Minister) and the Nunavik Regional Board of Health and Social Services:

68.1 A document entitled *Convention de prestation et de financement de services de Santé au Nunavik (2009-2016)* – Exhibit PGQ-1;

68.2 A document entitled *Convention de prestation et de financement de services de Santé au Nunavik (2018-2025)* – Exhibit PGQ-2;

68.3 A document entitled *Cadre financier de la Convention Nunavik (2018-2015)* – Exhibit PG-3.

[69] Being that as it may, no such immunity will ever protect the State in connection with decisions which are either irrational or made in bad faith[71] - in which case evidence of carelessness or gross negligence must be submitted.[72]

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[68] *Québec (Attorney General of) v. Proulx*, 1999 CanLII 13648 (QC CA), p. 63.

[69] *R. v. Imperial Tobacco Ltd.*, 2011 CSC 42 (hereinafter, "**Imperial Tobacco**"), par. 90

[70] *Nelson (City of) v. Marchi*, 2021 CSC 41, par. 54 (quoting *Imperial Tobacco*, supra, note 69).

[71] *Hinse v. Canada (Attorney General of)*, 2015 CSC 35, par. 23. *Imperial Tobacco*, supra, note 69, par. 90.

[72] *Tonnelier v. Québec (Attorney General of)*, 2012 QCCA 1654, par. 89.

[70] It will not, either, protect the State with respect to public policies which are subsequently said to go against the Charter or to violate fundamental rights.[73]

[71] According to the AGQ, none of the allegations found in the Application for Authorization allow this Court to conclude that the immunity granted to the State should be set aside.

[72] With the utmost respect, and without considering the issue on its merits, this Court believes that the allegations found in the Application for Authorization (which from the outset are supported by documentary evidence pertaining, among other things, to the historical, social, legal, and political context of the funding and provisionsof youth and family services[74]) allow one to infer that the Respondents' conduct might amount to gross negligence against which the State's immunity (assuming it does apply) would be rendered ineffective.

[73] In fact, the following items support the possibility that evidence will be submitted about the carelessness or gross negligence of the Respondents and/or the violation of the fundamental rights recognized to class members:

73.1 Allegations of the historical policy of discrimination and racism implemented against indigenous people (which in fact resulted in the systemic underfunding of the services they were offered), as well as exhibits that tend to confirm that conclusions were reached in that respect;

73.2 Allegations focused on the violation of the fundamental rights the Canadian and Québec's Charters confer upon class members – which, among other things, are supported by the Gagnon Report;[75]

73.3 The conclusions of the 2022 Referral;[76]

73.4 Allegations according to which the Petitioners were subjected to various apprehensions, placements, and hospitalizations by themselves, and were deprived of any kind of support and therapy services.

[74] Consequently, and even though it stands as a valid ground of defense, the State's immunity will have to be debated on its merits. It cannot justify the dismissal of a class action at the authorization stage. Anyhow, the AGC recommends[77] that the matter of immunity be added to the list of common issues – which this Court has agreed to do in paragraph 55.1 above.

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[73] *Conseil Scolaire Francophone de la Colombie-Britannique v. Colombie Britannique*, 2020 SCC 13, par. 164; *Benrouayene v. Attorney General of Canada*, 2023 QCCS 144, par. 36, 37, and 40.

[74] See par. 17 et seq. of this ruling.

[75] Exhibit R-4.

[76] Supra, note 14.

[77] *Plan of Argument of the Attorney General of Canada*, dated September 11, 2023, par. 151.

### 3.2.4 Analysis – Applying law to the facts at hand

[75] We must now, in order to determine whether or not these proceedings are based on an arguable case, review the causes of action the Petitioners have raised against the Respondents;

[76] We shall also consider the other grounds of defense which, according to the Respondents, must lead to the dismissal of the class action at the authorization stage.

#### 3.2.4.1 Failure to fulfil fiduciary duties and obligations

[77] The Petitioners allege the existence of fiduciary duties and obligations whose breach by the Respondents entitles them to compensation. Although such a distinction is not made in the Application for Authorization, it would appear from the representations the Petitioners made at the hearing that their proceedings rely on the existence of an *ad hoc* fiduciary duty or obligation.[78]

[78] As previously emphasized, three (3) conditions must be met before any *ad hoc* fiduciary duty or obligation can be said to exist:[79]

78.1 The trustee, by means of a private accord, agreed to act loyally and in the best interest of the beneficiaries;

78.2 The beneficiaries are vulnerable under the trustee's control;

78.3 The beneficiaries have a substantial legal or practical interest on which the exercise of the trustee's control or discretionary powers might have detrimental consequences.

[79] The Petitioners suggest that the following syllogism should apply in this case:[80]

79.1 The federal and provincial Crowns knew perfectly well that they were underfunding the youth protection services they were providing to the indigenous children who are now members of the Nunavik Child and Québec Indigenous Child Classes, which in fact prevented the supply of adequate preventive services to said children and their families;

79.2 As a result, several children were taken away from their families without any valid reason. Children that now belong to the Nunavik Child Class, even though their case had been reported to youth protection services, were entrusted to unsafe environments in which they were subjected to physical, psychological, and sexual abuse;

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[78] See the *Plan of Argument of Petitioners' Reply*, dated September 22nd, par. 20 and 22.

[79] *Alberta Elder Advocates of Alberta Society*, 2011 CSC 2011 24, par. 36. See also *Manitoba Metis Federation*, supra, note 45, par. 49, 50, and 61.

[80] Application for Authorization, par. 4.80 et seq.

79.3 The line of conduct the Respondents adopted, because it discriminated against the class members, went against the fiduciary duties and obligations they had contracted toward indigenous children;

79.4 The Respondents, among other things, ended up exercising some measure of discretionary control over the lives and vital interests of class members by committing to funding and providing youth and family services that would be identical or materially similar to those supplied to non-indigenous children and families;

79.5 Because class members were vulnerable to such control, the failure of the Respondents to meet their requirements in terms of youth and family services ended up harming them in specific ways – all the more since they are now children and parents who must deal with the intergenerational trauma many indigenous individuals are subjected to;

79.6 According to the CBJNQ, the provincial Crown must "*be the guarantor of the rights, the legal status, and the well-being of the native people of its northern territory*."[81]

79.7 It is also stated that while the treaty is being implemented, employees are being recruited, and health and social services are being funded within the Nunavik territory[82], "*Québec should recognize and allow to the maximum extent possible for the unique difficulties of operating facilities and services in the North*."[83]

79.8 The Respondents must ensure that indigenous people have access to identical or materially similar health and social services – regardless of which level of government is, ultimately, responsible for the funding of such services;

79.9 Disputes among the federal and provincial governments resulted in youth, family, and/or essential services being either denied or delayed, which eventually (i.e., in 2018) prompted the federal Crown to initiate the program entitled *Inuit Child First Initiative*.[84]

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[81] Application for Authorization, par. 4.24.

[82] Application for Authorization, par. 4.24.

[83] Exhibit R-11.

[84] Application for Authorization, par. 4.86

79.10 The provincial Crown also has the fiduciary duty to ensure that the essential services associated with the obligations it contracted pursuant to the CBJNQ are provided adequately.

[80] The AGQ denies that there exists, at the authorization stage, any arguable case based on *ad hoc* duties or obligations.

[81] They argue, among other things, that the first criteria (namely, the commitment to act in the beneficiaries' best interest) has not been met, considering that:

81.1 the Petitioners did not demonstrate that such a commitment can be assimilated to a private accord according to which the AGQ disregarded the interests of any and all other parties in favor of the beneficiaries';

81.2 the CBJNQ was never meant to stand as such a commitment.

