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COURT OF KING'S BENCH OF MANITOBA

Proceeding under ***The Class Proceedings Act***, C.C.S.M. c. C130

B E T W E E N:

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; and ASSEMBLY OF MANITOBA CHIEFS,	)	H. Michael Rosenberg Valérie Lord Stephanie Willsey Alana Robert J. Byron Williams Joëlle M. Pastora Sala Keelin Griffin Desiree B. Dorion for the plaintiffs
plaintiffs,	)	
- and -	)	
THE GOVERNMENT OF MANITOBA and THE ATTORNEY GENERAL OF CANADA,	)	Bernice R. Bowley Dean G. Giles Ari M. Hanson Meghan F. Payment Jim R. Koch for the defendant the Government of Manitoba
defendants.	)	
	)	Deborah Babiuk-Gibson Cynthia K. Lau Josh A. Seib Samantha C. Gergely Katherine Creelman Christine D. Williams for the defendant the Attorney General of Canada
	)	
	)	Judgment Delivered: May 11, 2026

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JOYAL C. J.

I. INTRODUCTION

[1] This proposed Class proceeding, which relates to the child welfare system in Manitoba, is undeniably unique and complex. It highlights, yet again, the tragic history and the sad reality of too many Indigenous Manitoba children in care. It also sheds light on what have been earnest but frequently inadequate efforts by government to address this tragedy.

[2] The proposed representative plaintiffs (the "plaintiffs") are First Nations who impugn the legislated structure, government funding and the implementation and delivery of child welfare services to First Nations children and families. They seek monetary, declaratory and injunctive relief for collective harms suffered by the First Nations Class members, including loss of language, culture, spirituality, and identity. Those harms are alleged to have been caused by the separation of First Nations children (under the age of 18) from their lands and communities (on and off reserve) through the child welfare system in Manitoba. The Class period spans the years between 1992 and the present.

[3] The plaintiffs come before this Court on two motions: first, they seek certification on an array of issues under ***The Class Proceedings Act***, C.C.S.M. c. C130 (the "***CPA***"), and second, they ask for summary judgment under Rule 20 of the Court of King's Bench Rules, M.R. 553/88 ("the Rules"). This Rule provides a robust forum for summary judgment. The plaintiffs seek judgment on Stage 1 common issues on the basis that such do not require a trial because the rich and voluminous evidentiary record means they are suitable for summary disposition.

[4] This judgment of the Court will address both the plaintiffs' motion for certification and the motion for summary judgment.

[5] The plaintiffs say they bring their proposed Class proceeding on their own behalf and on behalf of all other members of the Class regarding claims within the Class period. The plaintiffs are Chief Heidi Cook, who sues on behalf of Misipawistik Cree Nation, Chief Sheldon Kent, who sues on behalf of Black River First Nation, and Chief David Monias, who sues on behalf of Pimicikamak Cree Nation. Also proposed as a party is the Assembly of Manitoba Chiefs (the "AMC") who the plaintiffs describe as the collective voice for First Nations in Manitoba, speaking on behalf of its 63 member First Nations.

[6] The defendants are the Governments of Canada ("Canada") and Manitoba ("Manitoba").

[7] The plaintiffs, on behalf of the proposed First Nations "opt-in" Class, allege that either Canada and Manitoba, or both, breached their fiduciary duties, duties of care and the honour of the Crown. The plaintiffs also allege that Canada and Manitoba violated the proposed Class members' rights to freedom of religion and equality under ss. 2(a) and 15 of the ***Canadian Charter of Rights and Freedoms*** (the "***Charter***"). It is alleged that the rights of the proposed Class members under ss. 35 and 36 of ***The Constitution Act, 1982***, Schedule B to the Canada Act 1982 (UK), 1982, c 11 (the "***Constitution Act***") were similarly violated. The plaintiffs contend these violations occurred because of various policies and funding decisions respecting the child welfare

system in Manitoba put into practice by the defendants, either jointly or individually, from January 1, 1992, to the present day (the "proposed Class period").

[8] It is alleged that during this proposed Class period, Manitoba and Canada received repeated advice and warnings, including from their own experts, that they were failing First Nations and their citizens. It is the submission of the plaintiffs that again and again, the defendants were told that the way they deployed their funding was creating perverse incentives to remove children unnecessarily from their families and sever their connection to their First Nation. Although the defendants were advised of the devastating consequences of these failures, the responses to this catastrophe have been and continue to be, at least according to the plaintiffs, a dangerous combination of "prejudice, inertia and ineptitude" which they say is at odds with their responsibilities to First Nations and the honour of the Crown.

II. ISSUES

[9] While other preliminary and important issues must be addressed, two principal issues require the Court's determination:

i) Based on the application of s. 4 of the ***CPA***, to what extent if at all, ought this Court to certify this action as a Class proceeding based on the currently formulated (or any reformulated) common issues?

ii) Ought the Court to grant summary judgment regarding the plaintiffs' currently formulated (or any reformulated) Stage 1 common issues?

[10] As I explain in the reasons that follow, given the problematic nature of the plaintiffs' formulated Stage 1 common issues, I have exercised the Court's discretion to

reformulate those Stage 1 common issues. Even with that reformulation, based on s. 4 of the ***CPA*** and the applicable low threshold, I have determined first, that only the plaintiffs' claim respecting the alleged breach of s. 35 of the ***Constitution Act*** will be certified.

[11] The rest of the plaintiffs' motion for certification respecting breaches of any other fiduciary duty, a common law duty of care, ss. 2(a) and 15 of the ***Charter***, and s. 36 of the ***Constitution Act***, is dismissed.

[12] Second, I have determined that summary judgment will be granted respecting the plaintiffs' claim alleging a breach of s. 35 of the ***Constitution Act***.

[13] The rest of the plaintiffs' motion for summary judgment respecting breaches of any other fiduciary duty, a common law duty of care, ss. 2(a) and 15 of the ***Charter***, and s. 36 of the ***Constitution Act***, is dismissed.

[14] Given the length of the reasons that follow, I have included at the end of this judgment (see paras. 816 to 844), a section entitled "Conclusion and Executive Summary of this Court's Determinations". That section synthesizes in a more concise but thorough way, the above determinations and any of the other determinations of note that I was required to make.

III. JUDICIAL HISTORY AND THE NATURE OF THE PROPOSED CLASS PROCEEDING

[15] The plaintiffs describe this proceeding as one which tries to compel an end to the harm that encompasses collective loss, intergenerational loss, losing connection with community, culture and language. Along with bringing an end to that harm, the plaintiffs also seek compensation they say will help First Nations heal.

[16] The plaintiffs argue that as with other Class proceedings which have addressed harms to children and families, as well as some of the collective harms done to earlier generations, this claim, seeks to address systemic wrongs. The plaintiffs suggest, however, that this is a simpler case than most because it is marshalled on behalf of First Nations, and it need not consider the circumstances of any particular child taken into care. Rather, it focusses on the fact that the defendants' dereliction of their duties regarding First Nations' child welfare, taken as a whole, caused harm to First Nations in Manitoba.

[17] In addition to a disposition that will end the identified harm and include the requested future compensation that will help First Nations heal (compensation that would follow what the plaintiffs hope will be the eventual determination of Stage 2 common issues), the plaintiffs also seek a declaration. In that connection, the plaintiffs express hope that such a declaration could - in a true spirit of reconciliation - set the foundation for intergovernmental negotiations respecting the design, delivery and funding of future child welfare systems established by the Indigenous communities to care for their children.

[18] The plaintiffs' motion for certification raises a single issue: should the action be certified as an opt-in Class proceeding for First Nations in Manitoba? In arguing this issue should be determined in the affirmative, the plaintiffs argue that they could have just as easily proceeded by way of a mass joinder action. Instead, they prefer to avail themselves of the protections of a Class proceeding. In that regard, as set out later when

I further explain their position, the plaintiffs assert that, the certification criteria have been satisfied and the parties should now turn to the merits of the plaintiffs' claims.

[19] Regarding the motion for summary judgment, this Court has heard a contested screening motion and determined that the plaintiffs' motion for summary judgment is appropriate to proceed. Given what I will explain are the defendants' persistent objections to the appropriateness of proceeding with the plaintiffs' summary judgment motion, I will be required when addressing certain other preliminary issues, to say more about those objections.

The Record

[20] I will note at this stage, that there was indeed a rich evidentiary record for these motions. That record encompasses what I will identify as admissible and voluminous fact, expert and documentary evidence about which cross-examination would have or could have taken place.

[21] While there was no *viva voce* testimony taken before the Court, the plaintiffs by way of affidavit evidence, proffered six fact witnesses and, with subsequent leave of the Court, an additional nine expert witnesses. Canada adduced four fact witnesses and no experts. Manitoba presented seven fact witnesses and no expert witnesses. I note as was underscored by the plaintiffs, that several of the defendants' key witnesses – including a former Deputy Minister of Family Services, a former Assistant Deputy Minister of Healthy Children, and the Comptroller of Manitoba – candidly acknowledge many of the defendants' failures as identified by the plaintiffs.

[22] The record before this Court is full and to the extent permitted and necessary, it provides the Court an ample factual foundation to fairly adjudicate what I will explain are some of the reformulated Stage 1 common issues that need be addressed. As it relates to that evidentiary record, there is no conflicting expert evidence because the defendants chose not to lead any experts, and there are no points of credibility to assess. When noting the fulsomeness and adequacy of the record (notwithstanding some of the defendants' preliminary objections which I address later in this judgment), and when I consider the consistent findings of what I have determined are the many admissible reports, studies, audits, and evaluations of the defendants' approach to First Nations child welfare throughout the Class period (as well as the defendants own admissions), the plaintiffs are not wrong when they say that the dispute between the parties does indeed largely turn on the legal significance of the facts rather than the facts themselves.

The Plaintiff's Invocation of and the Defendants' Expressed Commitment to Reconciliation

[23] Despite the plaintiffs' disappointment with what they submit is the defendants' disheartening lack of cooperation respecting the nature of the plaintiffs' claim, they (the plaintiffs) remain nonetheless hopeful that this process will provide meaningful access to justice and advance the vital project of reconciliation. The plaintiffs submit that they have seen one generation after another hobbled by a child welfare system that is stacked against First Nations and they cannot allow the future to resemble their recent past.

[24] Although the defendants oppose various or all parts of the plaintiffs' motions that are currently before the Court, both defendants underscore their commitment to reconciliation with First Nations people and they acknowledge that historical wrongs have

been committed against them in the provision and administration of Child and Family Services ("CFS"), some of which they say are subject to previous legal settlements.

[25] Canada makes its submissions on these motions while acknowledging that the overrepresentation of First Nations children in child welfare programs can be linked, in large part, to historic colonial policies and intergenerational trauma. Canada insists, however, that despite that history and its position on these motions, it remains committed to the recognition of its responsibilities to support CFS on First Nations reserves, now and in the future. Canada further recognizes that its commitments to First Nations children and families do not end at pure expressions of law, or the legal outcome of this proceeding.

[26] For its part, Manitoba readily acknowledges that past harms were perpetuated against First Nations people prior to the proposed Class proceeding in this action. Manitoba recognizes in its legal brief that colonialism, residential schools and other national policies caused and contributed to the poverty, lower education rates, poor employment outcomes and generally strained social conditions of First Nations people. Manitoba also acknowledges that that CFS system operated within the context of the related harms set out above, which they say, existed before the material time of this claim. Manitoba acknowledges that the CFS system has shortcomings and that it (Manitoba) continues to make efforts to address them.

The Need for a Judicious Consideration of the Defendants' Past Legislative Action and any Accompanying Policy Margin of Maneuver

[27] In connection to what the plaintiffs justifiably invoke as the critically important project of reconciliation, this Court must nonetheless remain mindful of its distinct and

juridical obligation. In that connection, with reference to the governing law and the applicable legal tests, the Court must make its determinations in the present case in a manner that properly and judiciously ensures that it takes into account the unique, complex and ever-evolving history of CFS in Manitoba.

[28] Given the expressed commitments to and the acknowledged need for reconciliation, all parties recognize that the issues raised in this proceeding are difficult and cannot be properly comprehended outside the broader context of the history of colonialism and the historical wrongs committed against First Nations people. In this regard, this Court must carefully and dispassionately examine the evidentiary record before it. In doing so, the Court must remain vigilant and rigorous in trying to understand and assess how Manitoba and Canada sought to be responsive to the needs of all children and families in Manitoba, including First Nations children and families, in respect of its primary legislative principle which was "the best interests of the child".

[29] With reference to the legal issues, the Court must conduct its assessment and make its requisite determinations mindful of the fact that throughout the proposed Class period, changes may indeed have been made to the child welfare system in a sincere attempt to improve outcomes, including for First Nations children and families. The determinations that this Court will make will have to consider that some of the changes made by the defendants may have resulted in improvement even if not all achieved the desired result or were equally successful.

[30] That history of child welfare and CFS in Manitoba, properly considered, includes what must be acknowledged as funding increases, changes to frontline service delivery,

system and policy changes, and review and implementation of recommendations made during the proposed Class period. In its consideration of the evolving history of CFS in Manitoba, this Court must remain appreciative of the reality that during the Class period and prior, the defendants' relationship with First Nations people and leadership, (and its understanding of Indigenous issues), has evolved and developed. In considering this history and the evolving relationship between the parties and the efforts the defendants say they made, I must and will give full consideration to the fundamental arguments raised by Manitoba that much of the plaintiffs' claim is based on the impugning of legislative action and other core policy decisions, which Manitoba says are immune from liability and are not justiciable.

IV. BACKGROUND AND CONTEXT

[31] The following background and context is drawn from this proceeding's rich evidentiary record. The record is made up of not only the factual and expert witnesses set out at paras. 318 to 392, but also, from the numerous documents or public reports whose sometimes differing focus nonetheless sheds a remarkably similar light on a long and often sad history and evolution of child welfare in Manitoba.

[32] Much of this background and context is uncontested. It represents either agreed facts or facts that can be assumed I have found after closer review and consideration. To the extent that anything that is included in this background and context is rooted in contested evidence, my determinations as to admissibility (respecting any of those contested evidentiary issues) can be found at paras. 99 to 192 of this judgment in the section entitled "Evidentiary Issues".

[33] The background and context to this proposed class proceeding is, in many respects, as old as Canada itself. It deals squarely with the federal and provincial governments' relationship with Indigenous peoples, specifically with matters respecting child and family welfare and the provision of what has come to be known as CFS.

[34] The Supreme Court of Canada recently provided a succinct summary of the history of that relationship in its ***Reference re An Act respecting First Nations, Inuit and Métis children, youth and families***, 2024 SCC 5 ("***C-92 Reference Decision #2***"). (For clarity, that decision has been shorthanded as "#2" because it followed the Quebec Court of Appeal's preceding decision in the matter, which is also discussed later in these reasons, ***Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis,*** 2022 QCCA 185 ("***C-92 Reference Decision #1***")). In ***C-92 Reference Decision #2***, The Supreme Court writes:

> [10] For most of Canada's history, lawmakers have wrongly employed a policy of assimilation aimed at "lifting [Indigenous peoples] out of [their] condition of tutelage and dependence, and . . . prepar[ing] [them] for a higher civilization" (*Annual Report of the Department of the Interior for the Year Ended 30th June, 1876*, reproduced in *Sessional Papers*, vol. X, No. 7, 4th Sess., 3rd Parl., 1877, No. 11, at p. xiv, quoted in *Report of the Royal Commission on Aboriginal Peoples*, vol. 1, *Looking Forward, Looking Back* (1996), at p. 277; see also *The Final Report of the Truth and Reconciliation Commission of Canada*, vol. 1, *Canada's Residential Schools: The History, Part 1 — Origins to 1939* (2015), at pp. 107-9). This history, which includes the residential schools policy, the "Sixties Scoop" and the harm and intergenerational trauma that resulted therefrom, is detailed in several reports published in recent decades (see, e.g., *The Final Report of the Truth and Reconciliation Commission of Canada*, vol. 1, *Canada's Residential Schools: The History, Part 1 — Origins to 1939* and *The History, Part 2 — 1939 to 2000* (2015); *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019), vol. 1a).
>
> [11] The effects of these government policies are still being felt today. "In tandem with the residential school system, the child welfare system . . . became a site of assimilation and colonization by forcibly removing children from their

> homes and placing them with non-Indigenous families" (*Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol. 1a, at p. 282). The statistics on the overrepresentation of Indigenous children in child welfare systems are quite simply staggering. According to 2016 census data, about 7.7 percent of children under the age of 15 in Canada are Indigenous, but they represent 52.2 percent of children in foster care in private homes (Indigenous Services Canada, *The Government of Canada announces the coming into force of an Act respecting First Nations, Inuit and Métis children, youth and families*, September 10, 2019 (online)).

[35] These facts, as the Supreme Court has articulated them, are not in dispute. It is this child welfare system and, specifically, the apprehension of Indigenous children on and off reserve within the Province of Manitoba, and their placement in out-of-home care, often off reserve, which is at the heart of this matter.

[36] Prior to 1951, Canada notionally exercised exclusive jurisdiction over First Nations peoples on reserve. In 1951, Canada amended the ***Indian Act***, S.C. 1951, c. 29, to declare that provincial laws of general application applied to Indians (see s. 87; now s. 88 of the current version of the legislation, ***Indian Act***, R.S.C. 1985, c. 1-5). With the amendment, Canada purported to shift responsibility for First Nations peoples to the provinces, including for the provision of CFS on reserve.

[37] Notwithstanding this amendment, jurisdictional disputes regarding the provision of First Nations child welfare would remain a significant issue for federal-provincial relations for several decades. Manitoba took the position that Canada at least retained jurisdiction respecting on-reserve children and families; Canada maintained that jurisdiction respecting all child and family services, including respecting First Nations members living on reserve, were the purview of the provinces. In practice, this meant that for several decades following that amendment to the ***Indian Act***, Manitoba did not exercise jurisdiction over First Nations children and families living on reserve but did deliver child

and family services to families who lived off reserve, and was compensated for the provision of off-reserve services through dedicated payments made by Canada (which payments Canada would continue to make until the early 1990s).

[38] In the early 1980s, Canada, Manitoba and First Nations leadership executed several tripartite agreements, which attempted to address these jurisdictional disputes. These agreements established that Canada would provide funding for CFS on reserve, which would be delivered by provincial CFS agencies and in accordance with provincial law. The agreements recognized that, while Manitoba exercised jurisdiction over child protection, Canada retained a special relationship and special interest in the welfare of First Nations children by virtue of the treaties, the ***Indian Act*** and the ***Constitution Act, 1867***, 30 & 31 Victoria, c. 3 (U.K.).

[39] One such agreement, signed in 1982, the "Canada-Manitoba-Indian Child Welfare Agreement":

- acknowledged the "special responsibility and interest" of First Nations in Manitoba to "ensure the welfare" of First Nations children and their right to deliver child welfare services on reserve;
- recognized that, while Manitoba had jurisdiction over child protection, Canada "retain[ed] a special relationship to and interest in the welfare" of First Nations children by virtue of treaties, the ***Indian Act***, and the ***Constitution Act, 1867***;

- recognized that First Nations children throughout Manitoba must have access to child welfare services that were responsive to their traditions, cultures and lifestyles; and,
- had as one of its guiding principles the commitment to preserving First Nations cultural identity, together with the importance of both language and customs.

[40] In 1985, Manitoba introduced ***The Child and Family Services Act***, C.C.S.M. c. C80 (the "***CFSA***"), which had the effect of shifting the mode of delivery of child welfare services toward a decentralized model based on child welfare agencies, including First Nations Child and Family Services ("FNCFS") Agencies. At its inception, the ***CFSA*** included a "Declaration of Principles", which included the following "fundamental principles guiding the provision of services to children and families":

1. The best interests of children are a fundamental responsibility of society.
2. The family is the basic unit of society and its well-being should be supported and preserved.
3. The family is the basic source of care, nurture and acculturation of children and parents have the primary responsibility to ensure the wellbeing of their children.
4. Families and children have the right to the least interference with their affairs to the extent compatible with the best interests of children and the responsibilities of society.
5. Children have a right to a continuous family environment in which they can flourish.
6. Families and children are entitled to be informed of their rights and to participate in the decisions affecting those rights.
7. Families are entitled to receive preventive and supportive services directed to preserving the family unit.

8. Families are entitled to services which respect their cultural and linguistic heritage.

9. Decisions to remove or place children should be based on the best interests of the child and not on the basis of the family's financial status.

10. Communities have a responsibility to promote the best interests of their children and families and have the right to participate in services to their families and children.

11. Indian bands are entitled to the provision of child and family services in a manner which respects their unique status as aboriginal peoples.

(see ***The Child and Family Services Act,*** S.M. 1985-86, c. 8).

[41] The year 1985 was also significant because it was in that year that the findings from the Kimelman Inquiry were published. The findings of the Aboriginal Justice Inquiry ("AJI") would soon follow in 1991. Both of these Inquiries, which considered the Indigenous child welfare system in Manitoba, underscored the imminent risk of further damage and violence to children, their families, and their First Nations by this system.

[42] The Kimelman Inquiry, which concluded that the child welfare system was guilty of "cultural genocide", recommended changes to the child welfare system in Manitoba, changes which were intended to promote First Nations' children's cultural and linguistic heritage. The Aboriginal Justice Inquiry – Child Welfare Initiative Report (1991) found:

- the cumulative impacts of Manitoba and Canada's child welfare policies led to staggering rates of poverty, unemployment, suicide, substance abuse, and crime among Indigenous Canadians;
- the large-scale removal of First Nations children compromised the ability of First Nations to function properly and to retain their languages and cultural traditions;

- the child welfare system was underfunded, with funds for prevention and education being a low funding priority;
- significant problems with the provision of services to status Indians living off reserve; and,
- self-determination was an integral element to restoring the health of First Nations, their children, and their families.

[43] In 1991, Canada introduced Directive 20-1, its long-term policy and funding formula for on-reserve child welfare and, in so doing, established the FNCFS program. As part of Canada's FNCFS program, on March 31, 1992, Canada terminated its payments to Manitoba to support off-reserve child welfare. (Until this time, Canada had been reimbursing Manitoba for social assistance given to "resident off-reserve status Indians including for off-reserve child welfare services" (see Brief of the Defendant, Attorney General of Canada, filed March 11, 2025, at para. 59 (the "Defendant (Canada) Brief")).) Thereafter, Canada asserts that "off-reserve" funding was incorporated into the general transfer payments made by Canada to Manitoba; "on-reserve" funding was delivered through the FNCFS program pursuant to Directive 20-1. Canada's FNCFS program remained relatively unchanged from its inception until 2016. Indeed, from 1995 onwards, Canada stopped adjusting its funding for inflation under the Directive.

[44] Following the release of the final report of the AJI, in 2000 the Aboriginal Justice Inquiry - Child Welfare Initiative ("AJI-CWI") was established, a joint initiative of Manitoba and three indigenous groups (the AMC, the Manitoba Métis Federation (the "MMF"), and the Manitoba Keewatinowi Okimakanak (the "MKO")) (the "CFS Authorities"). The

AJI-CWI led to amendments to the ***CFSA*** and the enactment in 2003 of ***The Child and Family Services Authorities Act***, C.C.S.M. c. C90 ("***CFSAA***") and associated Child and Family Services Authorities Regulation, M.R. 183/2003, which marked the beginning of a process known as "devolution" of child welfare in Manitoba. As this Court explained in ***Flette et al. v. The Government of Manitoba et al.,*** 2022 MBQB 104 ("***Flette #1***"):

> [36] Devolution recognized the need for culturally appropriate care to be provided to First Nation and Metis Children. As a result, the responsibility for providing services to provincially funded Indigenous Children in care shifted from Manitoba to independent statutory Child and Family Service Authorities ("CFS Authorities") and to Indigenous CFS Agencies. Devolution was accomplished through amendments to the *CFS Act*, the introduction of *The Child and Family Services Authorities Act*, C.C.S.M. c. C90 ("*CFSA Act*") and a variety of agreements between the parties. (See the Memoranda of Understanding and Protocol Agreements between the Government of Manitoba, the Assembly of Manitoba Chiefs, the Manitoba Metis Federation, and Manitoba Keewatinowi Okimakanak (Agreed Book of Documents, Tabs 2 a - f))
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> [37] The determination of which CFS Authority provides services to a particular child is governed by the "Authority Determination Protocol". The geographic boundaries of the CFS Authorities are set by the Agencies Mandates Regulation 184/2003.

[45] The process of devolution was concluded in 2005. Post-devolution, Manitoba retained responsibility for funding CFS (save and except for that funding which was provided by Canada for on-reserve services), and for establishing policies and standards for the provision of those services. Service delivery was provided by various agencies overseen by the four CFS Authorities. (There are currently 26 mandated agencies across four Authorities. Of these, 20 are FNCFS agencies, two are Métis agencies and four are non-Indigenous agencies.)

[46] Both before and after devolution, Canada and Manitoba maintained distinct funding models for child welfare, which resulted in inconsistencies in the funding levels on and off reserve. Canada's FNCFS program, which funded on-reserve child welfare, was

based on an estimate of the number of children on reserve in care; Manitoba's funding of off-reserve child welfare, was based on an estimate of the number of days a child was in care. Even after Canada retooled its approach to funding the FNCFS program in 2007, during which time it adopted a block funding strategy known as the "Enhanced Prevention Model", the operational costs funded by Canada continued to be partially based on an assumed average rate of out-of-home placements rather than actual agency expenses.

[47] On March 18, 2011, Canada and Manitoba signed a Memorandum of Understanding ("MOU") for the integration of funding for FNCFS agencies in Manitoba, which covered the period from October 1, 2010, to March 31, 2015. The MOU provided for a common approach to core funding, child protection, and prevention funding; it committed to the provision of service consistent with the ***CFSA*** and in a manner comparable, both on and off reserve; and it recognized First Nations people have unique needs and that the preservation of cultural identity constitutes an important consideration. Under the MOU, Canada and Manitoba agreed to a cost-sharing model, with 40% of core funding for First Nations agencies coming from Canada, and 60% of core funding for First Nations agencies coming from Manitoba. (At the time, approximately 40% of children and families receiving CFS fell within Canada's funding mandate.)

[48] Canada's calculation of its 40% contribution to First Nations agencies' core funding was based on an assumed rate of 7% of children on reserve being in care, rather than being tied to an actual rate. That differential funding approach by Canada led to a complaint to the Canadian Human Rights Commission by the Assembly of First Nations

(the "AFN") and the First Nations Child and Family Caring Society of Canada, which complaint was referred to the Canadian Human Rights Tribunal ("CHRT"). In 2016, the CHRT rendered its decision on the merits of the complaint, finding Canada's funding model had discriminated against First Nations children and families on reserve and in the Yukon, contrary to s. 5 of the ***Canadian Human Rights Act***, R.S.C., 1985, c. H-6 (the "***CHRA***"), (see ***First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)***, 2016 CHRT 2 ("***Caring Society***")). In response, two years later in 2018, Canada amended its funding approach to on-reserve CFS to capture the actual costs of providing those services. The CHRT subsequently released its compensation decision on the matter in 2019 (see ***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).

