Court File No. CI 22-01-37801

THE KING'S BENCH
Winnipeg Centre

BETWEEN:

CHIEF HEIDI COOK on behalf of MISIPAWISTIK CREE NATION;
CHIEF SHELDON KENT on behalf of BLACK RIVER FIRST NATION;
CHIEF DAVID MONIAS on behalf of PIMICIKAMAK CREE NATION;
ASSEMBLY OF MANITOBA CHIEFS

Plaintiffs

and

THE GOVERNMENT OF MANITOBA and
ATTORNEY GENERAL OF CANADA

Defendants

Proceeding under *The Class Proceedings Act*, C.C.S.M. c. C.130

STATEMENT OF DEFENCE

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DEC 29 2023

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STATEMENT OF DEFENCE

OVERVIEW

1. Canada is committed to reconciliation with First Nations people and acknowledges that historical wrongs have been committed against First Nations people in the provision and administration of child welfare services. The overrepresentation of First Nations children in care is a national tragedy.

2. Canada acknowledges certain circumstances may give rise to a fiduciary duty between the federal Crown and a First Nations collective and accordingly may require the performance of specific duties by the federal Crown; however, no such fiduciary duties arise in the circumstances set out in the Fresh as Amended Statement of Claim (Claim).

3. Manitoba has legislative jurisdiction under section 92 of the *Constitution Act, 1867* with respect to the welfare, protection, and care of all children in the province, including First Nations children residing on and off-reserve. At all material times, Manitoba, and not Canada, exercised its jurisdiction through provincial entities acting pursuant to its child and family services legislation. In this case, Canada did not exercise jurisdiction or have control over the child welfare services at issue and provided no direct funding for the delivery of off-reserve child welfare services.

4. In Manitoba, as in other provinces, Canada provides direct funding to First Nations and First Nations Child and Family Services Agencies for child welfare services to First Nations children and families who are ordinarily resident on reserve. However, Canada has no statutory responsibility for the delivery of child and family services, including on-reserve child and family services. In Manitoba, Canada's role is to fund provincially delegated First Nations Agencies for the provision of certain services on reserve in accordance with provincial legislation, including child welfare services. Agencies that provide services to First Nations children and families on-reserve receive funding from both Manitoba and Canada. All other agencies in the province are funded solely by Manitoba.

5. The circumstances set out in this Claim do not give rise to any duties on the part of Canada in law or equity to the Plaintiffs or to the proposed class. In the alternative, should the Claim establish a breach of any such duty, Canada has rectified that breach by way of a settlement agreement in three related class actions in the Federal Court of Canada. That agreement includes a total of $23.34 billion to compensate First Nations children and families who have asserted harm as a result of Canada's

underfunding of the First Nations Child and Family Services (FNCFS) program, The claims made against Canada should be dismissed.

SPECIFIC RESPONSES TO THE PARAGRAPHS OF THE FRESH AS AMENDED STATEMENT OF CLAIM

6. In the interests of clarity and ease of reference, and in accordance with the requirements of the *Court of King's Bench Rules* and Form 18A, Canada responds to each of the paragraphs of the Claim as follows:

7. Canada admits the assertions in paragraphs 9(a), 9(b), 19, 20, 25, 26, 27, 34, 35, 36, 41, 42, 49, 52, 53[1], 55, 56, 67, 68, 108 - 110, 122(d), and 137.

8. Canada has no knowledge of the assertions in paragraphs 6, 7, 21, 22, 23, 28, 30 - 33, 37 - 40, 44 - 46, 51, 54, 80, 84, 86 - 93, 96 - 99, 116 - 118, 120, 122(a), (b), and (c), 131, and 136.

9. Canada denies the assertions in paragraphs 1 - 5, 8, 9 (first paragraph), 9(c), 10 - 18, 24, 29, 43, 47, 48, 50, 57 - 66, 69 - 79, 81, 85, 94, 95, 100 - 107, 111 - 115, 119, 121, 123 - 130, 132 - 135, 138 - 157.

10. Canada denies the assertions in paragraphs 13, 17, 18, 29, 68, 79, 81 - 83, 95, 100, 101, 105 - 107, 111 - 115, 122 - 128, 130, 132 - 134, 138, 139, 141, 142, 196(a)[2], 143, 145 - 152, and 154 - 157 only in so far as they pertain to Canada. These

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[1] However, Canada does not admit that Bill C-92 was introduced "unilaterally".
[2] This paragraph number appears to be a typographical error.

paragraphs also contain assertions against Manitoba. Canada has no knowledge of assertions that are not directed at Canada.

