File No. CI23-01-41054

THE KING'S BENCH

Winnipeg Centre

BETWEEN:

RENE LAFONTAINE, MARY DERENDORF, 4501712 MANITOBA ASSOCIATION INC. O/A METIS CHILD AND FAMILY SERVICES AUTHORITY, METIS CHILD, FAMILY AND COMMUNITY SERVICES AGENCY INC., AND MICHIF CHILD & FAMILY SERVICES INC.

Plaintiffs

- and -

THE GOVERNMENT OF MANITOBA

FILED OCT 13 2023

Defendant

Proceeding under *The Class Proceedings Act*, C.C.S.M. cC130

BRIEF OF THE PLAINTIFFS

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C	Affidavit of Gregory Besant affirmed on October 6, 2023

PART I - OVERVIEW

1. This class action is brought on behalf of over 6,000 individuals who were children in the care of the Manitoba's Métis child and family services agencies between January 1, 2005 and March 31, 2019.

2. The plaintiffs' claim seeks remedies against the Government of Manitoba for its discriminatory policy of misappropriating federal children's special allowance benefits applied for and received on behalf of Class members. By statute, these CSA benefits were to be used exclusively for the benefit of children in care—not as a source of funds to offset Manitoba's costs. Manitoba misused its authority and legislative powers to deny vulnerable children critical benefits during their most formative years.

3. The Class is comprised of some of the most disadvantaged and vulnerable people in our society—many are Indigenous, and all are, or were, *children* without stable family structures. Class members who spent a significant portion of their childhood in care during the Class Period were deprived of tens of thousands of dollars that would have made a material difference in the quality of their day-to-day lives.

4. There is no question of liability. Manitoba's discriminatory misappropriation policy has already been found to be unconstitutional and unlawful by Justice Edmond in his decision dated May 18, 2022. The remaining step is to determine the amount of compensation owed and how that compensation should be distributed. It is in the best interest of all involved to close this dark chapter, which has already gone on for too long. It is time to provide meaningful and appropriate relief to the members of the Class, and this class action presents an effective means for doing so.

5. There is no dispute that the certification criteria are satisfied. There is obvious commonality on the critical issues, namely Manitoba's liability to the proposed Class members and the quantum of damages Manitoba must pay. The Class members have already been individually identified by the plaintiffs. Critical information about each Class member's time in care has already been collected. A class action will provide an efficient vehicle for distributing the benefits of a settlement or judgment to the class members.

6. Certification of this Action will advance the legislation's underlying policy objectives. Certification will promote access to justice: given their vulnerabilities, most Class members are unable or unwilling to prosecute individual actions; they need the collective power of a class action to obtain the remedies to which they are entitled. Certification will also encourage behaviour modification by sending a strong message to Manitoba that it will be held to account for engaging in these types of discriminatory policies. Finally, the benefits to judicial economy are obvious: certification will facilitate an efficient determination of the Class members' claims and avoid unnecessary duplication and eliminate the risk of inconsistent results.

PART II - SUMMARY OF FACTS

A. The Parties

7. This Action is brought by Mary Derendorf ("**Mary**") and Rene Lafontaine ("**Rene**") as Representative Plaintiffs on behalf of the proposed class. The class comprises Indigenous and non-Indigenous children who are or were in the care of Metis Child, Family and Community Services ("**Métis CFCS**") or Michif Child and Family Services

("**Michif**" and collectively the "**Métis Agencies**") between January 1, 2005, and March 31, 2019 (the "**Class**" and the "**Class Period**").

8. Rene resides in Winnipeg, Manitoba. She is 19 years old. Rene self-identifies as Métis and has been approved for a citizenship card with the MMF. Between 2011 and August 2022, she was a child in care of Métis CFCS. While in care, Métis CFCS was entitled to, and did, apply for and receive federal Children's Special Allowance benefits ("**CSA Benefits**") in respect of Rene. However, as a result of Manitoba's policy to directly and indirectly appropriate CSA Benefits from child and family services agencies ("**CFS Agencies**") during the Class Period ("**CSA Policy**"), Rene was deprived the benefit of almost $38,000 in CSA Benefits from 2011 until April 2019.[1]

9. Mary resides in Winnipeg, Manitoba. She is 23 years old. Mary does not identify as Métis or Indigenous. Between 2005 and June 2018, she was a child in care of Métis CFCS. While in care, Métis CFCS was entitled to, and did, apply for and receive CSA Benefits in respect of Mary. However, as a result of Manitoba's CSA Policy, Mary was deprived the benefit of over $56,000 in CSA Benefits from 2007 until June 2018.[2]

10. The Métis Agencies, along with the Metis Child and Family Services Authority (the "**Métis Authority**" and collectively the "**Métis CFS Plaintiffs**") comprise the institutional structure of the Métis child and family services system in Manitoba. As explained below, the relationship between the Métis CFS Plaintiffs and the application

[1] Affidavit of Rene Eileen Deneige Lafontaine affirmed October 10, 2023 ["**Lafontaine Affidavit**"], at paras.1-5 & 9, List of Documents ["**LOD**"], pp. 36-39.
[2] Affidavit of Mary Faith Brooke Derendorf affirmed October 10 2023 [**"Derendorf Affidavit**"], at paras. 1-6 & 12, LOD, pp.5-8.

for, receipt, and recovery of CSA Benefits in respect of the Class cannot be disassociated.

11. Furthermore, the Métis CFS Plaintiffs will play an integral role in the administration and distribution of any settlement or damages award received to the Class members They are necessary and property parties.

12. The Métis Authority was established by the *Child and Family Services Authorities Act* C.C.S.M. c. C90. Pursuant to that Act, the Métis Authority is responsible for administering and providing for the delivery of child and family services to Métis and Inuit Manitobans, and to other Manitobans who choose to receive services from the Métis Authority.

13. The Métis Agencies are child and family services agencies as defined in *The Child and Family Services Act* C.C.S.M. c. C80. The Métis Authority oversees the Métis Agencies, which in turn provides culturally relevant and community-based child protection and prevention services to the children and families they serve.

14. The Métis CFS Plaintiffs are under the umbrella of the Manitoba Métis Federation (the "**MMF**"). The MMF is the Indigenous self-government of the Red River Métis and governing body of the Métis Authority.[3]

B. The Claim

15. As a result of Manitoba's CSA Policy, the Métis Agencies were forced to make difficult decisions in order to provide for the children in their care with less than enough.