[49] Neither has Manitoba's approach to funding been without controversy. As this Court has already found in ***Flette #1***, between January 1, 2005 and March 31, 2019, Manitoba "clawed back" from agencies providing services to provincially-funded First Nations children. That "claw back" included the children's entitlement to the Children's Special Allowance Benefits (the "CSA Benefits"), which is a federal benefit meant to ensure that children in the care of CFS receive the same federal funding that other children receive through Canada's child benefit and disability benefit. In 2024, this Court approved a settlement in ***Flette et al. v. The Government of Manitoba***, 2024 MBKB 146 ("***Flette #2***"), and two other Class actions related to Manitoba's retention of the

CSA Benefits (see ***Lavallee et al. v. The Government of Manitoba***, 2024 MBKB 148; ***LaFontaine et al. v. The Government of Manitoba***, 2024 MBKB 147). Manitoba also did not increase its maintenance rates between 2012 and 2019, despite inflation. Today, those maintenance rates are among the lowest in the country.

[50] In 2017, Manitoba introduced a new funding model for its four CFS Authorities, "single envelope" or "block" funding. Such a model provided each Authority with child maintenance funding up front in a "single envelope", rather than making payments based on a child or youth in CFS. Manitoba made such a model permanent for all authorities and agencies in the province as of April 1, 2019.

[51] During this period, from post-devolution onwards, a number of significant public reports were published that dealt with or discussed Indigenous child welfare, including the 2006 Manitoba Ombudsman Report, the Manitoba Auditor General's 2006 General Report, the March 2009 House of Commons Report of the Standing Committee on Public Accounts, the September 2018 Legislative Report on Child Welfare on transforming child welfare legislation in Manitoba, the Final 2015 Report on the Truth and Reconciliation Commission, the Manitoba Advocate for Children and Youth's March 2019 report on the story of Tina Fontaine, and their subsequent 2021 Special Report to the Phoenix Sinclair Inquiry, the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (2019) (the "MMIWG"), and the Manitoba Auditor General's November 2019 Report to the Legislative Assembly on the management of foster homes.

[52] In 2019, Parliament also enacted ***An Act respecting First Nations, Inuit and Métis children, youth, and families***, S.C. 2019, c. 24 (the "2019 ***Act***"), which

established minimum standards that any provider of CFS for Indigenous children must follow (see ss. 10 - 17). The Supreme Court of Canada considered the constitutionality of that ***Act*** in the ***C-92 Reference Decision #2***, and, in so doing, upheld the authority of the federal government to establish such minimum national standards, binding on the provinces, for the provision of services to Indigenous peoples.

[53] In its ***C-92 Reference Decision #2*** decision, the Supreme Court of Canada noted the "double aspect" of youth protection in the Indigenous context:

> [98] … Youth protection in the Indigenous context has a double aspect, since it can be approached from two different perspectives: protection of the ties between Indigenous families and communities, in a spirit of cultural survival, under s. 91(24) (*Canadian Western Bank*, at para. 61; see also *Natural Parents v. Superintendent of Child Welfare*, 1975 CanLII 143 (SCC), [1976] 2 S.C.R. 751, at p. 787, per Beetz J.); or child and family services and youth protection, under s. 92(13) and (16) (*NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 S.C.R. 696, at paras. 36-40, per Abella J., and at paras. 74-78, per McLachlin C.J. and Fish J., concurring; see also J. Woodward, *Aboriginal Law in Canada* (loose-leaf), at § 4:16). While the provinces are generally "the keeper[s] of constitutional authority over child welfare" (*NIL/TU,O*, at para. 24), the federal government also has jurisdiction to legislate in relation to child and family services for Indigenous children….

[54] The Supreme Court further noted in its ***C-92 Reference Decision #2*** decision the importance of Canada and the provinces working together in this field:

> [99] Child welfare in the Indigenous context is not only a field in which Parliament and the provinces can act, but also one in which concerted action by them is necessary. The importance of cooperation in this area between these two levels of government is illustrated, for example, by Jordan's Principle, according to which intergovernmental disputes may not interfere with the right of Indigenous children to access the same services as other children in Canada. With regard to such disputes, the Truth and Reconciliation Commission noted that the federal government and the provincial governments have historically tended to shift responsibility for Indigenous child welfare services to one another (*Honouring the Truth, Reconciling for the Future*, at pp. 142-43). However, today it is recognized that providing such services is the responsibility of both levels of government, which must act in a concerted fashion (*House of Commons Debates*, vol. 142, No. 31, 2nd Sess., 39th Parl., December 5, 2007, at p. 1780 (S. Blaney)). Since there is overlapping federal and provincial jurisdiction with respect to Indigenous

> children, it was entirely open to Parliament to legislate as it did (see, e.g., Grammond (2018), at pp. 137-38).

[55] Despite the "double aspect" of Indigenous child welfare, in this matter, Canada and Manitoba have continued to dispute the extent to which each had responsibility for it during the Class period.

[56] What is not in dispute is that for the duration of the Class period, Canada has had jurisdiction over "Indians, and Lands reserved for the Indians" pursuant to s. 91.24 of the ***Constitution Act, 1867***; it has exclusively funded the provision of CFS on reserve through its FNCFS program; and, as of 2019, by way of the 2019 ***Act***, established national standards for the provision of Indigenous CFS.

[57] For Manitoba's part, throughout the Class period, it has had legislative authority over child welfare pursuant to ss. 92.13 and 92.16 of the ***Constitution Act, 1867***. Under that authority, it has maintained a legislative framework for funding and provision of child welfare through its ***CFSA*** and ***CFSAA***, which legislative framework has applied to First Nations peoples living on reserve pursuant to s. 88 of the ***Indian Act***. Even after devolution, Manitoba has had a Director of CFS, which, "[u]nder the control and direction of the minster", shall, amongst other things, "ensure the development and establishment of standards of services and practices and procedures to be followed where services are provided to children and families", and "ensure that agencies are providing the standard of services and are following the procedures and practices established" under the ***CFSA*** (see ***CFSA***, ss. 4(1)(d) and (e)).

[58] Moreover, pursuant to the ***CFSAA***, "[t]he minister is responsible for", amongst other things, "establishing policies and standards for the provision of child and family

services", and "monitoring and assessing how authorities carry out their responsibilities under this Act" (see ***CFSAA***, ss. 24(b) and (c)). In other words, even though devolution ostensibly transferred much of the day-to-day operations of the CFS system to the four Authorities and numerous agencies operating under them, those Authorities and agencies were and remain bound by the standards set by Manitoba with respect to the delivery of CFS off and on reserve and are ultimately accountable to Manitoba for the delivery of those services.

[59] What is also true, is that throughout the Class period, Manitoba has had the highest rate of children in CFS in the country - and First Nations children continue to constitute an overwhelming majority of the children in CFS. In the first 10 years after devolution, the number of First Nations children in CFS nearly doubled, and Manitoba's rate of child apprehension was the highest in the Western world. Between 1998 and 2019, one in three First Nations infants had an open CFS file before the age of one (whereas, for non-First Nations infants, that ratio was one in 20); one in five First Nations infants were placed in out-of-home care before the age of one (whereas, for non-First Nations infants, that ratio was one in 100). And, for over 20 years, even though they have consistently accounted for less than 20% of children in the province, First Nations children have represented more than 70% of the children in care in Manitoba; as of 2021, they represented 78.2% of all children in CFS in Manitoba.

[60] This Court is being asked to consider a particular period in time, the Class period, during which, as noted above, Indigenous children have disproportionately and overwhelmingly constituted the total number of children apprehended by and in the care

of the state. This Court is also being asked to render its decision in the present case at a particular moment in time. In this particular and potentially propitious moment in time, the Court's decision is being made against the backdrop of, "a broader legislative program introduced by Parliament to achieve reconciliation with First Nations, the Inuit and the Métis 'through renewed nation-to-nation, government-to-government and Inuit-Crown relationships based on recognition of rights, respect, cooperation and partnership'" (see ***C-92 Reference Decision #2***, at para. 3). It is a backdrop, per the Preamble to the 2019 ***Act***, in which:

> …the Government of Canada is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples;
>
> …
>
> …Parliament recognizes the legacy of residential schools and the harm, including intergenerational trauma, caused to Indigenous peoples by colonial policies and practices;
>
> …Parliament recognizes the disruption that Indigenous women and girls have experienced in their lives in relation to child and family services systems and the importance of supporting Indigenous women and girls in overcoming their historical disadvantage;
>
> …Parliament recognizes the importance of reuniting Indigenous children with their families and communities from whom they were separated in the context of the provision of child and family services;
>
> …
>
> …Parliament affirms the right to self-determination of Indigenous peoples, including the inherent right of self-government, which includes jurisdiction in relation to child and family services;
>
> …Parliament affirms the need
>
> > to respect the diversity of all Indigenous peoples, including the diversity of their laws, rights, treaties, histories, cultures, languages, customs and traditions,
>
> …

> to address the needs of Indigenous children and to help ensure that there are no gaps in the services that are provided in relation to them, whether they reside on a reserve or not,
>
> to eliminate the over-representation of Indigenous children in child and family services systems, …

[61] The Supreme Court of Canada has explained that this legislative program not only includes the 2019 ***Act***, but also the incorporation of the United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 ("UNDRIP"), into the country's positive law through Parliament's enactment of the ***United Nations Declaration on the Rights of Indigenous Peoples Act***, S.C. 2021, c. 14 (the "***UNDRIP Act***") (see ***C-92 Reference Decision #2***, at paras. 3 and 4). Amongst other things, UNDRIP:

- provides that "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, …" (Art. 4);
- emphasizes the right not to be subjected to any act of violence, including "forcibly removing children of the group to another group" (Art. 7.2);
- provides that "Indigenous peoples have the right to practise and revitalize their cultural traditions and customs" which "includes the right to maintain, protect and develop the past, present and future manifestations of their cultures…" (Art. 11.1), as well as, "the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies,…" (Art. 12.1);

- refers to the right of Indigenous peoples to transmit their histories, languages and cultures to future generations (Art. 13.1); and
- recognizes "the right of indigenous families and communities to retain shared responsibility for the upbringing… and well-being of their children, consistent with the rights of the child" (Preamble; see also Art. 14).

[62] At this propitious moment in time, through its new legislative framework, Canada has provided important and clarifying affirmations, affirmations which in turn have been endorsed by the Supreme Court of Canada. Within this legislative framework, Canada has also presented a new and connected model of service delivery, which may well inspire future, constitutionally sound approaches to Indigenous self-government in the area of child welfare.

[63] Concurrent with what must be acknowledged are now new, bold and purposeful legislative initiatives, this Court must still carry out its own institutional and adjudicative responsibilities respecting the assessment of the alleged past and potentially current systemic wrongs. Nonetheless, it is hoped that in the context of what indeed might be an admittedly encouraging and propitious period involving new legislative initiatives and approaches, this Court can – when assessing (for constitutional compliance) the defendants' conduct during the discreet Class period in question – carry out its adjudicative responsibilities in a manner that balances both an appropriate and vigilant focus with a necessary institutional humility and restraint. In that regard, in looking to the future and in addressing its immediate adjudicative responsibility, the Court can be

guided by the observations of both Jamal and Martin JJ. in ***Ontario (Attorney General) v. Restoule***, 2024 SCC 27 ("***Restoule***"):

> [297] These principles concerning the proper role of the courts dovetail with the idea that "[r]econciliation often demands judicial forbearance. Courts should generally leave space for the parties to govern together and work out their differences" (*First Nation of Nacho Nyak Dun*, at para. 4). As Lamer C.J. wrote in *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 S.C.R. 1010, "it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve . . . a basic purpose of s. 35(1) — 'the reconciliation of the pre-existence of [A]boriginal societies with the sovereignty of the Crown'" (para. 186; see also F. Hoehn, "The Duty to Negotiate and the Ethos of Reconciliation" (2020), 83 *Sask. L. Rev.* 1). As this Court has recognized in the duty to consult context, "[t]rue reconciliation is rarely, if ever, achieved in courtrooms" (*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, at para. 24; see also *Mikisew Cree 2018*, at para. 22).
>
> [298] Even so, as my colleague Martin J. wisely observed during Ontario's oral submissions before this Court, accountability most certainly *does* take place in a courtroom (transcript, day 1, at p. 9). Indeed, "judicial forbearance should not come at the expense of adequate scrutiny of Crown conduct to ensure constitutional compliance" (*First Nation of Nacho Nyak Dun*, at para. 34). As in the present case, litigation may sometimes be the only way to bring an intransigent party to the negotiating table with a view to reaching a settlement and advancing reconciliation.

[64] And so, it is within this broader context, that this Court finds itself in the present case being asked to address the principal issues before it. Consistent with the above observations in ***Restoule***, this Court will address those issues and carry out its responsibilities recognizing as it must, that where the parties purport to be pursuing reconciliation, negotiation is usually the advisable and preferable goal. That said, however advisable and preferable that goal may be, it must be recognized that this goal is sometimes only achieved through a concomitant operation of judicial forbearance and Crown accountability.

V. POSITIONS OF THE PARTIES

[65] I set out below in a general way the positions of the parties as it relates to the principal issues before the Court in respect of certification and summary judgment. Later, in the Analysis section of this judgment, I will more thoroughly outline the arguments raised by the parties as it relates to the criteria for certification (as set out in s. 4 of the ***CPA***) and the specific arguments raised in connection to summary judgment.

[66] As earlier noted, insofar as the parties have raised what might be characterized as important but preliminary issues, I will address their positions on those issues in a section of the judgment identified as "Preliminary Issues".

Position of the Plaintiffs

[67] Respecting their motion for certification, the plaintiffs' proposed Class include Misipawistik First Nation, Black River First Nation, Pimicikamak Cree Nation and any other First Nation located in Manitoba that elects to join the action within a period of time to be prescribed by this Court following the issuance of a certification order.

[68] For the purposes of defining the Class, the plaintiffs submit that each First Nation is composed of one or more "bands" within the meaning of s. 2(1) of the ***Indian Act***, or Indigenous people of Canada, other than Inuit or Métis peoples, with a modern treaty, being a land claims agreement within the meaning of s. 35 of the ***Constitution Act,*** entered into on or after January 1, 1973.

[69] For the purposes of defining the claims asserted on behalf of the Class, the plaintiffs take the position that the Class period runs from January 1, 1992, to the last day of the period to opt into this Class proceeding following certification.

[70] In setting out its overall position respecting both the motions for certification and summary judgment, the plaintiffs maintain that the defendants' own submissions confirm that the facts of this matter are not materially in dispute. In that connection, the plaintiffs submit that the defendants do not deny that Manitoba is in the grips of a child welfare crisis that has had a disproportionate impact on First Nations people and their communities. Nor say the plaintiffs, do the defendants deny the colonial roots of this catastrophe or their involvement in that history. In this regard, the plaintiffs express frustration that despite the acceptance of these tragic facts, the defendants "quibble" about some of the "details" insofar as they (the defendants) insist that their actions involved no breaches, constitutional or otherwise. The plaintiffs express similar frustration at what they describe are the ill-founded evidentiary objections and technical defences advanced by the defendants that the plaintiffs say ignore the special significance of the plaintiffs' claims.

[71] Regarding their motion for certification, the plaintiffs assert that their action is appropriately brought as a Class proceeding and that it satisfies each of the criteria for certification as set out in s. 4 of the ***CPA***.

[72] In noting that the ***CPA*** is remedial in nature, the plaintiffs argue that the certification criteria are to be applied generously and in a way that gives effect to the objectives of judicial economy, enhanced access to justice, and modification of harmful behaviour (see ***Weremy v The Government of Manitoba***, 2021 MBCA 34, at para. 27, citing ***Hollick v. Toronto (City)***, 2021 SCC 68, at paras. 14 and 15; ***Anderson et al v Manitoba et al***, 2017 MBCA 14, at para. 34).

[73] The plaintiffs argue that there is ample precedent for certifying a Class proceeding brought by First Nations as they have become a procedural vehicle routinely used by Indigenous peoples for their child welfare claims against the Crown. Class proceedings have been used for claims relating to Indian Residential Schools, Indian Day Schools, the Sixties Scoop, and the Millennium Scoop (see ***McLean v. Canada***, 2019 FC 1075; ***Brown v. Canada (Attorney General)***, 2013 ONSC 5637 ("***Brown #1***"); ***Stonechild v. Canada***, 2022 FC 914; ***Moushoom v. Canada (Attorney General)***, 2023 FC 1533). Additionally, Class proceedings are regularly used by First Nations for collective claims against the Crown, including over access to safe drinking water and adequate housing on reserve (see, for example, *St. Theresa Point First Nation et al v. Attorney General of Canada* (April 30, 2024), Ottawa T-1207-23 (FC) (Certification Order, St. Theresa Point); *Shamattawa First Nation et al v. Attorney General of Canada* (March 14, 2023), Ottawa T-1937-22 (FC) (Certification Order, Shamattawa); ***Tataskweyak Cree Nation et al. v. Canada (A.G.)***, 2021 MBQB 153, at paras. 58, 59 and 64).

[74] The plaintiffs cite ***Tataskweyak***, where this Court certified a Class proceeding on behalf of First Nations and their members against Canada for its failure to provide reliable access to safe drinking water on reserve, and identified Chief Doreen Spence and Tataskweyak Cree Nation as the representative plaintiffs. First Nations have certified other Class proceedings against the Crown, with both Chiefs and First Nations as the representative plaintiffs (see, for example, Certification Order in *St. Theresa Point*, at para. 8; Certification Order in *Shamattawa*, at para. 8).

[75] In setting out its position on certification, the plaintiffs pointedly lament what they identify as the unfortunate "gamesmanship" of the defendants. The plaintiffs argue that it appears the defendants' real objection to certification stems from a challenge to some of the plaintiffs' pleaded causes of action. But given that the plaintiffs are moving for summary judgment in tandem with certification, the plaintiffs say that the defendants should simply have consented to certification, allowed Class members to opt in, and then opposed the plaintiffs' claims on the merits. This the plaintiffs say, would have lowered the bar for the defendants, who, given their apparent confidence in their position, would have then been able to prevail on the motion for summary judgment by showing a genuine issue requiring a trial, rather than having to demonstrate that the plaintiffs' claims cannot be certified because they are certain to be dismissed on the pleadings.

[76] In respect of the plaintiffs' motion for summary judgment, the plaintiffs submit that having heard a contested screening motion and having determined that the plaintiffs' motion for summary judgment is indeed appropriate to be heard, this Court should now, after having heard the argument on the merits, grant summary judgment in favour of the plaintiffs.

[77] As has already been noted, the plaintiffs' summary judgment motion seeks judgment on the Stage 1 common issues as formulated by the plaintiffs. These common issues say the plaintiffs, define the scope and content of the duties that the defendants owed the plaintiffs. As part of the plaintiffs' formulation of the common issues, it is asked whether the defendants have breached their obligations.

[78] The plaintiffs submit that there is no genuine issue for trial in respect of the Stage 1 common issues. As such, the plaintiffs assert that this Court ought to grant summary judgment in their favour. In rendering its decision on the Stage 1 common issues, the plaintiffs urge this Court to describe the nature and content of Canada and Manitoba's duties to the plaintiffs, as well as the breach of those duties. The plaintiffs assert that the defendants owed Class members private law and ***Charter*** duties to put the interests of the plaintiffs ahead of their own and to manage First Nations child welfare in a prudent manner that advanced First Nations' communal interest in the wellbeing of their children, without discrimination and without trammelling Class members' right to freedom of spiritual belief. The plaintiffs submit that these duties required the defendants to make best efforts to provide appropriate preventative services directed at supporting First Nations families in order to avoid unnecessary apprehensions of their children; to support kinship and community placements for their children; to provide culturally and spiritually appropriate services to their children in care; to ensure their children in care are able to maintain and develop a connection to their distinct culture, language, identity, land-based traditions, and First Nation; and to ensure Class members' children are afforded the same opportunities as non-First Nations children in Manitoba.

[79] The plaintiffs take the position that if the Court resolves their formulated Stage 1 common issues in favour of the Class, the action will proceed to the Stage 2 common issues which include Class members' damages, as well as the need for supervisory or injunctive relief. Alternatively, if the Court is not satisfied that this matter can be

determined on summary judgment, then the Court should identify the deficiencies and direct a summary trial on the existing record.

Position of Canada

[80] Canada takes the position that based on the criteria set out in s. 4 of the ***CPA***, no part of the plaintiffs' proposed Class proceeding ought to be certified.

[81] Canada asserts that this Court's first task before proceeding to consider the motion for summary judgment, should be to determine whether this proceeding meets the required elements for certification and following that, to make any order it considers appropriate. Canada reminds the Court that the low burden of and threshold for certification does not excuse a court of first instance from its obligation to consider whether the Statement of Claim is properly pleaded for each cause of action, which Canada says in this case, the plaintiffs have not done.

[82] Canada submits that only if the proceeding is certified can the First Nations opt in to the proceeding. However, in the present case, Canada argues that the requirements for certification have not been met and the pleading discloses no reasonable cause of action against Canada.

[83] Canada maintains the pleading does not support a cause of action against them. Canada notes that one of the key elements of this proposed proceeding is that during the proposed Class period, it was Manitoba – not Canada – that maintained and exercised its jurisdiction and legislative authority over CFS provided to children on and off reserve through provincial entities. Canada did not have control over child welfare services and did not provide direct funding for the delivery of off-reserve child welfare services.

[84] At a basic level, Canada insists that the plaintiffs have also not pleaded material facts that support breaches of ss. 2(a) and 15 of the ***Charter***, breaches of ss. 35 and 36 of the ***Constitution Act,*** and a breach of fiduciary duty.

[85] Canada also argues the pleading cannot support a cause of action against Canada because Canada has already paid compensation for the same loss claimed by the individuals making up the collective. Therefore, the claims are barred by s. 9 of the ***Crown Liability and Proceedings Act***, R.S.C., 1985, c. C-50 (the "***CLPA***"), and by the rule against double recovery.

[86] Canada submits that even if the certification order sought by the plaintiffs is issued, this is not an appropriate case to be heard for summary disposition. Canada notes that the plaintiffs ask this Court to decide "seven distinct questions of legal duty or obligation: fiduciary law, honour of the Crown, negligence, sections 2(a) and 15 of the ***Charter***, and sections 35 and 36 of the ***Constitution Act, 1982***." (see the Defendant (Canada) Brief, at paras. 13 and 296). None, say Canada, are suitable for summary judgment and many of these do not hold the necessary record of support.

[87] Canada contends that summary judgment would also be premature as there has been no documentary or oral discovery. Canada says that for claims of this complexity and significance, the entire discovery process and a trial are required for the Court to have a complete evidentiary record with which to make a fair and just determination.

[88] In addition, it is the position of Canada that it is not fair and just to allow summary judgment given the issues, the nature and strength of the evidence, and the need for a proportionate procedure. Canada submits that a proper assessment of the plaintiffs'

claims requires a determination of Canada's legal duties and obligations regarding both on and off-reserve child welfare, with reference to the specific requirements and precise legal tests established under the common law, the ***Charter***, and the ***Constitution Act***. Canada suggests that this can only be done at a trial.

[89] Canada argues that even if the Court maintains its initial decision that this motion for summary judgment can proceed, the motion for summary judgment on the merits should be dismissed as there are genuine issues that demand a trial. Canada points to what it says is a complex factual matrix, a voluminous record and multiple sophisticated legal issues all of which require trial on notice to the respective Class members who may seek to participate in the proceeding.

[90] Put simply, Canada takes the position that this matter is not suitable for summary determination because it does not allow the Court to make the necessary findings of fact and properly apply the law to the facts. Canada says the issues require determination at trial.

Position of Manitoba

[91] Manitoba suggests that it has endeavoured to respond to the plaintiffs' proposed Class proceeding purposefully and on its merits with respect to both certification and summary judgment.

[92] Manitoba takes the position that while certain aspects of the proposed claim against Manitoba meet the threshold for certification, others do not. Manitoba opposes certification of the plaintiffs' causes of action for breach of s. 15 of the ***Charter*** and breach of s. 36 of the ***Constitution Act***. Manitoba also notes that with respect to the

requirement in s. 4(c) of the ***CPA***, that if the claims of the proposed Class raise a common issue, a substantial portion of the claims advanced by the plaintiffs are plainly statute-barred and to that extent, should not be certified. Rather, the proposed Class period should be adjusted so as to preclude claims that are out of time.

[93] Apart from the above, Manitoba does not oppose certification of the action as an opt-in Class proceeding.

[94] Manitoba shares with Canada those already expressed concerns and objections with respect to this Court proceeding with any consideration of the merits on a summary judgment assessment. Like Canada, Manitoba asserts that it is premature and inappropriate to proceed with any of the Stage 1 common issues by way of summary disposition.

[95] In the alternative, if the Court does proceed with the assessment of the plaintiffs' arguments on summary judgment, Manitoba takes the position that on the merits, the Court should not grant summary judgment in respect of the plaintiffs' proposed Stage 1 common issues. Manitoba submits that apart from the other legal weaknesses in the plaintiffs' claim, the plaintiffs' allegations against Manitoba do not account for the unique, complex and ever-evolving history of CFS within Manitoba. Moreover, and fundamentally, Manitoba argues that much of the plaintiffs' claim is based on legislative action and other core policy decisions which Manitoba insists are immune from liability and not justiciable.

VI. PRELIMINARY ISSUES

[96] As was earlier noted, a number of preliminary matters or issues have been raised by the parties, many of which – in different ways – have the potential to significantly impact the nature of my analysis (issues respecting the prematurity, appropriateness and chronology of the plaintiffs' motion for summary judgment), the basis of my analysis (the admissibility and use of certain evidence) and, the identification of the issues around which my analysis will take place (questions about the problematic formulation of the plaintiffs' common issues).

[97] The preliminary issues present as substantive, procedural and evidentiary in nature. Given the foundational importance of many of these issues and their potential impact on my analysis and the proceeding itself, it is well that this Court address those issues prior to considering, assessing and using (to the extent permissible) the evidence adduced in connection to the principal issues respecting certification and/or summary judgment.