[82] Québec's Court of Appeal stated as follows in the case known as *Takuhikan v. Attorney General of Québec*[85]:

> [58] Although the Supreme Court has not yet had to rule upon a case where fiduciary duties or obligations were invoked in connection with actions of the Crown focused on indigenous interests other than real estate, it does not seem to dismiss the possibility of such a principle applying to other kinds of relationships between the Crown and First Nations. Such a possibility, however, would only come into play whenever the Crown's liability appears to arise from duties that can be assimilated to "private law obligations" […]
>
> […]
>
> [72] Due consideration being given to Supreme Court caselaw that deals with the Crown's fiduciary duties and obligations (which, from the outset, is not etched in stone), I do not believe that relying on it is entirely safe at this point – all the more since no commitment to participate in the funding of public police services triggers a *prima facie* liability on the part of the respondents that can be assimilated to a "private law obligation". I hereby endorse the words of Justice Binnie, as they were written in the *Bande indienne Wewaykum* case.

[83] The AGQ also relies on the *Brown* case, as it was ruled upon by the Superior Court of Ontario.[86] As the Petitioners have pointed out, however, said ruling pertains to the merits of the class action rather than to its authorization.

[84] This Court hereby confirms that any cause of action relying on fiduciary duties and obligations will require a rather complex trial on relevant facts and law that cannot be decided upon at the authorization stage. The allegations the Petitioners have

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[85] 2022 QCCA 1699 (hereinafter, "**Takuhikan**"), par. 72.

[86] *Brown v. Canada (Attorney General of)*, 2017 ONSC 251.

submitted so far suggest that they may, at trial level, be able to demonstrate the soundness of the conclusions they are seeking.

[85] Hence, the Court, without issuing any kind of opinion on such a cause of action's potential for success, concludes that the Petitioners have proven the existence of an arguable case revolving around the violation of the Respondents' fiduciary duties or obligations.

#### 3.2.4.2 Violation of rights protected under the Canadian and Québec's Charters

[86] The Petitioners are adamant that the underfunding of youth and family services to be provided to class members (which, from the outset, was systemic, chronic, and discriminatory in nature) violated their constitutional rights to life, freedom, integrity, and dignity in a manner that went against principles of fundamental justice.[87]

[87] They also allege that such a discriminatory line of conduct harmed class members even further by perpetuating (if not worsening) the damages that residential schools and the Sixties Scoop had caused throughout several decades. We hereby refer to subsection 1.2 of this ruling, which summarizes the Petitioners, position on the matter and defines the exhibits they filed in support of such a position.[88]

[88] Let us, for reference purposes only, review a few of the exhibits the Petitioners have filed so far:

88.1 The Gagnon Report, released in 2007[89], concluded as follows in regards to the Nunavik experience:

> As a result of its investigation, the Commission declares that the rights of the Inuit children and young people of Nunavik, as recognized in the Youth Protection Act and the Youth Criminal Justice Act, have been infringed.
>
> In addition, the Commission declares that the fundamental rights of the children and young people, as recognized in sections 1, 4 and 39 of the Québec's Charter of human rights and freedoms, have been infringed, in particular the right to personal inviolability, to the safeguard of their dignity, and to the protection, security and attention that their parents or the persons acting in their stead are capable of providing.

[Emphasis added]

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[87] Application for Authorization, par. 4.93 to 4.98.

[88] See Exhibits R-1, R-2, R-3, R-4, R-8, R-9, R-14, and R-19.

[89] Exhibit R-4, p. 59.

88.2 For its part, the Viens Report[90], released in 2019, had the following to say about the interactions of indigenous people with some of the public services provided within the province of Québec

> I was mandated by the Québec government to assess whether indigenous peoples have been subject to violence or systemic discriminatory practices in the delivery of public services.
>
> […]
>
> […] Systemic discrimination […] is characterized as being widespread and institutionalized in a society's practices, policies and culture. Systemic discrimination can impede individuals throughout their entire lives and its effects can persist over multiple generations.
>
> […]
>
> Having completed my analysis, it seems impossible to deny that members of First Nations and Inuit are victims of systemic discrimination in their relations with the public services that are the subject of this inquiry […] [M]any current institutional practices, standards, laws and policies remain a source of discrimination and inequality, to the point where they significantly taint the quality of services offered to First Nations and Inuit. In some cases this lack of sensitivity manifests as a complete lack of service which leaves entire populations to their own devices with no ability to remedy their situations. In this way, thousands have enlightening insights been stripped not only of their rights, but their dignity, as they are forced to live under deplorable conditions, deprived of their own cultural references. […]

[Emphasis added]

[89] Exemplary (punitive) damages may be awarded whenever a right protected under Québec's Charter is violated illegally and deliberately.[91] Such a violation occurs "when the person who commits the unlawful interference has a state of mind that implies a desire or intent to cause the consequences of his or her wrongful conduct, or when that person acts with full knowledge of the immediate and natural or at least extremely probable consequences that his or her conduct will cause".[92]

[90] The AGQ denies that there exists an arguable case based on a breach of section 7 of the Canadian Charter and section 1 of Québec's Charter.

[91] According to the AGQ:

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[90] Exhibit R-2, p. 203. Also refer to pages 124 and 407 et seq, which deal specifically with youth protection services.

[91] *Cinar Corporation v. Robinson*, 2013 CSC 73, par. 115 and 116.

[92] *Québec (Curateur Public) v. Syndicat National des Employés de l'Hôpital Saint-Ferdinand*, [1996] 3 R.C.S. 211 par. 121.

91.1 Nothing in section 7 of the Canadian Charter imposes any kind of positive duty or obligation upon the State. The provision merely creates a negative duty or obligation not to violate guaranteed rights;

91.2 Because the Petitioners did not identify a single specific principle of fundamental justice, their proceedings are devoid of any arguable case. In other words, the Petitioners, in order to prevail in the context of the class action they intend to file, must not only prove that some legislative or government-related measure indeed violates one of the basic rights discussed in section 7 of the Canadian Charter, but also that such violation goes against one or more principles of fundamental justice;[93]

91.3 Nowhere does the Application for Authorization refer to any legislative or government-related measure likely to be the cause of so-called violations of basic rights guaranteed under the Charters.

[92] As regards the AGQ's argument to the effect that section 7 of the Canadian Charter does not create any positive duty or obligation, it must be pointed out that in the case known as *Gosselin v. Attorney General of Québec*[94], the Supreme Court of Canada remained open to an interpretation according to which some form of positive duty or obligation would be created:

> [82] One day s. 7 may be interpreted to include positive obligations. To evoke Lord Sankey's celebrated phrase in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136, the *Canadian Charter* must be viewed as "a living tree capable of growth and expansion within its natural limits": see *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 180, *per* McLachlin J. It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. In this connection, LeBel J.'s words in *Blencoe*, *supra*, at para. 188 are apposite:
>
> We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*.
>
> The question therefore is not whether s. 7 has ever been — or will ever be — recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.

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93 *Plan d'Argumentation du Procureur Général du Québec* (dated September 11, 2023), par. 179 to 185.

94 *Gosselin v. Attorney General of Québec*, 2002 SCS 84, par. 82. See also *R.L. v. Ministère du Travail, de l'Emploi et de la Solidarité Sociale*, 2021 QCCS 3784, par. 106 to 109.

[93] In any event, the Application for Authorization contains various factual allegations as well as some evidence that explain to what extent the discriminatory provision of youth protection services compromised the safety of indigenous children and also defines the disastrous consequences[95] of the systemic discrimination policy that appears to plague youth and family services.

[94] The evidence submitted on this matter, which from the outset is rather substantial, touches upon many aspects of the youth and family services that were provided to class members throughout the years. It must be debated at length before the trial judge.