3 Affidavit of Gregory Besant affirmed October 6, 2023 ["**Besant Affidavit**"] at paras. 4-7, LOD, pp. 67-68.

Comprises were made that required, among other things, reductions in work force, cutting various initiatives and not investing in interest yielding savings accounts for the children in their care.[4] In all cases, the Class members were the ultimate victims as they were deprived the benefit of the CSA Benefits and experienced a corresponding reduction in the quality of care and opportunities available to them.

16. During the Class Period, the services offered by the Métis CFS Plaintiffs were not exclusively provided to those who are, or identify as, Indigenous. Unlike many other Indigenous CFS Agencies, the Métis CFS Plaintiffs did not require that children in care be able to prove their claims to Métis citizenship as a condition to receiving services. At that time, it was not typical for children in care to seek their citizenship status and claims to Métis status was largely based on self-identification by the child in care's parent. The Métis Agencies offered services to families and individuals irrespective of whether the child in care could prove a claim to Métis citizenship. There was no requirement that children in their care be Indigenous or self-identify as Indigenous.[5]

17. The Representative Plaintiffs bring this proceeding (the "**Action**") on behalf of the Class to seek redress for Manitoba's wrongs in respect of this vulnerable group of individuals.

C. CSA Benefits and the CSA Act

18. CSA Benefits are governed by the *Children's Special Allowances Act*, S.C. 1992, c. 48 (the "***CSA Act***"). CSA Benefits are paid in respect of children in care and must be

[4] Besant Affidavit, at paras. 28-29, LOD, pp. 74-75.
[5] Besant Affidavit, at paras. 26-27, LOD, pp. 73-74.

used exclusively for the benefit of the child for whom the benefit is paid. Section 3(2) of the *CSA Act* states as follows:

> **Use of special allowance**
>
> **3(2)** A special allowance shall be applied exclusively toward the care, maintenance, education, training or advancement of the child in respect of whom it is paid.

19. Under the *CSA Act*, the responsibility for applying for CSA Benefits lies exclusively with the agency that maintains the child. Section 4 states:

> **Application for special allowance**
>
> **4(1)** A special allowance is not payable in respect of a child for any month unless
> **(a)** an application therefor has been made in the prescribed manner by the department, agency, institution, or Indigenous governing body referred to in subsection 3(1) that maintains the child; and
> **(b)** payment of the special allowance has been approved under this Act.

20. CFS Agencies are not statutorily required by the *CSA Act* to make an application for CSA Benefits in respect of children in their care. However, these agencies were required by Manitoba to apply for CSA Benefits when a child was admitted into care, so that the province could appropriate these amounts. The Métis Agencies' practice was therefore to apply for CSA Benefits for each child in their care. This was part of the standard intake process for all children, including children that were transferred to one of the Métis Agencies from another agency.[6]

[6] Besant Affidavit, at paras. 20-21, LOD, pp. 71-72.

21. The Métis Agencies, and no other person or entity, applied for and received the CSA Benefits from the federal government, with respect to each child in their care during the Class Period.[7]

D. Manitoba's Policy to Misappropriate CSA Benefits

22. Beginning on January 1, 2005, Manitoba implemented its CSA Policy, which required that CSA Benefits granted to CFS Agencies in respect of children in their care be remitted to Manitoba.

23. Many Indigenous CFS Agencies, including the Métis Agencies, refused to remit the CSA Benefits to Manitoba. To compel compliance, Manitoba unilaterally withheld or clawed back an amount equivalent to the unremitted CSA Benefits from the operational funding it provided to these agencies. Manitoba took the abusive and unreasonable position that those amounts satisfied the debt owed for the unremitted CSA Benefits.[8]

24. Furthermore, Indigenous CFS Agencies, including the Métis Agencies, were compelled to remit CSA Benefits under threat by Manitoba of further claw backs on their funding from the province.

25. Manitoba terminated its CSA Policy on April 1, 2019, over 14 years after it was first introduced.

E. Litigation Challenging Manitoba's CSA Policy

26. Manitoba's CSA Policy has been the subject of litigation for several years. For example, on April 28, 2018, the Métis Agencies joined a number of other Indigenous

[7] Besant Affidavit, at para. 22, LOD, p. 72.
[8] Besant Affidavit, Exhibit F, CSA Agreed Statement of Facts, at paras. 84-89, LOD, pp. 244-246.

CFS Agencies to commence an application against Manitoba seeking declaratory relief regarding Manitoba's forced remittances and claw backs of CSA Benefits (the "**2018 Application**").[9]

27. On December 20, 2018, a proposed class action was commenced by Elsie Flette and Lee Malcolm-Baptiste against Manitoba (the "**Flette Action**"). The Flette Action sought declaratory relief and claimed damages for the forced remittances and claw backs of the CSA Benefits.

28. In November 2020, Manitoba enacted section 231 of *The Budget Implementation and Tax Statutes Amendment Act, 2020* (the "***BITSA***"), which purported to retroactively provide legislative authority for Manitoba's unlawful CSA Policy and to explicitly dismiss the various lawsuits brought by a number of agencies, including the 2018 Application and the Flette Action.

29. On November 27, 2020, the applicants from the 2018 Application joined several other Indigenous CFS Agencies as well as Indigenous child and family service authorities to commence a second application against Manitoba regarding CSA Benefits (the "**2020 Application**"). The 2020 Application expanded upon the relief sought in the 2018 Application, including challenging section 231 of the *BITSA*.[10]

F. Manitoba's CSA Policy is Found to Be Unconstitutional

30. By decision dated April 20, 2021, the Honourable Justice Edmond of the Manitoba Court of King's Bench ordered the consolidation of the various CSA Benefits

[9] Besant Affidavit, at para. 10 & Exhibit B, LOD, pp.69 & 129.
[10] Besant Affidavit, at para. 14 & Exhibit D, LOD, pp. 70 & 165.

proceedings on the consent of the parties. The purpose of the consolidation was to determine constitutional issues that were common to all the proceedings.[11]

31. By decision dated May 18, 2022 (the "**Constitutional Decision**"), Justice Edmond held, among other things, that:

(a) pursuant to the doctrine of paramountcy, section 231 of the *BITSA* operationally conflicts with the *CSA Act* and is of no force or effect and therefore invalid; and

(b) Manitoba's policy to preclude children in care from receiving CSA Benefits, and enacting section 231 of the *BITSA*, is a violation of s. 15(1) of the Charter and cannot be justified by section 1 of the *Charter*.[12]

32. Section 15 of the *Charter* provides that:

> **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.