11. Unless expressly admitted, Canada denies the facts contained in the Claim.

THE PARTIES

A. The Plaintiffs

Black River First Nation

12. In response to paragraph 19 of the Claim, Canada admits:

    a. Black River First Nation is a "band" within the meaning of section 2(1) of the *Indian Act*, RSC 1985, c. I-5 and is also known as a First Nation.

    b. Black River First Nation is a signatory to Treaty 5.

    c. Black River First Nation's current registered membership is approximately 2000, with approximately 900 members ordinarily resident off reserve.

13. In response to paragraph 20, Canada understands that Chief Sheldon Kent is the current Chief of Black River First Nation and first took office as described in 1997. Canada does not dispute Chief Kent's background as described.

14. In response to paragraph 25, Canada does not dispute Chief Kent's ability to bring suit and assert a communal claim on behalf of Black River First Nation and its members.

Cross Lake Band of Indians, also known as Pimicikamak Cree Nation

15. In response to paragraphs 26 of the Claim, Canada admits:

    a. Pimicikamak Cree Nation is a "band" within the meaning of section 2(1) of the *Indian Act*, RSC 1985, c. I-5 and is also known as a First Nation.

    b. Pimicikamak Cree Nation is a signatory to Treaty 5.

    c. Pimicikamak Cree Nation's current registered membership is approximately 9207, with approximately 2852 members ordinarily resident off reserve.

16. In response to paragraph 27, Canada understands that Chief David Monias is the current Chief of Pimicikamak Cree Nation and first took office as described in 2019. Canada does not dispute Chief Monias' background as described.

17. In specific response to paragraph 34, Canada does not dispute Chief Monias' ability to bring suit and assert a communal claim on behalf of Pimicikamak Cree Nation and its members.

Misipawistik Cree Nation

18. In response to paragraph 35 of the Claim, Canada admits:

    a. Misipawistik Cree Nation is a "band" within the meaning of section 2(1) of the *Indian Act*, RSC 1985, c. I-5 and is also known as a First Nation.

    b. Misipawistik Cree Nation is a signatory to Treaty 5.

c. Misipawistik Cree Nation's current registered membership is approximately 2218, with approximately 1308 members ordinarily resident off reserve.

19. In response to paragraph 36, Canada understands that Chief Heidi Cook is the current Chief of Misipawistik Cree Nation and first took office as described in 2020. Canada does not dispute Chief Cook's background as described.

20. In specific response to paragraph 41, Canada does not dispute Chief Cook's ability to bring suit and assert a communal claim on behalf of Misipawistik Cree Nation and its members.

Assembly of Manitoba Chiefs

21. In response to paragraph 42, Canada does not dispute the description of the Assembly of Manitoba Chiefs (AMC) and its role as advocate for Manitoba First Nations and First Nations citizens of Manitoba.

B. The Defendants

22. In response to paragraph 55, Canada acknowledges that the Government of Manitoba represents His Majesty the King in Right of Manitoba.

23. In response to paragraph 56, Canada admits that the Attorney General of Canada represents His Majesty the King in Right of Canada and states that this is pursuant to section 23(1) of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50.

STATUTORY AND POLICY CONTEXT

24. With respect to paragraph 6 of the Claim, Canada agrees that Manitoba's jurisdiction to legislate with respect to, and administer, child welfare services in the province is based on ss. 92(13) and (16) of the *Constitution Act, 1867*.

25. With respect to paragraphs 9 and 53 of the Claim, Canada agrees that on June 21, 2019, *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c. 24 (***Act***), received Royal assent, and came into force on January 1, 2020. The *Act* sets out principles applicable, on a national level, to the provision of child and family services in relation to Indigenous children.

26. The *Act* also recognizes the inherent right of First Nations peoples to exercise self-government, which includes jurisdiction in relation to child and family services.

27. Canada continues to fund the delivery of on-reserve child and family services, regardless of whether First Nations have opted to exercise their right of self government with respect to child and family services consistent with the *Act*.