[95] Considering the foregoing, this Court believes that allegations of a chronic, systemic, and harmful conduct on the part of the Respondents, as well as of an underfunding campaign that targeted indigenous children[96] specifically, should they be proven on their merits, could be declared in violation of fundamental rights guaranteed by the Canadian and Québec's Charters and warrant the award of exemplary damages as well as of compensatory damages within the meaning of subsection 24(1) of the Canadian Charter.

[96] Hence, the Petitioners indeed demonstrated that they have an arguable case to submit in this regard.

#### 3.2.4.3 Section 1457 of the *Civil code of Québec*

[97] Section 1457 C.c.Q. states that everyone has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another.

[98] The Petitioners, in their Application for Authorization, allege that the Respondents knew (or ought to have known) that their failure to provide services that were materially similar to those offered to non-indigenous children would cause severe harm to indigenous children.

[99] Class members reportedly suffered severe physical and emotional harm as a direct and immediate result of the line of conduct the Respondents adopted – including, without being limited to, psychological trauma and substance abuse.

[100] Considering such alleged misconduct, the numerous studies and reports submitted as evidence of the painful realities indigenous children and families had to endure throughout the province of Québec, as well as the Petitioners' personal experiences, this Court is of the opinion that the latter indeed demonstrated that they have an arguable case to submit in this regard.

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[95] Application for Authorization, par. 4.16, 4.17, 4.18, 4.42, 4.47, 4.63, and 4.64 to 4.79.

[96] Application for Authorization, par. 4.95.

#### 3.2.4.4 Damages claimed

[101] The Petitioners are requesting the payment of the following amounts:

10.1 Compensatory damages ranging from 40 000 $ to 300 000 $ for each member of the class, depending on the extent of the harm they have suffered;

10.2 Exemplary and punitive damages based on subsection 24(1) of the Canadian Charter, whose amount shall be determined by the trial judge.

[102] Considering the allegations of the Application for Authorization, the compensatory damages the Petitioners are seeking are based on the faulty actions and omissions of the Respondents, who underfunded youth and family services in a systemic and discriminatory manner.

[103] Exemplary and punitive damages, for their part, are based on an illegal and deliberate violation of fundamental rights guaranteed under Québec's Charter – being understood and agreed that a party can also, by relying on subsection 24(2) of the Canadian Charter, claim compensation for the breach or denial of fundamental rights.

[104] Since this Court has already come to the conclusion that the Petitioners had an arguable case to submit, the same reasoning shall be followed when it comes to damages.

### 3.2.5 Authority of *res judicata*

[105] The Respondents are adamant that some of the claims found in the Application for Authorization must be dismissed on account of *res judicata* – namely:

105.1 The AGQ maintains that *res judicata* applies to the Nunavik Child and Québec Indigenous Child Classes insofar as the causes of action they are relying upon are covered under the authorization ruling this Court issued in the *Ward* case.[97] Hence, an exclusion should be included in the definition of the Québec Indigenous Child Class on account of the *Ward* class action;

105.2 The AGC pleads that *res judicata* applies to the Québec Indigenous Child Class insofar as the latter involves Indian and Metis children who, while they did not have any particular status, were entrusted to non-indigenous parents within the province of Québec between January 1st, 1992 and February 1st, 2020 – the whole pursuant to the authorization

[97] Ward Ruling, supra, note 63.

ruling this Court issued in the *Ward* case.[98] Hence, an exclusion should be included in the definition of the Québec Indigenous Child Class on account of the *Ward* class action;

105.3 The AGC maintains that *res judicata* applies to the Nunavik Child Class, the Essential Services Class, and the family classes insofar as they involve Inuit children who were entrusted to non-indigenous parents anywhere in Canada between November 11, 1975 and December 31st, 1991, and whose cases were settled, released, and discharged in the context of the *Riddle* class action in accordance with the terms and conditions of the Riddle Agreement (including cases that dealt with psychological care and treatment);

### 3.2.5.1 Governing legal principles

[106] Section 2848 of the *Civil code of Québec* (hereinafter, the "**C.c.Q**") defines *res judicata* as follows:

> **2848.** The authority of *res judicata* is an absolute presumption; it applies only to the object of the judgment when the demand is based on the same cause and is between the same parties acting in the same qualities and the thing applied for is the same.

[107] In order for such absolute presumption to come into play, we must be in the presence of the same parties, object, and cause.

[108] The authority of *res judicata* binds the parties to a litigation with respect to the latter's object and cause – which means that, in the end, the matter to be ruled upon will be settled among the parties.[99] As a rule, such authority is also recognized to decisions made in other provinces.[100]

[109] The "cause" of proceedings consists in "the legal or material fact upon which the claim is directly and immediately based".[101] Québec's Court of Appeal, in the case known as *Globe Technologies Inc. v. Rochette*[102], specified that the cause "includes a material component, namely the facts of the case, as well as a formal and abstract component, namely the legal characterization of such facts."

[110] In the *Ungava Mineral Explorations Inc. v. Mullan* case[103], the Court of Appeal explained that in order to determine whether or not causes are one and the same, one must ask themselves if "based on all the facts submitted, the consequences of

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[98] Ward Ruling, supra, note 63.

[99] *Gingras v. Attorney General of Canada*, 2018 QCCS 5647 (hereinafter, "**Gingras**"), par. 56.

[100] *Gingras*, supra, note 99, par. 49 (quoting *Boucher c. Stelco Inc.*, 2005 CSC 64, as well as section 3155 C.c.Q.).

[101] Ducharme, Léo, *Précis de la preuve*, 6th edition, Montréal, Wilson & Lafleur, 2005, p.252 (quoted in *Gowling Lafleur Henderson LLP v. Lixo Investments Ltd.*, 2015 QCCA 513 (hereinafter, "**Gowling**"), par. 23.

[102] 2022 QCCA 524 (hereinafter, "**Globe**"), par. 17.

[103] 2008 QCCA 1354 (hereinafter, "**Ungava**"), par. 72 (quoted in *Gowling*, supra, note 101, par. 25.

applying the rule of law relied upon in the second case would be the same as applying the same rule of law in the first case […]".

[111] In *Roberge v. Bolduc*, the Supreme Court of Canada emphasized that, in order for identity of causes to be achieved, the basics of the legal characterization of the facts alleged by the plaintiff must be identical[104] – which is usually the case whenever two (2) separate sets of proceedings are based on the exact same line of conduct.[105]

[112] In other words, the factual account must be more or less the same in both cases, the alleged misconduct must arise from the same failures, or (as the case may be) the same facts must give rise to the disputed rights in issue.[106]

[113] The "object" of a claim, for its part, consists in the "immediate legal advantage the claimant is seeking, which is to say the right they wish to enforce"[107] or have recognized.[108] The principle of identical objects was defined by the King's Bench Court in *Pesant v. Langevin*[109], a landmark case that is still quoted nowadays[110]:

> The object of a claim is the advantage one expects to gain by filing it. Material identity (namely, the fact that two physical objects are identical) is not necessarily required in that respect. An abstract identity of rights will be deemed sufficient – even though we might be pushing the limits of the term "object". Such identity of rights will be recognized not only when the exact same right is claimed over the same object or any part thereof, but also whenever the right which is at the core of the most recent claim or exception, without being absolutely identical to the one to which the first ruling refers to, accounts for a substantial part of it or is virtually included in it, a follow-up to it, or an essential consequence of it. In other words, *res judicata* will apply whenever two objects are so interrelated that both disputes raise, between the same parties, the exact same issue with respect to the fulfilment of the exact same duty or obligation.