33. The Constitutional Decision found, among other things, that Manitoba's CSA Policy discriminated against Indigenous children in care on the basis of the enumerated ground of race, and further that within the context of CSA Benefits, family status, i.e., being a child in care is an analogous ground under section 15 of the *Charter*.

[11] Besant Affidavit, at para. 15 & Exhibit E, LOD, pp. 70 & 195.
[12] Besant Affidavit, at para. 17 & & Exhibit H, LOD, pp.70-71 & 742.

34. In the Constitutional Decision, in addition to its section 15(1) analysis that focussed on the discriminatory effect of Manitoba's CSA Policy on Indigenous children, the Court also engaged in a broader analysis under section 15(1) of the *Charter* in respect of family status and made the following findings:

(a) "From the perspective of a reasonable person in the position of a child in care or foster parents, their family status is important to their identity, personhood, or belonging. I certainly agree that being a child in care as part of a family is an immutable personal characteristic that is important to the individual's personal identity. Children in care are governed by a legal relationship between a CFS Agency, the foster parents, and the child. Clearly, the child in care lacks any power and is disadvantaged and vulnerable";

(b) "All children in care are entitled to the CSA Benefit and foster parents have a legal right to receive the CSA Benefit just as the parents of a child not in care is entitled to receive the [Canada Child Benefit]";

(c) "I note that family status is a protected ground in nearly every human rights code across the country, including Manitoba"; and

(d) "In the context of this case, the evidence satisfies me that the CSA Policy and s.231 of *BITSA* create a distinction based on family status. This is an

appropriate case to recognize family status as an analogous ground under the step one test".[13]

35. In his concluding paragraph, among other things, Justice Edmond determined that:

(a) "The CSA Policy implemented by Manitoba during the funding period and enacting s. 231 of BITSA infringes s. 15(1)"; and

(b) "The prima facie breach of s. 15(1) of the *Charter* cannot be justified under s. 1 of the *Charter*. Therefore, it is a violation of s. 15(1) by Manitoba to preclude children in care from receiving the CSA Benefits and then enacting s. 231 of *BITSA* to make the CSA Policy law in Manitoba".[14]

36. It is clear that Justice Edmond's conclusion about the unconstitutionality of Manitoba's CSA Policy is not contingent on the indigeneity of the affected children in care. Neither the Constitutional Decision, nor the Order arising from it limits or circumscribes the illegality of Manitoba's CSA Policy in any way.

37. On the contrary, the effect of the Constitutional Decision was to render unconstitutional and illegal the entirety of Manitoba's CSA Policy, as it was carried out in practice during the Class Period and as it was enacted into law through section 231 of the *BITSA*, and as it applied to CSA Benefits for all children in care.

[13] Besant Affidavit, Exhibit H, Constitutional Decision, at paras. 206-210, LOD, pp. 818-819.
[14] Besant Affidavit, Exhibit H, Constitutional Decision, at para. 261, LOD, pp. 835-836.

38. In other words, the Constitutional Decision encompasses and benefits all children in care for whom CSA Benefits were applied for, received, and then remitted and/or clawed back.

G. The Representative Plaintiffs Will Be Granted Carriage of the Claims in the Action

39. In addition to the Action, there are two other proposed class proceedings before the Court:

(a) The proposed Flette Action as previously constituted was comprised of “Indigenous children” who were or are wards of child and family services agencies in Manitoba. The Flette Action does not seek any relief for non-Indigenous children or in respect of any child and family service agency;

(b) On May 30, 2023, Trudy Lavallee as litigation guardian for the minor child, A.L. and Joshua Camplin, brought a proposed class proceeding on behalf of non-Indigenous children and the estates of those children who are or were wards of child and family services agencies funded by Manitoba and whose CSA Benefits were payable under the provisions of section 3(2) of the *CSA Act* but which payments, beginning in or about 1993, were aggregated and deposited into Manitoba's "consolidated revenue fund" instead of being applied exclusively toward the care, maintenance, education, training or advancement of the child in respect of whom it is paid (the “**Lavallee Action**”). In short, the Lavallee Action is in respect of non-Indigenous children in Manitoba who were affected by Manitoba’s CSA Policy.

40. The Plaintiffs in the Action sought carriage of CSA Benefits claims on behalf of only those children who were in the care of the Métis Agencies. The Plaintiffs are awaiting the issued and entered Carriage Order which grants them carriage of the claims in the Action. The Carriage Order will be entered on consent of the parties in all three proposed class actions. As a result, the proposed Class in the Action will be "carved out" of the Flette Action and the Lavallee Action.[15] By design, there is no overlap between the three proceedings.

41. The Carriage Order appoints Lax O'Sullivan Lisus Gottlieb LLP and MN Trachtenberg Law Corporation as counsel to the Plaintiffs in the Action. The Honourable Justice Alain Huberdeau jointly case manages this Action, alongside the Flette Action and the Lavallee Action.

PART III - ISSUES TO BE DETERMINED

42. The sole issue to be determined is whether the Action satisfies the test for certification under the Class Proceedings Act, CCSM c C130 ("***CPA***"). Section 4 of the *CPA* states that the court must certify an action as a class proceeding if the following criteria are met:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of two or more persons;

(c) the claims of the class members raise common issues;

[15] Lafontaine Affidavit, Exhibit A, LOD, p.46; Derendorf Affidavit, Exhibit A, LOD, p.16.

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and

(e) the proposed representative plaintiff (i) fairly and adequately represent the interests of the class, (ii) has produced a workable litigation plan, and (iii) does not have conflicting interests with other class members on the common issues.

