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 THE ATTORNEY GENERAL OF CANADA

Defendants

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

FILED
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REPLY

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REPLY

1. The Plaintiffs repeat and rely upon all the allegations contained in the Fresh as Amended Statement of Claim. Defined and capitalized terms in the Fresh as Amended Statement of Claim are replicated here.

2. The Plaintiffs deny each and every new assertion and allegation contained in the Attorney General of Canada's Statement of Defence filed on December 29, 2023 ("**Canada's Defence**"), except those admissions and concessions made in paragraphs 1, 7, and 12-23 of Canada's Defence, or as otherwise expressly stated herein.

3. The Plaintiffs deny each and every new assertion and allegation contained in the Government of Manitoba's Statement of Defence filed on December 28, 2023

("**Manitoba's Defence**"), except those admissions and concessions made in paragraph 1 of Manitoba's Defence, or as otherwise expressly stated herein.

ROLE OF CFS AUTHORITIES AND AGENCIES

4. Throughout Manitoba's Defence, it attempts to blame the CFS Authorities and Agencies for its own failures and those of Canada. The Plaintiffs deny that the CFS Authorities or Agencies are responsible in law for the damages set out in the Fresh as Amended Statement of Claim.

5. In the alternative, to the extent that Manitoba or Canada lawfully delegated duties or obligations to the CFS Authorities and Agencies, Manitoba and Canada remained responsible to the Plaintiffs for any breach by the CFS Authorities or Agencies. At all material times, Manitoba and Canada were aware of the harms to the Plaintiffs and they cannot escape liability by relying on the instrumentality of the CFS Authorities and Agencies.

6. In specific reply to paragraphs 8(g), 14, 19, and 51 of Manitoba's Defence, the Plaintiffs state that throughout the Class Period:

(a) The *CFS Act* provided that Manitoba was responsible for, among other things: developing standards of services, practices, and procedures; ensuring agencies provide the standard of services and follow the procedures and practices established; setting the rates payable for child welfare services; and licensing and supervising foster homes, group homes, treatment centres, and other child care facilities; and

(b) The Defendants' ill-conceived operational policies and procedures and inadequate funding severely limited the ability of CFS Authorities and Agencies to help First Nations families and children. The Defendants

were aware of these limitations at all material times. The Defendants are ultimately responsible for any harm that the CFS Authorities and Agencies caused to the Plaintiffs.

7. The Defendants have not cross-claimed against one another or commenced any Third Party Claim against any person. The Defendants remain jointly and severally liable for the Plaintiffs' damages.

THE PLAINTIFFS' CLAIMS ARE NOT STATUTE-BARRED

8. The Defendants' rely on the *Limitation Act,* C.C.S.M. c. L150, and the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. 50 (together, the "**Limitations Acts**"). In reply to paragraph 86 of Canada's Defence and paragraph 27 of Manitoba's Defence, the Plaintiffs expressly deny that claims for any of the relief sought in the Fresh as Amended Statement of Claim are time-barred.

9. The Defendants' duties and obligations to the Plaintiffs arise from a nation-to-nation relationship. It would be unconscionable and wholly inequitable for the Defendants to legislate to curtail their own fiduciary obligations to the Plaintiffs or to curtail the duties and obligations arising from the honour of the Crown. No such legislation, whether the Limitations Acts or otherwise, may validly limit the scope of the Plaintiffs' right to seek redress.

10. Additionally, to the extent that the Defendants rely on legislation that purports to derogate from the Plaintiffs' rights as First Nations, that legislation is inapplicable or ineffective because it is contrary to section 35(1) of the *Constitution Act, 1982,*

which expressly preserves "[t]he existing aboriginal … rights of the aboriginal peoples of Canada".

11. The Defendants' reliance on legislated limitation periods is expressly contrary to the Truth and Reconciliation Commission of Canada's Call to Action #26, which provides:

> We call upon the federal, provincial, and territorial governments to review and amend their respective statutes of limitations to ensure that they conform to the principle that governments and other entities cannot rely on limitation defences to defend legal actions of historical abuse brought by Aboriginal people.