THE DEVELOPMENT OF CHILD WELFARE LEGISLATION AND POLICY IN CANADA

28. With respect to the entirety of the Claim, the Plaintiffs do not distinguish between the roles of Canada and Manitoba in their description of the administration of child welfare for First Nations children. Each province and territory is responsible for, and has its own legislation that governs, the delivery of child and family services to those requiring them within that province or territory. Canada was not, and is not, in control of the delivery of child welfare programs for children residing on or

off-reserve. In this matter, Manitoba is responsible for the provision of child welfare services to all children within the province of Manitoba, including First Nations children, whether on or off reserve.

29. In Manitoba, Canada does not provide any direct funding for the provision of off-reserve child welfare services. Canada's role in the provision of off-reserve child welfare services is limited to general funding to assist Manitoba in delivering social programs, including child welfare:

a. commencing in 1966, pursuant to Part I of the Canada Assistance Plan, Canada began cost sharing by paying 50% of funding to provinces and territories for eligible social programs. These eligible social programs included child welfare services;

b. commencing in 1977 the Established Programs Financing was introduced and replaced cost-sharing programs for health and post-secondary education; and,

c. commencing in 1995 the Canada Assistance Plan and the Established Programs Financing were combined into a block transfer arrangement called the Canada Health and Social Transfer, which was split into the Canada Health Transfer and the Canada Social Transfer in 2004. The allocation of these funds between programs is entirely in the discretion of Manitoba. Canada does not have knowledge of the nature of Manitoba's contribution, or of the methods used by Manitoba to determine how the funding received through the transfer payments is allocated.

30. In 1989 the Department of Indian Affairs and Northern Development (DIAND) developed its program to provide funding for welfare costs for First Nations people on reserve, and in 1991 introduced the FNCFS program.

31. Under this program, provincially delegated FNCFS agencies and/or First Nations communities operate and manage child and family services on reserve and in the Yukon. Provinces and territories mandate and regulate FNCFS agencies according to provincial or territorial legislation and standards. Canada provides funding to FNCFS agencies or to First Nations in certain circumstances, which are established, managed, and controlled by First Nations and delegated by provincial authorities to provide prevention and protection services. These delegated agencies provide child welfare services in accordance with the legislation and standards of the province or territory of residence. Canada also provides funding to the provinces or First Nations for on-reserve prevention and protection services where FNCFS agencies do not exist.

32. Canada provides 3 streams of funding on reserve and in the Yukon in relation to child and family services:

    a. Operations: core and operational funding for protection services (such as salaries and overhead);

    b. Prevention: resources for enhanced prevention services; and

c. Maintenance: direct costs of placing First Nations children into temporary or permanent care out of the parental home (such as foster care rates and group home rates).

33. In Manitoba, Canada funds provincially delegated First Nation child and family services agencies to support the delivery of on-reserve services through a cost-sharing arrangement whereby Manitoba funds 60% for the core operating costs and Canada funds the remaining 40%.

THE CHRT DECISIONS, JORDAN'S PRINCIPLE, AND THE MOUSHOOM SETTLEMENT AGREEMENT

A. *The CHRT Decisions and Jordan's Principle*

34. With respect to paragraphs 135 - 138 of the Claim, Canada acknowledges the complaint brought by the Assembly of First Nations and First Nations Child and Family Caring Society of Canada to the Canadian Human Rights Tribunal (CHRT). This Claim should be understood in relation to a complex series of CHRT decisions on child welfare programs on reserve, and access to government services by First Nations children.

35. In *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2016 CHRT 2 (CHRT Merit Decision), the CHRT made the following findings with respect to the funding and administration of the FNCFS Programs and Jordan's Principle:

a. that the FNCFS Program and the Directive 20-1 funding formula (the

"Directive") apply only to First Nations people living on-reserve and in the Yukon, and apply only to First Nations people as a result of their race/ethnic origin;

b. the Directive resulted in an inadequate funding of the operation costs and prevention costs of FNCFS Programs;

c. that the Directive and the Enhanced Prevention Funding Approach (EPFA) perpetuated incentives to remove children from their on-reserve communities;

d. that the failure to coordinate the FNCFS Program and other related government departments, programs, and services for First Nations on-reserve resulted in service gaps, delays and denials for First Nations children and their families; and

e. the narrow definition and implementation of Jordan's Principle resulted in service gaps, delays, and denials for First Nations children.