[114] Identical objects will be deemed to exist whenever the same parties seek to enforce the same right – even though they might be claiming different remedies by means of separate proceedings.[111] Conversely, objects will be seen as different whenever the parties claim the same right over a different thing, or claim a different right over the same thing[112]

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[104] *Roberge v. Bolduc*, [1991] 1 R.C.S .374 (hereinafter, "**Roberge**"), p. 417.
[105] *Ungava*, supra, note 103, par. 74 (quoted in *Gowling*, supra, note 101, par. 28).
[106] *Ungava*, supra, note 103, par. 58 to 62. *Gowling*, supra, note 101, par. 37.
[107] *Globe*, supra, note 102, par. 21.
[108] *Gowling*, supra, note 101, par. 44.
[109] (1926) 41 B.R. 412, par. 421 (quoted in *Gowling*, supra, note 101, par. 46)
[110] *Roberge*, supra, note 104, p. 414.
[111] *Gowling*, supra, note 101, par. 49.
[112] *Roberge*, supra, note 104, p. 413

[115] In any event, it has long been recognized in prevalent caselaw that the object of an application for authorization is the authorization to file a class action.[113]

[116] Last but not least, identity of parties relates to legal rather than physical identity[114] - which may involve identity acquired through judicial representation.[115]

### 3.2.5.2 *Res judicata* and the Ward Ruling

[117] Speaking on behalf of the Superior Court of Québec, Justice Donald Bisson authorized as follows the introduction of a class action against the defendants:

> [231] **AUTORIZES** the introduction, against defendants Attorney General of Canada and Attorney General of Québec, of a class action based on non-contractual liability and the liability of subordinates, for and on behalf of the four plaintiffs and of the following class:
>
> As regards the Attorney General of Canada:
>
> All Metis individuals and unregistered Indians who, as children, were taken out of their home on account of assimilation programs or policies created by the Attorney General of Canada and/or the Attorney General of Québec and implemented by youth protection services, who were subsequently, within the province of Québec, placed with non-indigenous foster homes, released for adoption by non-indigenous parents, or entrusted to non-indigenous guardians, at any time from 1951 to January 1st, 2020;
>
> As regards the Attorney General of Québec:
>
> All Metis individuals, Inuit people, and unregistered Indians who, as children, were taken out of their home on account of assimilation programs or policies created by the Attorney General of Canada and/or the Attorney General of Québec and implemented by youth protection services, who were subsequently, within the province of Québec, placed with non-indigenous foster homes, released for adoption by non-indigenous parents, or entrusted to non-indigenous guardians, at any time from 1951 to January 1st, 2020;
>
> […]
>
> [234] **DEFINES** as follows the main issues of fact or law this Court will have to address on a collective basis:
>
> 1 ) Were the defendants guilty of non-contractual misconduct when (and must they be held liable toward the class member because) they created, funded, and operated assimilation programs or policies within the province of Québec through the input of youth protection infrastructures from 1951 to 2020 (hereinafter, "programs and policies")?

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[113] *Genest v. Air Transat AT Inc.*, 2021 QCCA 857, par. 15

[114] *Roberge*, supra, note 104, p. 411. See also *Hotte v. Servier Canada Inc.*, 1999 CanLII 13363, REJB 1999-14507 (C.A.), pp. 8 and 9.

[115] *Roberge*, supra, note 104, p. 411.

2 ) What was the spatiotemporal extent of such programs or policies?

3 ) What (actual or assumed) knowledge did the defendants have of such programs or policies?

4 ) Was defendant Attorney General of Québec, at any time between 1951 and 2020, the subordinate of defendant Attorney General of Canada with respect to such programs or policies? If so, can the subordinate be held liable in any way?

5 ) Should the defendants be held jointly and severally responsible?

6 ) Did the class members actually incur the following damages:

a ) Emotional damages meant to compensate a loss of identity?

b ) Emotional damages meant to compensate fear and anxiety?

c ) Emotional damages meant to compensate sexual abuse?

d ) Emotional damages meant to compensate brutality and physical abuse?

e ) Emotional damages meant to compensate a loss of the affection and support biological parents would have provided?

f ) Emotional damages meant to compensate psychological distress?

g ) Damages meant to compensate the expenses incurred in connection with health care, psychological and psychiatric follow-ups, and other similar treatment, insofar as they cannot be recovered from a government agency, an insurance company, or any other third party?

7 ) Does a causal relationship exist between the alleged misconduct and the damages the class members reportedly suffered?

8 ) Should compensatory damages be recovered on a collective basis?

[…]

[235] **DEFINES** as follows the conclusions that arise from the issues listed above:

**GRANTS** the class action the plaintiffs filed against the **defendants**;

**DECLARES** that the defendants are jointly and severally responsible for the harm caused to the four plaintiffs as well as to the class members;

**ORDERS** the defendants to pay to the plaintiffs as well as to all class members an amount (to be determined at a later date) which shall include interest and the additional indemnity and be sufficient to cover the following damages:

a ) Emotional damages meant to compensate a loss of identity?

b ) Emotional damages meant to compensate fear and anxiety?

c ) Emotional damages meant to compensate sexual abuse?

d ) Emotional damages meant to compensate brutality and physical abuse?

e ) Emotional damages meant to compensate a loss of the affection and support biological parents would have provided?

f ) Emotional damages meant to compensate psychological distress?

g ) Damages meant to compensate the expenses incurred in connection with health care, psychological and psychiatric follow-ups, as well as similar treatment, insofar as they cannot be recovered from a government agency, an insurance company, or any other third party?

[Emphasis added]

[118] The Petitioners maintain that the class defined in the Ward Ruling is only composed of individuals who, within the province of Québec, were either placed or adopted in accordance with assimilation programs or policies enacted by Canadian or Québec's authorities, whereas in the present case the existence of such programs or policies is irrelevant.

[119] The Ward Ruling states the following when it comes to the existence of "assimilation programs":

> [78] The Court understands from the plaintiffs' individual allegations that they were either placed or adopted within the province of Québec in accordance with assimilation programs or policies implemented by the government of Canada or Québec. But were we provided with any evidence of the existence of such programs? Because the plaintiffs' allegations on the matter are rather unclear, the Court concludes that this case requires some "measure of evidence".
>
> [79] The AGQ and the AGC argue that the class action must be dismissed on account of a total lack of evidence – a position the Court cannot endorse.
>
> [80] The plaintiffs allege the following in Claim 6:
>
> • Par. 4 : It is the plaintiffs' contention that the defendants are responsible for creating and implementing social service programs Québec's indigenous population will be able to access and benefit from;
>
> • Par. 7 : In 1962, Canada and the province of Québec entered into an agreement according to which all youth services provided to indigenous children were to be managed by the province;
>
> • Par. 9 to 11, 14, 32, 44, 57, 70, and 76 : Between 1951 and 2020, the defendants reportedly promoted and operated the AIM program as well as any and all other assimilation programs and policies under which indigenous children were systematically entrusted to (or adopted by) non-indigenous families residing in Québec in order to become members of a "white society". <u>According to the plaintiffs, it is because of the AIM program and similar assimilation programs or policies the defendants promoted and managed within the province of Québec that numerous indigenous children were withdrawn from their native communities against their will</u>

and subsequently entrusted to the care or custody of non-indigenous foster or adoptive families against their parents' will. Because of such forced placements, those children were allegedly prevented from growing up while relying on their respective language and culture – assuming they were not subjected to abuse.

[81] That, in and of itself, would be insufficient. The Court requires some evidence in support of such general and rather vague allegations.

[82] Such evidence exists, however.

[83] First and foremost, the recitals of the Riddle Agreement (which in fact corresponds to Exhibit PGC-1) contain the following clause:

> A. Between 1951 and 1991, Indian and Inuit children were taken into care and placed with non-Indigenous parents where they were not raised in accordance with their cultural traditions nor taught their traditional languages (the "Sixties Scoop");

[84] This, in this Court's opinion, demonstrates the existence of the so-called Sixties Raffle, which the AGC had been operating since 1951 at the very least.