[98] For convenience, I set out immediately below, the list and type of preliminary issues that have arisen, all of which I will now address in paras. 99 to 317:

i) Evidentiary issues;

ii) Issue estoppel and abuse of process;

iii) Opposition to the AMC as a representative plaintiff;

iv) Limitations of Actions issues;

v) The applicability of the ***CLPA*** to claims against Canada;

vi) The problematic formulation of the plaintiffs' common issues; and

vii) The defendants ongoing and persistent opposition to the plaintiffs' motion for summary judgment.

Evidentiary Issues

[99] A description of the expert and lay witnesses adduced on these motions is later set out in the section of this judgment entitled "Evidence Adduced" (see paras. 318 to 392). Separate from the setting out and the description of that evidence, in order to clarify and confirm the evidentiary record that I will be using for the determinations I must make on the certification and summary judgment motions, I must as a preliminary matter, address and decide certain contested evidentiary issues. I do so immediately below.

[100] The contested evidentiary issues that need be addressed prior to my analysis respecting certification or summary judgment relate to the following:

i) The plaintiffs' motion for leave to adduce additional expert evidence and the admissibility of that expert evidence;

ii) The defendants' objection to the admissibility of the affidavit evidence of the plaintiffs' lay witnesses; and

iii) The defendants' objection to the admissibility of public reports.

The Plaintiffs' Motion for Leave to Adduce Additional Expert Evidence and the Admissibility of that Expert Evidence

[101] The plaintiffs seek leave to lead more than three expert witnesses (six) pursuant to s. 25 of ***The Manitoba Evidence Act***, C.C.S.M. c. E150. These additional six witnesses would result in a total of nine. The plaintiffs contend that each of the proposed

experts have important and distinct areas of expertise and that each offers crucial insights necessary to the resolution of the issues in dispute.

[102] While contested motions for leave to admit additional experts are rare, in the present case, Canada opposes the plaintiffs' motion. It also opposes the admissibility of the plaintiffs' expert evidence generally.

[103] Canada emphasizes that in order to preserve the timelines for the litigation, it agreed to cross-examine the proposed experts while unequivocally reserving its right to oppose the number of witnesses and the admissibility of their evidence at a later stage. They are now doing so.

[104] Canada submits that the plaintiffs are proposing a multitude of experts with irrelevant or unnecessary evidence and that it is not necessary in this case to call more than three such experts (assuming they are so qualified) to adduce evidence on questions that the defendants say are fact-driven and unique to each First Nation. Canada argues that while the issues before this Court are complex and technical, much of the plaintiffs' expert evidence does not relate to or fails to consider, the key issues before the Court on either the certification motion or the summary judgment motion. It is Canada's position that in addition to the unjustified number (beyond the permitted three), the plaintiffs' comparatively late request to tender the additional expert witnesses fails to consider the intended judicial economy of summary judgment.

[105] In the alternative, Canada argues that even if leave is granted to the plaintiffs for the purposes of adducing additional expert evidence, that evidence is otherwise inadmissible and should be excluded. In so objecting, Canada invokes the modern legal

framework for determining the admissibility of expert evidence as set out in ***R. v. Mohan***, 1994 CanLII 80 (SCC), [1994] 2 SCR 9, and further clarified in ***White Burgess Langille Inman v. Abbott and Haliburton Co.***, 2015 SCC 23, (the "***White/Mohan*** test"). Canada insists that the expert evidence in question lacks the required relevance, that it is not necessary, and that it is being proffered by experts who do not possess the proper qualifications or the required impartiality.

[106] I am not persuaded by Canada's submissions in respect of its opposition to either leave or admissibility. For the brief reasons that follow, I have determined that leave will be granted to adduce the evidence of the additional expert witnesses. Further, I have determined that while it is always open to the Court to accord varying degrees of weight to some of the expert evidence, I have heard no persuasive argument, based on the governing tests, that would justify, in relation to the plaintiffs' proposed experts, the exclusion of their evidence.

[107] As it relates to the plaintiffs' motion to adduce additional expert witnesses, I note the guidance provided by the Ontario Superior Court in the judgment of ***K.N.B. v. Wu***, 2005 CanLII 5874 (ON SC). In ***K.N.B.***, Ferguson J. interpreted Ontario's identically worded equivalent provision and identified a non-exhaustive list of factors to assist courts in determining whether to grant leave. Those factors are:

a) Whether the opposing party objects to leave being granted;

b) The number of expert subjects in issue;

c) The number of experts each side proposes to have opine on each subject;

d) The number of experts customarily called in cases with similar issues;

e) Whether the opposing party will be disadvantaged because the applying party will have more experts than the opposing party;

f) Whether it is necessary to call more than three experts in order to adduce evidence on the issue in dispute;

g) The extent of duplication in the proposed opinions of different experts; and

h) The time and cost in involved in calling the additional experts is disproportionate to the amount at stake in the trial.

[108] Mindful of the above non-exhaustive factors, in the face of the plaintiffs' solid justification as to why in the particular circumstances of this case additional expert evidence is required, Canada has not in my view, articulated any persuasive contrary basis or argument that would cause me to refuse leave to adduce the proposed evidence from additional experts.

[109] When I examine the applicable factors in ***K.N.B.*** in relation to this proceeding and in relation to what it is that the plaintiffs seek and need to establish in terms of the provision of evidentiary proof, the questions raised by the identified factors in ***K.N.B.*** do not militate against the admission of the six additional experts. The number of experts as a factor by itself, is not, given the complexity and scope of this case, a determinative factor. Indeed, similar cases of this sort suggest that where the issues are complicated and where the evidence is relevant, necessary and of obvious assistance to the Court, the increased number and varied nature of the expert evidence is neither surprising nor should it be seen as disruptive. In the present case, the evidence of each expert witness is unique and there is little or no unnecessary duplication. Moreover, with both Canada

and Manitoba having chosen to not adduce expert evidence and with both having conducted cross-examinations, it cannot be reasonably argued that either opposing party will be disadvantaged by the mere fact that the plaintiffs have comparatively more experts.

[110] In addition to the forementioned factors, I note that given the importance and complexity of the issues in this case and the connected scope of the analysis required of the Court – both as to evidence and the application of the governing legal principles – it cannot be appropriately argued that the time and cost involved in adducing the additional expert evidence is disproportionate to what is at stake in this proceeding. While I appreciate that the defendants continue to argue that it is inappropriate to permit the Stage 1 common issues to be adjudicated by way of a motion for summary judgment, some of their related arguments (which I later address and reject as an additional preliminary issue) in respect of the inadequacy of the evidentiary record on summary judgment, fit uncomfortably with any objection they now raise (to additional expert evidence) based on an alleged disproportionate approach by the plaintiffs concerning the amount of evidence they (the plaintiffs) wish to produce.

[111] Separate from the specific factors in ***K.N.B.***, Canada also impugns the plaintiffs' expert reports by saying it is "evidence on questions that are fact-driven and unique to each First Nation". In that regard, I note that none of the proposed experts opine on specific or individual First Nation experiences. It would seem that this is logically so precisely because of the nature of the claims that are the subject matter of these motions.

The proposed expert opinions are intended to assist the Court in understanding the proposed common issues as they exist between the plaintiffs and the Class members.

[112] Insofar as Canada argues that the plaintiffs' request "fails to consider the intended judicial economy of summary judgment", it is far from clear how this argument would have persuasive application at this stage of this proceeding. As was conceded by the defendants, all cross-examinations of the experts were completed some time in advance and their experts' affidavits have been long filed with the Court. When I consider these completed cross-examinations, when I consider what I see as the potential and significant prejudice to the plaintiffs' case were I not to grant leave, and when I consider and conclude (as I do below) that the experts are otherwise qualified to provide their relevant evidence in a complicated case such as this one, I fail to see what judicial economies would be achieved by limiting the number of experts to three. No less vexing is the question of which three witnesses precisely would be pre-empted? As the plaintiffs argue, who is to choose? Is it the plaintiffs who must choose? And what of the cross-examination evidence of all of the rest of the plaintiffs' expert witnesses?

[113] On a similar motion to this one (seeking leave to present additional experts), Canada raised the same sort of opposition (see ***St. Theresa Point First Nation v. Canada (Attorney General)***, 2025 FC 382 ("***St. Theresa Point #1***")). That too occurred in the context of a summary judgment motion involving a certified class proceeding in respect of on-reserve housing (see ***St. Theresa Point #1***, at paras. 41 – 43.) In his decision, Favel J. dismissed all of Canada's arguments and granted leave to adduce evidence from all 12 of the proposed plaintiffs' experts. He noted the complex

and technical nature of the issues in dispute as well as the public significance of the litigation.

[114] In the unique circumstances of this case, for reasons similar to Favel J.'s in ***St. Theresa Point #1***, and in the absence of any persuasive argument by Canada in respect of any of the factors set out in ***K.N.B.***, I have no hesitation in determining that leave should be granted permitting the plaintiffs to adduce additional expert witnesses.

[115] Having determined that the plaintiffs are permitted to present additional expert witnesses, I now turn to the other objection raised by Canada respecting the admissibility of the expert witnesses.

[116] The test for admissibility of expert evidence is set out as already noted, in the ***White/Mohan*** test. In order for a moving party to have admitted the expert evidence in question, four threshold requirements of admissibility must be met: relevance, necessity, absence of other exclusionary rules, and expert qualification. If these requirements are met, the trial judge then conducts a cost benefit analysis, balancing the probative value of the evidence against its prejudicial effect (see also ***R. v. P.J.C.***, 2025 ONCA 196, at para. 25).

[117] Mindful of the four threshold requirements for admissibility, it is my determination that all of the plaintiffs' proposed expert evidence can be properly admitted.

Relevance

[118] The expert evidence in question is highly relevant. In the face of such relevance, the objections raised by the defendants (many of which are collateral) are not persuasive.

[119] I reject Canada's submission that the expert evidence of Dr. Leanne Betasamosake Simpson ("Dr. Simpson"), Dr. Vandna Sinha, and Ms. Tara Petti goes to the "ultimate issues" and therefore should be treated with caution and or rejected. While it is clear that the role of a judge at trial or otherwise can never be usurped and that caution and care will always be reference points for considering the relevancy, materiality and the overall use and admissibility of evidence, I agree with the plaintiffs when they argue that first, none of the expert reports in question opine on the ultimate issue of whether the claims should be certified. Second, given that the plaintiffs seek summary judgment on the Stage 1 common issues and given the nature of what must be examined and assessed on a summary judgment motion, some of the expert evidence will obviously and by necessity be focussed - directly or indirectly - on the issues in dispute (ultimate issues or otherwise). The absence of such focus would be odd indeed. It is that focus and the possibility of probative assistance which potentially makes that evidence relevant.

[120] The reports of Dr. Sinha and Ms. Petti attempt to set out the ways in which the defendants fell below the standard expected of a reasonable and prudent government overseeing First Nations child welfare during the Class period. Neither of the reports go so far as to suggest a particular outcome on the motions nor do they, in my view, inappropriately provide opinions concerning the "ultimate" issues.

[121] Despite Canada's objections, the expert evidence of Dr. Simpson is also relevant. It is relevant to the plaintiffs' assertion that the Aboriginal interest in issue in this case is a collective interest. It is a collective interest in maintaining their children's connection to their reserve lands and land-based teachings. Dr. Simpson's evidence is central to the

plaintiffs' claims and to the Court's understanding of the very cultural and spiritual teachings that are at issue in this proceeding. Her evidence demonstrates that for "First Nations peoples, a deep and intimate connection with the land and waters in their homelands is the foundation of life." It is Dr. Simpson's evidence that "Land-based practices are the primary way First Nations peoples maintain a connection to the land, foster a sense of belonging, form a positive identity, and pass on their cultures to the next generation." In that regard, Dr. Simpson concludes that "[t]he survival of First Nations knowledge systems and languages is entirely dependent upon the next generation of First Nations people learning land-based practices from their Elders." (see Affidavit of Leanne Betasamosake Simpson, affirmed March 14, 2024, at pp. 7 - 9).

Necessity

[122] In objecting to the "necessity" of some of the plaintiffs' expert evidence, Canada challenges the evidence of Dr. James Reynolds. Again, Canada's arguments are not persuasive.

[123] I am satisfied that the evidence of Dr. Reynolds meets the threshold test for necessity. His evidence does not provide legal conclusions, but rather, Dr. Reynolds provides the Court with insight into the historical and social context of the relationship between the Crown and Indigenous peoples. The plaintiffs are correct when they argue that this is exactly the type of evidence the Court said was admissible in ***Quebec (Attorney General) v. Canada***, 2008 FC 713, at para. 163, affirmed at 2009 FCA 361 and 2011 SCC 11.

[124] Canada impugns Dr. Reynolds' report and evidence as being unnecessary and as lacking specificity. On this point, I share the plaintiffs' uncertainty as to which parts of Dr. Reynolds' evidence and report represent that absence of specificity. Instead of specifying their objection, Canada simply states that Dr. Reynolds' report should be struck as it contains unspecified "inadmissible legal conclusions and legal argument", "unnecessary surveys of political reports, legislative history and case law", "impermissible commentary as to their legal effect or relevance" and "legal opinion on matters that go to an ultimate issue before this Court" (see Defendant (Canada) Brief, p. 182 at para. 9). The plaintiffs are right to note that Dr. Reynolds' report is 52 pages long and that they, the plaintiffs, should not be left having to guess to which part of Dr. Reynolds' evidence Canada objects. The plaintiffs are also right to expect more from Canada than blanket and conclusory statements which, without more specificity, cannot be reconciled with what I have determined (on my assessment of Dr. Reynolds' evidence) to be evidence which is both necessary and of assistance.

[125] I agree with the plaintiffs' position that Dr. Reynolds' evidence represents a rich knowledge of the relationship between the Crown and Indigenous peoples and insofar as some of that evidence is in respect of matters of fact, it should not be excluded simply because it suggests answers to issues which are at the core of the dispute before this Court (see ***R. v. Burns***, 1994 CanLII 127 (SCC), at p. 666). I have no difficulty in saying that despite this Court's own capacity to find facts and its own capacity to apply the governing legal principles necessary to decide this case, the Court would be nonetheless

greatly assisted by Dr. Reynolds' vast historic knowledge concerning the complex and technical relationship between the Crown and Indigenous peoples.

Impartiality

[126] Notwithstanding the concerns raised by Canada, on my evaluation of all of the evidence, including the cross-examinations, I am of the view that the plaintiffs' proposed experts are impartial.

[127] It is trite to say that experts are required to be impartial for their evidence to be admissible (see ***Campbell et al v. Jones et al***, 2016 MBQB 10, at para. 148, citing ***White Burgess***).

[128] I have determined that there is nothing about the plaintiffs' proposed experts or their proposed evidence that raise any concerns respecting their impartiality. As with Canada's other objections as to the threshold requirements for admissibility, Canada chooses to focus on only certain of the plaintiffs' experts. In the context of this objection (as to impartiality) Canada impugns the evidence of Ms. Petti.

[129] In my view, contrary to Canada's submissions, Ms. Petti's involvement with First Nations should not preclude her from being able to serve as an expert witness. In fact, her experience and involvement in this particular work, contributes to and enhances her qualifications. I am also in agreement with the plaintiffs' submissions when they say that Canada has mischaracterized some of Ms. Petti's evidence in support of its argument respecting impartiality.

[130] In ***White Burgess***, the Supreme Court of Canada made it clear that the existence of some interest or relationship does not automatically render inadmissible the evidence

of a proposed expert. In fact, in the majority of cases, a mere employment relationship with the party calling the evidence would be insufficient to establish an absence of impartiality or a disqualifying bias (at para. 49).

[131] Put simply, Ms. Petti is an objective, fair and non-partisan expert and her opinion, in my view, is the result of her independent analysis and any related conclusions she has drawn from that independent analysis.

The Experts are Highly Qualified

[132] Canada argues that the joint report of Dr. Melanie O'Gorman, Dr. Wayne Simpson and Dr. Christine Neill ("O'Gorman et al.") involving a proposed methodology for calculating damages should not be admitted. Canada takes that position arguing that the proposed methodologies are "novel" and that the authors of the report lack the expertise to provide such evidence.

[133] As was noted in the O'Gorman et al. report and on cross-examination, Dr. O'Gorman and her colleagues rely on methodologies that are indeed well established in the literature for the purpose of answering a question that has not previously been asked. In this case, the question not previously asked is "What is the harm caused to First Nations by unnecessary apprehensions?"

[134] I note that the issue of the quantification of damages is a Stage 2 concern. As the plaintiffs have submitted, all they are required to show for certification is that there is a plausible methodology for the calculation of common damages as per the Supreme Court of Canada's judgment in ***Pro-Sys Consultants Ltd. v. Microsoft Corporation***, 2013 SCC 57, at paras. 115 and 118.

[135] As it relates to a plausible methodology, all that is needed for the purposes of certification is some evidence of the availability of the data in respect of which the methodology is to be applied. As the plaintiffs have emphasized, Dr. O'Gorman testified to the fact that the data needed (to quantify damages) is available to be used for the assessment of the Stage 2 common issues. Manitoba's witness, Chief Executive Officer of the General Child and Family Services Authority, Mr. John "Jay" Rodgers, also confirmed that point.

[136] As it relates to qualifications, having examined the credentials and relevant experience of the proposed experts who authored the report in question, I have no concerns about their qualifications. I note that Dr. O'Gorman, Dr. Simpson and Dr. Neill were not seriously questioned during cross-examination respecting either their credentials or experience.

[137] As it relates to concerns raised in respect of the admissibility of a jointly written report, I am not troubled by the fact that the report may have been written jointly, neither do I see it as determinative that it may be unclear as to who authored which parts of that report. What is important (as I so find) is that all authors were qualified to provide the evidence in question as contained in the report (see ***Gordon et al. v. 837690 Ontario and Tyco et al.***, 2022 ONSC 1028, at paras. 37 - 39).

[138] Canada also challenges the qualifications of Dr. Sinha, Dr. Kathryn Levine and Elder Florence Paynter.

[139] In the case of Dr. Sinha, Canada points to the fact that she has never been recognized as an expert by this Court. In my view, in the particular circumstances of this

case, this alleged deficiency is not by itself a pre-emption nor should it disentitle Dr. Sinha from being qualified as an expert. As the plaintiffs have submitted, Dr. Sinha is an award-winning and highly recognized scholar. She has addressed issues relating to the impact of social policies and children's access to services just as she has addressed issues respecting the health and wellbeing of children in historically marginalized communities. She has published in leading journals and lectured extensively about First Nations' child welfare and about the development of support and prevention services through Jordan's Principle. Her experience in these areas has been recognized by diverse funders and collaborators including the Public Health Agency of Canada, Indian and Northern Affairs Canada, the Quebec Ministry of Health and Social Services, the Canadian Pediatric Society, the Canadian Association of Pediatric Health Centres and numerous First Nations organizations.

[140] Concerning Canada's challenge to Dr. Levine's qualifications, I am similarly not persuaded. As explained by the plaintiffs, she has extensive experience as a social worker working with First Nations children. Although Dr. Levine may not have interviewed any First Nations children or families while preparing her expert report, I agree with the plaintiffs when they submit that such evidence would not have assisted. Instead, in this particular instance, Dr. Levine's opinion is directed at measuring generalized outcomes for First Nations children involved in the child welfare system. As noted by the plaintiffs, this scope is distinct from a description of the outcomes for a handful of individual children or families. I have no difficulty in determining that Dr. Levine is qualified to provide an

expert opinion on the outcomes for First Nations children involved with the child welfare system.

[141] To the extent that Canada similarly challenges Elder Paynter's expert evidence, I once again reject their concerns. I note what the plaintiffs emphasize when they highlight Elder Paynter's insight as knowledge keeper and Elder on First Nations teachings on children and families. This experience, knowledge and insight is widely recognized, including by the Treaty Relations Commission of Manitoba and the National Centre for Truth and Reconciliation. I do not agree with Canada when they characterize Elder Paynter's evidence as "fact evidence". Properly understood and read, Elder Paynter's evidence can be seen to address the communal aspect of the plaintiffs' claim and the effect of severing children from their families, communities and lands. I also note, as did the plaintiffs underscore, that Canada, despite its concerns about Elder Paynter's evidence, chose to conduct no cross-examination.

[142] To summarize, all of the plaintiffs' proposed expert evidence will be admitted and all of the connected proposed expert witnesses should be assumed to be qualified to provide the opinions expressed in the reports. If and where necessary, those opinions will be – as they always are – subject to the possibility of receiving greater or less weight.

[143] As it relates to any of the contested evidence respecting the now qualified experts, it should be assumed unless otherwise stated or stipulated, that later in my analysis, where I have invoked and relied upon their opinion evidence, I have determined that both the witness and the opinion given are credible and reliable and properly grounded in training, experience and or other evidence on the record. The weight afforded to any

expert opinion should be discernible and reflected in the degree to which that opinion is relied upon for whatever findings or determinations I must make.

The Defendants' Objection to the Admissibility of the Affidavit Evidence of the Plaintiffs' Lay Witnesses

[144] It is Manitoba who most forcefully opposes the admissibility of the affidavits executed by many of the plaintiffs' lay witnesses.

[145] Manitoba contends that the affidavits adduced by the plaintiffs' lay witnesses present significant challenges, both for the defendants and the trier of fact. Manitoba says that to varying degrees, each lay witness offers a mixture of opinion, argument, unattributed hearsay and anecdotal information incapable of verification. On this latter point, Manitoba says that the affidavits purport to recount multiple interactions other individuals and families have had with CFS workers. But in virtually every instance says Manitoba, little or no information is provided respecting: the identity of the individuals or families involved; when and where the events described took place; the particular agency involved; or the circumstances leading to the apprehension or intervention. According to Manitoba, all of these deficiencies leave the defendants and the Court, with no means of verifying the events in question.

[146] Manitoba also argues that many of the portions of the plaintiffs' affidavit material do not provide facts in any meaningful sense, and instead, simply offer negative opinions concerning CFS in Manitoba. While Manitoba submits that a full listing of the evidence falling into this category is difficult to produce for presentation, they do identify in particular, the affidavit evidence of Chief Cook, who gives evidence on behalf of the representative plaintiff Misipawistik Cree Nation, Chief Kent, who gives evidence on behalf

of the representative plaintiff Black River First Nation, and Chief Monias speaking on behalf of the representative plaintiff Pimicikamak Cree Nation.

[147] A consistent theme in Manitoba's objections to the plaintiffs' evidence, is its assertion that an unduly permissive approach to receiving otherwise inadmissible evidence will have particular consequence and impact in the context of a summary judgment motion that is intended to be dispositive of part of the claim. Manitoba says this is especially important in relation to the admissibility of any alleged hearsay evidence.

[148] I accept that some of the affidavit evidence executed by the plaintiffs' lay witnesses may in parts, stretch the boundaries of certain evidentiary rules – both common law and those identified in the Rules. I also accept, however – as Manitoba itself has acknowledged – that it is now well established that in interpreting and weighing evidence, a court must be conscious of the special nature of Aboriginal claims. The Supreme Court of Canada has acknowledged the need for that special awareness and the need to not "undervalue" the evidence adduced in support of Aboriginal claims. I note that at the same time, the Supreme Court offers the reminder that despite what may be the required special responsibility and awareness in cases involving Aboriginal claims, the foundational principles of the law of evidence (and the common sense that undergirds it) still have application (see ***Mitchell v. M.N.R.***, 2001 SCC 33, at para. 38).

[149] I will be guided by the direction of the Supreme Court of Canada in ***Mitchell*** and will remain mindful of the needed balance when considering what is not only the special nature of Aboriginal claims generally, but what is particularly unique about the claims in this case and the nature of the evidence available and required to establish them. In that

regard, I must and will find the requisite balance by remaining mindful of the proposition that the stringency by which certain evidentiary rules need be applied, may depend on the purpose for which the evidence in question is being tendered. I must also, and will, find that balance by remaining vigilant to not lose sight of the truth-seeking function that animates not only the modern approach to the interpretation and application of the rules of evidence, but also, a court's approach to its task in a case such as this one.

[150] To the extent that the evidence of Chief Monias, Chief Cook and Chief Kent, for example, has been impugned and challenged in the way it has, I am not persuaded by the submissions of Manitoba and or Canada that any of the connected objections can or should justifiably lead to the exclusion or categorical disregarding of that evidence. Indeed, I have come to the same conclusion about the evidence of all of the plaintiffs' lay witnesses.

[151] Some of the objections raised by Manitoba suggest that certain key and representative witnesses that the plaintiffs present, cannot properly draw on their experiences as Chiefs when giving evidence on behalf of their respective First Nations. I disagree.

[152] Chief Monias, for example, explains how the defendants' policies have impacted First Nations in a variety of ways, not the least of which involves keeping First Nations children out of suitable First Nations foster homes. I agree with the plaintiffs' submissions which note that Chief Monias' assertions are core complaints in the present case. While I appreciate that Manitoba's alleging that Chief Monias is "making assumptions without stating the underlying material facts, and offering conclusions respecting the knowledge,

motivations and/or 'preferences' of the defendants without having any direct knowledge of same," (Motion Brief of the Defendant The Government of Manitoba, filed March 12, 2025 ("Defendant (Manitoba) Brief"), at para. 149(c)), that stark observation and perspective by Manitoba fails to understand the actual basis for and potential value of Chief Monias' evidentiary contribution. Rather than being deficient for the reasons identified by Manitoba, Chief Monias' affidavit can be seen as disclosing the very basis on which he is able to give evidence about the practical operation of the child welfare system. It also discloses the basis for his perception of the defendants' motivations, all of which is in any event, subject to weight.

[153] Despite the need to carefully calibrate the provision of weight respecting the evidence from witnesses like Chief Monias, care must also be taken to consider the value and relevance of such evidence, particularly, as in the case of Chief Monias, where such evidence is rooted in a unique educational background, experience and exposure. In that regard, I note his Master of Arts degree from the University of Victoria focussing on children and youth in government care. I also note his considerable experience which Chief Monias explains as follows (Affidavit of Chief David Monias ("Monias Affidavit"), affirmed April 22, 2024):

> 4. I have spent approximately 30 years in various roles in First Nations governance and the child welfare system. I was first formally exposed to the operations and challenges of Child and Family Services ("CFS") agencies as a front-line CFS worker. I subsequently held various roles with CFS agencies, including as a supervisor, program manager, director of programs, and Executive Director with Awasis Agency of Northern Manitoba ("Awasis") from 1991-2010. I was then the Chief Executive Officer of Manitoba Keewatinowi Okimakanak from 2010–2014. After that, I was the Director of Operations for the Kinosao Sipi Minisowin Agency.