PART IV - LAW AND ARGUMENT

A. Legal framework for class action certification

43. The legal principles governing class action certification are well-established:

(a) section 5(2) of the *CPA* expressly states that "[A]n order certifying a proceeding as a class proceeding is not a determination of the merits". This is because, "the certification stage focuses on the *form* of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action" [emphasis in original].[16] The Court should therefore not engage in a detailed assessment of the merits of the case or the likelihood of success at trial;

[16] *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, at para. 16 ["***Hollick***"], Plaintiff's Book of Authorities ["**BOA**"], Tab 1.

(b) the evidentiary standard for each of the certification criteria is "some basis in fact", not a balance of probabilities, except for section 4(1)(a) which is assessed solely on the pleadings using the "plain and obvious" test;[17]

(c) the certification test presents a "low bar". Justice Perell, one of Ontario's longest-tenured class action judges, described the test this way: "the proposed Representative Plaintiff has a downhill bunny hill ski slide to certification and the Defendant has a Mount Everest climb to resist certification";[18]

(d) the certification analysis must be conducted through the lens of the three goals of class proceedings legislation, namely access to justice, judicial economy and behaviour modification. The Supreme Court of Canada has cautioned courts not to "take an overly restrictive approach", but rather to interpret the *CPA* liberally in order to give "full effect" to the objectives of the legislation. [19]

B. Section 4(a) – The Pleadings Disclose a Cause of Action)

44. The first criteria for certification set out in the *CPA* is that the pleadings disclose a cause of action. The court should only find that this criterion is not satisfied if assuming the facts pleaded to be true, it is "plain and obvious" that the claim has no reasonable prospect of success.[20]

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[17] *Hollick,* at para. 25, BOA, Tab 1.
[18] *Harris v. Bayerische Motoren Werke Aktiengesellschaft*, 2020 ONSC 1647, at para. 74, BOA, Tab 2.
[19] *Hollick*, at paras 14-15, BOA, Tab 1; See also *Weremy v. The Government of Manitoba*, 2021 MBCA 34, at para 27 ["***Weremy***"], BOA, Tab 3.
[20] *Hollick*, at para. 25, BOA, Tab 1.

45. The “plain and obvious” standard is a low threshold for a plaintiff to meet. If there is a chance the plaintiff’s claim might succeed, the court must find that section 4(a) of the *CPA* is satisfied. When considering the “plain and obvious” standard, neither “the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case”. The plaintiff should only be barred at this stage if their claim is “certain to fail”.[21]

46. The statement of claim in the Action clearly pleads the essential elements for breach of trust and knowing receipt of trust property; breach of fiduciary duty; negligence; unjust enrichment; international interference with economic relations; and breach of section 15 of the *Charter*. These are recognized causes of action and, assuming the facts pleaded are true, appropriately pled.

C. Section 4(b) – There is an Identifiable Class

47. The second criteria for certification set out in section 4(b) of the *CPA* is that “there is an identifiable class of two or more persons”.

48. The Supreme Court of Canada in *Dutton* provided the following guidance when evaluating the identifiable class requirement:

> …the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational

[21] *Hunt v. T&N plc*, [1990] S.C.J. No. 93 (SCC), at para. 36, BOA, Tab 4.

> relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.[22]

49. In order to be a member of the Class, an individual must meet the following criteria:

(a) was a child in care of either of Métis CFCS or Michif ;

(b) at any point in time during the Class Period, i.e., between January 1, 2005, and March 31, 2019;

(c) in respect of whom Métis CFCS or Michif applied for and received CSA Benefits; and

(d) those CSA Benefits were directly or indirectly taken by Manitoba.

50. It is obvious that the Class is defined by objective, readily ascertainable criteria. It is neither over- nor under-inclusive and can be determined without reference to the merits of the Action.[23]

51. The Class consists of both Indigenous and non-Indigenous persons, which overcomes the potential difficulties some Class members may face in objectively establishing their Indigenous status. Further, the Métis CFS Plaintiffs applied for and received CSA Benefits in respect of all children in their care during the Class Period –

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[22] *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para. 38 [“***Dutton***”], BOA, Tab 5.
[23] *Hollick*, at para. 17, BOA, Tab 1.

indeed they were required by Manitoba to do so as a condition of their funding. They have detailed records in respect of each of the over 6, 000 putative Class members, including their time spent in the care of the Métis Agencies during the Class Period, as well as the amount of CSA Benefits misappropriated by Manitoba in respect of each Class member. It is unquestionable that the "identifiable class" criteria set out in the statue is easily satisfied.

D. Section 4(c) – The Common Issues are Certifiable

52. The Plaintiffs proposes 24 common issues, reproduced at **Schedule "A"**. Each should be certified. A draft Certification Order is attached at **Schedule "B".**

53. In *Anderson et al. v Manitoba et al.*, the Court of Appeal outlined the analytical framework for the commonality inquiry under section 4(c). In summary:

(a) As defined in section 1 of the *CPA*, "common issues" are (i) common, but not necessarily identical issues of fact, or (ii) common, but not necessarily identical issues of law that arise from common, but not necessarily identical facts;

(b) the court must not refuse to certify a proceeding by reason only that "the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues";

(c) the question underlying the commonality inquiry, and the certification inquiry as a whole, is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis";

(d) an issue will be common where its resolution is necessary to the resolution of each class member's claim and where it is a "substantial ingredient of each of the class members' claim.[24]

54. Questions that are focused on the defendants' conduct, as opposed to the actions of individual class members, are typically amenable to class-wide determination and will meet the standard under section. 4(c) for certification.[25]

55. Importantly, commonality does not require an identical answer for each class member. All that is required is that the answer does not give rise to conflicts between class members. As the Supreme Court of Canada held in *Vivendi Canada Inc. v Dell'Aniello*:

> …The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members.[26]

56. Each of the Plaintiffs' proposed common issues is a substantial ingredient to the Class members' claims, and all members of the Class will benefit from their prosecution and resolution.[27] Certifying these issues will avoid duplication of the fact-finding and legal analysis required for each Class member's claims and will therefore facilitate

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[24] *Anderson et al. v Manitoba et al.*, 2017 MBCA 14, at paras 31-35, BOA, Tab 6.
[25] *Grossman v. Nissan Canada*, 2019 ONSC 6180, at para. 59 ["***Grossman***"], BOA, Tab 7.
[26] Vivendi Canada Inc v Dell'Aniello, 2014 SCC 1 at para. 46, BOA, Tab 8.
[27] *Bayens v. Kinross Gold Corporation*, 2014 ONCA 901, at para.115, BOA, Tab 9; Pro-*Sys Consultants Ltd. v.Microsoft Corp.*, 2013 SCC 57, at para. 108, BOA, Tab 10.

judicial economy and access to justice.[28] The evidentiary record establishes "some basis in fact" in support of the commonality of the proposed common issues.