36. In *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 14 (CHRT Content Decision)[3] the CHRT made the following findings about the content of Jordan's Principle:

a. Jordan's Principle is a child-first principle that applies equally to all First Nations children in Canada, whether resident on or off reserve. It is not

[3] As amended by 217 CHRT 35 at para 135.

limited to First Nations children with disabilities, or those with discrete short-term issues creating critical needs for health and social supports or affecting their activities of daily living.

b. It addresses the needs of First Nations children by ensuring there are no gaps in government services to them. It can address, for example, but is not limited to, gaps in such services as mental health, special education, dental, physical therapy, speech therapy, medical equipment and physiotherapy.

c. When a government service, including a service assessment, is available to all other children, the government department of first contact will pay for the service to a First Nations child, without engaging in administrative case conferencing, policy review, service navigation or any other similar administrative procedure before the recommended service is approved and funding is provided. Canada may only engage in clinical case conferencing with professionals with relevant competence and training before the recommended service is approved and funding is provided to the extent that such consultations are reasonably necessary to determine the requestor's clinical needs. Where professionals with relevant competence and training are already involved in a First Nations child's case, Canada will consult those professionals and will only involve other professionals to the extent that those professionals already involved cannot provide the necessary clinical information. Canada may also consult with the family, First Nation community or service providers to fund services within the timeframes specified in paragraphs 135(2)(A)(ii) and 135(2)(A)(ii.1) where the service

is available, and will make every reasonable effort to ensure funding is provided as close to those timeframes where the service is not available. After the recommended service is approved and funding is provided, the government department of first contact can seek reimbursement from another department/government.

d. When a government service, including a service assessment, is not necessarily available to all other children or is beyond the normative standard of care, the government department of first contact will still evaluate the individual needs of the child to determine if the requested service should be provided to ensure substantive equality in the provision of services to the child, to ensure culturally appropriate services to the child and/or to safeguard the best interests of the child. Where such services are to be provided, the government department of first contact will pay for the provision of the services to the First Nations child, without engaging in administrative case conferencing, policy review, service navigation or any other similar administrative procedure before the recommended service is approved and funding is provided. Clinical case conferencing may be undertaken only for the purpose described in paragraph 135(1)(B)(iii). Canada may also consult with the family, First Nation community or service providers to fund services within the timeframes specified in paragraphs 135(2)(A)(ii) and 135(2)(A)(ii.1) where the service is available, and will make every reasonable effort to ensure funding is provided as close to those timeframes where the service is not available. After the recommended

service is provided, the government department of first contact can seek reimbursement from another department/government.

e. While Jordan's Principle can apply to jurisdictional disputes between governments (i.e., between federal, provincial, or territorial governments) and to jurisdictional disputes between departments within the same government, a dispute amongst government departments or between governments is not a necessary requirement for the application of Jordan's Principle.

f. Canada shall not use or distribute a definition of Jordan's Principle that in any way restricts or narrows the principles enunciated in order 1(b).

37. *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39 (CHRT Compensation Decision), ordered compensation for those individuals it found Canada had discriminated against or was discriminating against, based on the findings in the CHRT Merit Decision.

38. *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 20, and *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 36 (collectively, the CHRT Eligibility Decisions and together with CHRT Merit Decision, CHRT Content Decision and CHRT Compensation Decision, the CHRT Decisions) clarified the individuals the

CHRT said were eligible for consideration under Jordan's Principle:

a. a child who is registered or eligible to be registered under the *Indian Act*, as amended from time to time;

b. a child who has one parent/guardian who is registered or eligible to be registered under the *Indian Act*;

c. a child who is recognized by their Nation for the purposes of Jordan's Principle; or

d. a child who is ordinarily resident on reserve.

B. *The Moushoom Settlement Agreement*

39. Three certified class actions related directly to the decisions described above were brought against Canada (*Xavier Moushoom et al. v. the Attorney General of Canada*, Federal Court File Number T-402-19; *Assembly of First Nations et al. v. His Majesty the King*, Federal Court File Number T-141-20; and *Assembly of First Nations et al. v. Attorney General of Canada*, Federal Court File Number T-1120-21 (collectively, the "Moushoom Class Actions"). The Moushoom Class Actions were related directly to the decisions described above and sought compensation for First Nations individuals on the basis that Canada:

a. knowingly underfunded child and family services on reserve and in the Yukon;

b. failed to comply with Jordan's Principle; and

c. failed to provide First Nations children with essential services available to non-First Nation children, or which would have been required to ensure substantive equality under the *Canadian Charter of Rights and Freedoms (Charter)*.