[154] It is obvious that Manitoba has the right to strenuously challenge the conclusions that Chief Monias has drawn from three decades working in the child welfare system and his work leading his First Nation. But with that said, I am in agreement with the submissions of the plaintiffs, that Manitoba cannot as easily deny Chief Monias' right to explain, through evidence, on a motion such as this one, what it is that he is capable of saying he saw, experienced and concluded. Indeed, I would make that same point as it relates to Manitoba's objections respecting the evidence of Chief Cook, on behalf of her First Nation, and Chief Kent, on behalf of his First Nation.

[155] As it relates to the above three witnesses (Chiefs Monias, Cook and Kent), I am not in agreement with Manitoba to the extent that it says that it is improper for these witnesses to draw on their experiences as Chiefs when giving evidence on behalf of their respective First Nations. Instead, I endorse the submissions of the plaintiffs when they suggest that it is commonly understood that a First Nation can speak through a duly elected Chief who is acting with the authority of the band council. Indeed, while the rules of evidence must continue to apply, courts have routinely accepted evidence from Chiefs on behalf of their communities. This is of particular importance in cases like the present one where the plaintiffs are First Nations. If the plaintiffs are First Nations and if they cannot speak through their Chiefs, it is difficult to see how they will speak at all (see ***Wood Mountain Lakota v Goodtrack***, 2018 SKQB 230 (reversed on other grounds 2020 SKCA 10, leave to appeal refused 2021 CanLII 6706 (SCC)); ***Children's Aid Society of Sudbury and Manitoulin v. C.J.P.***, 1991 CanLII 7396 (ON CJ)).

[156] To the extent that certain parts of the plaintiffs' lay witnesses' affidavits may offer a mixture of opinion, argument, unattributed hearsay and anecdotal information incapable of verification, I will remain conscious of the distortative potential of any such evidence and if and where necessary, take the appropriate care. I will also, however, and at the same time, be taking the necessary and appropriate care when interpreting and weighing the evidence in a case involving what is the special nature generally of Aboriginal claims and what is the special and specific nature of the collective claims in the present case. All of that to say that while the necessary cautions and care will require an attentive calibration as to how much weight will be attributed to the evidence in question, there is in my view, no sufficient justification to rule inadmissible any of the plaintiffs' lay witnesses' affidavits.

[157] It should be assumed that unless otherwise stated or stipulated, in those instances and parts of my analysis (found later in this judgment) where I have relied upon the lay witnesses' affidavits (either separately or cumulatively with other evidence) to make certain findings of fact or other determinations, those lay witnesses along with the contested affidavits (or those contested parts of the affidavits) have been accepted as credible and reliable and deserving of the weight that the particular factual finding would suggest has been given.

The Defendants' Objection to the Admissibility of Public Reports

[158] Both Manitoba and Canada argue strenuously that the public reports relied upon by the plaintiffs to establish parts of their claim are either inadmissible or admissible for a very limited purpose.

[159] To the extent that Manitoba acknowledges that these public reports may be admissible for the limited purpose of providing "some basis in fact" for the certification criteria set out in s. 4 of the ***CPA*** (where there is other supporting evidence), objection is nonetheless taken to the plaintiffs' efforts in using any of these public reports to establish their case on summary judgment.

[160] The public reports which are the subject of this contested evidentiary issue, include the following reports referenced within the plaintiffs' Fresh as Amended Statement of Claim ("FASC"), filed August 24, 2023:

- "Bringing Our Children Home" in 2014 (at para. 43);
- "Keewaywin: Our Way Home, Manitoba First Nations Engagement on First Nations Child and Family Services" (at para. 47);
- "Keewaywin II: Closer to Home Community Visits" (at para. 50);
- "Kimelman Inquiry (1985)", "Aboriginal Justice Inquiry (1991)" (at paras. 73 – 78);
- "Aboriginal Justice Inquiry (AJI) (1991)", "Royal Commission on Aboriginal Peoples (1996)" (at para. 79);
- "Post-Development Reports" which include reports from the Manitoba Ombudsman, Provincial and Federal Auditor Generals, Manitoba Advocate for Children and Youth, the Phoenix Sinclair Inquiry, the Truth and Reconciliation Commission, and the National Inquiry into Missing and Murdered Indigenous Women and Girls (at para. 85);

- 2006 Manitoba Ombudsman report – "Strengthen the Commitment: An External Review of the Child Welfare System", "2014 Phoenix Sinclair Inquiry", "2014 Bringing our Children Home Report", "2015 Truth and Reconciliation Commission" (at para. 115);
- "Transforming Child Welfare Legislation in Manitoba: Opportunities to Improve Outcomes for Children and Youth" (at para. 116);
- "A Place Where it Feels Like Home: The Story of Tina Fontaine" released by the Manitoba Advocate for Children and Youth (at para. 119);
- Auditor General report of 2019 (at para. 120); and
- National Inquiry into Missing and Murdered Indigenous Women and Girls (at para. 121).

[161] These reports were largely adduced through the affidavits of Ms. Jennifer Kasper, a legal assistant at McCarthy Tétrault LLP, and Ms. Kayla Frank, the Director of Children and Families for the AMC First Nations Family Advocate Office ("FNFAO") and the person authorized to give evidence on behalf of the AMC.

[162] As Manitoba has pointed out, to the extent that the plaintiffs' claims include allegations of systemic negligence and other breaches, those allegations are largely predicated on and rooted in the contents of these reports, which the plaintiffs seek to have the Court accept as true. It is to this that Manitoba objects. In this regard, Manitoba points to the body of jurisprudence that stands for the proposition that public inquiry reports, commission reports, etc. are not admissible for the truth of their contents (see ***Robb Estate v. St. Joseph's Health Center***, 1998 CarswellOnt 4898, at paras. 23

and 24; ***Rumley v. B.C. (Province of)***, 2003 BCSC 234, at paras. 51 - 53; ***Bigeagle v. Canada***, 2021 FC 504, affirmed 2023 FCA 128; and ***R.G. v. The Hospital for Sick Children***, 2017 ONSC 6545, at para. 26).

[163] The general and specific concerns typically discussed in the jurisprudence in respect of the potential use of such public (inquiry or commission) reports tendered for their truth, relate to concerns in relation to the following: the absence of or the different nature of the tests for admissibility; the absence or reduced opportunity for cross-examination; the absence or reduced level of due process or procedural fairness; and the intended initial use or purpose of the reports (e.g. healing, reconciliation, and or to encourage government action) which purpose is inconsistent with the use of the reports for the legal purposes identified in the context of specific litigation. Put simply, the valid concerns most often raised in respect of the use of such public reports relates to the overall worry that the conclusions that arise out of public inquiries or commissions should not be used to establish legal liability and they should not replace a separate and independent judicial review of the facts with all of the attendant procedural and evidentiary safeguards associated with the adversarial process.

[164] I accept the concerns raised in any of the cited jurisprudence that identifies the possible deficiencies, distortions and potential unfairness relating to the undue reliance upon public reports (for their truth) in the context of highly contested issues that later play out in a litigation setting. That said, as in the present case, distinctions exist, distinctions which mitigate some of the typically identified concerns. These distinctions

challenge the defendants' stated and broad proposition in this case, that reports of this type should not be and cannot be relied upon "for their truth".

[165] To better appreciate the overly broad nature of the defendants' objection to the use of public reports (whether arising from studies, inquiries or commissions), it is useful as a starting point to consider the existence of the "public documents exception" to the rule against hearsay. That exception by itself has been used as a safeguarding test or reference point for the admission of public documents and reports (see ***Yahey v British Columbia***, 2021 BCSC 1287, at para. 831 (the admission of the Auditor General of British Columbia report); ***Francis v. Ontario***, 2020 ONSC 1644, at para. 20 (the admission of the Ombudsman of Ontario report); ***R. v. Duffy***, 2015 ONCJ 304, at para. 70 (the admission of a Senate report)). As the plaintiffs have asserted, despite the defendants' argument and objections, reports of the type relied upon by the plaintiffs have often been admitted into evidence for the truth of their contents under the public documents exception to the hearsay rule.

[166] As was noted in ***R. v. A.P.***, 1996 CanLII 871 (ON CA), [1996] O.J. No. 2986, at para. 15, a public document is a document that is made for the purpose of public use and reference. Public documents are admissible "because of their inherent reliability or trustworthiness and because of the inconvenience of requiring public officials to be present in court to prove them." (at para. 14).

[167] As stated in ***Yahey*** (citing ***R. v. A.P.*** at para. 15), for a document to be admitted under the public documents exception, the following must be established:

> [827] …
>
> i. the document must have been made by a public official, that is a person on whom a duty has been imposed by the public;
>
> ii. the public official must have made the document in the discharge of a public duty or function;
>
> iii. the document must have been made with the intention that it serve as a permanent record; and
>
> iv. the document must be available for public inspection.

[168] Beyond the public documents exception rule, it is useful to consider the now more contemporary and evolving nature of the "principled approach" to the hearsay rule which provides a consistent but somewhat distinct rationale for determining when hearsay (including that contained in public documents and records) can be properly admitted into evidence.

[169] The principled exception to the hearsay rule is equally applicable in both criminal and civil cases (see ***Fawley et al v Moslenko***, 2017 MBCA 47, at para. 95). Hearsay can be admitted into evidence under the principled exception to the hearsay rule where the party tendering it can satisfy the court that it is both reliable and necessary (see ***R. v. Bradshaw***, 2017 SCC 35, at para. 23, citing ***R. v. Khelawon***, 2006 SCC 57, at para. 47). As the Supreme Court of Canada recently explained, "[t]hreshold reliability is established when the hearsay 'is sufficiently reliable to overcome the dangers arising from the difficulty testing it'" (see ***Bradshaw***, at para. 26, citing ***Khelawon***, at para. 49). One such way that "danger" may be overcome is if the hearsay evidence is inherently

trustworthy (i.e., that it is *substantively* reliable) (see ***Bradshaw***, at para. 27). As the Supreme Court of Canada explains in ***Bradshaw***:

> [31] While the standard for substantive reliability is high, guarantee "as the word is used in the phrase 'circumstantial guarantee of trustworthiness', does not require that reliability be established with absolute certainty" (*Smith*, at p. 930). Rather, the trial judge must be satisfied that the statement is "so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process" (*Khelawon*, at para. 49). The level of certainty required has been articulated in different ways throughout this Court's jurisprudence. Substantive reliability is established when the statement "is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken" (*Smith*, at p. 933); "under such circumstances that even a sceptical caution would look upon it as trustworthy" (*Khelawon*, at para. 62, citing Wigmore, at p. 154); when the statement is so reliable that it is "unlikely to change under cross-examination" (*Khelawon*, at para. 107; *Smith*, at p. 937); when "there is no real concern about whether the statement is true or not because of the circumstances in which it came about" (*Khelawon*, at para. 62); when the only likely explanation is that the statement is true (*U. (F.J.)*, at para.40).

[170] With respect to the second criterion, that of necessity, the Manitoba Court of Appeal has explained that hearsay evidence will be considered necessary where it is "reasonably necessary, not absolutely necessary", and is established, "when there is no other way to present evidence of similar value at trial" (see ***Fawley***, at para. 100). Importantly, the principled exception's twin criterion of reliability and necessity work in tandem; the more reliable a statement, the less important the necessity analysis may become (see ***R. v. Bridgman***, 2017 ONCA 940, at para. 63; ***Fawley***, at para. 99).

[171] Separate from the description of the criteria of reliability and necessity attaching to the principled approach to the hearsay rule, is the inextricably connected and always present concern relating to what was identified as the circumstantial guarantees of trustworthiness. Indeed, these circumstantial guarantees of trustworthiness were always part of an analysis in respect of any of the traditional exceptions to the hearsay rule, including the public documents exception. They are also now, as noted, an inherent and

continuing part of any assessment and consideration of what may be the hallmarks of reliability that need be present in any case where the Court is considering the possible admission of hearsay evidence based on the principled approach.

[172] I am of the view that in the case at bar, the necessary guarantees of trustworthiness and the hallmarks of reliability as identified in ***Yahey*** and in many other distinct and diverse cases, are indeed present. The presence of these "guarantees of trustworthiness" and "hallmarks of reliability" in this case, make the admission of the contested public reports coherent and consistent with the proper application of the public documents exception and the principled approach to hearsay more generally.

[173] I turn now to some of the specific hallmarks of reliability that exist in the present case.

[174] I note first that the reports that the defendants seek to exclude involve reports by highly credible public officials exercising public functions, including the Ombudsman of Manitoba, the Manitoba Advocate for Children and Youth, and the Auditors General of both Manitoba and Canada.

[175] I also note that the reports in question were produced with the purpose of conveying information to the defendants and guiding their decision making. It is worthy of note, that the defendants did in fact rely upon these reports to guide their decision making. In this regard, I note the defendants' affidavits of Mr. Rodgers and Ms. Pamela Fraser. No less significant and telling (as outlined in the Brief of the Plaintiffs on the Motions for Certification and Summary Judgment, filed February 13, 2025 (the "Plaintiffs' Brief"), at paras. 94, 95, 97, 101, 128 and 129), is the fact that the defendants accepted

the recommendations and findings of many of these reports. The plaintiffs make the logical and somewhat obvious point that the defendants' responsive actions in this regard would not have taken place if they, the defendants, did not view the reports to be trustworthy and reliable.

[176] I note as the plaintiffs have also argued, the sheer consistency of the reports over time. This consistency in my view also speaks to reliability. As the plaintiffs insist, this is not a body of conflicting reports pointing in many different directions. The reports were produced over the course of the Class period and they repeatedly notified the defendants of systemic issues in the child welfare system leading to the drastic and growing over-representation of First Nations children in CFS. As the plaintiffs contend, these systemic issues include longstanding and perverse incentives in its funding model which bias the system towards apprehension, persistent underfunding of prevention services, endemic challenges in accommodating the social, cultural and financial realities of First Nations families and communities and, the lack of the necessary, culturally specific programming to support First Nations children following their apprehension. I cannot disagree with the plaintiffs' submissions that while these reports assist in creating a varied and voluminous overall record, the reports themselves, are also remarkably consistent and all do in fact, point in the same direction.

[177] The defendants maintain their generally expressed position that they are unable to test the findings in the reports. In my view however, the identifiable hallmarks of reliability and circumstantial guarantees of trustworthiness that exist in the present case, address, directly or indirectly, not only the defendants' objection, but also, many of the

typically identified due process and procedural fairness concerns raised in the jurisprudence.

[178] For example, the defendants actually participated in the processes that lead to several of these reports. I note the participation in the Phoenix Sinclair Inquiry, the MMIWG Inquiry, and the Truth and Reconciliation Commission.

[179] I also note the defendants had the opportunity to provide contemporary responses to the findings and recommendations of these reports (see, for example, Exhibit 1 to the Affidavit of Pamela Fraser ("Fraser Affidavit"), affirmed July 17, 2024; Exhibit C to the Affidavit of John Rodgers ("Rodgers Affidavit"), affirmed August 8, 2024; and Exhibit L to the Affidavit of Jennifer Kasper ("Kasper Affidavit"), sworn March 15, 2024).

[180] Many of what I identified as the contemporary responses to the findings and recommendations in the reports, involved a responsive commitment to implementing the recommendations of the reports which commitment itself, often involved the implicit or explicit acceptance of the findings contained in the reports.

[181] It need be noted that as a natural part of this proceeding (given what I must assume the defendants understood was at stake), was the obvious opportunity open to the defendants to lead evidence that would have disputed any of the reports in question. They have failed to do so.

[182] Having discussed what are the hallmarks of reliability and the circumstantial guarantees of trustworthiness present in the case at bar, it is useful to take note of where other courts have seen fit to rely on reports like those in the present case. They have done so where it appears to have been necessary and critical to the just and timely

resolution of matters in issue (particularly in the context of constitutional cases and issues) and where it would seem that the reports can be relied upon as possessing hallmarks of reliability and circumstantial guarantees of trustworthiness. Some examples of those cases are those cited by the plaintiffs: ***R. v. Le***, 2019 SCC 34, at paras. 71 and 83 - 97; ***Fraser v. Canada (Attorney General)***, 2020 SCC 28, at paras. 99 and 100; ***R. v. Sharma***, 2022 SCC 39, at para. 55; ***Flette #1***, at paras. 47, 48, 52 and 53; ***Stadler v Director, St. Boniface/St. Vital***, 2020 MBCA 46, at paras. 91 and 92, and ***C-92 Reference Decision #2***.

[183] In ***Le***, the Supreme Court of Canada noted that evidence of social context in ***Charter*** cases can be derived from "social fact" or the taking of judicial notice. In this regard, the Supreme Court noted that the information required to inform the reasonable person "can take the form of reliable research and reports that are not the subject of reasonable dispute" (at para. 71). In ***Le***, the Supreme Court relied on multiple reports on racial profiling produced by the Ontario Human Rights Commission and the Tulloch report on the practice of carding.

[184] In ***Fraser***, the Supreme Court of Canada placed reliance on these reports:

- Canada. Royal Commission on Equality in Employment. *Report of the Commission on Equality in Employment*. Ottawa: Supply and Services Canada, 1984; and
- Canada. Royal Commission on the Status of Women in Canada. *Report of the Royal Commission on the Status of Women in Canada*. Ottawa, 1970.

[185] In ***Sharma***, the Supreme Court of Canada noted the important role of taking judicial notice of "notorious and undisputed facts, or of facts which are capable of immediate and accurate demonstration, by resorting to readily accessible sources of undisputable accuracy" (at para. 55).

[186] In ***Flette #1***, this Court relied on two of the reports challenged by the defendants: the 2006 Auditor General Report and the 2019 Auditor General Report. In ***Stadler***, the Manitoba Court of Appeal relied upon the report of the Manitoba Ombudsman on Manitoba's Employment and Income Assistance Program.

[187] In ***C-92 Reference Decision #2***, various reports are cited by the Supreme Court of Canada, including:

- Canada. National Inquiry into Missing and Murdered Indigenous Women and Girls. *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*. Vancouver, 2019;
- Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples*, vol. 1, *Looking Forward, Looking Back*. Ottawa: Canada Communication Group, 1996;
- Canada. Truth and Reconciliation Commission. *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*. Winnipeg, 2015;
- Canada. Truth and Reconciliation Commission. *The Final Report of the Truth and Reconciliation Commission of Canada*, vol. 1, *Canada's*

Residential Schools: The History, Part 1 — Origins to 1939. Montréal: McGill-Queen's University Press, 2015; and

- Manitoba. Public Inquiry into the Administration of Justice and Aboriginal People. *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People*. Winnipeg, 1991.

[188] The Supreme Court variously relies upon the above reports to, amongst other things, provide the historical context giving rise to the legislation's genesis and when discussing the legislation's procedural effects. For example, in ***C-92 Reference Decision #2***, the Supreme Court makes certain statements about the history of Canada's approach to its Indigenous child welfare policies:

> [10] For most of Canada's history, lawmakers have wrongly employed a policy of assimilation aimed at "lifting [Indigenous peoples] out of [their] condition of tutelage and dependence, and . . . prepar[ing] [them] for a higher civilization" (*Annual Report of the Department of the Interior for the Year Ended 30th June, 1876*, reproduced in *Sessional Papers*, vol. X, No. 7, 4th Sess., 3rd Parl., 1877, No. 11, at p. xiv, quoted in *Report of the Royal Commission on Aboriginal Peoples*, vol. 1, *Looking Forward, Looking Back* (1996), at p. 277; see also *The Final Report of the Truth and Reconciliation Commission of Canada*, vol. 1, *Canada's Residential Schools: The History, Part 1 — Origins to 1939* (2015), at pp. 107-9). This history, which includes the residential schools policy, the "Sixties Scoop" and the harm and intergenerational trauma that resulted therefrom, is detailed in several reports published in recent decades (see, e.g., *The Final Report of the Truth and Reconciliation Commission of Canada*, vol. 1, *Canada's Residential Schools: The History, Part 1 — Origins to 1939* and *The History, Part 2 — 1939 to 2000* (2015); *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019), vol. 1a).
>
> [11] The effects of these government policies are still being felt today. "In tandem with the residential school system, the child welfare system . . . became a site of assimilation and colonization by forcibly removing children from their homes and placing them with non-Indigenous families" (*Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol. 1a, at p. 282). The statistics on the overrepresentation of Indigenous children in child welfare systems are quite simply staggering. According to 2016 census data, about 7.7 percent of children under the age of 15 in Canada are Indigenous, but they represent 52.2 percent of children in foster care in private homes (Indigenous

> Services Canada, *The Government of Canada announces the coming into force of an Act respecting First Nations, Inuit and Métis children, youth and families*, September 10, 2019 (online)).
>
> [12] Over time, Canada has abandoned its policy of assimilation in favour of a policy of reconciliation. Parliament established the Truth and Reconciliation Commission of Canada and gave it a dual mandate to "reveal to Canadians the complex truth about the history and the ongoing legacy of the church-run residential schools" and to "guide and inspire a process of truth and healing, leading toward reconciliation within Aboriginal families, and between Aboriginal peoples and non-Aboriginal communities, churches, governments, and Canadians generally" (*Honouring the Truth, Reconciling for the Future*, at p. 23).

[189] The Supreme Court also relies on the AJI Report to make the following statement discussing the "practical effects" of the legislation:

> [75] The usefulness of practical effects in characterizing the Act is relative, because the Act was enacted only recently and its "actual or predicted" effects, to use the language of *Morgentaler* (at p. 483), cannot be determined with precision. However, it is reasonable to expect that Indigenous children and families will receive services that are more appropriate to their cultural realities (see, e.g. Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (1991), c. 14). This in turn may reasonably be expected to reduce the overrepresentation of Indigenous children in child and family services settings and to help protect the well-being of Indigenous children, youth and families.

[190] I will conclude my consideration of the defendants' objections to the admissibility of the public reports by noting an incongruity arising from the defendants' own evidence. In this connection, the plaintiffs are right to point out that the defendants' objections to the public reports are rather puzzling. This is so, given the defendants' own evidentiary records which include several relevant reports and the defendants' own responses and submissions to the reports that they now seek to exclude. The plaintiffs argue persuasively that the defendants' proposed exclusions would have this Court consider their (the defendants') responses and submissions to the reports "as though they materialized out of thin air, instead of within the essential context in which they were

produced." (Reply Submissions of the Plaintiffs, filed March 24, 2025 ("Reply Brief"), at p.84 para. 12). I agree with the plaintiffs' submission that the fact the defendants saw fit to include in their own evidence, their responses and submissions to the public reports adduced by the plaintiffs, speaks directly to the relevance, necessity and reliability of the very same public reports that the defendants now seek to have excluded from evidence.

[191] For the above reasons, I will not be excluding the public reports in question, nor do I agree with the defendants' categorical position that they cannot in any way be tendered for their truth. In the present case, given the presence of the hallmarks of reliability and the guarantees of trustworthiness, some or all of the reports (or parts of the reports) may indeed be accepted for their truth. As always, and like all evidence, if and where necessary, any of the connected evidence may be subject to greater or less weight.

[192] Once again, it should be assumed, that in those instances or parts of my analysis where I have relied upon these public reports to make certain factual findings, or other determinations, the contested evidence meets the public documents exception to the hearsay rule and or it more than meets the aforementioned requirements for substantial relevance and necessity.

Issue Estoppel and Abuse of Process

[193] Another issue that need be addressed at this preliminary stage, is the plaintiffs' argument that Canada is estopped from disputing the findings of the CHRT in its ***Caring Society*** decision. That decision arose as a result of a complaint by the Caring Society and the AFN to the Canadian Human Rights Commission that the funding provided by Canada for on-reserve child welfare through its FNCFS program was discriminatory and contrary to the ***CHRA***.

[194] In adjudicating the identified complaint, the CHRT agreed with the complainants. It concluded that contrary to s. 5 of the ***CHRA***, Canada's funding model had discriminated against First Nations children and families on reserve and in the Yukon.

[195] The plaintiffs argue in the present case that issue estoppel operates to effectively bar Canada from disputing the CHRT's findings in the context of several of the issues before this Court, namely the plaintiffs' claims under s. 15(1) of the ***Charter*** and under ss. 35 and 36 of the ***Constitution Act***. In effect, the plaintiffs ask this Court to adopt the CHRT's decision for the purpose of finding that the plaintiffs' rights under s. 15(1) of the ***Charter***, and ss. 35 and 36 of the ***Constitution Act*** have been breached. The plaintiffs' position of course, presupposes that they (the plaintiffs) are even entitled to advance, as a Class proceeding, their claim under s. 15(1) of the ***Charter*** or under ss. 35 and 36 of the ***Constitution Act***, about which I will have more to say later in this judgment.

[196] For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior

judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies (see ***Toronto (City) v. C.U.P.E., Local 79***, 2003 SCC 63, at para. 23; ***Glenko Enterprises Ltd. v. Keller***, 2008 MBCA 24, at para. 33). Importantly, even if all three preconditions are met, the court retains discretion not to apply the doctrine (see ***Danyluk v. Ainsworth Technologies Inc.***, 2001 SCC 44, at para. 33; ***Glenko***, at para. 52).

[197] In the circumstances of the present case, I am not satisfied that all three preconditions for issue estoppel are met.

[198] Although the plaintiffs and Canada seem to agree that the second precondition has been met on the basis that Canada has elsewhere accepted the CHRT's decision, I am not persuaded that the plaintiffs have adequately established either the first or third precondition.

[199] As it relates to the first precondition, it is true, as the plaintiffs point out, that the CHRT described the matter before it as concerning, "how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities." (***Caring Society***, at para. 1). It should also be noted however, that the very first sentence of that decision, which precedes the above quotation reads as follows: "This decision concerns children" [emphasis in original] (***Caring Society***, at para. 1). From these opening sentences, the plaintiffs would have the Court conclude that the "issue" before the CHRT, was the same as the issue before this Court. I disagree.

[200] The actual issue before the CHRT was in my view much narrower. To discern the "issue" animating that 494-paragraph decision requires consideration of the decision itself, not just its introductory paragraph. One can better discern the issue by looking to what it was that the CHRT actually found in that case:

> [28] …the Panel finds [Aboriginal Affairs and Northern Development Canada] is involved in the provision of child and family services to First Nations on reserves and in the Yukon; that First Nations are adversely impacted by the provision of those services by AANDC, and, in some cases, denied those services as a result of AANDC's involvement; and; that race and/or national or ethnic origin are a factor in those adverse impacts or denial.

While the CHRT may have initially characterized the decision as being "about children" and "how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities", the issue was, as noted, narrower. That more narrower issue dealt squarely with whether the provision of CFS to First Nations on reserves and in the Yukon (through a particular federal government program) was discriminatory. The issues before this Court in the present case are much broader; they implicate not only a single federal government program but a panoply of government actions, both federal and provincial, actions that span decades. In addition, while the issues in the present case also involve children in the widest possible sense, more fundamentally, the matter before this Court concerns whether and to what extent First Nations themselves have certain rights and whether those rights give rise to certain duties by Canada and Manitoba in the context of child welfare. I am not convinced that the issues before this Court are the same as the ones decided by the CHRT in ***Caring Society*** so as to satisfy the first precondition for invoking issue estoppel.