57. The proposed common issues are grouped into five categories: (i) standing; (ii) common law claims; (iii) breach of section 15 of the *Charter*; (iv) remedies; and (v) distribution.

i. *Group 1 – Standing (common issue 1)*

58. The first common issue asks whether the Class has standing to make claims under the *CSA Act* for recovery of CSA Benefits that were directly and indirectly taken by Manitoba during the Class Period. The Plaintiffs have included the issue of standing as a common issue at Manitoba's request, without prejudice to their ability to argue that the issue of standing has already been resolved.

ii. *Group 2 – Elements of common law claims (common issues 2-12)*

59. The Group 2 common issues address elements of the Plaintiffs' common law claims that are amenable to class-wide determination.

60. Common issue 2 is a question of statutory interpretation: whether the payment of CSA Benefits under s. 3(2) of the *CSA Act* created a trust for the benefit of the Class. This question is a question of law – it is focused on determining the legal result flowing from the process mandated by the *CSA Act*. It does not require individual inquiries. The statute governs the application and receipt of CSA Benefits in the same way for all Class members.

[28] *Dutton*, at paras. 39-40, BOA, Tab 5.

61. Common issues 3-12 are all directed at Manitoba's legal obligations and conduct. They seek to determine: whether Manitoba owed duties to the Class members, and the nature of those duties; whether Manitoba's CSA Policy breached those duties; whether Manitoba's actions were intentional; and whether liability flows from Manitoba's actions. The answers to these questions do not require an inquiry into individual Class members' circumstances and will benefit all Class members.

62. The evidentiary record amply establishes "some basis in fact" for the Group 2 common issues. It is agreed between the parties and was found as a fact in the Constitutional Decision, that Manitoba implemented the CSA Policy. Those facts are confirmed in the affidavits of the Representative Plaintiffs and Gregory Besant, which were filed by the Plaintiffs specifically for this motion. There is also no dispute over Manitoba's position and role *vis a vis* children in care for the purposes of determining the existence and scope of duties owed by Manitoba.

63. Indeed, given Manitoba's admissions and the findings of fact in the Constitutional Decision, it is highly likely that the Action can be determined summarily as opposed to through a full trial.

iii. Group 3 – Breach of section 15 of the Charter (common issues 13 and 14)

64. The Constitutional Decision has already determined that Manitoba breached section 15 of the *Charter.* Common issues 13 and 14 addresses the scope of the finding that section 15 was breached – specifically whether the decision also applies to non-Indigenous Class members. This common issue is a pure legal question directed at the scope of Justice Edmond's prior findings and Order.

65. To the extent that the answer to common issue 13 is “no”, common issue 14 asks whether Manitoba’s CSA Policy contravened the section 15 *Charter* rights of the non-Indigenous Class members in a manner that cannot be justified by section 1 of the *Charter*.

66. The Group 3 common issues will benefit all non-Indigenous members of the Class, all of whom would rely on the ground of family status, *i.e*., being a child in care, which was recognized in the Constitutional Decision as being an analogous *Charter* ground in this context.

67. The “some basis in fact” standard is easily satisfied for these common issues given Manitoba’s admissions, the findings made in the Constitutional Decision, and the evidence filed by the Plaintiffs in this action, addressing the scope and harmful effects of Manitoba’s CSA Policy on children that were in the care of the Metis Agencies.

iv. *Group 4 – Remedies (common issues 15-23)*

68. The common issues in Group 4 focus on the financial entitlements of the Class, if liability is proven under the common issues in Group 2 and/or Group 3. Specifically, these questions ask, what remedies are the Class members entitled to?

69. The resolution of these issues will narrow the issues in dispute, simplify the quantification exercise and improve the efficiency of the litigation. The answers to the Group 4 common issues will establish a common framework for determining Class members’ entitlements to compensation – the basis of compensation (repayment, disgorgement, restitution), and the amount of that entitlement, including interests and

costs. This framework can then be applied for each individual Class member based on the period of time they were in the care of the Métis Agencies.

70. Common issue 21 asks whether damages can be assessed on an aggregate basis. Aggregate damages may be certified where there is a "reasonable likelihood" that the conditions of section 29(1) of the *CPA* would be satisfied.[29]

71. The "reasonable likelihood" standard is easily met for each of the section 29(1) conditions:

(a) 29(1)(a): the Representative Plaintiffs claim "monetary relief" on behalf of all members of the Class;

(b) 29(1)(b): if some or all of the common issues in Groups 1, 2 are answered in the Class's favour, Class-wide liability will be established and there will be "no questions of fact or law other than those relating to the assessment of monetary relief" remaining;

(c) 29(1)(c): The aggregate amount of liability, in particular with respect to the Class's claims for disgorgement and restitution can reasonably be determined without proof by individual members of the class. The Métis CFS Plaintiffs have detailed records of all amounts of CSA Benefits that were directly and indirectly taken by Manitoba during the Class Period.

[29] *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, at para. 111, dealing with the parallel provision in Ontario's *Class Proceedings Act*, BOA, Tab, 11.

Manitoba also has this data. The aggregate amount is a matter of simple arithmetic.

72. Common issue 20 addresses punitive damages. Like many of the other common issues, the availability of punitive damages is certifiable because it depends on the conduct of the Defendant, not the Class members, and can thus be determined on a class-wide basis.[30]

v. *Group 5 – Distribution (common issue 23)*

73. Common issue 24 asks the simple question of whether Manitoba is responsible for the administrative and legal costs incurred by the Métis CFS Plaintiffs in distributing any amounts awarded to the Class. This question is focused solely on the conduct of Manitoba; it does not require any individual inquiries.

E. Section 4(d) – A Class Action is the Preferable Procedure

74. For an action to be certified as a class proceeding, the class action must be the preferable procedure for the resolution of the common issues.