40. The Moushoom Class Actions asserted discrimination, negligence, and breach of fiduciary duty, and included certified classes dating back to 1991. On April 19, 2023, the parties concluded a final settlement agreement with respect to the Moushoom Class Actions. In July 2023, the CHRT issued a decision which indicated that this proposed settlement satisfied the orders in the CHRT's Compensation Decision and related decisions. On November 3, 2023, the Federal Court of Canada approved the proposed settlement agreement, back dating the approval to October 24, 2023.[4]

41. This agreement includes a total of $23.34 billion to compensate First Nations children and families who were harmed by underfunding of the FNCFS program and those impacted by the federal government's previous narrow definition of Jordan's Principle.

42. On January 4, 2022, following the CHRT Decisions and prior to the settlement of the Moushoom Class Actions, the Government of Canada announced that an Agreement-in-Principle had been reached on long-term reform of the FNCFS Program and a renewed approach to Jordan's Principle. A future final settlement agreement will ensure that the discrimination found by the CHRT never repeats

[4] https://www.canlii.org/en/ca/fct/doc/2023/2023fc1466/2023fc1466.html?resultIndex=2

itself. The Agreement-in-Principle dedicates approximately $20 billion and includes:

a. funding that is focused on culturally appropriate prevention activities and based on substantive equality and the best interests and needs of First Nations children, youth, young adults, and families;

b. use of evidence-informed well-being indicators for First Nations children, youth, families and First Nations to inform best practices and improve federal child and family services policies, procedures, agreements, and legislation over time;

c. child and family services funding to support young First Nations adults aging out of the child welfare system and formerly in care up to their 26th birthday or the age for post-majority services specified in the applicable provincial or Yukon legislation (whichever age is greater);

d. funding to expand First Nations Representative Services to all provinces and in the Yukon; and

e. new funding for housing on reserves in relation to the needs of First Nations children.

43. Funding for child and family services will be furnished to First Nations and to First Nations child and family service providers to deliver a range of services to children and families in their communities.

44. The parties continue to negotiate a final settlement agreement on long-term reform based on the Agreement-in-Principle.

45. The Plaintiffs and the proposed class in this proceeding are First Nations that are made up of individual members who have been compensated by the settlement agreement in the Moushoom Class Actions as set out above.

EVIDENCE

46. Canada acknowledges that there have been a number of independent and parliamentary reports, agreements, and memoranda of understanding (MOUs) relating to First Nations child welfare. However, these reports, agreements, and MOUs are evidence. As such, Canada denies paragraphs 43, 47, 48, 50, 69-79, 83 – 85, 108, 109, 115, 119, and 121 because these paragraphs constitute the pleading of evidence.

ARGUMENT

47. Paragraphs 1 – 5, 9 (introductory paragraph), 10 – 18, 22, 31 – 33, 57 – 66, 83, 102 – 105, 107, 110 – 113, 124 – 130, 132 – 135, and 139 – 151 of the Claim constitute argument and statements of legal conclusion and thus contain no discernible facts to admit or deny. To the extent that any of these paragraphs contain facts, Canada denies these facts.

48. With respect to paragraphs 9, 10, 15, 16, 18, 107, 110, 112, 113, 124 – 127, 135, 138, and 141 – 156 of the Claim, these paragraphs constitute legal arguments and therefore have been addressed in paragraphs 49 - 87 of this statement of defence.

NO LIABILITY ON THE PART OF CANADA

A. Canada's Constitutional Obligations and the Honour of the Crown

49. In response to paragraphs 1(c), 10, 107, 110, 124, 135, and 152 of the Claim, Canada denies that it breached the honour of the Crown, or any duties arising from the honour of the Crown or failed to comply with any legal or constitutional obligations, as stated in the Claim.

50. Canada recognizes that the honour of the Crown guides all its interactions with First Nations people. The honour of the Crown is not a stand-alone cause of action. Rather, it speaks to how obligations that engage it must be fulfilled. What specifically constitutes honourable conduct will vary with the circumstances of each case. In the circumstances of this case, the honour of the Crown, while guiding the federal Crown in its conduct with First Nations collectives, does not give rise to any specific duties.

51. Moreover, the Plaintiffs do not provide sufficient particulars with respect to the asserted breaches of legal and constitutional duties to ground this claim as against the federal Crown.