12. Additionally, the Defendants' reliance on the Limitations Acts is contrary to the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 (the "**UNDRIP Act**"). In the case of Canada, this reliance is contrary to the Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples (the "**Litigation Directive**"), including Litigation Guideline #14 thereunder. In the case of Manitoba, this reliance is contrary to s. 2 of *The Path to Reconciliation Act*, C.C.S.M. c. R30.5.

13. Further and in the alternative, the Plaintiffs have suffered the damages described in the Fresh as Amended Statement of Claim, which severely traumatized them and their citizens, such that they lacked capacity to commence an action prior to commencing the within action.

14. Further and in the alternative, the Limitations Acts do not apply to the claims in respect of the Defendants' fiduciary obligations and duties consistent with the honour of the Crown. In the case of Canada, the Department of Justice's Principles Respecting the Government of Canada's Relationship With Indigenous Peoples #3

confirms that the honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples.

15. Further and in the alternative, the constitutional imperative of reconciliation is paramount and bars the application of any limitation period in the within action.

16. Further and in the alternative, if the Limitations Acts apply to constrain the within action, which is expressly denied, the applicable limitation period is the 30-year ultimate limitation period for Indigenous claims against the Crown, as set out in section 10(2)(b) of the *Limitation Act*. In turn, section 32 of the *Crown Liability and Proceedings Act* incorporates this 30-year ultimate limitation period.

17. Further and in any event, the *Limitations Acts* provide that limitation periods do not apply to proceedings for declaratory relief.

THE PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE DOCTRINE OF LACHES

18. In reply to paragraph 86 of Canada's Defence, the Plaintiffs deny that any of their claims are barred by the equitable doctrines of laches and acquiescence. The Plaintiffs deny that the doctrine of laches applies to claims arising under a nation-to-nation relationship between the Plaintiffs and the Crown, or to First Nations protected by section 35(1) of the *Constitution Act, 1982*. Nor can the doctrine of laches apply to excuse a breach of the honour of the Crown or a breach of the Defendants' fiduciary and constitutional obligations to the Plaintiffs.

19. Further, the Plaintiffs state that Canada's reliance on the doctrine of laches is contrary to the *UNDRIP Act* and the Litigation Directive, including Litigation Guideline #14.

20. In any event, the Plaintiffs took all reasonable steps to commence the within action at the earliest opportunity that their capacity allowed, and despite the severe intergenerational trauma caused by the Defendants' disastrous mismanagement of First Nations CFS.

21. Further and in the alternative, the Plaintiffs deny that Canada is entitled to rely on the doctrine of laches because the Defendants worked to systematically undermine the capacity of the Plaintiffs and other First Nations in Manitoba to assert their rights. The Defendants are responsible for any delay in commencing the within action and their unclean hands bar reliance on an equitable defence.

MISCELLANEOUS

22. In reply to paragraphs 26, 35(a), and 50 of Manitoba's Defence, the Plaintiffs deny that they lack standing, either individually or as a proposed class, to challenge or take issue with the design and funding of the child welfare system in Manitoba. The Plaintiffs are First Nations in Manitoba, represented by their elected Chiefs, all of which have been directly affected by Manitoba and Canada's disastrous management of CFS in Manitoba.

23. In reply to paragraphs 5 and 45 of Canada's Defence, the Plaintiffs deny that any class action or Canadian Human Rights Tribunal Settlement had the effect of releasing the claims asserted in the within action; rectifying the Defendants' breaches of their duties or obligations; or mitigating the Plaintiffs' damages. No such settlement released any claims by or on behalf of any First Nation or in respect of any collective damages or harm suffered by any First Nation. Nor did any such settlement affect any claims in respect of First Nations children apprehended off reserve.

24. In reply to paragraphs 38, 43, and 52 of Manitoba's Defence and paragraph 60 of Canada's Defence, the Plaintiffs deny that the within action challenges any core policy decision that is immune from suit. The actions and omissions at issue in the within action are either operational in nature or they are non-core policymakers. In any event, the Defendants' actions and omissions were irrational, such that they do not benefit from immunity.

RELIEF SOUGHT

25. The Plaintiffs respectfully request the relief set out in paragraph 1 of the Fresh as Amended Statement of Claim.

January 12, 2024

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