75. In order to determine whether a class proceeding is the preferable procedure for the resolution of the common issues, courts must "adopt a practical cost-benefit approach to this procedural issue, and…consider the impact of a class proceeding on class members, the defendants, and the court".[31] Courts must assess the preferability requirement in light of the overarching goals of class proceedings, namely judicial economy, access to justice and behaviour modification.

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[30] *Grossman*, at para. 59, BOA, Tab 7.
[31] *Fischer v. IG Investment Management Ltd*, 2013 SCC 69, at para 21 ["***Fischer***"], BOA, Tab 12.

76. The representative plaintiff is not required to prove that the proposed class proceeding will "*actually* achieve those goals in a specific case". Rather, "courts must focus on the statutory requirement of preferability and not impose on the representative plaintiff the burden of proving that all of the beneficial effects of the class action procedure will in fact be realized".[32]

77. Access to justice is a central consideration in the preferability inquiry for marginalized groups who traditionally face obstacles to engaging with the justice system. The Supreme Court of Canada in *Fischer* identified the following five questions as providing helpful guidance for determining preferability through the lens of access to justice:

(a) *What are the barriers to access to justice?*

> The sorts of barriers to access to justice may vary according to the nature of the claim and the make-up of the proposed class. They may relate to either or both of the procedural and substantive aspects of access to justice. The most common barrier is an economic one, which arises when an individual cannot bring forward a claim because of the high cost that litigation would entail in comparison to the modest value of the claim. However, barriers are not limited to economic ones: they can also be psychological or social in nature.[33]

(b) *What is the potential of the class proceeding to address those barriers?*

> A class action may allow class members to overcome economic barriers by distributing fixed litigation costs amongst a large number of class members … [and thus] making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own….It may also allow claimants to overcome psychological and social

[32] *Fischer*, at para. 22, BOA, Tab 12.
[33] *Fischer*, at para. 27, BOA, Tab 12.

> barriers through the representative plaintiff who provides guidance and takes charge of the action on their behalf. [Citations omitted][34]

(c) *What are the alternatives to a class proceeding?*:

> The preferability analysis requires the court to look to *all* reasonably available means of resolving the class members' claims, and not just at the possibility of individual actions.[35]

(d) *To what extent do the alternatives address the relevant barriers?*

> The question is whether the alternative has the potential to provide effective redress for the substance of the plaintiffs' claims and to do so in a manner that accords suitable procedural rights.[36]

(e) *How do the two proceedings compare?*

> The focus at this stage of the analysis is on whether, if the alternative or alternatives were to be pursued, some or all of the access to justice barriers that would be addressed by means of a class action would be left in place. At the end of the day, the motions court must determine whether, on the record before it, the class action has been shown to be the preferable procedure to address the specific procedural and substantive access to justice concerns in a case. As set out in *Hollick*, the court must also, to the extent possible within the proper scope of the certification hearing, consider the costs as well as the benefits of the proposed class proceeding in relation to those of the proposed alternative procedure. [Citations omitted][37]

78. Applying the analytical framework described above, a class proceeding is clearly the preferable procedure. This Action will ensure that all individuals who were in the care of the Métis Agencies during the Class Period have access to the justice system,

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[34] *Fische*r, at para. 29, BOA, Tab 12.
[35] *Fischer*, at para. 35-36, BOA, Tab 12.
[36] *Fischer*, at para. 37, BOA, Tab 12.
[37] *Fischer*, at para. 38, BOA, Tab 12.

that their rights are fairly adjudicated, and that they are properly compensated if successful. There is no reasonable available alternative. The economics make individual proceedings unrealistic, particularly in light of the socioeconomic vulnerabilities of the Class members. Further, most claims are of relatively small value when weighed against the time and cost required to litigate. Access to justice will be served by granting certification.

79. Certification will also serve judicial economy and behaviour modification by eliminating the risk of duplicative court proceedings and inconsistent findings. This factor is of particular importance in light of the subject matter of the litigation: Manitoba's CSA Policy to directly and indirectly appropriate CSA Benefits from the Métis Agencies, benefits which were to be used exclusively for the benefit of the children for whom they were paid. There is no reason for only some of the affected Class members to be entitled to compensation from Manitoba. All were affected by Manitoba's CSA Policy and all are entitled to redress.

F. Section 4(e) – the Representative Plaintiffs are Suitable

80. A proposed representative plaintiff must (i) fairly and adequately represent the interests of the class, (ii) produce a workable plan for the class proceeding, and (iii) not have a conflicting interest with other class members on the common issues.[38] The Supreme Court of Canada explained that:

> …the proposed representative need not be 'typical' of the class, nor the 'best' possible representative. The court should

[38] *Weremy*, at para. 136, BOA, Tab 3.

> be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class.[39]

81. A representative plaintiff should only be rejected if they are clearly unwilling or unable to represent the class.

82. Both proposed Representative Plaintiffs satisfy the three criteria set out in section 4(e) of the CPA. First, they ***fairly and adequately represent the interests of the class***. Both Representative Plaintiffs have, at some point during the Class Period, been in the care of Métis CFCS. They have demonstrated a high level of engagement, interest, and involvement in all aspects of the litigation since it was commenced. Among other things, the Representative Plaintiffs have done the following to advance the interests of the class, stay informed, and direct this litigation: (i) retained and instructed counsel, and met with counsel on multiple occasions; (ii) reviewed pleadings and motion materials, and authorized court filings; (iii) engaged in discussions with counsel and co-plaintiffs regarding strategy; and (iv) demonstrated the desire to ensure a fair and just result for all class members. They have also affirmed their intention to continue taking steps to represent the interests of Class members.

83. Second, ***the proposed litigation plan sets out workable method of advancing the class proceeding and notifying Class members of the proceeding***.

84. The requirement to produce a workable litigation plan is not onerous and should not be held to a standard of perfection. Litigation plans necessarily evolve as the action proceeds, and the certification process is not intended to be a review of the merits.

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[39] *Dutton*, at para. 41, BOA, Tab 5.

Courts should evaluate this criterion cognizant of the fact that all litigation plans are "something of a work in progress", and will "undoubtedly have to be amended, particularly in light of the issues found to warrant a common trial". Nothing in the litigation plan exposes weakness in the case or undermines the conclusion that a class action is preferable procedure.[40]

85. The Representative Plaintiffs have filed a detailed litigation plan that addresses all presently known aspects of the litigation. The litigation plan provides a framework for how the Action will proceed in an expeditious and cost-effective manner, in light of the scope of the Action and the significance of the issues at stake. The evidence demonstrates that the Representative Plaintiffs, together with the Métis CFS Plaintiffs and their counsel, have a full understanding of the complexities involved in the prosecution of their claims.