[85] Second, the ruling according to which the Riddle Agreement was approved (Riddle v. Canada, 2018 CF 641), as it was filed as Exhibit PGC-2, contains the following excerpt:

[…]

[86] This, in this Court's opinion, proves that the AGC, throughout Canada, created, implemented, and managed assimilation programs and/or policies that targeted indigenous children

[87] Third, paragraph 76 of Claim 6 refers to the *Rapport final de la Commission d'enquête sur les relations entre les Autochtones et certains services publics : écoute, réconciliation et progrès du 30 septembre 2019* (hereinafter, the « Viens Report »). […]

[…]

[89] This, in this Court's opinion, proved that the AGC created, implemented, and managed (through the input of social services) assimilation programs and/or policies that resulted in the placement or adoption of indigenous children.

[90] Such conclusions of the Viens Report, far from being limited to the years 2001 to 2016, apply to the "previous century" – which is to say the 20th century.

[91] Fourth, paragraph 4 of Claim 6 refers to a referral to the Court of Appeal in connection with the *Act respecting First Nations, Inuit, and Metis children, youth, and families*, 2022 QCCA 185 (hereinafter, the "Referral"), decided upon on February 10, 2022. […]

> [92] The Referral in question pertains to a provincial statute enacted in Québec. It states, among other things:
>
> […]
>
> [93] In this Court's opinion, it has been extensively demonstrated that programs or policies focused on the assimilation of indigenous children by means of placements and adoptions were indeed implemented and operated by the AGQ and the AGC;
>
> [94] Such conclusions also apply to the "previous century", which is to say the 20th century.
>
> […]
>
> [96] This Court comes to the conclusion that the plaintiffs demonstrated the existence, since 1951 at the very least, of assimilation programs or policies created by the AGQ and the AGC and operated throughout the province of Québec through the input of youth protection infrastructures – which, ultimately, amounts to non-contractual misconduct toward the plaintiffs and the class members.
>
> [Emphasis added]

[120] The AGQ pleads that *res judicata* applies to the Québec Indigenous Child and Nunavik Child Classes insofar as the causes of action they rely on are covered under the Ward Ruling. Hence, an exclusion should be included in the definition of these classes on account of the *Ward* class action;

[121] The AGC also alleges that *res judicata* applies to the Québec Indigenous Child Class and more specifically to all cases involving Indian and Metis children who, while they did not have any particular status, were entrusted to non-indigenous parents within the province of Québec between January 1st, 1992 and January 1st, 2020 – the whole pursuant to the Ward Ruling.

[122] The Petitioners, for their part, maintain that the *Ward* class action relies on the existence of assimilation programs or policies, whereas the present case is mostly based on the underfunding of youth and family services.

[123] According to the Petitioners, no ruling that would conclude to the absence of assimilation programs or policies in the *Ward* case would have any kind of impact on the class action contemplated in the present case. Conversely, and because at least two (2) of the three (3) causes of action invoked hereunder are different, no ruling concluding to the existence of such programs or policies and ordering the financial compensation of class members in the *Ward* case would in any way overlap in the event where the Petitioners prevailed in the case at hand.

[124] The Court, relying on the arguments below, believes that the lines between the two cases remain blurred at this stage of the proceedings:

124.1 Both cases deal with misconduct, failures, and the violation of guaranteed personal rights in connection with the provision of the youth and family services the class members were entitled to receive;

124.2 Although most of the blame expressed in the present case relates to the systemic and discriminatory underfunding of youth and family services, the Application for Authorization specifies that such underfunding had harmful consequences such as the loss of native languages and cultures and the severance of ties developed with local communities – which, in turn, caused the class members to experience pain, suffering, and emotional distress.[116]

124.3 The Petitioners, as previously mentioned, base some of their allegations on the Viens Report[117] and the 2022 Referral[118]. The documents in question were quoted in the Ward Ruling when it came time to define some "measure of evidence" of the existence of assimilation programs or policies under which, from 1951 to January 1st, 2020, "indigenous children were systematically entrusted to (or adopted by) non-indigenous families residing in Québec in order to become members of a *white society*".[119]

124.4 The Ward Ruling, while pondering the existence of assimilation programs or policies in order to adequately define the common issue having to do with the defendants' non-contractual liability, addressed the matter of funding as well.[120]

124.5 Save for non-contractual liability, the causes of action recognized in the Ward Ruling differ from those the class members are relying upon.

124.6 Because the application for authorization did not contain satisfactory allegations on the matter[121], causes of action pertaining to the breach of fiduciary duties and the violation of fundamental rights protected by Charters were, in the *Ward* case, dismissed at the authorization stage.

124.7 When it comes to compensation, both class actions focus on emotional damages based on the abuse class members have endured while being entrusted to youth and family services.

[125] That being said, some overlapping appears to exist when it comes to the parties involved:

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[116] Application for Authorization, par. 4.101.
[117] Exhibit R-2.
[118] Supra, note 14.
[119] Ward Ruling, supra, note 63, par. 80.
[120] Ward Ruling, supra, note 63, par 219(1).
[121] Ward Ruling, supra, note 63, par. 115 to 129 and 130 to 143.

125.1 The Respondents are the same in both cases;

125.2 The interval of time relevant to the *Ward* case (namely, 1951 to 2020) partly overlaps with the ones covered hereunder – namely, 1975 to nowadays (Nunavik Child, Nunavik Family, and Essential Services Classes) and 1992 to nowadays (Québec Indigenous Child and Québec Family Classes);

125.3 The Québec Indigenous Child Class includes children who are also members of classes recognized in the *Ward* case, namely (against the AGC) Indian and Metis children who, while they did not have any particular status, were entrusted to non-indigenous parents within the province of Québec between January 1st, 1992 and January 1st, 2020, and (against the AGQ) Indian, unregistered Indian, Metis, and Inuit children who are not members of the Nunavik Child Class;

125.4 The Nunavik Child Class, namely Inuit children who were either "*registered or entitled to be registered as a beneficiary*" pursuant to the CBJNQ or registered with an *Inuit Land Claim Organization* between November 11, 1975 and today, includes children who are also members of the class allowed to sue the AGQ in the *Ward* case (including, without being limited to, Inuit children).

[126] Hence, there exists a partial identity of parties.

[127] As regards identity of object, an application for authorization was filed in both cases – which, from the outset, do not focus on the exact same thing.

[128] As regards identity of causes, there exists substantial similarities between the causes of action and the evidence both cases are built upon. Consequently, one assumes that the arguments the parties will submit and the evidence the Court will manage will be of a similar nature.

[129] That being said, it would be premature to conclude that causes are identical in both cases. The Court cannot, at this time, determine whether or not the issue of systemic and discriminatory underfunding (raised hereunder) is the same as (or is included in) the issue of the existence of assimilation programs or policies (raised in the *Ward* case). Anyhow, and as previously mentioned, the *Ward* case will not ponder the matters of fiduciary duties or of the violation of fundamental rights protected under the Canadian and Québec's Charters.

[130] In other words, this Court cannot, at this stage of the proceedings, dismiss a class action (or any portion thereof) based on the authority of *res judicata* – which is a matter to be debated on its merits.

[131] The AGC also suggests that this case should be suspended on the ground of litispendence. This Court does not believe the case should be suspended until the *Ward* case has been ruled upon. Again, it would be premature to conclude that both cases overlap.

[132] As pointed out by the Court of Appeal in the case known as *Province Canadienne de la Congrégation de Sainte-Croix v. J.B.*[122], "justices who are entrusted with such cases will eventually have to deal with the risk of double compensation and/or contradictory rulings." Hence, this debate should be postponed until both cases have evolved enough to provide a clearer picture of the overall situation.