[201] That said, it seems clear that the third precondition has also not been met in that the parties in ***Caring Society*** were Canada, the Caring Society and, critically, the AFN, which is a separate and distinct organization from the AMC, which is a party here. The plaintiffs would have me conclude that this third precondition is nevertheless satisfied because the AFN has sufficiently similar interests to the plaintiffs in this case. I am not prepared to make that determination.

[202] In my view, there is not sufficient evidence before me to make the determination the plaintiffs need me to make respecting the third precondition.

[203] In the alternative, the plaintiffs suggest that, even if issue estoppel is not established, it would be an abuse of process for Canada to disclaim the findings made by the CHRT in its ***Caring Society*** decision.

[204] In support of their arguments respecting abuse of process, the plaintiffs cite several paragraphs from ***Toronto (City)***, but they do not spend any time substantively engaging in what could be considered an analysis of the doctrine's applicability. Canada, for its part, does not address abuse of process at all; rather, Canada confines its response to the inapplicability of issue estoppel perhaps because the plaintiffs only really discuss abuse of process tangentially.

[205] Respecting the doctrine of abuse of process, I note that in circumstances where the strict requirements of issue estoppel are not met (typically the privity/mutuality requirements) but where allowing litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice, Canadian courts have applied the doctrine of abuse of process to preclude

re-litigation (see ***Toronto (City)***, at para. 37). I also note however, that abuse of process is "an extraordinary remedy", which ought to be applied "sparingly and only in the clearest and most obvious cases" (see ***Glenko***, at para. 56, citing Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2d ed. (Markham: LexisNexis Canada Inc., 2004) at 372). In the circumstances of the present case, I have serious reservations about invoking such an extraordinary remedy to prohibit the defendant, Canada, from taking certain positions in its defence, particularly when I have already found that neither the issues nor the parties are the same as those before the CHRT in ***Caring Society***.

[206] I am mindful of the importance of not disturbing clear findings of other adjudicative bodies when to do so could potentially compromise the integrity of the broader judicial system and the administration of justice. That said, for the reasons I have offered above, to the extent Canada wishes to take the position before me that it disputes the factual findings made by the CHRT in ***Caring Society*** (despite having declined to appeal that decision), I will permit them to do so. In other words, they are not (based on the application of the relevant test) estopped from doing so. I make that determination however, with the obvious and common-sense proviso that if the findings in question are indeed disputed and if any of those findings are at all relevant and have any application and connection to the determinations I must make in the present case, it is expected that those disputed findings will be addressed with the appropriate evidence and argument.

Opposition to the AMC as a Representative Plaintiff

[207] The proposed representative plaintiffs for the lass proceeding are Misipawistik Cree Nation, Black River First Nation, Pimicikamak First Nation, and the AMC. Misipawistik, Black River and Pimicikamak are all Manitoba First Nations and are also the plaintiffs seeking summary judgment in this case.

[208] The AMC, as the plaintiffs explain, is the collective voice for First Nations in Manitoba, speaking on behalf of the Chiefs and its 63 member First Nations. The plaintiffs (the three First Nations and AMC) seek to have AMC appointed as a representative plaintiff even though it is not itself a First Nation, and therefore not a member of the proposed Class for the purposes of the proposed Class proceeding.

[209] In their written submissions, the plaintiffs argue for the appointment of the AMC pursuant to s. 2(4) of the ***CPA***. They say that provision contemplates that a non-member of the Class may be appointed as a representative plaintiff to avoid an injustice to the Class. Section 2(4) provides as follows:

> **Representative plaintiff not from class**
>
> 2(4) The court may appoint a person who is not a member of the class as the representative plaintiff only if it is necessary to do so in order to avoid a substantial injustice to the class.

While the ***CPA*** does indeed contemplate that a non-member of a class may be appointed as a representative plaintiff, it would appear, based on a plain reading of the provision, that such an appointment would be exceptional (i.e., only when necessary to avoid a substantial injustice to the class).

[210] The plaintiffs submit that the AMC's leadership and expertise is vital to the success of their proceeding. They explain that, through its participation, the AMC provides

institutional strength, governance and accountability. I infer from this that, owing to the vital role of the AMC, it is the plaintiffs' position that a substantial injustice to the Class would arise if the AMC was not appointed as a non-member representative plaintiff.

[211] Manitoba takes no position on the appointment of the AMC as a non-member representative plaintiff. Canada, for its part, opposes such an appointment.

[212] Canada raises two objections to the AMC's appointment. First, Canada argues the AMC does not have common interests with the other Class members as it is not, in itself, a First Nation and therefore does not meet the definition of a Class member. Second, Canada argues the AMC may be in a conflict of interest. To that end, Canada points to the case of ***Fisher River Cree Nation v. Canada (Attorney General)***, 2025 FC 561. Canada asserts that the five First Nations who are named as plaintiffs in that action have taken issue with the plaintiffs in this proceeding seeking summary judgment. Canada also points to the AMC's position *vis-à-vis* the 2019 ***Act***, and certain ***Charter*** principles, which Ms. Frank, in her Reply Affidavit ("Frank Reply Affidavit"), affirmed September 18, 2024, (on behalf of the AMC) described as "colonial law". Canada argues the AMC's position is not easily reconcilable with the evidence of the other representative plaintiffs in this proceeding.

[213] Canada's opposition is not persuasive and I do not accept its position on this issue.

[214] In rejecting Canada's opposition to the appointment of the AMC as a representative plaintiff, I note first that the fact that the AMC does not meet the definition of a Class member is not, in itself, a bar to being a representative plaintiff. Indeed, it would seem that the point of s. 2(4) of the ***CPA*** is to enable a person who is not a member of the

Class to serve where appropriate, as a representative plaintiff. More to the point, not being a member of the Class is not *prima facie* evidence that the non-member's interests do not align with the Class members. If such were the case, a non-member would never be able to serve as a representative plaintiff. The legislative scheme clearly contemplates situations in which a non-member can share the interests of the Class members such that it can capably serve as a representative plaintiff for the purpose of advancing a Class proceeding on behalf of the Class.

[215] In rejecting Canada's position on this issue, I also note that even though as Canada repeatedly notes, the AMC is a "political and advocacy organization", it does not follow that its interests cannot be aligned with that of the First Nations themselves. Indeed, as the plaintiffs explain, the AMC's purpose is to represent the interests of Manitoba First Nations. Moreover, the plaintiffs have led evidence of the AMC's lengthy and detailed interest and, indeed, involvement in issues of child welfare. While I recognize that as a "political and advocacy organization", the AMC may not be capable of suffering the losses the plaintiffs claim the First Nations themselves have suffered as a result of the defendants' conduct, it does not necessarily follow that the AMC's interests would somehow not be aligned with the member First Nations on whose behalf the AMC advocates. This might be so in a case where different Manitoba First Nations truly had different interests, but that does not appear to be the situation in the circumstances of the present case. In any event, because of the opt-in process, it would be open to Manitoba First Nations themselves to decide against opting in to these Class proceedings if they were of the view that their interests were somehow not aligned with the AMC, or

indeed with those of the other plaintiffs. In the circumstances of this case, it is difficult to accede to Canada's argument that the AMC's interests are somehow in conflict with that of the Chiefs and First Nations on whose behalf the AMC exists and serves. Even to the extent that the AMC may consider the previously mentioned 2019 ***Act*** and the ***Charter*** to be "colonial law", it does not follow that the AMC cannot have an interest in seeking redress for its member First Nations under those laws.

[216] The possible appointment of the AMC as a representative plaintiff is a decision for this Court to make pursuant to its discretion under s. 2(4) of the ***CPA***. Faced with the plaintiffs' persuasive arguments about the vital importance of the AMC to this litigation, the fact that Manitoba does not oppose such an appointment, and being unpersuaded by Canada's opposition, I have no difficulty granting the plaintiffs' request for the appointment of the AMC as a representative plaintiff.

Limitations of Actions Issues

[217] An additional preliminary matter requiring the Court's attention relates to whether and to what extent, this Court, at this juncture, will consider limitations defences. To understand how the issue of limitations defences has arisen as a preliminary issue and how this Court has come to potentially revisit an earlier determination, some background is appropriate.

[218] As earlier noted, when describing the judicial history of this proceeding, the plaintiffs filed their Statement of Claim on October 6, 2022. Manitoba and Canada responded with their Statements of Defence in late December 2023. The plaintiffs then replied on January 15, 2024.

[219] On October 18, 2023, in the context of my role as case management judge in this proceeding I directed a timetable for bringing the plaintiffs' motion for summary judgment to a hearing. The plaintiffs subsequently prepared and served their affidavit evidence in support of the motion during the spring and summer of 2024.

[220] Canada and Manitoba raised objections to the Court's hearing of the plaintiffs' motion for summary judgment. As a result of the defendants' objections to the plaintiffs' proposed motion for summary judgment, on May 28, 2024, the plaintiffs brought a screening motion (in what the Rules describe as a summary judgment conference) by which they (the plaintiffs) sought leave to proceed with their motion for summary judgment.

[221] Following the submissions of the parties, I agreed on May 28, 2024, to permit the plaintiffs' motion for summary judgment to proceed.

[222] In connection to the plaintiffs' summary judgment motion which, based on my May 28, 2024, decision would now proceed, Canada and Manitoba delivered their affidavit evidence in the summer of 2024.

[223] At the end of the summer, on August 28, 2024, Canada served a notice of cross-motion for summary judgment. That motion sought to pre-empt yet again, the plaintiffs from bringing their motions for certification and summary judgment, this time, on the basis that the plaintiffs' claims were statute-barred by limitations legislation. Manitoba declined to join this cross-motion seemingly because it accepted that any limitations defence is an individual issue and should be decided on a Class-wide basis.

[224] The parties conducted cross-examinations on the previously filed affidavit evidence from September 19, 2024, through to November 28, 2024. I note that none of the affidavits or examinations addressed evidentiary issues related to any of the parties' limitations arguments.

[225] It was on December 12, 2024, that I heard Canada's screening motion in which it sought leave to bring its cross-motion for summary judgment in relation to its position that the plaintiffs' claims were statute-barred by limitations legislation. At the conclusion of that hearing, I delivered oral reasons which dismissed Canada's screening motion. I noted that Canada's cross-motion for summary judgment would be held in abeyance pending a determination of the Stage 1 common issues. I also note that were the plaintiffs to prevail, the limitations questions would be decided with the Stage 2 common issues, or thereafter.

[226] In rendering the decision I did on December 12, 2024, I noted that limitations issues are often best dealt with on an individual basis. I noted that it would be necessary to hear evidence, specifically individual evidence, to decide the questions surrounding the limitations defences. I also noted that limitations issues in Class proceedings, are generally addressed after the resolution of common issues. Additionally, I noted the following:

- That cross-examinations had already been completed and had not been conducted with the view to or mindful of limitations issues being argued at the time of the summary judgment on the Stage 1 common issues;
- The potential constitutional argument identified by the plaintiffs, if successful, would effectively supersede any limitations defence in relation to their s. 35 Aboriginal right; and,
- The plaintiffs' claims for declaratory relief, at least in relation to certain of their claims, would be unaffected by the limitations defences and would still need to be decided, such that there would be no judicial economy were I to entertain Canada's cross-motion.

[227] At no point did Canada seek leave to appeal my December 12, 2024, decision as to its screening motion, and the parties proceeded to the scheduled hearing of the plaintiffs' motions for certification and summary judgment.

[228] As a result of my December 12, 2024, decision, the parties did not (on their motions) lead further evidence on limitations issues. Additionally, the plaintiffs deferred service of their notice of constitutional question which would have and could still in the

future, challenge the applicability of limitations statutes in so far as they would curtail or compromise rights protected by s. 35 of the ***Constitution Act***. In other words, the plaintiffs proceeded with their approach to this litigation in reliance on my December 12, 2024 decision.

[229] Despite my earlier December 12, 2024, ruling to not grant Canada permission to bring its cross-motion for summary judgment respecting the limitations arguments, both defendants nevertheless made limitations arguments in their submissions in response to the plaintiffs' motions for certification and summary judgment.

[230] For its part, Canada says that my earlier decision about its cross-motion for summary judgment did not set aside the limitations issues for the purpose of these motions. In Canada's view, my decision related strictly to Canada's ability to bring its cross-motion concurrently with the plaintiffs' motions and that it in no way denied Canada the ability to rely on legally available defences in response to the plaintiffs' motions. Manitoba similarly takes the position that, in electing not to join Canada's cross-motion, it did not forego its right to rely on limitations arguments as a response to the plaintiffs' motions for certification and summary judgment.

[231] Substantively, both Canada and Manitoba argue that because of the transitional provisions in ***The Limitations Act***, C.C.S.M. c. L150 (the "***New Act***"), ***The Limitations of Actions Act***, R.S.M. 1987, c. L150 (the "***LAA***"), applies to the claims being advanced by the plaintiffs in this case. Under the ***LAA***, limitation periods were set out in s. 2(1), running for two, six, or 10 years from when a cause of action arose. Where there is an

action for which a provision is not specifically made, the default limitation period was, per s. 2(1)(n), "within six years after the cause of action arose."

[232] Canada argues that, save for the claim for fiduciary duty, for which Canada submits s. 2(1)(k) of the ***LAA*** applies, and which exceptionally, includes a discoverability component (i.e., "actions grounded on accident, mistake, or other equitable grounds of relief not hereinbefore specifically dealt with, within six years from the discovery of the cause of action"), every one of the plaintiffs' claims are captured by s. 2(1)(n) of the ***LAA*** (i.e., the claims under ss. 36 and 36 of the ***Constitution Act***, the claims under ss. 2(a) and 15(1) of the ***Charter***, and the claims in negligence). Accordingly, Canada argues that, in the case of fiduciary duty, the plaintiffs would need to show they did not discover such a claim before October 6, 2016, six years before the plaintiffs filed their Statement of Claim. Canada submits that all remaining claims would be statute-barred if they arose before October 6, 2016. Canada contends, at least as it relates to the plaintiffs' causes of action as against Canada, that all such claims are, in fact, statute-barred because they arose (or, in the case of fiduciary duty claims, were discovered) well before October 6, 2016.

[233] Canada asserts that the above is clear from the plaintiffs' own pleadings. Each of the plaintiffs' claims, Canada argues, arose as early as 1985, with the publication of the Kimelman Report, or by 1990, when the FNCFS program was established, or as late as 2012, when the last report criticizing Canada's involvement was published. In relation to the plaintiffs' fiduciary duty claims, Canada submits that they are statute-barred given

the dates respecting which the plaintiffs knew or ought to have known all material facts necessary to make such claims.

[234] As it relates to the plaintiffs' position that its claims for declaratory relief (at least in relation to some of their claims) would not be affected by limitations defences, Canada argues that claims seeking declaratory relief do not preserve time-barred damages. In other words, Canada says that, outside of the narrow category of declarations related to the constitutionality of the Crown's conduct, declarations of breach are remedial in substance, coercive and therefore time-barred. In that connection, Canada says that none of the plaintiffs' claims for declaratory relief meet that narrow exception.

[235] Respecting the limitations issues, Manitoba's position is more nuanced. Manitoba does not raise any limitations defences with respect to the plaintiffs' proposed causes of action alleging breaches of ss. 35 and 36 of the ***Constitution Act***, or breach of fiduciary duty. Indeed, Manitoba concedes that, because s. 2(1)(k) of the ***LAA*** applies to the plaintiffs' fiduciary duty claim, which provision provided for a limitation period running from the discovery of that cause of action, the applicable limitation period for that claim is best dealt with on an individual basis. Manitoba also does not seek to apply the ***LAA*** to the plaintiffs' Aboriginal rights claim predicated on s. 35 of the ***Constitution Act***. Without conceding whether the ***LAA's*** "basket clause" includes Aboriginal claims, Manitoba takes the position that adjudicating that type of claim goes beyond the ambit of defining a class period for the purposes of a certification motion.

[236] Concerning the plaintiffs' claim of systemic negligence and its claims under the ***Charter***, Manitoba submits that the ***LAA*** should be applied to limit the length of the

proposed Class period, and only with respect to the components of the claims that seek remedial relief. To that end, Manitoba says that the plaintiffs' claims in negligence and under the ***Charter*** are essentially covered by the ***LAA's*** "basket clause" at s. 2(1)(n), which, they say, are not subject to any principle of discoverability, and are therefore subject to a strict, six-year limitation period, such that the commencement date of those claims should be October 6, 2016 (being six years before the plaintiffs filed their claim).

[237] Manitoba stipulates that its limitations arguments are limited to remedial claims. Manitoba is not arguing that any of the plaintiffs' claims for declaratory relief are statute-barred.

[238] The plaintiffs object strenuously to any of the limitations submissions now being made by the defendants at this stage on the plaintiffs' motions for certification and summary judgment. Simply put, the plaintiffs contend that the Court has already decided when the limitations issues should be determined and the Court should not now address or decide questions surrounding the application of the limitations defences pending a determination of the Stage 1 common issues.

[239] In addition to their other objections, the plaintiffs invoke the serious procedural unfairness and obvious prejudice that would result were this Court to permit the defendants to raise the limitations defences they are now attempting to argue in the context of these motions. The plaintiffs submit that in view of the Court's decision on the defendants' screening motion (attempting to bring the cross-motion for summary judgment on the basis of the limitations arguments), the parties did not lead further evidence on the limitations issues. Further, at the Court's direction, the plaintiffs deferred

service of their notice of constitutional questions challenge respecting the application of limitations statues in respect of what the plaintiffs maintain would be the curtailing of their rights protected by s. 35 of the ***Constitution Act***. Given the potential for serious prejudice and procedural unfairness, and given that the defendants did not seek leave to appeal from my decision on the screening motion, the plaintiffs insist that this Court uphold its prior December 12, 2024, decision and confirm that any limitations defences are an individual issue that cannot be resolved at this stage respecting the Stage 1 common issues.

[240] I accept the plaintiffs' submission on this issue that in the circumstances of this case, the limitations defences cannot and should not be resolved at this stage of the proceeding. In coming to that determination, I am reaffirming my reasons for decision rendered December 12, 2024, in respect of the defendants' cross-motion for summary judgment. Further, I agree with the plaintiffs' characterization that despite my December 12, 2024, decision and what I thought was reasonably clear direction from the Court, the defendants have indeed tried to bring their limitations arguments "through the back door" by arguing that the allegedly statute-barred claims cannot give rise to a reasonable cause of action for the purposes of certification.

[241] While I do not intend to fully address all of the defendants' substantive limitations arguments, it will suffice to note that to the extent that my December 12, 2024, reasons do not specifically address any of the arguments now being raised by the defendants, for the purpose of dealing with this preliminary issue, I do find persuasive the arguments that the plaintiffs advanced on Canada's screening motion. Those arguments were

reasserted in the plaintiffs' supplemental submissions (requested by the Court) concerning the defendants' attempts to raise the limitations defences on these motions. In that connection and in arguing why the limitations issues cannot be resolved at this stage, the plaintiffs assert the following: Manitoba's old ***LAA*** does not apply to Aboriginal claims; there remains an open constitutional question concerning the application of a limitation period to s. 35 of the ***Constitution Act***, which the plaintiffs have identified is an argument that they intend and have a right to pursue; given the possible questions relating to discoverability and capacity, the limitations periods are individual issues; the discriminatory conduct is ongoing; and finally, the plaintiffs seek declaratory relief which remains available even where claims for other relief remain statute-barred.

[242] Concerning Manitoba's old ***LAA*** which both defendants say apply to the plaintiffs' claims, it is worthy of note that Manitoba's ***New Act*** is the first to expressly address claims predicated on Aboriginal rights. The plaintiffs advance a strong argument when they submit that Manitoba's old ***LAA*** should be interpreted in a manner consistent with the Ontario analog at issue in ***Restoule***, and that it should not apply to their claims.

[243] As it relates to the open constitutional question, it is clear as the plaintiffs expressly pled in their reply to the Statements of Defence, that they contend to their inherent right to care for their children is an Aboriginal right protected by s. 35(1) of the ***Constitution Act***. They argue that this right arises from a nation-to-nation relationship and it cannot be curtailed by statutory limitations periods. The plaintiffs are right to have the Court note that the recent Supreme Court of Canada decision of ***Shot Both Sides v. Canada***, 2024 SCC 12, specifically acknowledged that this constitutional question remains

unsettled in the jurisprudence (at para. 60). The plaintiffs have a right to pursue this constitutional argument. To proceed with a limitations question that would initiate eventual pursuit of the constitutional question at this stage would obviously prejudice the plaintiffs' capacity to do so.

[244] As I would have noted in my December 12, 2024, reasons, to the extent that there are issues of discoverability and capacity, the application of limitations periods is properly an individual issue. It is an issue that should be resolved at the second stage of the litigation or thereafter assuming the plaintiffs prevail. In this regard, I endorse and follow the judgments in ***Smith v. Inco Limited***, 2011 ONCA 628, at paras. 163 - 165; ***Varley v. Canada (Attorney General)***, 2025 FC 753, at para. 67; and ***Fisher River***, at para. 65.

[245] Separate from the constitutional arguments, it is clear that the plaintiffs seek to rely on their own individual circumstances to address the issues of discoverability and lack of capacity. I am mindful of the Ontario Court of Appeal's decision in ***Smith***, which found that "[i]t is an error to treat the limitation period as running from the date when a majority, even an overwhelming majority, of the class members knew or ought to have known the material facts in issue." (at para. 164). I also acknowledge the jurisprudence about which the parties seem to be in agreement, that establishes that where the resolution of the limitation issues depend on a factual inquiry, such as when the plaintiff discovered or ought to have discovered the claim, the issue should not be decided on the motion for certification (see ***Amyotrophic Lateral Sclerosis Society of Essex v. Windsor (City)***, 2015 ONCA 572, at para. 41; ***Hudson v. Canada***, 2022 FC 694, at

para. 141). As the plaintiffs have noted, following my December 12, 2024, decision, the parties do not appear to have adduced evidence or conducted cross-examinations mindful of the limitations issues and the facts that might underly them.

[246] There can be no question that individual circumstances matter when considering questions of discoverability and capacity. I agree with the plaintiffs' submission that argues against and rejects Canada's position that the Court should make a "Class-wide" determination. Canada's position in that regard is effectively a request of the Court to resolve issues that cannot and should not be properly determined on the basis of an evidentiary record that was necessarily shaped and confined by Canada's delay in bringing its cross-motion for summary judgment. It is an evidentiary record that was also shaped and confined by the Court's earlier December 12, 2024, decision that clearly indicated that the limitations issues were to be determined at a later stage.

[247] When considering why the limitations issues cannot and should not be resolved at this time, I am also mindful of the plaintiffs' argument that even where claims are discoverable and First Nations have the capacity to sue, the ongoing nature of the defendants' wrongful conduct may pre-empt their ability to treat the plaintiffs' claims as statute-barred. This submission suggests that the defendants continue to exercise control over First Nations child welfare services through funding allocation, legislative authority, policies, service standards and practices. It is the submission of the plaintiffs that this is not a case about a single injurious act in the past that was never repeated. Instead, the plaintiffs suggest that this is a case in which the defendants' mismanagement of the care of new and existing children in CFS continues to cause fresh harms to their

First Nations. It is the plaintiffs' position that the defendants' conduct is not a series of discrete, completed acts, but an ongoing course of harmful conduct and cumulative injury. Given what is alleged as continuous wrongdoing, the plaintiffs maintain that the harm cannot be said to have crystallized at a single point in time and in these circumstances, limitations periods do not operate to bar the plaintiffs' claims.

[248] Finally, I take note of what the plaintiffs identify as the availability of declaratory relief even where claims for other relief are statute-barred, as in ***Manitoba Metis Federation Inc. v. Canada (Attorney General)***, 2013 SCC 14, at para. 134; and ***Watson v. Canada***, 2020 FC 129, at para. 346).

[249] As the Supreme Court of Canada stated in ***Shot Both Sides***, "[a]lthough claims for personal relief or damages flowing from treaty breaches may be subject to limitations statutes, limitations legislation cannot bar courts from using declarations on the constitutionality of the Crown's conduct." (at para. 63). The Supreme Court went on to note that declarations can be obtained to assist with extra judicial negotiations with the Crown even when personal relief may be statute-barred.

[250] From the above, given what was earlier identified in this judgment as the expressed commitment by all parties to the vital project of reconciliation and by extension, what I assume must be an accompanying commitment to reaffirming the honour of the Crown, the possible availability (at the very least) of an expressive declaration in a case like the present one seems both logical and congruous with the expressed commitment of all the parties. There can be no question that all parties (no less so defending governments) can and in many cases may need to pursue their rights

by invoking the law and existing legal defences in the context of independent and respectful adjudications. It is also true that "[t]rue reconciliation is rarely, if ever, achieved in courtrooms." (see ***Clyde River (Hamlet) v. Petroleum Geo-Services Inc.***, 2017 SCC 40, at para. 24) and will not end at pure expressions of the law or the legal outcome of a given proceeding. That said, the plaintiffs are well to raise as they do, questions about how reconciliation and the restoration of the honour of the Crown might be pursued in a case like the present, if and where contested issues and adjudications are pre-empted too quickly and where a Court is not permitted to consider the substance of some of the plaintiffs' claims, particularly in areas where historical harms are acknowledged.

[251] In summary, while the reasons that are briefly set out above do not definitively decide the substantive merits of the limitations arguments raised by the defendants or the plaintiffs, they do support my ongoing view (and my earlier December 12, 2024, decision) that any available limitations defences should be addressed at a later stage of these proceedings.

The Applicability of the *CLPA* to Claims Against Canada

[252] Canada argues that none of the various causes of action the plaintiffs have advanced can succeed, as least against Canada, because of s. 9 of the ***CLPA***, and the rule against double recovery operate to bar the plaintiffs' claims against it.

[253] Section 9 of the ***CLPA*** states:

> **No proceedings lie where pension payable**
>
> 9 No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.

[254] Canada argues that while the plaintiffs try to frame their claim as a claim made by First Nations and not individual members, Canada has already paid compensation for many of the same losses as are being claimed here (loss of spirituality, culture, language, and the ability to transmit them to the next generation) to the individual members who make up the First Nations through the Indian Residential School Settlement Agreement, the Residential Schools Band Class Settlement Agreement, the Day Scholars Survivor and Descendant Class Settlement Agreement, the Sixties Scoop Settlement Agreement and the Moushoom Settlement addressing the FNCFS program (see ***Moushoom v Canada (Attorney General)***, 2023 FC 1466 ("***Moushoom 2***"). Accordingly, Canada submits that the plaintiffs' claims are therefore statute-barred.