86. Third, ***there is no conflict of interest with other Class members***. The Representative Plaintiffs are not in any conflict of interest with Class members. On the contrary, their legal entitlements and interests are the same. The Representative Plaintiffs' sole motivation, as affirmed in their affidavits, is to recover their losses and those of the other 6, 000 Class members similarly affected by Manitoba's CSA Policy.

[40] *Cloud v. Canada*, 2004] O.J. No. 4924 (ONCA), at para. 95, BOA, Tab 13.

PART V - ORDER REQUESTED

87. The Representative Plaintiffs and Métis CFS Plaintiffs respectfully request that this court grants its motion for certification including that Mary and Rene be confirmed as the representative plaintiffs in the class action.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of October, 2023.

LAX O'SULLIVAN LISUS GOTTLIEB LLP
MN TRACHTENBERG LAW CORPORATION
Counsel for the Moving Parties

SCHEDULE A

PLAINTIFFS' PROPOSED COMMON ISSUES

Group 1: Standing

1. Does the Class have standing to make claims under the *CSA Act* for recovery of CSA Benefits that were directly and indirectly taken by Manitoba during the Class Period?

Group 2: Common elements of common law claims

Breach of trust

2. Does the payment of CSA Benefits pursuant to section 3(2) of the CSA Act establish a trust for the benefit of the Class?

3. If the answer to common issue (2) is yes, is Manitoba liable for knowing receipt of trust property as a consequence of directly and indirectly taking the CSA Benefits from the Métis Agencies during the Class Period?

Breach of fiduciary duty

4. Did Manitoba owe a fiduciary duty to members of the Class?

5. If the answer to common issue (4) is yes, did Manitoba breach this fiduciary duty by directly and indirectly taking the CSA Benefits from the Métis Agencies during the Class Period?

Negligence

6. Did Manitoba owe a duty of care to members of the Class?

7. If the answer to common issue (6) is yes, did Manitoba breach its duty of care owed to the Class by directly and indirectly taking the CSA Benefits from the Métis Agencies during the Class Period?

8. If the answer to common issue (7) is yes, is Manitoba liable in negligence?

Unjust enrichment

9. Is Manitoba liable in unjust enrichment for directly and indirectly taking the CSA Benefits from the Métis Agencies during the Class Period?

Intentional Interference with economic relations

10. Did Manitoba commit an actionable wrong as against the Métis Agencies by directly and indirectly taking the CSA Benefits from the Métis Agencies during the Class Period?

11. Did Manitoba's actions cause loss or harm to the Class?

12. Were Manitoba's actions intentional?

Group 3: Breach of Section 15 of the Charter

13. Is Manitoba liable to the non-Indigenous members of the Class for breach of their rights to be free from discrimination as guaranteed under section 15 of the *Charter of Rights and Freedoms* by virtue of the decision of Justice Edmond dated May 18, 2022 (2022 MBQB 104)?

14. If the answer to common issue (13) is no, did Manitoba's policy of directly and indirectly taking the CSA Benefits from the Métis Agencies during the Class Period constitute discrimination against the non-Indigenous members of the Class in contravention of section 15 of the *Charter* and in a manner that cannot be justified under section 1 of the Charter?

Group 4: Remedies

15. Is the Class entitled to repayment of the CSA Benefits that were directly and indirectly taken by Manitoba from the Métis Agencies during the Class Period? If so, for what amount?

16. Is the Class entitled to an accounting and disgorgement? If so, for what amount?

17. Is the Class entitled to restitution? If so, for what amount?

18. Is the Class entitled to damages for lost opportunity for not having the use or benefit of the CSA Benefits? If so, for what amount?

19. Is the Class entitled to damages under section 24(1) of the *Charter*? If so, for what amount?

20. Is the Class entitled to an award of punitive damages? If so, for what amount?

21. Is an Order for an aggregate monetary award appropriate? If so, for what amount?

22. Is the Class entitled to an award of interest? If so, for what amount?

23. Is the Class entitled to costs on a full indemnity basis? If not, what amount of costs is the Class entitled to?

Group 5: Distribution

24. Is the Defendant responsible for the administrative and legal costs of distributing any amounts awarded to the Class?

SCHEDULE B

 File No.CI23-0I-4I054

THE KING'S BENCH

Winnipeg Centre

THE HONOURABLE MR. JUSTICE HUBERDEAU	))	TUESDAY THE 31st
	)	DAY OF OCTOBER, 2023

BETWEEN:

RENE LAFONTAINE, MARY DERENDORF, 4501712 MANITOBA ASSOCIATION INC. O/A METIS CHILD AND FAMILY SERVICES AUTHORITY, METIS CHILD, FAMILY AND COMMUNITY SERVICES AGENCY INC., AND MICHIF CHILD & FAMILY SERVICES INC.

Plaintiffs

- and -

THE GOVERNMENT OF MANITOBA

Defendant

Proceeding under *The Class Proceedings Act*, C.C.S.M. cC130

CERTIFICATION ORDER

THIS MOTION, made by the Plaintiffs for an Order certifying this action as a class proceeding, was read this day at the Winnipeg Law Courts Building, 408 York Ave, Winnipeg, Manitoba.

ON READING the pleadings, the Notice of Motion; Plaintiffs' Certification Brief; Affidavit of Rene Lafontaine (affirmed October 10, 2023); Affidavit of Mary Derendorf (affirmed October 10, 2023); Affidavit of Gregory Besant (affirmed October 6, 2023) and upon being advised of the consent of the Parties:

1. **THIS COURT ORDERS** that this action is hereby certified as a class proceeding pursuant to Part 2 of The *Class Proceedings Act*, C.C.S.M. c. C130 (the "***CPA***").