52. Canada denies the existence of any statutory duties owed to the Plaintiffs or members of the class in the circumstances described in the Claim. Canada did not exercise jurisdiction over the child welfare and social services at issue in the province of Manitoba, nor could it exercise any control over the decisions and actions of the provincial government. To the extent that the Plaintiffs may assert that any general funding agreements between the province and Canada resulted in

such control or liability, Canada denies that there is any basis for this in fact or law in the circumstances of this case.

53. With respect to paragraph 8 of the Claim, while Canada admits Parliament's legislative jurisdiction over "Indians and Lands reserved for Indians" under section 91(24) of the *Constitution Act, 1867*, this jurisdiction does not create a positive duty to legislate or to provide programming. To the extent the Plaintiffs base their claim on discretionary statutory authority, rather than specific duties, no legal liability can arise from the exercise or non-exercise of such authority in the circumstances of this case. Canada was not required to exercise jurisdiction and did not do so.

B. No breach of fiduciary duty

54. Canada agrees that the relationship between Canada and the First Nations people of Canada can be fiduciary in nature. However, not every aspect of the relationship gives rise to a fiduciary duty. In response to paragraphs 1(b), 1(j), 10, 107, 110, 112, and 124 of the Claim, Canada states that Crown fiduciary duties to First Nation peoples can arise in two circumstances:

a. the honour of the Crown gives rise to a *sui generis* fiduciary duty where the Crown assumes a sufficient amount of discretionary control over a specific or cognizable 'Aboriginal' interest in such a way that invokes responsibility "in the nature of a private law duty"; or

b. an *ad hoc* fiduciary duty arises where there is an undertaking by the alleged fiduciary to act in the best interests of alleged beneficiaries; a defined class of beneficiaries vulnerable to the fiduciary's control; and a legal or

substantial practical interest of the beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

55. The Plaintiffs have not pled the essential elements to establish either an *ad hoc* or *sui generis* fiduciary obligation. Further, Canada does not owe any fiduciary duties to the proposed class members, including in relation to the funding or the provision of child and family services, in the specific circumstances asserted in the Claim.

56. At all material times Canada did not have a role in Manitoba's direction, supervision, administration, coordination, or other responsibilities relating to the provision of child and family services for children living on and off reserve in Manitoba. As a consequence, Canada did not undertake to act in the best interests of the proposed class members in this context.

57. Accordingly, Canada denies that any legal rule, any legislative authority, the Honour of the Crown or any provision of the *Constitution Act, 1982* gave rise to a fiduciary duty in the circumstances outlined in the Claim.

58. The Claim does not identify the source of any asserted discretion allowing Canada to interfere with the manner in which Manitoba provided child and family services in the province. Canada has no duty to legislate or to provide programming. Further, there is no indication of an undertaking by Canada to exercise discretionary control over child and family services provided by Manitoba.

59. Alternatively, if a fiduciary duty was owed by Canada, Canada met this obligation.

C. No Negligence

60. Canada pleads and relies on section 3(b)(i) of the *Crown Liability and Proceedings Act*, RSC 1985 c C-50, as amended. Under this provision, the Crown in right of Canada is only vicariously liable in negligence. In other words, the Crown will only be liable in negligence where a federal Crown servant was negligent.

61. To the extent that harm is asserted to have arisen from the formulation and implementation of policy, these are core policy decisions for which Canada is immune from tort liability. As the claim against Canada is predicated directly on policy decisions with respect to funding on reserve, and policy decisions to not directly fund or direct the provision of services for the proposed class, a claim in negligence is not available to the Plaintiffs.

62. In any event, Canada denies that it owed a duty of care in the specific circumstances of this case with respect to the Plaintiffs and the proposed classes. In response to paragraphs 8 and 9 of the Claim, while Canada acknowledges the legislative jurisdiction grounded in section 91(24) of the *Constitution Act, 1867*, and the specific duties established in the *Indian Act* with respect to First Nations peoples, this does not in itself create a duty of care. The Plaintiffs have not provided facts or particulars which would support such a duty.

63. Further, considering Manitoba's exercise of jurisdiction and control relating to the provision of child and family services for children living on and off reserve in Manitoba, Canada denies sufficient proximity with the class to create a duty of care in negligence.