### 3.2.5.3 *Res Judicata* and the Riddle Agreement

[133] According to the AGC, the authority of *res judicata* applies to the Nunavik Child Class, the Essential Services Class, and the family classes, more specifically to all cases involving Inuit children who were entrusted to non-indigenous parents anywhere in Canada between November 11, 1975 and December 31st, 1991, which were settled, released, and discharged in the context of the *Riddle* class action in accordance with the terms and conditions of the Riddle Agreement[123] (including cases that dealt with psychological care and treatment).

[134] This Court endorses the definitions Justice Donald Bisson provided of the Riddle Agreement and of the scope of the release and discharge it involves:

> [27] The Sixties Scoop Settlement (hereinafter, the « Riddle Agreement »), which was filed as Exhibit PGC-1 and Exhibit PGQ-11, was entered into in 2017 by Canada and Plaintiffs who represented « Indian and Inuit » people on a national scale. The recitals of the settlement specifies that the Sixties Scoop ran « [b]etween 1951 and 1991, [where] Indians and Inuit were taken into care and placed with non-Indigenous parents … ».
>
> [28] The Riddle Agreement encompasses «[a]ll actions, causes of actions, liabilities, claims and demands whatsoever of every nature or kind for damages, contribution, indemnity, costs, expenses and interest which any class Member ever had, now has or may hereafter have arising in relation to the Sixty Scoop against Canada …» (Exhibit PGC-1, par. 1.10 and 10.01). In this Court's opinion, the scope of the release and discharge is clear, as it covers any and all damages (regardless of the cause of action they are based on) any « Inuit or registered Indian » suffered after having been entrusted to a non-indigenous family between 1951 and 1991.
>
> [29] The settlement agreement, having been approved by the Federal Court and Ontario's Superior Court, was implemented on December 1st, 2018. All individuals who were involved in the *Riddle* federal omnibus class action and the *Brown* class action and have not opted out (and are not deemed to have opted out) are bound by the settlement in question.

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[122] 2023 QCCA 1307.

[123] See Exhibits AGC-1, AGC-2, and AGC-3.

[135] Both the Nunavik Child and Essential Services Classes rely on an interval of time that differs from the one referred to in the Riddle Agreement. Although the period running from 1975 to 1991 is the same, nothing past 1992 is covered under the release and discharge attached to the Riddle Agreement.

[136] Because some of the claims covered under the Riddle Agreement might be in issue in the present case, we should modify the definition given to the two classes in order to prevent any kind of overlap with the *Riddle* release and discharge.

[137] In any event, the Petitioners maintain that any and all exclusions arising from the Riddle Agreement must heed the fact that some members might have experienced situations covered under the Riddle Agreement as well as other situations that occurred later on – which is to say outside of the agreement's reach. Hence, any and all exclusions we add to the definition of the classes must be limited to what is explicitly covered under the Riddle Agreement.

[138] The Court agrees with the Petitioners at this stage of the proceedings. In the event where the AGC wished to challenge the fact that a member should be (i) governed by the Riddle Agreement as regards any and all events that occurred during the interval of time covered under the release and discharge, and (ii) subject to these proceedings when it comes to any and all situations that occurred past the interval of time covered under the release and discharge, all arguments pertaining to the scope of said release and discharge shall be submitted to the trial judge.

[139] To sum up, the definitions given to the Nunavik Child and Essential Services Classes must be modified on account of the conclusions the Court has reached in regards to the Riddle Agreement.

#### 3.2.6 Statute of limitations

[140] The AGQ maintains, at the authorization stage, that parts of the Application for Authorization are prescribed with respect to the Nunavik Family, Québec Family, and Essential Services Classes.

[141] According to the AGQ, the three (3)-year statute of limitations provided for in section 2925 of the C.c.Q. must apply since the Application for Authorization does not contain any factual allegations which suggest that such delay should be suspended on account of the class members' inability to act sooner. Hence, any and all claims pertaining to facts that occurred prior to 2018 would be prescribed.

[142] The AGQ also suggests that section 2926.1 of the C.c.Q. should not apply in this particular case.

> **2926.1** An action for damages for bodily injury resulting from an act which could constitute a criminal offence is prescribed by 10 years from the date the person who is a victim becomes aware that the injury suffered is attributable to that act. Nevertheless, such an action cannot be prescribed if the injury results from violent behaviour suffered during childhood, sexual violence or spousal violence. Conversion therapy, as defined by section 1 of the Act to protect persons from conversion therapy provided to change their sexual orientation, gender identity or gender expression (chapter P-42.2), constitutes violent behaviour suffered during childhood within the meaning of this article.
>
> However, an action against an heir, a legatee by particular title or a successor of the author of the act or against the liquidator of the author's succession must, under pain of forfeiture, be instituted within three years after the author's death, unless the defendant is sued for the defendant's own fault or as a principal. Likewise, an action brought for injury suffered by the person who is a victim must, under pain of forfeiture, be instituted within three years after the death of the person who is a victim.

[143] The Petitioners reply that the AGQ's position on this matter in untenable for the following reasons:

143.1 The issue of prescription is usually left to the appreciation of the trial judge, since the latter must be able to assess comprehensive evidence on the matter;

143.2 One must thread carefully before declaring that a class action is prescribed at the authorization stage. Such a conclusion must be reserved for clear cases where prescription is obvious. Any doubt on the matter must play in favor of the applicant;[124]

143.3 The inability to act sooner is an issue that must be decided upon once every single party has had the opportunity to submit comprehensive evidence;

143.4 According to the Application for Authorization, it is only within the year that preceded the filing of the proceedings[125] that the Petitioners were made aware of the causal relationships that exists between the Respondents' misconduct and the fact that they were subjected to numerous apprehensions and to acts of abuse;

143.5 Petitioner A.B. experienced the harm referred to in the Application for Authorization not only as a child member of the Nunavik Child Class, but also as a mother who happens to be a member of the Nunavik Family Class;

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[124] *Bouchard c. Banque de Montréal*, 2022 QCCS 748, par. 75 and 76.
[125] Application for Authorization, par. 4.69, 4.70, 4.71, 4.78, and 4.79.

143.6 The harm caused by a failure to provide essential services is ongoing in nature;

143.7 As stated by the Supreme Court of Canada in the *Montréal (Ville de) v. Dorval* case[126], the harm caused to the family classes on account of the physical abuse members of the child classes were subjected to should also be viewed as physical harm.

[144] Although this Court takes the issue of prescription seriously, the allegations found in the Application for Authorization suggest that comprehensive evidence must be submitted before any decision is made. Consequently, this argument will be dismissed at the authorization stage.

### 3.2.7 The definition given to specific classes

[145] It is the Respondents' contention that the Petitioners have failed to establish an arguable case with respect to certain classes whose definition is too broad.

[146] The AGC pleads as follow:

146.1 As regards the Nunavik Child Class:

146.1.1 None of the allegations remotely support a definition that includes members who, although they were the object of a report, were never withdrawn from their family – all the more since neither Petitioner fits such a definition;

146.1.2 Given the use of the sentence "reported to, or otherwise brought to the attention of", the definition is so broad and unclear that no potential member will be able to determine whether or not they belong with the Class;

146.1.3 The definition of the Class should be limited to children who were the object of a report *and* were subsequently taken away from their family.

146.2 As regards the Essential Services Class:

146.2.1 Since none of the allegations remotely support a definition of "essential services" that includes education, infrastructure, equipment or medical supply, medical transportation, relief care, dental care, or vision care services, the Petitioners have no arguable case to submit with respect to such a broad definition.

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[126] 2017 CSC 48.