2. **THIS COURT ORDERS** that the Class is defined as all Indigenous and non-Indigenous persons, and the estates of those persons, who were in the care of Metis Child, Family and Community Services Agency Inc. and Michif Child & Family Services Inc. (together, the "**Métis Agencies**") at any time between January 1, 2005, and March 31, 2019 (the "**Class Period**"), and for whom the Métis Agencies received Children's Special Allowances and other applicable benefits ("**CSA Benefits**") pursuant to the *Children's Special Allowances Act* ("***CSA Act***") that were directly or indirectly taken by Manitoba, including through claw backs of provincial funding.

3. **THIS COURT ORDERS** that Rene Lafontaine and Mary Derendorf are hereby appointed as the representative Plaintiffs of the Class.

4. **THIS COURT ORDERS** that Lax O'Sullivan Lisus Gottlieb LLP and MN Trachtenberg Law Corporation are appointed as Class Counsel in this action.

5. **THIS COURT DECLARES** that the causes of action asserted on behalf of the Class are:

(a) breach of trust and knowing receipt of trust property;

(b) breach of fiduciary duty;

(c) negligence;

(d) unjust enrichment;

(e) intentional interference with economic relations;

(f) breach of section 15 of the *Canadian Charter of Rights and Freedoms* (the "***Charter***").

6. **THIS COURT DECLARES** that the relief sought by the Class on a class-wide basis is as set out in Paragraph 1 of the Statement of Claim and is for:

(a) an accounting and disgorgement of all CSA Benefits that were paid to the Métis Agencies pursuant to the *CSA Act* and its regulations, and that were unlawfully misappropriated by Manitoba during the Class Period;

(b) an accounting and disgorgement of provincial funding that was unlawfully withheld or clawed back by Manitoba from the Métis Agencies during the Class Period, on account of CSA Benefits that were demanded by Manitoba but not remitted by the Métis Agencies;

(c) an order directing the repayment of the misappropriated CSA Benefits and unlawfully clawed back provincial funding to the Métis Agencies to be distributed to the Class in accordance with the *CSA Act* and the directions of the Court;

(d) in the alternative, an order directing the repayment of the misappropriated CSA Benefits and unlawfully clawed back provincial funding to the Class members, to be administered and distributed by the Métis Agencies in accordance with the CSA Act and the directions of the Court;

(e) damages for lost opportunity for the Class not having use of the unlawfully misappropriated and withheld and/or clawed back funds during the Class Period;

(f) damages under section 24(1) of the *Charter*;

(g) an order for an aggregate monetary award and judgment pursuant to section 29(1) of the *CPA*;

(h) punitive and exemplary damages;

(i) interest on all amounts awarded by the Court;

(j) costs of this proceeding on a full indemnity basis, plus all applicable taxes; and

(k) an order that Manitoba is responsible for the administrative and legal costs of distributing any amounts awarded to the Class.

7. **THIS COURT DECLARES** that the certified common issues are:

Standing

(a) Does the Class have standing to make claims under the *CSA Act* for recovery of CSA Benefits that were directly and indirectly taken by Manitoba during the Class Period?

Breach of trust and knowing receipt of trust property

(b) Does the payment of CSA Benefits pursuant to section 3(2) of the *CSA Act* establish a trust for the benefit of the Class?

(c) If the answer to common issue (b) is yes, is Manitoba liable for knowing receipt of trust property as a consequence of directly and indirectly taking the CSA Benefits from the Métis Agencies during the Class Period?

Breach of fiduciary duty

(d) Did Manitoba owe a fiduciary duty to members of the Class?

(e) If the answer to common issue (d) is yes, did Manitoba breach this fiduciary duty by directly and indirectly taking the CSA Benefits from the Métis Agencies during the Class Period?

Negligence

(f) Did Manitoba owe a duty of care to members of the Class?

(g) If the answer to common issue (f) is yes, did Manitoba breach its duty of care owed to the Class by directly and indirectly taking the CSA Benefits from the Métis Agencies during the Class Period?

(h) If the answer to common issue (g) is yes, is Manitoba liable in negligence?

Unjust enrichment

(i) Is Manitoba liable in unjust enrichment for directly and indirectly taking the CSA Benefits from the Métis Agencies during the Class Period?

Intentional Interference with economic relations

(j) Did Manitoba commit an actionable wrong as against the Métis Agencies by directly and indirectly taking the CSA Benefits from the Métis Agencies during the Class Period?

(k) Did Manitoba's actions cause loss or harm to the Class?

(l) Were Manitoba's actions intentional?

Breach of Section 15 of the *Charter*

(m) Is Manitoba liable to the non-Indigenous members of the Class for breach of their rights to be free from discrimination as guaranteed under section 15 of the *Charter of Rights and Freedoms* by virtue of the decision of Justice Edmond dated May 18, 2022 (2022 MBQB 104)?

(n) If the answer to common issue (m) is no, did Manitoba's policy of directly and indirectly taking the CSA Benefits from the Métis Agencies during the Class Period constitute discrimination against the non-Indigenous members of the Class in contravention of section 15 of the *Charter* and in a manner that cannot be justified under section 1 of the Charter?

Remedies

(o) Is the Class entitled to repayment of the CSA Benefits that were directly and indirectly taken by Manitoba from the Métis Agencies during the Class Period? If so, for what amount?

(p) Is the Class entitled to an accounting and disgorgement? If so, for what amount?

(q) Is the Class entitled to restitution? If so, for what amount?

(r) Is the Class entitled to damages for lost opportunity for not having the use or benefit of the CSA Benefits? If so, for what amount?

(s) Is the Class entitled to damages under section 24(1) of the *Charter*? If so, for what amount?

(t) Is the Class entitled to an award of punitive damages? If so, for what amount?

(u) Is an Order for an aggregate monetary award appropriate? If so, for what amount?

(v) Is the Class entitled to an award of interest? If so, for what amount?

(w) Is the Class entitled to costs on a full indemnity basis? If not, what amount of costs is the Class entitled to?

Distribution

(x) Is the Defendant responsible for the administrative and legal costs of distributing any amounts awarded to the Class?

8. **THIS COURT DECLARES** that the approval of the Litigation Plan in respect of this action shall be dealt with by further Order of this Court, upon consideration of further submissions from the parties.

9. **THIS COURT DECLARES** that issues related to notice of certification of this action as a class proceeding and of opt-out terms shall be determined by further Orders of this Court following the final resolution of all appeal proceedings arising from this Order and upon consideration of further submissions from the parties.

Signed the __ day of _____, 2023

Huberdeau J.