[255] Canada points to the Supreme Court of Canada's decision in ***Sarvanis v. Canada***, 2002 SCC 28, where the Court stated that in determining whether s. 9 of the ***CLPA*** operates to bar proceedings against the Crown, courts need to look at whether compensation has already been paid in respect of the same event or factual basis upon

which compensation is being sought in a current claim (at paras. 25 - 29). Canada argues that in the present case, this test has been met.

[256] Canada further argues that the plaintiffs' claims are barred by the releases signed in these various Settlement Agreements and by the presumption against double recovery.

[257] I note that Canada advanced this same argument before the Federal Court in ***Fisher River***, an application for certification of class proceedings advanced by several First Nations against Canada. The claims in that case were in relation to losses allegedly sustained in respect of culture, tradition, and spiritual practices when First Nations children were separated and removed from their communities because of Canada's operation of child welfare programs. In a manner similar to this case, the First Nations applying for certification in ***Fisher River*** alleged that Canada, through the establishment administration, funding, operation, supervision, and control of the FNCFS program, had breached the plaintiffs' rights under s. 2(a) of the ***Charter*** and s. 35 of the ***Constitution Act***, and had further breached the fiduciary duty, the honour of the Crown, and the common-law standard of care owed to the plaintiffs.

[258] In making its s. 9 ***CLPA*** argument in ***Fisher River***, Canada relied on many of the same cases and settlement agreements it relies on here (see ***Tk'emlúps te Secwépemc First Nation v. Canada***, 2023 FC 327; ***Gottfriedson v. Canada***, 2015 FC 706; ***Riddle v. Canada***, 2018 FC 901; and ***Moushoom 2***). The plaintiffs in ***Fisher River*** made similar arguments to those that the plaintiffs are making in this case. In the present case, the plaintiffs argue that that compensation provided in the context of the Indian Residential School Settlement, Residential Schools Band Class Settlement Agreement, the

Day Scholars Survivor and Descendants Class Settlement Agreement and the Sixties Scoop Settlement Agreement was provided to individual members of First Nations, and not to First Nations themselves; that the harms sustained by these individual members are different in character from the harms sustained by First Nations collectively; and that there is very little overlap in terms of Class period. With respect to the Moushoom Settlement, while there is more overlap in Class period and the harms sustained arise out of some of the same activity (Canada's management of the on-reserve child welfare system), the Moushoom Settlement did not deal with off-reserve child welfare. It was also a settlement where the compensation was for the harms sustained by individual members of First Nations and not harms sustained by the First Nations themselves.

[259] Having considered carefully the submissions of the parties and having examined the relevant jurisprudence and the connected settlement agreements, I find myself in substantial agreement with the Federal Court's reasons in ***Fisher River*** as invoked by the plaintiffs to reject Canada's arguments that all of the plaintiffs' claims against them are statute-barred. My rejection of Canada's arguments in this regard extend to their arguments concerning the releases signed by bands and First Nations members and to their arguments respecting the presumption against double recovery. Put simply, I am not satisfied on the basis of what has been put before me, that the test in ***Sarvanis*** has been satisfied. Instead, I have been persuaded by the submissions of the plaintiffs that the settlement agreements invoked by Canada, while involving some overlap, do not involve sufficiently similar merits, facts, collective claimants and harms, such as to apply the applicable test in Canada's favour.

The Problematic Formulation of the Plaintiffs' Common Issues

[260] The plaintiffs' framing of the common issues about which they seek determinations and an eventual order, are problematic and, in my view, flawed.

[261] Given the complexity of the issues generally in this case as it relates to the determinations that need be made on the motions for certification and summary judgment, the formulation of the common issues requires clarity and appropriate focus. Regrettably, the current formulation of those common issues provides neither that clarity nor focus.

[262] Given what the plaintiffs seek in relation to certification and summary judgment, any clear, coherent and rigorous analysis by the Court will require that the proposed common issues be addressed and perhaps rectified by reformulating, clarifying and/or reframing those common issues. Given the importance of that task and the use of these issues as reference points for the determinations I must make respecting certification and summary judgment, the need to address this problem early in the judgment should be understood as not merely a matter that is preliminary, but one that is foundational.

[263] In the circumstances of this case, the framing of the common issues has a particular and practical consequence insofar as the plaintiffs have already persuaded this Court at the summary judgment screening stage, to permit not just the summary judgment motion to proceed to hearing, but also, to permit the summary judgment motion to proceed more or less concurrently with the motion for certification. In that context, the flawed framing of the common issues becomes particularly relevant where the plaintiffs have an expressed preference for proceeding with the summary judgment

motion (and by extension receiving my determinations on that motion) prior to the certification motion.

[264] For the reasons that I later explain, I will not be ceding to the plaintiffs' proposal that the summary judgment motion proceed prior to the certification hearing. Having made that determination for the reasons that will be provided, the problem of the flawed framing of the common issues remains and must still be addressed early in the judgment if a meaningful analysis is to take place regarding the determinations I must make, mindful of course of the applicable tests and criteria connected to the motions for certification and summary judgment.

[265] Accordingly, I address immediately below the following matters that relate to what I identify is the plaintiffs' problematic formulation of the common issues:

a) The plaintiffs' current formulation of the common issues;

b) The problems with the current formulation of the common issues;

c) The defendants' position regarding the formulation of the common issues and response to pleadings;

d) The Court's discretion to reformulate common issues; and

e) The Court's reformulation of the common issues.

The Plaintiffs' Current Formulation of the Common Issues

[266] The plaintiffs divide their common issues into two categories: "Stage 1 common issues," in respect of which the plaintiffs ask this Court for certification for the proposed Class proceeding and for which the plaintiffs also seek summary judgment. The "Stage 2 common issues" are also issues for which the plaintiffs seek certification but which will

be decided (to the extent the plaintiffs are successful at the first stage) at a later stage of the proposed Class proceeding after summary judgment has been rendered and after the time limit for other proposed Class members to opt into the Class proceeding has expired. The plaintiffs have requested that Class members be allowed to opt in to the proceeding, despite the fact that Manitoba Class proceedings generally take place on an opt-out basis, per s. 16 of the ***CPA***. In requesting an opt-in order, the plaintiffs appear to rely on the Court's overarching discretion under that ***CPA*** to authorize Class members to participate in Class proceedings in such a manner and on such terms as the Court determines is appropriate.

[267] The plaintiffs have formulated their Stage 1 and Stage 2 common issues as follows:

> **Stage 1 Common Issues**
>
> (a) During the Class Period, did Manitoba or Canada, or both, owe a duty or an obligation to Class members in accordance with:
>
> i. a fiduciary duty;
>
> ii. the honour of the Crown;
>
> iii. a private law duty of care;
>
> iv. section 2(a) of the *Charter;*
>
> v. section 15 of the *Charter;*
>
> vi. section 35 of the *Constitution Act, 1982;* or
>
> vii. section 36 of the *Constitution Act, 1982,*
>
> (b) to take reasonable measures to prevent injury to Class members by:
>
> viii. providing or supporting the provision of appropriate preventative services directed at supporting families and avoiding the apprehension of First Nations children by CFS;

ix. promoting or supporting the promotion of kinship or community placements over foster care for First Nations children in CFS, all else equal;

x. providing or supporting the provision of culturally and spiritually appropriate services and care to First Nations children in CFS;

xi. ensuring that First Nations children in CFS are able to maintain and develop a connection to their distinct culture, spirituality, identity, traditional territory and First Nation;

xii. ensuring that First Nations children in CFS live in environments that afford them the same opportunities as non-First Nations children in Manitoba;

xiii. providing or supporting the provision of appropriate services to help Class members heal when First Nations children are apprehended and placed in CFS; and

xiv. providing or supporting the provision of appropriate services to help First Nations children and young adults reintegrate and reconnect with Class members after being in CFS,

where reference to "in CFS" means any child who is a ward of an Agency, as defined in the [*sic*] *Child and Family Services Act,* C.C.S.M. c. C80, (the "CFS *Ac*t"), or under apprehension by an Agency or for whom an Agency undertook to provide care and treatment, whether on or off a reserve associated with an Impacted First Nation.

(c) If the answer to the common issues 1(a) and 1(b) is "yes", what is the scope of that duty or obligation?

(d) If the answer to common issues 1(a) and 1(b) is "yes", did Manitoba or Canada, or both, breach their duties or obligations to some or all Class members during the Class Period?

Stage 2 Common Issues

If the answer to common issue 1(d) is "yes", can causation and damages for all or some Class members be assessed in whole or in part in the aggregate pursuant to the [*sic*] *Class Proceedings Act,* CCSM, c C130?

(e) If the answer to common issue 1(d)is [*sic*] "yes" and the answer to common issue 2(e) is "no", how should causation and damages be assessed for such Class members?

(f) If the answer to common issue 1(d) is "yes", does the conduct of Manitoba or Canada, or both, provide a prima facie justification for an award of punitive damages, and if punitive damages can be quantified, in what amount?

(g) If the answer to common issue 1(d) is "yes", should the Court order that Manitoba or Canada, or both, take measures to comply with their duties or obligations to Class members, or take measures to prevent or mitigate harm to Class members?

(h) If the answer to common issue 2(d) is "yes", what measures should the Court order?

The Problems with the Current Formulation of the Common Issues

[268] The plaintiffs' formulation of the common issues is confusing and in my view distracting from the more basic and foundational questions that the plaintiffs' claims raise and that their motions need have addressed by the Court. The current Stage 1 common issues described in section 1(a), consist of alleged duties or obligations which the plaintiffs claim the defendants owed to them and other proposed Class members throughout the proposed Class period (January 1, 1992 to the opt-in deadline) and which they further claim, the defendants have breached. These duties or obligations, the plaintiffs assert, flow from several different sources of law, including rights which they maintain have been guaranteed to First Nations themselves, rather than to their members, under Parts I to III of the ***Constitution Act***; the law of negligence; the fiduciary relationship between the Crown and First Nations; and the honour of the Crown.

[269] In grouping together issues of tort, issues of fiduciary duty, the concept of honour of the Crown, ss. 2(a) and 15(1) ***Charter*** rights issues, and ss. 35 and 36 ***Constitution Act*** issues (and in formulating the common questions as they have), I say with respect that the plaintiffs ignore unique aspects of each of these areas of law. In doing so, they gloss over what I believe are preliminary questions that need to be answered before a

court could be satisfied whether certain of these areas of law are capable of giving rise to a duty or obligation owed by the defendants to the plaintiffs.

[270] For example, the plaintiffs do not ask the Court to certify, in the context of the alleged ***Charter*** rights violations, any of the following questions:

- whether the plaintiffs, as First Nations themselves, rather than as First Nations representing the interests of their individual members, can advance claims under ss. 2(a) or 15(1) of the ***Charter***;
- whether the defendants have infringed the plaintiffs' rights under ss. 2(a) and 15(1) of the ***Charter***;
- whether, in the context of any infringement of their ss. 2(a) and 15(1) ***Charter*** rights, the defendants' infringements constitute reasonable limits prescribed by law that can be demonstrably justified in a free and democratic society, and are accordingly saved by s. 1 of the ***Charter***; or
- whether ss. 2(a) and s. 15(1) ***Charter*** rights, or alternatively, breaches of these rights, give rise to duties or obligations on the part of governments to take specific actions.

[271] The plaintiffs similarly do not ask the Court to certify, as questions, whether s. 36 of the ***Constitutional Act*** gives rise to a legally enforceable right, and if so, who can assert it; whether a duty to First Nations can arise independently from the concept of the honour of the Crown; or what the scope of the existing Aboriginal right being claimed by the plaintiffs under s. 35 of the ***Constitutional Act***, might be. All of the above questions appear germane to the analysis a court would need to undertake to determine whether

duties or obligations flow to the proposed Class members from these identified sources of law. By framing the issues as they have, the plaintiffs are, in effect, putting the cart before the horse, presuming that all of these above questions have already been answered in a manner favourable to the plaintiffs and that the only matter left for the Court to resolve is whether duties or obligations flow from these sources of law, their content and scope, and whether the defendants have breached these duties or obligations.

[272] In addition, while the plaintiffs, in section 1(c) of their formulation of common issues, ask the Court to determine the scope of the defendants' duties and obligations, they use section 1(b) to outline their own understanding of content and scope. In so doing, the plaintiffs do not appear to be seeking an answer from the Court on scope, but rather, attempting to prescribe one. This is problematic.

[273] The Stage 2 common issues consist of issues of causation and damages as against the defendants. In that connection, the plaintiffs ask the Court to certify how liability should be apportioned between the defendants for the harms sustained by Class members resulting from the defendants' various breaches of duties identified in the Stage 1 common issues. They also ask how to assess damages. Despite those questions, I note that the plaintiffs do not ask the Court to certify as a common issue (as it pertains ss. 2(a) and 15(1) of the ***Charter***) in the event that a court determines that the defendants have infringed the plaintiffs' rights and the infringement is not saved by s. 1, whether damages are an appropriate remedy under s. 24(1) of the ***Charter***.

The Defendants' Position Regarding the Formulation of the Common Issues and Response to Pleadings

[274] Manitoba argues that the plaintiffs' formulation of the Stage 1 common issues is flawed, particularly as it pertains to the duties or obligations the defendants allegedly owe to the plaintiffs flowing from ss. 2(a) and 15(1) of the ***Charter***, ss. 35 and 36 of the ***Constitution Act***, and the honour of the Crown. It contends that, to the extent the Court chooses to certify these issues, none of them should be certified in their current form.

[275] Many of the issues Manitoba has identified with the plaintiffs' framing of the common issues are the same ones identified by the Court. Regarding the alleged ***Charter*** breaches, Manitoba argues that as it pertains to ss. 2(a) and 15(a), the common issues should be framed to start with whether the defendants - through specific legislation or state action - have infringed the plaintiffs' rights, and whether such infringement is a reasonable limit demonstrably justified in accordance with s. 1 of the ***Charter***. Manitoba further states that even if the Court determines that the plaintiffs' ss. 2(a) and 15(1) ***Charter*** rights have been infringed by one or both defendants, neither the ***Charter*** rights themselves nor any breaches of these rights impose freestanding positive obligations on government to take action, outside of exceptional circumstances. In addition, Manitoba argues that the Stage 2 common issues, as framed by the plaintiffs, presuppose that the remedy for the ***Charter*** breaches must necessarily be damages even though the jurisprudence surrounding s. 24(1) suggests that damages are often not the appropriate remedy for a ***Charter*** breach.

[276] Manitoba takes a similar position in respect of ss. 35 and 36 of the ***Constitution Act*** (i.e., that the common issues should be formulated commencing with the question of whether there has been rights infringement and whether that infringement is justified). As it pertains to s. 35 more specifically, Manitoba asserts that the plaintiffs' argument and proposed common issue (that the defendants have frustrated the plaintiffs' Aboriginal rights to raise their children in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions) amounts to a challenge to the constitutionality of Manitoba's ***CFSA*** and should take the form of a constitutional challenge to the ***CFSA***.

[277] Finally, as it pertains to the alleged duty arising from the honour of the Crown, Manitoba states that while the honour of the Crown establishes a fiduciary relationship between the Crown and Indigenous peoples, it is not independently actionable and should therefore be combined with the breach of fiduciary duty allegations advanced by the plaintiffs.

[278] Manitoba appears to be comfortable with the Court exercising its discretion to redraft the common issues prior to certification, even though extensive revisions would be required.

[279] Unlike Manitoba, Canada takes no position on the formulation of the common issues, or whether and to what extent the Court may exercise its discretion to reformulate them. Canada instead argues that irrespective of the currently formulated common issues, the plaintiffs have pled no material facts to support their proposed causes of action as required by Rule 25.06(1) of the Rules. Canada asserts instead, that the plaintiffs

have relied on the various reports (submitted as part of the evidentiary record for the purpose of summary judgment) to support their claims. It is Canada's position that because courts are not supposed to consider evidence during Class proceeding certification, the plaintiffs have failed to abide by Rule 25.06(1), which, Canada contends, constitutes an abuse of process, and that the plaintiffs' claims should all be struck on that basis. While I do not accept Canada's position concerning the striking of the plaintiffs' claims, as will become apparent from some of my determinations made on certification later in the Analysis section of this judgment, I do endorse some of Canada's concerns respecting the viability of many of the plaintiffs' claims.

The Court's Discretion to Reformulate Common Issues

[280] In a Class proceeding, the burden of proof is on the plaintiff to demonstrate that their pleadings disclose at least one cause of action. The threshold is low. All the plaintiff must do is satisfy the court that it is not "plain and obvious", assuming all material facts pled by the plaintiff to be true, that the claim will necessarily fail (i.e., the plaintiff must demonstrate that their claim is legally viable, or has some prospect of success).

[281] The plaintiffs in this case have made the above determination particularly challenging because of the way that they have chosen to formulate the common issues. In most cases, the common issues, as formulated by the plaintiff, would reflect the pleadings. Here, they do not. The plaintiffs seem untroubled by this. They urge the Court to use its discretion to amend the proposed common issues as necessary, rather than bar certification because of flaws in how the common issues are formulated. They reference ***Kumar v. Mutual Life Assurance Company of Canada***, 2003 CanLII 48334 (ON CA);

McGee v. London Life Insurance Company Limited, 2008 CanLII 20985 (ON SC); ***Ward-Price v. Mariners Haven Inc.***, 2002 CanLII 38058 (ON SC); ***Parker v. Pfizer Canada Inc.***, 2012 ONSC 3681; and ***Pearson v. Inco Ltd., et al***, 2006 CanLII 913 (ON CA), in support of their assertion that "this [reformulation of common issues by the Court] is common practice in class actions and should not prevent proceedings." (Reply Brief, at para. 67).

[282] While I accept that courts have discretionary authority to amend common issues advanced by a plaintiff, I remain mindful that this discretion is not unlimited. On the question of amending their common issues, some of the jurisprudence suggests that the courts should exercise caution and restraint in doing so especially when the amending of proposed common issues would fundamentally alter them (see ***McCracken v. Canadian National Railway Company***, 2012 ONCA 445, (at para. 144). The rationale for restraint was well articulated by the Saskatchewan Court of Appeal in ***Alves v First Choice Canada Inc***, 2011 SKCA 118, leave to appeal to Supreme Court of Canada refused, 2012 CanLII 22165, where the Court stated:

> [31] Speaking generally, it is obviously not acceptable to simply assume a court will, on its own initiative, repair the problems found to exist in the certification application. A court must operate with an eye to satisfying the objectives of the *Act* and with sufficient flexibility to ensure that justice is done. It must also be sensitive to the reality that new facts and insights into claims can emerge during the certification process as affidavits are filed and arguments are sharpened. Reasonably liberal efforts should be made to accommodate such developments by way of amendments to the pleadings, adjustments to common issues and otherwise. Sometimes the judge or court might have suggestions or thoughts about how best to proceed. However, all of that said, counsel have an obligation to do more than place the raw ingredients of a class action before the court and then expect the court itself to construct a viable proceeding. This is especially so at the appellate level.

> [32] There are no bright lines in any of this. Each case will have its own dynamics. But, while avoiding an unreasonably rigid approach to the certification process and appreciating its somewhat evolving nature, a judge or a court must nonetheless avoid being inappropriately conscripted into the role of ongoing assistant to one side or the other of the litigation.
>
> [emphasis added]

The Court's Reformulation of the Common Issues

[283] As noted, Manitoba has proposed a particular reformulation of the common issues. For their part, the plaintiffs have expressed the view that the Court has the discretion to reformulate the common issues as it sees fit. Canada has not expressed any views on the common issues and instead, argued that the plaintiffs have pled no material facts to support their proposed causes of action.

[284] I acknowledge that it can be challenging to separate what has been pled for the purposes of certification from the evidence led to support summary judgment. That said, I do not share Canada's view that the plaintiffs have failed to plead any material facts to support any of the various causes of action that they have advanced such that the claims should be struck. Nonetheless, I am still left to determine, based on a review of the pleadings, whether, given the determinations I am being asked to make on certification and summary judgment, it would be appropriate for me to exercise my discretion to substantially amend the common issues as formulated by the plaintiffs.

[285] My starting point is the language of s. 4(a) of the ***CPA***, which requires, not that the common issues (as formulated by the plaintiff) disclose a cause of action, but rather, that "the pleadings disclose a cause of action" [emphasis added]. Ideally and logically, the common issues identified by the plaintiffs would reflect the pleadings. This is not the case here.

[286] Given my earlier comments about how it is that the current common issues prematurely presume certain legal findings and answers and given my observations that the current common issues do not reflect what is more directly placed in issue in the pleadings, I intend to exercise my discretion to reformulate the plaintiffs' common issues. I intend to do so in a way that not only better reflects the pleadings, but also, better reflects the foundational questions and the logical chronology of those questions that need be asked in order to properly permit the Court to address the legal issues and tests that have to be addressed on the motions for certification and summary judgment.

[287] I note that Canada's and Manitoba's submissions do not directly address the common issues as formulated by the plaintiffs but rather respond to the arguments as pled by the plaintiffs. All parties to this action seem clear on what the basic issues for trial would be, the plaintiffs' flawed formulation of the common issues notwithstanding. I am accordingly satisfied that no prejudice would attach to any party if I decide (as I now do) to exercise my discretion to reformulate the common issues in a manner consistent with what the plaintiffs have actually pled. Nor should there be any prejudice to any party if I decide (as I now do) to exercise my discretion to reformulate the common issues in a manner consistent with the questions and the chronology of the questions that need be determined giving what the Court is being asked to do on these two motions.

[288] I have reformulated the Stage 1 common issues advanced by the plaintiffs as follows:

> **Stage 1 Common Issues**
>
> Section 2(a) of the *Charter*
>
> 1(a) Do the Class Members have an actionable right under section 2(a) of the *Charter*?
>
> 1(b) If the answer to question 1(a) is yes, did the manner in which the defendants funded, regulated and provided child welfare and child protection in Manitoba during the Class Period (the "Impugned Conduct") infringe Class Members' fundamental freedom of conscience and religion under section 2(a) of the *Charter*?
>
> 1(c) If the answer to question 1(b) is yes, was the infringement a reasonable limit prescribed by law demonstrably justified in a free and democratic society, such that the defendants' infringement is saved by section 1 of the *Charter*?
>
> Section 15(1) of the *Charter*
>
> 2(a) Do the Class Members have an actionable right under section 15(1) of the *Charter*?
>
> 2(b) If the answer to question 2(a) is yes, did the manner in which the defendants' Impugned Conduct infringe Class Members' rights to equal protection and equal benefit of the law, without discrimination under section 15(1) of the *Charter*?
>
> 2(c) If the answer to question 2(b) is yes, was the infringement a reasonable limit prescribed by law demonstrably justified in a free and democratic society, such that the defendants' infringement is saved by section 1 of the *Charter*?
>
> Section 35 of the *Constitution Act, 1982*
>
> 3(a) Do the Class Members have an existing Aboriginal right under section 35 of the *Constitution Act, 1982*, to raise their children in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions?
>
> 3(b) If the answer to question 3(a) is yes, have the defendants, during the Class period and through their Impugned Conduct, infringed this right?
>
> 3(c) If the answer to question 3(b) is yes, was the infringement justified (i.e., related to a compelling and substantial legislative objective, and consistent with the honour of the Crown and the Crown's fiduciary duty to Indigenous people)?

Section 36 of the *Constitution Act, 1982*

4(a) Do the Class Members have an actionable right brought under section 36 of the *Constitution Act, 1982*?

4(b) If the answer to question 4(a) is yes, did the defendants' Impugned Conduct breach Class Members' rights to equal opportunities for well-being, economic development, and essential public services under section 36 of the *Constitution Act, 1982*?

4(c) If the answer to question 4(b) is yes, was the infringement justified?

Ad Hoc and *Sui Generis* Fiduciary Duties

5(a) Do the defendants owe the Class Members an *ad hoc* fiduciary duty?

5(b) If the answer to question 5(a) is yes, what is the scope of that duty?

5(c) If the answer to question 5(a) is yes, have the defendants, through their Impugned Conduct, breached the *ad hoc* fiduciary duty owed to Class Members?

6(a) Do the defendants owe the Class members a *sui generis* fiduciary duty?

6(b) If the answer to question 6(a) is yes, what is the scope of that duty?

6(c) If the answer to question 6(a) is yes, have the defendants, through their Impugned Conduct, breached the *sui generis* fiduciary duty owed to Class Members?

Duty Arising from the Honour of the Crown

7(a) Do the defendants owe the Class Members a duty arising from the honour of the Crown?

7(b) If the answer to question 7(a) is yes, what is the scope of that duty?

7(c) If the answer to question 7(a) is yes, have the defendants, through their Impugned Conduct, breached the duty owed to them arising from the honour of the Crown?

Systemic Negligence/Duty of Care

8(a) Do the defendants owe the Class Members a common law duty of care?

8(b) If the answer to question 8(a) is yes, what is the applicable standard of care?

8(c) Did the defendants, through their Impugned Conduct, breach the standard of care owed to Class Members?

[289] To the extent necessary, I will use the above formulation of the Stage 1 common issues for the dual purpose of determining whether to certify this proceeding as a Class proceeding and, if and where required, in my determination as to whether summary judgment can be granted.

[290] With respect to the Stage 2 common issues, fewer changes are required. With respect to any of the alleged ***Charter*** breaches, it is necessary to ask whether the plaintiffs have been successful at Stage 1, damages would be a just and appropriate remedy for the breaches. Given that I have determined that limitations issues will be held over to Stage 2, it is also necessary to ask, as a preliminary Stage 2 question, whether any of the plaintiffs' claims are statute-barred. I have accordingly reformulated the Stage 2 common issues as follows:

> **Stage 2 Common Issues**
>
> 9(a) Do limitations defences operate to statute-bar any of the claims articulated in the Stage 1 Common Issues?
>
> 10(a) If either of the *Charter* claims is not statute-barred, in respect of any *Charter* rights breaches, are damages an appropriate and just remedy?
>
> 10(b) If the answer to question 10(a) is no, what is the appropriate remedy for these breaches?
>
> 11(a) If it is determined that damages are an appropriate remedy for the *Charter* rights breaches and/or the court determines that damages are payable in respect of any other breaches of duty in respect of claims that are not statute-barred,, can causation and damages for all or some Class Members be assessed in whole or in part in the aggregate, pursuant to the *Class Proceedings Act,* CCSM, c C130?
>
> 11(b) If the answer to question 11(a) is no, how should causation and damages be assessed for Class Members?
>
> 11(c) If the defendants, through their Impugned Conduct, have breached one or more duties owed to Class Members in respect of claims that are not statute-barred, does that conduct of Manitoba or Canada, or both, provide prima

facie justification for punitive damages, and if punitive damages can be quantified, in what amount?