146.2.2 Such a definition suggests the creation of a commission in charge of investigating the services provided to Nunavik Inuits since 1975 – which would have nothing to do with a class action;

146.2.3 The definition of the class should not include anything other than essential psychological care meant to alleviate the trauma caused by apprehensions and so-called abuse;

[147] The AGQ, while they endorse the arguments raised by the AGC, adds the following:

147.1 As regards the Essential Services Class:

147.1.1 None of the essential services related to the class have been defined, and none of the answers the Petitioners provided in the course of written examinations allow for a settlement of this matter;

147.1.2 The fact that the Petitioners never requested such services themselves warrants the dismissal of their claim. Complaining about a lack of offers in connection with such services (including psychological and therapy support) is not enough;

147.1.3 Hence, the facts alleged do not justify the conclusions sought.

147.2 As regards the Québec Indigenous Child Class:

147.2.1 The fact that the word “indigenous” has not yet been defined proves rather problematic. Some definition should be provided so potential members can determine whether or not they belong with the class.

[148] First and foremost, the definition of “essential services” that is provided in subsection 4.38.2 indeed encompasses a lot more than what the Petitioners allege having experienced;

[149] The definition in question, which includes education, infrastructure, equipment or medical supply, medical transportation, relief care, dental care, and vision care services, is in no way supported by the minimal factual allegations the Petitioners have the legal obligation to submit in connection with their personal claims.

[150] This Court shares the Respondent’s opinion to the effect that such a definition is likely to transform the class action into an investigative commission pertaining to

the services both levels of government, in accordance with the CBJNQ, provided to Inuit children from Nunavik since 1975.[127]

[151] For the purposes of this class action, the definition of "essential services" shall not extend beyond the psychological, support, and therapy services that were provided following the reports made to (and to the follow-ups ensured by) youth and family services. Such is the modification to be made to the definition in accordance with this Court's discretion.

[152] The fact that the Petitioners complain about not having been offered such services even though they never requested them is not detrimental to their case. That being said, they will have to demonstrate that the Respondents should have offered the services in question. The Class's action cannot be dismissed on that ground alone.

[153] When it comes to the definition to be given to the Nunavik Child Class, the Court does not endorse the Respondents' position according to which a child who was the object of a report but was not subsequently removed from their family cannot participate in this Class action.

[154] In and of itself, the lack of an adequate placement with a foster home may amount to a failure of the Respondents to fulfil their duties and obligations within the meaning of the causes of action authorized so far. Since such a deplorable situation was emphasized in the Gagnon Report[128], it seems hardly necessary to limit the scope of the class's definition at this stage of the proceedings.

[155] In the light of the foregoing, the definition appears to rest on criteria which are sufficiently clear to allow a potential member to identify with the class.

[156] As regards the absence of any specific definition of the word "indigenous" within the definition of the Québec Indigenous Child Class, the AGC submits that the clarifications the Petitioners provided by means of their written arguments should be incorporated into said definition – namely: (1) individuals who are either members of First Nations or "Indians" within the meaning of the *Indian Act*[129], (2) Inuits, and (3) Metis. The Court agrees that incorporating such clarifications into the definition of the class should help potential members to identify with the latter.

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[127] *Option Consommateurs v. Novopham Ltd.,* 2008 QCCA 949. *Durand v. Attorney General of Québec*, 2018 QCCS 2817.

[128] Exhibit R-4, p. 17.

[129] RSC (1985) ch. 105.

### 3.3. Composition of the class – 575(3) C.c.p.

[157] One must consider the following parameters whenever determining the composition of a class:[130]

157.1 The most likely number of members;

157.2 The geographical location of members;

157.3 The practical and legal difficulties of granting proxies or joining claims in relation to filing a class action.

[158] The Respondents do not deny that this criterion has been met.

[159] According to their Application for Authorization, the Petitioners believe that several thousand people living in the province of Québec could participate in the class action by identifying to one of its classes.[131]

[160] At this stage of the proceedings, this is enough for this Court to conclude that the criterion has been met.

### 3.4 Adequate representation by the Petitioners – 575(4) C.c.p.

[161] Québec's Court of Appeal has summarized as follows the conditions one must satisfy in order to provide adequate representation[132]:

> [30] In the opinion of the Supreme Court, who quoted the words of professor Pierre-Claude Lafond (a renowned expert in the field), this condition requires the appellant to demonstrate they have a valid interest, are able and competent, and hold no interests that go against (or compete with) those of the class members. Those parameters must be construed liberally so no potential representative is ever "[...] excluded unless their interests or ability are questioned to such extent that the dispute would not be allowed to progress in a fair manner". We are dealing with a "minimum threshold" which in no way involves a search for the perfect representative – all the more since the present case revolves around consumer protection.

[162] The QGC concedes that, save for the following, the Petitioners have a valid interest in acting as representatives:

162.1 They would both be governed by the Riddle Agreement, which would disqualify them as members of the Nunavik Child Class throughout the interval of time the agreement covers.

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[130] Yves LAUZON, *Le recours collectif*, Cowansville, Éditions Yvon Blais, 2001, p. 38. *Brière v. Rogers Communications*, 2012 QCCS 2733, par. 72.

[131] Application for Authorization, par. 6.1 to 6.4.

[132] *Tenzer*, supra, note 52, par. 30

162.2 Ms. Jones would be unable to represent the family classes as she does not allege any facts in support of her affiliation with said class.

[163] As regards the Petitioners being bound by the Riddle Agreement (which, as previously mentioned, applies to Inuit children who were, anywhere in Canada, entrusted to non-indigenous parents between November 11, 1975 and December 31st, 1991), the Court reasserts its conclusions to the effect that an exclusion must be added to the definition of the relevant class, whose scope will then be limited.

[164] Considering our other conclusions according to which specific class members might only be partially governed by the Riddle Agreement, neither Petitioner would be disqualified as a representative of such members.

164.1 As regards A.B.: During the period of time covered under the Riddle Agreement, A.B. was in the care of indigenous families. She was entrusted to another indigenous family in 1992, once said period of time had expired. Hence, she can represent all the members of such classes;

164.2 As regards Tanya Jones: During the period of time covered under the Riddle Agreement, Ms. Jones was in the care of indigenous and non-indigenous families who resided in Nunavik or in Montréal. She was integrated to other environments from 1992 to 1999. Hence, she can also represent all the members of such classes;

[165] The fact that Ms. Jones cannot represent the family classes is irrelevant since Ms. A.B. can.

[166] According to the AGQ, the adequate representation criterion is not met since the personal claims the Petitioners are submitting as members of the Essential Services Class are prescribed. It is alleged that Ms. A.B. reached the age of 18 in February 1993, whereas Ms. Jones did the same in August 2005. Consequently, their claims were already barred by the statute of limitations in 2021, at the time the Application Authorization was filed.

[167] For the reasons mentioned in paragraphs 140 to 144 above, this argument (as it is raised in order to challenge the Petitioners' ability to act as representatives) must be dismissed at the authorization stage.

[168] In other words, it is this Court's opinion that the criterion has been met.