64. In the alternative, if Canada did owe the Plaintiffs and proposed class members any duty of care, which is denied, Canada did not breach any such duty, nor did Canada's actions cause any of the damage asserted.

D. No Liability Under the *Charter*

65. Canada agrees that section 2(a) of the *Charter* guarantees freedom of conscience and religion and that section 15(1) guarantees equality before and under the law and equal protection and benefit of the law. Canada denies, however, that it breached the Plaintiffs' or any proposed class members' *Charter* rights as asserted, or at all.

66. In response to paragraphs 1(e), 1(h), 1(i), 15, 17, and 126 - 141 of the Claim, Canada does not admit that the Plaintiffs have established Canada's conduct and actions violate section 2(a) or section 15(1) of the *Charter*. At all material times, Manitoba, and not Canada, exercised jurisdiction through entities acting under its child and family services legislation. Manitoba has legislative jurisdiction under section 92 of the *Constitution Act, 1867* with respect to the welfare, protection, and care of all children in the province, including First Nations children, both on and off reserve. Provincial child and family services statutes are laws of general application.

67. In response to paragraphs 139 - 141, Canada denies that it infringed the freedom of religion or conscience of the Plaintiffs or any member of the proposed class, as guaranteed by section 2(a) of the *Charter*.

68. In response to paragraphs 127 - 138, Canada denies that any of its conduct or policies drew distinctions or produced a discriminatory effect, infringing in any way on the Plaintiffs or proposed class members' section 15(1) *Charter* rights.

69. Furthermore, section 15(1) of the *Charter* applies only to individuals. As such, the Plaintiffs are precluded from bringing a claim for any asserted violation of their section 15 rights as First Nations collectives.

70. In the alternative, if Canada has infringed any of the *Charter* rights of the Plaintiffs or of any other member of the proposed class, which Canada does not admit, any infringement was justifiable under section 1 of the *Charter* as reasonably proportionate in a free and democratic society.

E. United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) and other international instruments.

71. In response to paragraphs 108 - 110 of the Claim, Canada supports the UN Declaration and has committed to its implementation in Canada as part of its goal of achieving reconciliation with Indigenous Peoples. Canada is committed to the renewal of nation-to-nation, government-to-government and Indigenous-Crown relationships.

72. Canada recognizes that while the UN Declaration is nonbinding international law, it confirms international standards, rights, and principles, and may be used as a contextual aid to interpret domestic law. However, the UN Declaration does not create a stand-alone cause of action in Canadian law.

73. On June 21, 2021, Parliament adopted the *United Nations Declaration on the Rights of Indigenous Peoples Act* (*UN Declaration Act*). That Act provides a framework for implementation of the UN Declaration at the federal level by requiring Canada to take all measures necessary to ensure that its laws are consistent with the UN Declaration. It also ensures that an Action Plan be prepared and implemented to achieve the objectives of the UN Declaration.

74. Canada's obligations must be carried out in consultation and cooperation with Indigenous peoples in Canada. In essence, the Action Plan provides a framework for furthering the implementation of the UN Declaration in Canada and a process for discussions between the Crown and Indigenous peoples on measures to contribute to the implementation of the Declaration over time. As part of implementation of the *UN Declaration Act*, Canada has committed through its Action Plan,[5] released in June 2023, to continuing the implementation of the *Act respecting First Nations, Inuit and Métis children, youth and families* with the aim of reducing the number of First Nations children in care and ensuring that any in care remain connected to their families, communities and culture.

75. Canada acknowledges that it has ratified the other international instruments referred to in paragraph 108 of the Claim. As with the UN Declaration, none of these instruments creates a stand-alone cause of action in Canadian law.

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[5] https://www.justice.gc.ca/eng/declaration/ap-pa/ah/p2.html

F. Royal Commission on Aboriginal Peoples and the Truth and Reconciliation Commission

76. With respect to paragraphs 79, 85, and 115(d) of the Claim, Canada acknowledges that the Royal Commission on Aboriginal Peoples (1996) and the Truth and Reconciliation Commission Final Report called on the Defendants to adequately fund child and family services and fully implement certain principles and equality protections. However, these reports do not establish any cause of action against Canada.

G. No vicarious Liability

77. In response to paragraphs 148 - 151 of the Claim, Canada denies that any of its servants or agents breached their duties as asserted or at all. Canada further denies that any of its employees, servants, officers, or agents committed any wrongs in the course of their employment or at all.