11(d) If the defendants, though their Impugned Conduct, have breached one or more duties owed to Class Members in respect of claims that are not statute-barred, should the court order that Manitoba or Canada, or both, take measures to comply with their duties or obligations to Class Members?

10(e) If the answer to question 11(d) is yes, what measures should the court order?

The Defendants Ongoing and Persistent Opposition to the Plaintiffs' Motion for Summary Judgment

[291] Despite what I continue to maintain was – at the earlier screening motion – my clearly explained determination that the plaintiffs could proceed with their summary judgment motion on the proposed Stage 1 common issues, the defendants have persisted to re-argue their position that the plaintiffs not be permitted to proceed to a summary judgment hearing at this stage.

[292] Given the importance of this case and given what are some of its unique features, I will yet again briefly address the defendants' opposition to proceeding to a hearing on the plaintiffs' summary judgment motion. I will do so by addressing the following questions which were, directly or indirectly, raised by the defendants:

a) Is summary judgment inappropriate or premature?

b) Should the motions for certification and summary judgment proceed together? and

c) Which motion should proceed first: certification or summary judgment?

Is Summary Judgment Inappropriate or Premature?

[293] The plaintiffs argue that there is no genuine issue for trial in respect of the Stage 1 common issues, making summary judgment an appropriate way to adjudicate this matter.

The plaintiffs submit that this Court has before it, a rich and full record with all the evidence necessary to fairly and justly adjudicate the Stage 1 common issues. They further submit that determining the Stage 1 common issues via summary judgment also advances the objectives of judicial economy and cost effectiveness.

[294] Canada takes the position that even if the Court chooses to certify this proceeding as a Class proceeding in relation to some or all of the common issues, summary judgment is not appropriate in this case because of its complexity and the fact that the plaintiffs are asking the Court to decide seven distinct questions of legal duty or obligation: fiduciary law, honour of the Crown, negligence, ss. 2(a) and 15 of the ***Charter*** and ss. 35 and 36 of the ***Constitution Act***. Both defendants argue that issues that need be decided require a fact specific, contextual analysis that can only be done through trial. They further argue that summary judgment is premature, as there has been no documentary or oral discovery, and that the reports on which the plaintiffs are seeking to rely (in support of their motion for summary judgment) are presumptively inadmissible. Despite the shared position of both defendants respecting the inappropriateness of summary judgment, each has nonetheless submitted lengthy briefs responding to all of the plaintiffs' various causes of action on the merits.

[295] I previously summarized (as I will again later in this judgment) the legal framework for summary judgment. In ***Winnipeg (City) v. Caspian Projects Inc. et al.***, 2022 MBQB 53 (at paras. 185 - 188), the Rules provide the legal basis for deciding matters summarily. Specifically, Rule 20.03(1) provides as follows:

> **Granting summary judgment**
>
> 20.03(1) The judge must grant summary judgment if he or she is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.

[296] There will be no genuine issue requiring a trial if the Court has "the evidence required to fairly and justly adjudicate the dispute and [the motion for summary judgment] is a timely, affordable and proportionate procedure" (see ***Hryniak v. Mauldin***, 2014 SCC 7, at para. 66). Importantly, the standard of fairness is not whether the summary judgment procedure is as exhaustive as a trial, but whether that procedure gives the judge the confidence that they can find the necessary facts and apply the relevant principles so as to resolve the dispute (see ***Dakota Ojibway*** at para. 116, citing ***Hryniak*** at para. 50). Put another way, as Greenberg J. previously observed in ***Free Enterprise Bus Lines Inc. et al. v. Winnipeg Exclusive Bus Tours Inc. et al.***, 2018 MBQB 64:

> [28] …The traditional trial is no longer the default position but should be pursued only where the judge cannot "achieve a fair and just adjudication of the issues" on the basis of the evidence produced on the summary judgment motion…
> [29] To facilitate the use of the summary judgment motion as an alternative means of adjudication, the rules contemplate more flexibility in the type of evidence tendered and authorize the judge to weigh evidence, evaluate credibility of deponents and draw reasonable inferences (Rule 20.07(2)). Whereas under the former rules issues of credibility usually required a trial, the new rules facilitate the resolution of those issues on summary judgment. A trial is not required unless the judge is not confident making the necessary fact findings on the basis of the evidence presented and tools available on the motion…

[297] I have already stated my view that in the present case, the Court has a rich record on which to adjudicate the plaintiffs' motion. That record comprises affidavit evidence from the plaintiffs' six fact witnesses and nine expert witnesses, as well as affidavit evidence from Canada's four fact witnesses and Manitoba's seven fact witnesses. Most of the parties' witnesses were cross-examined. Those related transcripts are also before the Court. In addition to that evidence, many of the exhibits attached to certain of the affidavits are substantial reports of inquiry and other such government publications. As I have already determined and explained, these public reports can and will be be admitted as evidence. It is important to emphasize that neither Canada nor Manitoba seem to be disputing the findings of those reports. Indeed, while they may have objected to those documents for the truth of their contents, they nevertheless concede that those reports do, indeed, provide a record of what has transpired in the context of the Indigenous child welfare system, and what various governments, both federal and provincial, knew about that system at various points in time.

[298] Complicated and important adjudications, constitutional or not, may proceed by way of application or motion on affidavit evidence alone. Although no longer determinative, some of the relevant factors to be considered (as to whether summary judgment is appropriate) include whether the matter presents credibility concerns or addresses evidence of such complexity that it can only be adequately decided by means of a trial. I see neither of those identified factors in the circumstances of the present case as being such that they should pre-empt the relevant adjudication of a summary judgment merits hearing.

[299] It is an important reminder that, pursuant to Rule 20.03(2), I am able to weigh evidence, evaluate credibility of the deponents, and draw reasonable inferences from both direct and circumstantial evidence. To the extent the defendants take issue with the affidavit evidence of the plaintiffs' witnesses, as I have already noted, they have had the opportunity to cross-examine those witnesses - and did so at length (except the plaintiffs' expert witness, Elder Paynter, who neither Canada nor Manitoba elected to cross-examine).

[300] Given the scope and breadth of the witnesses' affidavits for both the plaintiffs and the defendants, I am also unclear what more the oral discovery process would have accomplished; the defendants do not elaborate on this point beyond simply asserting that it is necessary.

[301] Canada's insistence that summary judgment is somehow inappropriate or premature particularly for some of the claims such as that under s. 35 of the ***Constitution Act***, is likely related to its invocation of the Supreme Court of Canada's jurisprudence *vis-à-vis* s. 35, and, specifically, the original test for proving the existence of an Aboriginal right as formulated by Lamer C.J. in ***R. v. Van der Peet***, 1996 CanLII 216 (SCC), [1996] 2 SCR 507***.*** However, as will become clearer later in these reasons, ***Van der Peet*** is an ill-fitting test to establish the asserted s. 35 right at issue in this case. Consequently, I am not persuaded that in the present case, the evidentiary record on this summary judgment motion is lacking. In other words, I am not persuaded that a trial is required in order for the Court to make the necessary findings or determinations in respect of the identified s. 35 right or any alleged infringement.

[302] To summarize, having fully reviewed the issues, the evidence and the applicable law that pertain to the circumstances of this case, I am satisfied that there can be a fair and just determination and adjudication of the plaintiffs' claims in the context of a summary judgment motion. In other words, I am of the view that the summary judgment process will permit the Court to find the necessary facts and to apply the relevant principles in a manner that this case requires without need for a trial. Therefore, summary judgment is neither inappropriate nor premature.

Should the Motions for Certification and Summary Judgment Proceed Together?

[303] Another preliminary issue raised by the defendants is in respect of: (a) whether the motions for Class proceeding certification and summary judgment should proceed together, which Canada argues they should not; and if so, (b) whether it would be preferable to deal with the motion for summary judgment before the motion for certification, as the plaintiffs submit should be done, or deal with the motion for certification prior to the motion for summary judgment, as Manitoba submits should be done.

[304] Canada argues that the Court should deal with the procedural matter (the plaintiffs' motion for certification) first and only proceed to summary judgment at some later point in time. That later point would be after the proceeding has been certified, assuming it is certified, as a Class proceeding. It would also be after notice has been given to all other Class members, and that, in opting into the Class proceedings, the Class members agree to be bound by the results of the summary judgment. Canada further argues that summary judgment should only be addressed after the time limit for opting into the Class

proceeding has passed. In other words, Canada argues that this Court should not be dealing with the motion for certification and the motion for summary judgment at the same time.

[305] In support of its position, Canada cites ***Canada Post Corp. v. Lépine***, 2009 SCC 16, and ***Sanis Health Inc. v. British Columbia***, 2024 SCC 40. Those two decisions underscored the importance of notice as associated with Class action certification generally, and in respect of opt-in/opt-out mechanisms more specifically. In that regard "notice" should be seen as yet one more procedural protection designed to ensure that Class members fully understand how certification orders affect them, and the rights that they are sacrificing by participating in Class actions (see ***Lépine***, at paras. 42 and 43; ***Sanis Health***, at paras. 68 and 69). Canada argues that were the Court to decide the certification and summary judgment motions at the same time, it would be depriving Class members (other than the plaintiffs) of some of their litigation autonomy. As an example, Canada points to what might be the diminished right to petition the Court to participate in the Class proceeding (and potentially the summary judgment motion) as an intervenor.

[306] Unlike Canada, Manitoba has not expressed concern with the Court dealing with both the certification motion and the motion for summary judgment at the same time.

[307] Having carefully considered Canada's argument respecting why the motions for certification and summary judgment should not proceed together as part of the same hearing (and why the Court's reasons should also not be delivered at the same time), I remain unconvinced. I am not persuaded that in the circumstances of this particular

case, hearing the motions for certification and summary judgment together (with a concurrent release of a decision respecting both motions) will have the effect of, or result in, the Court interfering with the litigation autonomy of proposed Class members. In fact, if I certify the Class proceedings and render summary judgment at the same time, proposed Class members (other than the three currently seeking summary judgment) may in fact be better positioned than is usually the case to make litigation decisions.

[308] For example, with the benefit of determinations made on the summary judgment motion, and with full knowledge of the plaintiffs' success or failure on the substantive issues, other possible Class members could make an even more informed choice about whether to participate in the Class proceedings initiated by the plaintiffs.

[309] Further, the proposed Class members could advance their own claims against Canada and/or Manitoba. Alternatively, they could choose to participate in other Class proceedings raising similar common issues being initiated by other First Nations in other courts (such as, for example, the Class proceeding recently certified by the Federal Court against Canada in ***Fisher River***) for which the proposed Class members in this motion for certification may also meet the test to join.

[310] For all of these reasons, I have determined that in terms of judicial economy and the swifter determination of the issues in the particular circumstances of this case, it would be appropriate and indeed preferable, to render my decisions on certification and summary judgment at the same time.

Which Motion Should Proceed First: Certification or Summary Judgment?

[311] While both motions have been heard at the same time as part of the same hearing, which motion should be decided first?

[312] As noted, the plaintiffs prefer that I first decide the motion for summary judgment prior to deciding the motion for certification.

[313] For its part, Manitoba proposes that the Court deal with the plaintiffs' motion for certification before proceeding to adjudication on the merits. It takes that position on the basis that the Court performs a gatekeeper function at the certification stage of the proceedings. Manitoba cites the Manitoba Court of Appeal's decision in ***Soldier v. Canada (Attorney General)***, 2009 MBCA 12, at para. 21, as authority for this proposition. For that role to be properly performed, it requires in a case like the present one, that the motion for certification be decided first.

[314] The plaintiffs argue that there are efficiencies to be gained by rendering summary judgment first. As an initial point, they state that because the standard of proof required for summary judgment is more stringent than that required for certification, any issue upon which the Court is willing to render summary judgment on behalf of the plaintiffs will automatically be "in" when it comes to certification. The plaintiffs further argue that, were the Court to find in the plaintiffs' favour on all or most of the Stage 1 common issues, many Manitoba First Nations would likely opt in to the Class proceeding. If so, then when the time came to decide the Class 2 common issues, the Court would be effectively resolving for many First Nations at once, the apportionment of liability and damages. This say the plaintiffs, would be a highly efficient way of proceeding.

[315] I do not find the plaintiffs' arguments persuasive, particularly in the context of this case where, as will be apparent later in this judgment, so many of the plaintiffs' claims could not satisfy the test for certification.

[316] I am of the view that a coherent and well reasoned analysis of the issues (along with the goal of judicial economy) is best served in this case by first determining the extent to which the plaintiffs' claims and actions can be certified pursuant to s. 4 of the ***CPA***. Following the determinations as to certification, summary judgment can then be rendered on the Stage 1 common issues if and where those issues and the related claims still present (following the certification analysis) as viable claims that deserve and require a summary judgment assessment. In other words, in so far as it is plain and obvious - accepting the material facts pled by the plaintiffs to be true - that any of the claims advanced by the plaintiffs would not succeed (the low threshold that attaches to the first criterion for certification pursuant to s. 4 of the ***CPA***), the plaintiffs would be also unsuccessful in obtaining summary judgment on any of the same issues. To put it another way, if prior to the motion for summary judgment an attempt to certify a claim fails on the basis of s. 4 of the ***CPA***, there would be no need to adjudicate that issue on the merits for summary judgment. A summary judgment assessment would only proceed on any viable claim and on the basis of the related Stage 1 common issues.

[317] Accordingly, while both the motion for certification and the motion for summary judgment have been argued at the same time, I will first be deciding those issues that relate to certification and s. 4 of the ***CPA***.

VII. EVIDENCE ADDUCED

[318] The evidence adduced in this matter is extensive. The plaintiffs filed six fact witness affidavits and nine expert witness affidavits; Manitoba filed seven fact witness affidavits, Canada filed four. Most of these witnesses were cross-examined on their affidavits.

[319] The plaintiffs rely upon the following six fact witnesses: Chief Cook, Chief Kent, Chief Monias, Ms. Frank, Ms. Lisa Holland-Storozuk, and Ms. Kasper. The plaintiffs further rely upon the following nine expert witnesses: Dr. Leanne Simpson, Dr. Levine, Dr. Sinha, Ms. Petti, Dr. Reynolds, Dr. O'Gorman, Dr. Wayne Simpson, Dr. Neill, and Elder Paynter. With the exception of Ms. Kasper and Elder Paynter, all of the plaintiffs' witnesses were cross-examined on their affidavits.

[320] The defendant, Manitoba, relies upon the following seven fact witnesses: Mr. Andrew Lajeunesse, Dr. Robert Santos, Ms. Sidney Rogers, Ms. Janice Sanderson, Ms. Tannis Mindell, Ms. Meeka Kiersgaard, and Mr. Rodgers. All of Manitoba's witnesses were cross-examined on their affidavits.

[321] The defendant, Canada, relies upon the following four fact witnesses: Ms. Katrina Peddle, Mr. Jean-Pierre Morin, Mr. Duncan Farthing-Nichol, and Ms. Fraser. With the exception of Ms. Fraser, all of Canada's witnesses were cross-examined on their affidavits.

Plaintiffs' Fact Witnesses

Chief Heidi Cook

[322] Chief Cook is the elected Chief of Misipawistik Cree Nation and is a proposed representative plaintiff in this action. Prior to her election to Chief in July of 2020, Chief Cook was Band Councillor for six years, during which time she held the CFS portfolio

on Council and as which she served as the point of contact for Misipawistik families across the province who were interacting with CFS. She also served on the Board of Directors of the Cree Nation Child and Family Caring Agency from 2014 to 2020. And, since 2020, she has sat on the Swampy Cree Tribal Council, where she is also responsible for the CFS portfolio.

[323] Chief Cook's evidence, in the Affidavit of Chief Heidi Cook ("Cook Affidavit"), affirmed March 29, 2024, highlighted the impact of apprehensions on the children themselves, as well as on their families and the community, and the importance of maintaining connections between First Nations children and their communities, and of prioritizing family and community placements and culturally appropriate care, while also highlighting the superficial efforts that have been made by governments to do so.

[324] Chief Cook's evidence also discussed CFS standards and practices, and the challenges faced by her community to meet those standards and practices considering their history, way of life, and infrastructure issues on reserve. She also highlighted issues with single envelope funding ("SEF") and the limited resources dedicated to prevention, as well as the challenges faced by First Nations members living off reserve and the consequences for those individuals when proper support is lacking. She discussed how placements in non-First Nations homes can have lasting consequences.

Chief Sheldon Kent

[325] Chief Kent is the elected Chief of Black River First Nation and is a proposed representative plaintiff in this action. Chief Kent was elected as Chief in 1997, and he served as a band Councillor prior to his election. He also previously served as the

Chairman of the Board of Directors of the Southeast Tribal Council, which administered the Southeast CFS agency, which provides CFS in Black River First Nation and seven other First Nations in southeastern Manitoba.

[326] Chief Kent's evidence, in the Affidavit of Chief Sheldon Kent ("Kent Affidavit"), affirmed March 14, 2024, discussed the impact CFS has had and continues to have on his community, and how difficult it can be to satisfy CFS's standards and requirements, which do not reflect the realities of life on reserve.

[327] Chief Kent's evidence also highlighted the consequences to children and the community when children are taken into care off reserve, including the losses of the language and sense of connection with Black River and its customs, as well as the difficulties in reuniting those children with the Black River First Nation once they have been in care.

Chief David Monias

[328] Chief Monias is the elected Chief of Pimicikamak Cree Nation and is a proposed representative plaintiff in this action. Chief Monias was elected as Chief in 2019. He served in various roles within the child welfare system for 30 years prior to his election, including various positions with the Awasis Agency of Northern Manitoba, as the Chief Executive Officer of Manitoba Keewatinowi Okimakanak, and as Director of Operations for the Kinosao Sipi Minisowin Agency.

[329] Chief Monias' evidence discussed the Pimicikamak culture and way of life and the various ways in which children are exposed to that culture and way of life through land-based practices, and how the ability to pass on that culture and way of life is denied

when children are removed from the community and placed in care. He also highlighted the consequences for his community when children are apprehended, and how off-reserve placements, primarily in Winnipeg, have amplified those consequences for both his community and the children themselves.

[330] Chief Monias also discussed the use of the Structured Decision Making ("SDM") Assessment Tool and tendered as an exhibit Manitoba's Structured Decision Making® System for Child Protective Services Policy and Procedures Manual dated September 2009 for its use. He also discussed more broadly CFS standards and policies, and how difficult it can be for his community to satisfy them, which serves to reinforce the placement of children in non-First Nations homes that are often culturally inappropriate. He also highlighted underfunding of the child welfare system, and how the shift to single envelope block funding did not solve the problems it was intended to address.

Ms. Kayla Frank

[331] Ms. Frank is the Director of Children and Families for the AMC FNFAO and is authorized to give evidence on behalf of the AMC.

[332] Ms. Frank's evidence, in the Affidavit of Kayla Frank ("Frank Affidavit"), affirmed March 14, 2024, discussed the history and structure of the AMC, and its work to advance the cause of self-determination and self-government for First Nations, including in the area of CFS, as well as the related work of the FNFAO in this regard. Ms. Frank also discussed, and provided a copy of, the AMC's 2014 report, *Bringing Our Children Home*, which summarized the findings of a special Chiefs-in-Assembly and a series of open citizens' forums held to better understand the CFS system in Manitoba. That report

included 10 recommendations for reform, which were proposed to the defendants, but which she says neither level of government committed to implementing. Ms. Frank also tendered several reports and research papers to which the FNFAO made contributions, that, amongst other things, quantified the overlap between child welfare and youth criminal justice systems, identified the disparity between the health and well being of First Nations children and all other Manitobans, and highlighted the link between Indigenous child poverty and the overrepresentation of Indigenous children in the child welfare system.

[333] Ms. Frank also discussed the findings of the AJI of 1991 and the imposition of changes to the child welfare system by Canada and Manitoba following the release of the final report of that Inquiry. She provided a copy of Chapter 14 of Volume 1 of the Report of the Aboriginal Justice Inquiry of Manitoba, which examined the historical development of CFS in Manitoba and its impacts on First Nations children and families. She further discussed the AJI-CWI, which followed the publication of the AJI Report, and the Memorandum of Understanding between Manitoba, the AMC, the MKO, and the MMF, that was signed as a result of that process, a copy of which she tendered, and which lead to the process of devolution of the CFS system in Manitoba in 2005. Ms. Frank shared her perspectives on devolution and how Manitoba failed to fulfil its spirit and intent, and the consequences for First Nations children and communities as a result.

[334] Ms. Frank's evidence also discussed the continuing over representation of First Nations children in care and the consequences of that over representation and tendered several exhibits substantiating her evidence in this regard. She also highlighted the role

"birth alerts" have played in disrupting First Nations' culture at an important moment, and how, even after they ceased in 2020, infant apprehensions have continued.

[335] Ms. Frank also furnished the Court with two academic articles: Kenny, Kathleen S. et al., Infant Rates of Child Protective Services Contact and Termination of Parental Rights by First Nations status from 1998 - 2019: An Example of Intergenerational Transmission of Colonial Harm, Child Abuse & Neglect 154 (2024), which documented the rates of apprehension in Manitoba; and Brownell, Marni et al., Impact of being taken into out-of-home care: a longitudinal cohort study of First Nations and other child welfare agencies in Manitoba, Canada, Lancet Regional Health – Americas 38 (2024), which found that being in out-of-home care worsened children's health and legal system outcomes.

Ms. Lisa Holland-Storozuk

[336] Ms. Holland-Storozuk is a registered member of Black River First Nation with 22 years of experience working in various roles within CFS in Manitoba, including administrative, front line and supervisory work. Since February 2023, she has worked as the Prevention Director for Black River First Nation.

[337] Ms. Holland-Storozuk's evidence highlighted various systemic issues that affect families on reserve, including poverty and overcrowding, and a lack of access to adequate and safe housing, phones, internet, and transportation, that have interfered with a community's ability to satisfy CFS standards and requirements, including the licensing of foster homes. She also discussed the lack of culturally appropriate, on-reserve treatment facilities, and what she described as an insufficiency of funding dedicated to prevention services.

Ms. Jennifer Kasper

[338] Ms. Kasper is a legal assistant at McCarthy Tétrault LLP who compiled and tendered as exhibits a comprehensive catalog of publicly available information - agreements, legislative documents, press releases, and reports—including but not limited to: the Canada-Manitoba Indian Child Welfare Agreement of May 26, 1982; the Review Committee on Indian and Metis Adoptions and Placements' *Final Report to the Honourable Muriel Smith Minister of Community Services*: *No Quiet Place*, authored by Associate Chief Judge Edwin C. Kimelman (1985); the Report of the Royal Commission on Aboriginal Peoples (1996); the Report of the Aboriginal Justice Inquiry of Manitoba (1999); the First Nations Caring Society's Report, *Wen:De We Are Coming to the Light of Day* (2005); Indian and Northern Affairs Canada's *First Nations Child and Family Services—National Program Manual* (2005) and its *Evaluation of the First Nations Child and Family Services Program* (2007); the Manitoba Ombudsman's 2006 Report, *Strengthen the Commitment: An External Review of the Child Welfare System*; the Manitoba Department of Family Services and Housing Report, *Changes for Children: Strengthening the Commitment to Child Welfare Response to the External Reviews into the Child and Family Services System* (2006); the Auditor General of Manitoba's Report, *Audit of the Child and Family Services Division Pre-Devolution Child in Care Processes and Practices* (2006) and its 2019 Report, *Management of Foster Homes: Independent Audit Report*; the Auditor General of Canada's Report of 2008) and its Status Report to the House of Commons (2011); the Report of the House of Commons Standing Committee on Public Accounts (2009); the 2015 Final Report of the Truth and Reconciliation Commission; the Manitoba Office of the

Children's Advocate Report, *Strengthening our Youth: Their Journey to Competence and Independence: A Program Report on Youth Leaving Manitoba's Child Welfare System* (2012); the Report of the Commission of Inquiry into the circumstances surrounding the death of Phoenix Sinclair, *The Legacy of Phoenix Sinclair: Achieving the Best for All Our Children* (2013) (the "Phoenix Sinclair Final Report"); the FNFAO Report, *Lifting Up Children* (2016); the 2018 Report of the Legislative Review Committee of Manitoba, *Transforming Child Welfare Legislation in Manitoba: Opportunities to Improve Outcomes for Children and Youth*; the Manitoba Advocate for Children and Youth's 2019 Special Report, *A Place Where It Feels Like Home: The Story of Tina Fontaine* and its 2021 Special Report, *Still Waiting: Investigating Child Maltreatment after the Phoenix Sinclair Inquiry*; the National Inquiry into Missing and Murdered Indigenous Women and Girls Final Report (2019).

Plaintiffs' Expert Witnesses

Dr. Leanne Betasamosake Simpson

[339] Dr. Simpson is a Michi Saagiig Nishnaabeg scholar, writer and artist with over 25 years of experience as a land-based educator. Dr. Simpson holds a BSc, an MSc, and a PhD in Interdisciplinary Studies. In addition to her western academic credentials, Dr. Simpson has spent more than two decades learning Indigenous knowledge, on the land with First Nations Elders and in the oral tradition.

[340] Dr. Simpson's evidence, in the Affidavit of Leanne Betasamosake Simpson ("Dr. Simpson Affidavit"), affirmed March 14, 2024, highlighted the beliefs, customs and cultural traditions that inform the work that goes into raising First Nations children, the importance of being able to impart those beliefs, customs and cultural traditions

throughout children's lives, and what is lost by the community when they are no longer able to raise their children consistent with those beliefs, customs and traditions if they have been apprehended and removed from their community.

[341] Dr. Simpson's evidence also discussed the importance of language and land-based teachings to the community, and of maintaining that connection to the land itself. She also highlighted some of the beliefs, customs and traditions that First Nations have held and practiced since before colonisation, focusing on various beliefs, customs, traditions and practices of Anishinaabe, Cree, Oji-Cree and Dene peoples, demonstrating how they have been primarily transmitted through land-based practices, storytelling, and ceremonies.

Dr. Kathryn Levine

[342] Dr. Levine is an Associate Professor in the Faculty of Social Work at the University of Manitoba, where she has been employed since 1994. Prior to her employment with the University of Manitoba, she spent 10 years working as a child welfare worker and also has 10 years of experience in the field of child and adolescent psychiatry. She specializes in the outcomes of children who are involved with CFS.