## CONCLUSIONS

**FOR THESE REASONS, THE COURT:**

**GRANTS** parts of the *Re-Modified Application for Authorization to Institute a Class Action and to Obtain the Status of Representative as of September 22, 2023*;

**AUTHORIZES** the filing of a class action;

**AWARDS** to Petitioners A.B. and Tanya Jones (except, in regards to the latter, when it comes to the Nunavik Family and Québec Family Classes) the status of representatives with respect to the following classes:

> A. All Inuit persons ordinarily resident in Nunavik and registered or entitled to be registered as a beneficiary under The James Bay and Northern Québec Agreement ("JBNQA") or registered with an Inuit land claim organization who between November 11, 1975 and the date of authorization of this action:
>
> (a) Were under the age of 18; and
>
> (b) Were reported to, or otherwise brought to the attention of the Directors of Youth Protection in Nunavik («recevoir le signalement»), including, but not limited to, all persons taken in charge, apprehended, and placed in care, whether through a voluntary agreement, by court order or otherwise (the "**Nunavik Child Class**" or "**Sous-groupe des Enfants du Nunavik**")
>
> (c) The Nunavik Child Class (sous-groupe des Enfants du Nunavik) includes a subclass of all Inuit persons who were removed from their homes in Canada between November 11, 1975 and December 31, 1991 and placed, during that period, in the care of non-indigenous foster or adoptive parents ("**Nunavik Child Subclass**" or "**Sous-sous-groupe des Enfants du Nunavik**"). The Nunavik Child Subclass makes no claim against the Attorney General of Canada in regard to those placements made during that period.
>
> B. All Inuit persons ordinarily resident in Nunavik and registered or entitled to be registered as a beneficiary under the JBNAQ or registered with an Inuit land claim organization who between November 11, 1975 and the date of authorization of this action:
>
> (a) Were under the age of 18; and
>
> C. Needed an essential service but did not receive such service or whose receipt of the service was delayed by either respondent or their departments or agents, on grounds including, but not limited to, lack of jurisdiction or a gap in services (the "**Essential Services Class**" or "**Sous-groupe des Services essentiels**"). The Essential Services Class includes a subclass of all Inuit persons who were removed from their homes in Canada between November 11, 1975 and December 31, 1991 and placed, during that period, in the care of non-indigenous foster or adoptive parents

("**Essential Services Subclass**" or "**Sous-sous-groupe des Services essentiels**"). The Essential services Subclass makes no claim against the Attorney General of Canada in regard to Essential Services during that period.

D. All parents and grandparents who were providing care to a member of the Nunavik Child Class or the Essential Services Class (the "**Nunavik Family Class**" or "**Sous-groupe des Familles du Nunavik**")

E. All Indigenous persons (First Nations, Indians (as defined in the Indian Act, Metis and Inuit) ordinarily resident in Québec who:

(a) Were taken into out-of-home care between January 1, 1992 and the date of authorization of this action,

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

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

(d) By the Federal Crown or the Provincial Crown, or any of their agents, and

(e) Are not members of the Nunavik Child Welfare Class (the "**Québec Child Class**" or "**Sous-groupe des Enfants autochtones du Québec**")

F. All parents and grandparents who were providing care to a member of the Québec Child Class when that child was taken into out-of-home care (the "**Québec Family Class**" or "**Sous-groupe des Familles du Québec**").

[169] **DEFINES** as follows the main issues of fact or law to be addressed on a collective basis:

169.1 In regards to the Nunavik Child and Québec Indigenous Child Classes:

169.1.1 Do the Respondents have any kind of fiduciary duties or obligations toward the members of said classes when it comes to the creation, implementation, funding, and provision of youth and family services?

169.1.2 If so, did the Respondents fail to fulfil such fiduciary duties or obligations?

169.1.3 Were the Respondents guilty of misconduct while creating, implementing, funding, or providing youth and family services?

169.1.4 Did the Respondents, while creating, implementing, funding, or providing youth and family services, act in a discriminatory manner toward the members of these classes or otherwise violate fundamental rights guaranteed under sections 7 and

15 of the Canadian Charter and sections 1, 4, and 10 of Québec's Charter?

169.1.5 In the event where the Respondents were guilty of misconduct or were found to have failed to fulfil their fiduciary duties or obligations, to have acted in a discriminatory manner, or to have violated the class members' constitutional rights, should they be held liable for the harm and damage said class members suffered over the years?

169.1.6 If the Respondents are ever held responsible for the payment of compensatory damages, can such damages be recovered and then allocated to class members on a collective basis?

169.2 In regards to the Nunavik Family and Québec Family Classes:

169.2.1 Must the Respondents, in the course of the creation, implementation, funding, or provision of youth and family services, make sure that the withdrawal of a child from their family and community will be used only as a last resort?

169.2.2 Must the Respondents, in the course of the creation, implementation, funding, or provision of youth and family services, make sure that the members of a same family remain together whenever possible?

169.2.3 With respect to the Nunavik Family Class, must the Respondents make sure that Inuit children are provided with public goods and services in a timely fashion and regardless of jurisdictional disputes between the federal and provincial governments and of interdepartmental conflicts within specific levels of government?

169.2.4 If so, must the Respondents be found guilty of misconduct, to have failed to fulfil their fiduciary duties or obligations, to have acted in a discriminatory manner, and/or to have violated the class members' constitutional rights?

169.2.5 If so, should the Respondents be held liable for the harm and damage said class members suffered over the years?

169.2.6 If the Respondents are ever held responsible for the payment of compensatory damages to the class members, can such damages be recovered on a collective basis?

169.3 In regards to the Essential Services Class:

169.3.1 Must the Respondents make sure that the members of this class benefit from public goods and services in a timely fashion and regardless of jurisdictional disputes between the federal and provincial governments and of interdepartmental conflicts within specific levels of government?

169.3.2 Did the Respondents, in violation of the duties and obligations mentioned in question 169.3.1 above, deny or delay the provision of the health and social services the class members were entitled to?

169.3.3 Are the Respondents bound by fiduciary duties or obligations with respect to question 169.3.1 above?

169.3.4 If so, must the Respondents be found guilty of misconduct, to have failed to fulfil their fiduciary duties or obligations, to have acted in a discriminatory manner, and/or to have violated the class members' constitutional rights?

169.3.5 Must the Respondents be held responsible for the payment of compensatory and/or punitive damages, and, if so, how much should such damages amount to?

169.3.6 If the Respondents are ever held responsible for the payment of compensatory and punitive damages to the class members, can such damages be recovered on a collective basis?

169.4 In regards to all the classes involved in these proceedings:

169.4.1 What interval of time should apply to each and every class?

169.4.2 What facts and circumstances (which must be common to the members of all classes) are likely to explain why the latter were unable to act sooner?

169.4.3 Does the Crown's immunity extend to the claims covered under the class action the Petitioners intend to file against the Respondents?

169.4.4 Can the AGC's liability be contemplated in connection with the creation, implementation, funding, and provision (within the Nunavik territory) of youth protection services and other essential services (if any) pursuant to the CBJNQ?

169.4.5 Should the Court come to the conclusion that the Respondents are liable for any portion of the claims whatsoever, must liability be shared among the Respondents and/or third parties? If so, in what proportions?

169.4.6 What grounds of defense will the Respondents oppose to each and every member of a class, on an individual basis?

[170] **DEFINES** as follows the conclusions attached to such factual and legal issues:

170.1 **GRANT** the class action the Petitioners filed against the Respondents;

170.2 **ORDER** the Respondents to pay to the Petitioners as well as to all class members an amount (to be determined at a later date) which shall include interest and the additional indemnity and be sufficient to cover the following :

170.2.1 Compensatory damages ranging from 40 000 $ to 300 000 $ for each class member, depending on the extent of the harm they have suffered;

170.2.2 Exemplary and punitive damages based on subsection 24(1) of the Canadian Charter, whose amount shall be determined by the trial judge;

170.3 **ORDER** that such damages be recovered on a collective basis;

170.4 **ISSUE** any other order the Court will deem to be in the interest of the class members;

170.5 **THE WHOLE** including the payment of legal fees and of all costs associated with the release of notices, the enforcement of the ruling to be made, and the participation of consultants.

[170] **DECLARES** that unless they have duly opted out, class members will, according to governing law, be bound by this ruling as well as by all other rulings to be issued in connection with the class action;

[171] **POSTPONES** to a later date any and all arguments and decisions pertaining to: 1) the timeframe within which class members may opt out, 2) the content and release of authorization notices, and 3) the payment of release costs as legal fees;

[172] **DETERMINES** that this class action will be filed within the judicial district of Montréal;

[174] **THE WHOLE**, with legal costs.

Marie-Christine Hivon's digital signature
Date : 2024.04.30 08:47:15

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Hearing held on: September 25th and 26, 2023

**The above is a true and verbatim translation of the original document**

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