78. In the alternative, should any wrongs have been committed by any of Canada's employees, servants, officers, or agents in the course of their employment, which is not admitted but expressly denied, such wrongs were not related to their employment duties, and therefore, there can be no finding of vicarious liability against Canada.

H. No breach of Aboriginal rights

79. In response to paragraphs 1(f) and 196(a)[6] of the Claim, Canada recognizes that the

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[6] This paragraph number appears to be a typographical error.

existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are recognized and affirmed by section 35 of the *Constitution Act, 1982*. However, Canada denies that it has breached the Plaintiffs' or proposed class members' rights under section 35 of this Claim as asserted by the Plaintiffs, or at all.

I. No breach of the right to equal opportunities

80. In response to paragraphs 1(g) and 143 of the Claim, Canada acknowledges its commitment to promote equal opportunities to all Canadians pursuant to section 36 of the *Constitution Act, 1982.* However, Canada denies that it has breached the Plaintiffs' or proposed class members' rights under section 36 of this Claim as asserted by the Plaintiffs, or at all. Section 36 of the C*onstitution Act, 1982* does not give rise to enforceable legal obligations, and as such, having regard to the separation of executive, legislative, and judicial powers, is not a justiciable provision of the C*onstitution Act, 1982.*

J. No unjust enrichment

81. In response to paragraphs 145 - 147, Canada denies that it has been unjustly enriched as asserted in the Claim or at all, and states that the Plaintiffs or proposed class members have not suffered a deprivation. Canada denies that there is a basis for disgorgement or any equitable relief in this regard.

K. No damages

82. With respect to paragraphs 152 - 156 of the Claim, Canada acknowledges that the over representation of First Nations children in care is a national tragedy. However,

to the extent the Plaintiffs or proposed class suffered any damage, losses or injuries as set out in the Claim, these were not caused by any acts or omissions of Canada, and Canada is not liable for the damage, losses, or injuries.

83. In the alternative, to the extent Canada is liable for any portion of the Plaintiffs' or proposed class's damage, losses or injuries, Manitoba is also liable, and damages should be apportioned accordingly.

84. In the further alternative, to the extent that Canada is liable for any portion of the Plaintiffs' or proposed class's damages, losses, or injuries, Canada has already compensated the Plaintiffs and the proposed class by way of the Moushoom Settlement Agreement, as set out in paragraphs 5 and 38 - 40 above.

85. Canada does not admit there is a reasonable claim for section 24(1) *Charter* damages, and states that the circumstances, if proven, would not give rise to liability for special, punitive, or exemplary damages.

L. Limitations and Laches

86. The Plaintiffs' claims are out of time and statute-barred pursuant to *The Limitation Act*, CCSM c L150, as amended. Canada also relies upon the equitable doctrines of laches and acquiescence, the *Crown Liability and Proceedings Act*, R.S.C. 1985, Ch. C-50 and the *Crown Liability Act*, S.C. 1952-53, c.30.

M. Inappropriate Class Proceeding

87. The issues set out in the Claim are not appropriately determined in common.

STATUTES AND REGULATIONS RELIED UPON

88. Canada pleads and relies upon:

a. *An Act Respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24;

b. *Class Proceedings Act*, C.C.S.M. c. C130;

c. *Court of King's Bench Act*, C.C.S.M. c. C280;

d. Court of King's Bench Rules, Regulation 553/88;

e. *The Proceedings Against the Crown Act*, C.C.S.M. c. P140;

f. *Crown Liability Act*, S.C. 1952-53, c.30;

g. *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50;

h. *Constitution Act*, 1867, 30 & 31 Victoria, c. 3 (U.K);

i. *Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.)*, 1982, c. 11;

j. *Canadian Charter of Rights and Freedoms*;

k. *Trustee Act*, C.C.S.M. c. T160;

l. *Indian Act*, R.S.C. 1985, c, I-5;

m. *The Child and Family Services Act*, C.C.S.M., c. C80;

n. *The Child and Family Services Authorities Act*, C.C.S.M., c. C90;

o. *The Limitation Act*, C.C.S.M. c. L150;

p. *The Path to Reconciliation Act*, C.C.S.M. c. R30.5;

q. *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14; and

r. such other legislation or regulations as may apply.

RELIEF SOUGHT

89. For these reasons, Canada seeks that this Claim be dismissed.

Date: December 28, 2023

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