[343] Dr. Levine's evidence, the Affidavit of Kathryn Levine ("Levine Affidavit"), affirmed April 9, 2024, discussed the outcomes of First Nations children involved with the child welfare system, and how those outcomes compare to First Nations children not taken into the care of CFS. She concludes that First Nations children and youth involved with the child welfare system have reduced educational achievement and employment outcomes compared to those not involved with CFS, as well as higher probabilities of

homelessness, higher rates of negative physical and mental health outcomes, including higher likelihood of substance abuse and of suicide, and an overrepresentation in the criminal justice system. She also concludes that not only do the children who are apprehended by the child welfare system experience chronic feelings of ambiguous loss and disenfranchised grief, so, too, do their families; they also experience significant disconnection from their culture, community, and identity.

Dr. Vandna Sinha and Ms. Tara Petti

[344] Dr. Sinha is an Associate Research Professor at the University of Colorado's School of Education, and an Adjunct Professor in the School of Social Work at McGill University. She has extensive expertise on the impact of social policies on children's access to services, and the wellbeing of children in marginalized communities. Dr. Sinha also holds a Master's degree and a PhD in human development and social policy, with specific focus social services and policies and development.

[345] Ms. Petti is a member of Peguis First Nation with 20 years of experience in First Nations child welfare, including as the Chief Executive Officer of the Southern First Nations CFS Authority between 2016 - 2019. Together with Dr. Sinha, she authored an expert report for the purposes of this proceeding (the "Sinha-Petti Report").

[346] The Sinha-Petti Report discussed the structure of child welfare services in Manitoba and how it has evolved, particularly since 1992. As part of that discussion, the authors examined the division of responsibility as between the federal and provincial governments, how governments have retained control even after devolution, as well as

the policies and practices in force in Manitoba, and the ways in which First Nations child welfare has been and is now funded by both levels of government.

[347] Their report highlighted the disproportionate apprehension of First Nations children when compared to non-First Nations children, the complex needs of First Nations children in care and the importance of providing culturally appropriate care, the insufficiency of prevention programs, and the inadequacy of the various funding models that have been used to support the system generally.

[348] The Sinha-Petti Report also examined various factors that have led to an increased rate of First Nations children entering the child welfare system compared to other infants, including through the use of the SDM Assessment Tool and birth alerts (and the continued apprehension of infants even after that practice was formally ended), and the ways in which that overrepresentation has resulted in the normalization of out-of-home care.

[349] The Sinha-Petti Report also discussed the impact that the continued overrepresentation of First Nations children in care has on not only the children themselves, but also on their families and communities.

[350] Dr. Sinha and Ms. Petti also tendered a supplemental report in which they provide further evidence based upon their review of the affidavits of many of the defendants' witnesses (the "Sinha-Petti Supplemental Report"). That supplemental report was also included, as an exhibit, the academic article, Kenny, Kathleen S. et al., *Infant Rates of Child Protective Services Contact and Termination of Parental Rights by First Nations status from 1998 to 2019: An Example of Intergenerational Transmission of Colonial*

Harm, Child Abuse & Neglect 154 (2024), which documented the rates of apprehension in Manitoba.

Dr. James Reynolds

[351] Dr. Reynolds is a lawyer and historian with over 40 years of experience related to the relationship between Indigenous Peoples and the Crown. He has previously served as an expert in First Nations safe water class actions and was involved as a lawyer for the Musqueam Indian Band in the 1984 Supreme Court of Canada case of ***Guerin*** (see ***Guerin v. The Queen***, 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335).

[352] Dr. Reynolds' evidence traced the evolution in the relationship between First Nations and the Crown, with a particular focus on the provision of child welfare from 1992 onwards. He discussed how colonial policies and procedures, including of assimilation and displacement, have shaped that relationship and served to deny First Nations their ability to raise their own children within their own communities in accordance with their own languages, cultural practices and spiritual traditions.

Dr. Melanie O'Gorman

[353] Dr. O'Gorman is a Professor in the Department of Economics at the University of Winnipeg, where she specializes in development economies including First Nations, and where she teaches courses specific to Indigenous economic development. Dr. O'Gorman has previously qualified as an expert economist in Class actions for First Nations and safe drinking water.

[354] Along with Dr. Wayne Simpson and Dr. Neill, Dr. O'Gorman was retained by the plaintiffs to determine whether it is possible to model the damages claimed in the plaintiffs' Statement of Claim. In doing so, Dr. O'Gorman accepted as true the allegations

as pleaded in the Statement of Claim and asked whether it was possible to assess the economic impacts of the defendants' mismanagement of First Nations child welfare. Dr. O'Gorman concludes it is possible to model the communal damages that the First Nations claim to have suffered as a result of the defendants' policies, protocols and practices regarding First Nations child welfare in Manitoba from January 1, 1992 to present, and proposes a methodology to allow for an analysis of causation and quantification of damages related to these harms.

Dr. Wayne Simpson

[355] Dr. Wayne Simpson is a professor in the Department of Economics at the University of Manitoba with expertise in applied econometrics and applied microeconomics. He has also been qualified as an expert in applied microeconomics and has been qualified to give expert evidence in regulatory and constitutional proceedings. Along with Drs. O'Gorman and Neill, Dr. Wayne Simpson concludes it is possible to model the communal damages that First Nations claim to have suffered as a result of the defendants' policies, protocols and practices regarding First Nations child welfare in Manitoba from January 1, 1992 to present. Dr. Wayne Simpson adopts the methodology and conclusions as set out in the Affidavit of Melanie O'Gorman ("O'Gorman Affidavit"), affirmed March 20, 2024.

Dr. Christine Neill

[356] Dr. Neill is an Associate Professor in the Department of Economics at Wilfrid Laurier University, specializing in labour and public economics. With a PhD in economics, Dr. Neill has authored several papers on topics such as the economic effects of increasing First Nations post-secondary educational attainment in Ontario, student unemployment, tuition fees, education tax credits, and intergeneration transmission of education among

Indigenous people in Canada. Along with Drs. O'Gorman and Wayne Simpson, Dr. Neill concludes it is possible to model the communal damages that First Nations claim to have suffered as a result of the defendants' policies, protocols and practices regarding First Nations child welfare in Manitoba from January 1, 1992 to present. Dr. Neill adopts the methodology and conclusions as set out in the O'Gorman Affidavit.

[357] Dr. Neill was also retained by the plaintiffs to review and reply to portions of the affidavit of Dr. Robert Guzman Santos, affirmed July 8, 2024, (one of Manitoba's fact witnesses) that spoke to the social determinants of health as an explanation for the number of Indigenous children in care. Dr. Neill concludes that, while there was a large increase in out-of-home care in Manitoba beginning in roughly 2003, and while socio-economic outcomes remain concerningly weak for First Nations people in Manitoba, there is no evidence of any significant deterioration in any of the key socio-economic variables for First Nations people in Manitoba around that time who were likely of an age when they would have had children, that the percentage of First Nations individuals who had not completed high school had dropped considerably after 2006, and that there was, in fact, a considerable decline in absolute terms of the percentage of the population living in a household with an income below the low income cutoff in each year.

Elder Florence Paynter

[358] Elder Paynter is a Knowledge Keeper, Elder, a Great-grandmother from Sandy Bay First Nation, and a member of Norway House Cree Nation. Elder Paynter holds sacred knowledge of First Nations laws and teachings regarding children and families and has been recognized as a Knowledge Keeper and Elder by the Treaty Relations Commission

of Manitoba and the National Centre for Truth and Reconciliation. Elder Paynter is a member of the AMC and the Treaty Relations Commission Elders' Council, as well as a member of the Turtle Lodge International Centre for Indigenous Education and Wellness.

[359] Elder Paynter's evidence, in the Affidavit of Florence Paynter ("Paynter Affidavit"), affirmed March 14, 2024, discussed why the wellbeing of First Nations children is integral to the wellbeing of First Nations families, cultures, and nations. She explained how, historically, First Nations communities cared for their own children using their own methods, informed by traditional governance systems and First Nations laws, and discussed various traditional beliefs and approaches to child rearing and development. She explained how the current child welfare system prevents First Nations from putting into practice those methods informed by those beliefs.

[360] Elder Paynter's evidence also highlighted what happens to children who have been apprehended and do not grow up in their traditional communities, and how that affects the communities themselves. She emphasized the importance of the children's connection to the land and First Nations' interest in maintaining that connection.

Manitoba's Fact Witnesses

Mr. Andrew Lajeunesse

[361] Mr. Lajeunesse is currently the Comptroller for the Child and Youth Services Division of the Department of Families within the Government of Manitoba, and he was previously employed as the Acting Chief Financial Officer of the General Child and Family Services Authority. Mr. Lajeunesse tendered numerous exhibits with his affidavit, including charts and spreadsheets capturing governmental expenditures, governmental manuals and related explanatory documents, copies of the settlement agreements arising

from the Class actions against Manitoba for having retained the CSA Benefits, and copies of or excerpts from the provincial budgets for the years from 1997 to 2024.

[362] Mr. Lajeunesse's evidence, in the Affidavit of Andrew Lajeunesse ("Lajeunesse Affidavit"), affirmed August 1, 2024, discussed the governance structures and funding approaches of Manitoba's CFS system before and after devolution. He explained how the move towards SEF of Manitoba's CFS system led to cash positive positions for CFS agencies. He also discussed Manitoba's budgeting, reporting, and appropriations regarding CFS, and also highlighted that, following Canada's decision to terminate funding, it had up, until that point, been providing to Manitoba for social services delivered to First Nations people off reserve, Manitoba was the sole source of funding for agencies in connection with First Nations children whose families reside off reserve. In terms of Canada's direct involvement, Mr. Lajeunesse's evidence was that, throughout the proposed Class period, Canada has only provided funding for the direct child maintenance related to the placement of First Nations children into temporary or permanent care out of the parental home where the parents or guardians of those children have or are eligible to have treaty status and are normally resident on reserve.

Dr. Robert Guzman Santos

[363] Dr. Santos is a psychologist and a former employee of the Government of Manitoba. Between 1997 and 2019, he held several research and managerial positions focussed on children, youth, and families, including as the Assistant Deputy Minister of the Healthy Child Manitoba Office ("HCMO") from 2015 until 2019.

[364] Dr. Santos' evidence discussed the government structures that are involved in CFS, including the former Manitoba Children and Youth Secretariat and its successor the HCMO and associated Healthy Child Manitoba Strategy, while also providing an overview of the strategies and funding programs employed to target poor CFS outcomes for First Nations children. Dr. Santos also provided an overview of several prevention focussed programs and services that are available to families in Manitoba that are outside of CFS, including programs that provide financial benefits for low-income pregnant women, postpartum screening, home visits based on need, and fetal alcohol syndrome initiatives to assist families achieve healthy outcomes. Dr. Santos tendered as exhibits several reports prepared or commissioned by Manitoba, including the statutorily-mandated 2012 and 2017 reports on the status of Manitoba's children in relation to achieving the outcomes of the Health Child Manitoba Strategy, and a 2012 report by the Manitoba Centre for Health and Policy, *How Are Manitoba's Children Doing?,* which examined the health and development of Manitoba's children in reference to the Healthy Child Manitoba goals.

Mr. Sidney Walter Rogers

[365] Mr. Rogers is a former Government of Manitoba employee who has held various managerial positions between 1970 and 2013, including, from the mid-1980s onward, positions related to child welfare, child disabilities, housing and education, as well as with the Workers Compensation Board of Manitoba. At the time of his retirement, Mr. Rogers was the Acting Assistant Deputy Minister of Child and Family Services in the Department of Family Services and Labour.

[366] Mr. Rogers provided evidence, in the Affidavit of Sidney Walter Rogers ("Rogers Affidavit"), affirmed July 4, 2024, regarding the history and implementation of devolution in Manitoba, a process he says was undertaken with the goal of making Indigenous child welfare systems better for the children and families involved with them. He explained that devolution did not involve a transfer of jurisdiction to Indigenous bodies respecting Indigenous child welfare matters because he had been advised that Manitoba lacked the constitutional authority to affect that transfer. He acknowledged that Indigenous representatives were not fully satisfied with the outcome of devolution as it did not provide for a full transfer of that jurisdiction.

[367] Mr. Rogers' evidence also discussed the roles and responsibilities of Manitoba, and the CFS agencies and authorities, within the framework of the ***CFSA*** and the ***CFSAA*** and its regulations.

Ms. Janice Ann Sanderson

[368] Ms. Sanderson served as both the Secretary to the Healthy Child Committee of Cabinet and the Chief Executive Officer of the HCMO between 2001 and 2016.

[369] Ms. Sanderson's evidence discussed the HCMO's strategies, program development, and annual reports. Ms. Sanderson also provided evidence regarding the programs and services available to families in Manitoba outside of CFS that focus on prevention, including an early-years childcare centre in Winnipeg's Point Douglas neighbourhood.

Ms. Tannis Marlene Mindell

[370] As a previous employee of the Government of Manitoba, Ms. Mindell held several managerial positions between 1973 and 2012 related to family services, labour and

employment, and education. She also previously held positions with the Treasury Board, a subcommittee of the Cabinet.

[371] Ms. Mindell's evidence discussed Manitoba's CFS governance, decision-making processes, and funding mechanisms, and what she described as Manitoba's sincere desire to implement policies that were best for First Nations families. Ms. Mindell's evidence also highlighted that departments, including the Department of Families, would often receive less funding than they had requested even though the Secretariat to the Treasury Board usually recommended increases to each department's budgetary allocation on a yearly basis.

Ms. Meeka Kiersgaard

[372] Ms. Kiersgaard has been employed by the Government of Manitoba in the Department of Families (and its previous incarnations) since 2006. Since 2022, Ms. Kiersgaard has been the Executive Director, Strategic Initiatives and Program Support for the Child and Youth Services Division of the Department of Families.

[373] Ms. Kiersgaard's evidence, in the Affidavit of Meeka Kiersgaard ("Kiersgaard Affidavit"), affirmed August 6, 2024, discussed the governance structure of Manitoba's CFS system, including pre- and post-devolution, how it has been and continues to be funded by Manitoba, and how the ***CFSA***, ***CFSAA*** and the regulations made thereunder define the roles and responsibilities of Manitoba, the CFS Authorities, and CFS Agencies, which is informed by the best interests of the child, as defined in the ***CFSA***. It was Ms. Kiersgaard's evidence that the CFS programs and policies that Manitoba implemented during the Class period reflected Manitoba's desire to do what was best for First Nations

communities. Her evidence also highlighted Manitoba's decision to move to SEF, which transferred to CFS Authorities decisions about how funding would be allocated to their mandated agencies. She also explained that an objective of devolution was to deliver child welfare services though governance systems that were based on cultural affiliation.

[374] Ms. Kiersgaard's evidence discussed s. 88 of the ***Indian Act***, and the failure of Canada to provide the provinces with support or resources to assist them in caring for First Nations people following the shift of responsibilities because of the enactment of s. 88.

[375] Ms. Kiersgaard also discussed the implementation and use of the SDM system by agencies in the delivery of child protection services, and specifically the Safety Assessment tool, which she says was not imposed but implemented following a period of collaboration and discussion with the CFS Authorities. She explained that the Department of Families does not require that agencies use all the SDM tools, but that, where they receive a report about abuse or neglect, the Probability of Future Harm tool is mandatory. She also explained that the SMD Safety Assessment tool may be used by case workers to determine immediate child safety when incidents occur within open files, but that its use is not mandatory. Additionally, she explained that results of the Safety Assessment tool and the Probability of Future Harm tool are not binding on an agency and do not supersede the professional judgment of individual agency workers.

[376] Ms. Kiersgaard tendered as exhibits to her affidavit a number of documents, including several policy manuals, which addressed SEF, the use of certain SDM tools, and the standards of service and practices associated with CFS case management.

Mr. John "Jay" Charles Rodgers

[377] Mr. Rodgers is the current Chief Executive Officer of the General Child and Family Services Authority. Mr. Rodgers was previously employed in various roles concerning child welfare, including as an employee of the Government of Manitoba, dating back to the mid-1980s. Mr. Rodgers provided evidence regarding the implementation of devolution and subsequent CFS decision-making processes.

[378] Mr. Rodgers' evidence discussed the regional roll-out of devolution between 2003 and 2005, and the work involved in transitioning case files to the CFS Authorities and in ensuring Indigenous CFS Authorities would be able to develop their own culturally competent staff. He explained that, while the delivery of services was transitioning to the CFS Authorities in 2006 and 2007, a number of reports by external review teams, the Auditor General, and the Office of the Children's Advocate were produced, which, together, provided a total of 289 recommendations with respect to the CFS system. In response, Mr. Rodgers explained that Manitoba announced several initiatives known as "Changes for Children", which provided $73 million of new funding to review and implement the 289 recommendations, and increases in funding in the amount of $236 million to CFS between the 2005/2006 and 2012/2013 fiscal years.

[379] Mr. Rodgers' evidence also provided an overview of Manitoba's 2009 introduction of the three phase Differential Response/Family Enhancement ("DR/FE") model. The goal of the programs under the DR/FE model was, and remains, to provide resources to families struggling with challenges that, left unaddressed, would increase the likelihood

of a child coming into care. He also explained how the SDM Assessment tools were developed and implemented to support the Differential Response programs.

[380] Mr. Rodgers' evidence also discussed the creation and implementation of SEF, which he said was meant to provide CFS Authorities with autonomy, predictability and flexibility.

[381] Mr. Rodgers' affidavit included a number of exhibits, including several recent Annual Reports of the CFS Standing Committee, an advisory body to the CFS Authorities and the Department in respect of CFS, Manitoba's immediate response to the various external reviews of the CFS system completed in late 2006 and early 2007, including by the Auditor General of Manitoba and the Office of the Children's Advocate, and a follow-up report from 2014 documenting the province's progress on its "Changes for Children" initiatives.

Canada's Fact Witnesses

Ms. Katrina Peddle

[382] Ms. Peddle is employed as the Director General of the *Act respecting First Nations, Inuit and Métis Children, Youth and Families* Branch within the Child and Family Services Reform Sector of Indigenous Services Canada. Ms. Peddle's affidavit evidence included numerous exhibits, including *A Report on Children and Families Together: An Emergency Meeting on Indigenous Child and Family Services* (2018), prepared by Canada following an emergency meeting convened by Canada to provide an opportunity for federal, provincial, and territorial governments and Métis, Inuit and First Nations leaders, Elders, youth and community service organizations and advocates to address what the report

described as "the child welfare crisis in Canada", as well as governmental meeting notes and webpages.

[383] Ms. Peddle's evidence, in the Affidavit of Katrina Peddle ("Peddle Affidavit"), affirmed July 30, 2024, discussed the legislative history and purpose of the 2019 ***Act***, including the engagement process with Indigenous organizations undertaken by Canada that informed its drafting and passage. She also highlighted the federal funding Canada earmarked to support its implementation. She explained that, pursuant to the 2019 ***Act***, eight Indigenous governing bodies have requested to enter into coordination agreements related to the exercise of their legislative authority in relation to CFS. Another such Indigenous governing body, Peguis First Nation, has completed such an agreement, enabling it to implement its own CFS laws and regulations, a copy of which agreement Ms. Peddle also tendered as an exhibit.

Mr. Jean-Pierre Morin

[384] Mr. Morin is employed by Crown-Indigenous Relations and Northern Affairs Canada in the Strategic Research Unit of the Strategic Policy Directorate as its Departmental Historian. He has been an historian with the federal government for 24 years and has held his current position since 2008. Since 2015, he has also worked as an adjunct research professor in the Department of History at Carleton University, where he has taught courses on Indigenous history. Mr. Morin's affidavit included numerous exhibits, including historical agreements and memoranda-of-understanding, government policies, correspondence, status reports and departmental audits.

[385] Mr. Morin's evidence, in the Affidavit of Jean-Pierre Morin ("Morin Affidavit"), affirmed July 30, 2024, discussed Canada's role in and funding of CFS on reserve prior to 1991, and in particular its role and approach to funding in Manitoba during that period. He highlighted, and tendered copies of, various agreements Canada entered into during this period, including the tripartite Canada-Manitoba-Indian Child Welfare Agreements of 1982, 1983, and 1984. Mr. Morin also explained that, up until March 31, 1992, Canada had reimbursed Manitoba for social assistance for off-reserve child welfare services; after that date, Canada terminated those payments and instead, provinces and territories could fund their delivery of social and health services to First Nations individuals living off reserve by drawing upon Canada's general transfer payments to provinces and territories delivered pursuant to the ***Federal-Provincial Fiscal Arrangements Act***, R.S.C., 1985, c. F-8.

[386] Mr. Morin also described Canada's implementation and administration of the FNCFS program from 1991-2016, including its two funding models, Departmental Directive 20-1 and the Enhanced Prevention Focused Approach ("EPFA"). Referencing the CHRT's 2016 decision in ***Caring Society***, he noted that the EPFA continued many of the problematic aspects of Directive 20-1, such as a failure to consider the actual service needs of First Nations children and their families, and the impact of inflation costs, and explained that, following the CHRT's subsequent decision in 2018 (see ***First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)***, 2018 CHRT 4), Directive 20-1 and the EPFA no longer determine budgets for FNCFS agencies.

[387] It was Mr. Morin's evidence that Canada does not manage or oversee the operations of FNCFS agencies. He explained that Canada's role is to ensure that public funds are used for child welfare expenditures in accordance with the applicable funding authorities, such as the Terms and Conditions of the FNCFS program. Mr. Morin also discussed the provincial and territorial governments' legislative authority for CFS, including in Manitoba pursuant to the ***CFSA***, and explained that while Canada provides funding to support the delivery of CFS on reserve, these services must be provided in accordance with provincial and territorial legislation and regulations.

[388] Mr. Morin also provided an account of how Canada and Manitoba cost-share core operating costs for FNCFS agencies that receive both federal and provincial funding. He explained that costs are split between Manitoba and Canada at 60% and 40% respectively, which reflects the off-reserve/on-reserve split of First Nations clients serviced by FNCFS agencies. As part of his evidence, Mr. Morin also tendered a PowerPoint presentation he prepared and presented in 2018, which provided an historical overview of Indigenous CFS from the 1950s to the 2010s, and which described it as a "broken system".

Mr. Duncan Farthing-Nichol

[389] Mr. Farthing-Nichol is a lawyer who serves as the Director of the Litigation Management Directorate within the Child and Family Services Reform Sector of Indigenous Services Canada. He is responsible for managing litigation related to the FNCFS program and the 2019 ***Act***.

[390] Mr. Farthing-Nichol's evidence discussed the CHRT's decision in ***Caring Society***, which he says Canada has accepted, and summarized Canada's response to that decision, drawing on information contained in multiple affidavits and submissions to the CHRT, which he tendered as exhibits to his affidavit. Mr. Farthing-Nichol's evidence also highlighted increases in national expenditures for the FNCFS program since 2016, which included additional funding for prevention services. He also discussed more recent efforts by Canada since 2021 to negotiate a final agreement on long-term reform of the FNCFS program as between Canada and the AFN, the Chiefs of Ontario, and the Nishnawbe Aski Nation, which he says will provide stable and predictable funding to support the reformed FNCFS program, including for prevention services.

[391] Mr. Farthing-Nichol's evidence also discussed three Class action lawsuits that were filed against Canada in the Federal Court, seeking compensation for First Nations children and family members who were discriminated against in relation to the FNCFS program and Jordan's Principle (*Xavier Moushoom et al v Canada (Attorney General),* Federal Court File No. T-402-19, *Assembly of First Nations et al v Canada (Attorney General)*, Federal Court File No. T-141-20, and *Assembly of First Nations et al v Canada (Attorney General),* Federal Court File No. T-1120-21). He also referenced in 2019 the CHRT awarded compensation to First Nations children living on reserve and in the Yukon who were removed from their homes and First Nations children who were denied essential services or who encountered a delay in those services because of a narrow interpretation of Jordan's Principle. He explained that those court actions and related CHRT decision led to Canada negotiating a $23.34 billion settlement agreement with the various plaintiffs in

those actions that was approved by the CHRT in 2023 to compensate those harmed by discriminatory underfunding of the FNCFS program and those impacted by Canada's narrow definition of Jordan's Principle.

Ms. Pamela Fraser

[392] Ms. Fraser is a paralegal in the Prairie Region Winnipeg office of the Department of Justice Canada. She tendered as exhibits various government documents, correspondence, policies, guides, reports, webpages, as well as news releases and extracts from House of Commons Hansard. Ms. Fraser's evidence provided an historical overview of Canada's role with respect to funding and delivery of CFS to First Nations on reserve, descriptions of several federal programs aimed at providing First Nations with funding and support to promote and revitalize Indigenous languages, culture and traditions, as well as information related to Canada's adoption of Jordan's Principle.

VIII. ANALYSIS

[393] In this Analysis section, I propose to address the two principal issues that I earlier identified at para. 9 of this judgment. Those issues relate first, to the plaintiffs' motion for certification and second, to the plaintiffs' motion for summary judgment respecting Stage 1 common issues. Those two principal issues were expressed in the form of the following questions:

i) Based on the application of s. 4 of the ***CPA***, to what extent if at all, ought this Court to certify this action as a Class proceeding on the basis of the currently formulated (or any reformulated) common issues?

ii) Ought the Court to grant summary judgment in respect of the plaintiffs' currently formulated (or any reformulated) Stage 1 common issues?

[394] As has been explained, the initial Stage 1 common issues proposed by the plaintiffs have now been reformulated by the Court (see para. 288). It will be on the basis of those reformulated issues that I make my determinations, either in relation to certification, and or summary judgment. The claims being advanced by the plaintiffs for the Court's consideration are those claims that are identified and included in what are now the reformulated Stage 1 common issues.

[395] I intend to proceed with my analysis by first considering the issue of certification. I will then proceed with my analysis on summary judgment where – following my application of the law to the facts – I will determine whether there remain genuine issues (genuine Stage 1 common issues) requiring a trial in respect of any of the plaintiffs' viable claims that may have been certified.

[396] As will be noted in the analysis that follows, I have determined that even on the application of the relatively low threshold and standard that governs at the certification stage, following the application of the relevant principles and criteria, particularly s. 4(a) of the ***CPA***, the only viable cause of action disclosed by the plaintiffs' pleadings is that alleging a breach under s. 35 of the ***Constitution Act***. In other words, except for that proposed claim that will be certified, I have determined that on a review of the pleadings (assuming all of the facts pleaded to be true) it is "plain and obvious" that any of the other proposed claims cannot succeed.

[397] Having determined that on the criteria of s. 4(a) of the ***CPA*** that it is plain and obvious that most of the plaintiffs' proposed claims cannot succeed and therefore do not disclose viable causes of action as contemplated by the governing test, it will serve little purpose to address those non-certified claims in the context of the plaintiffs' motion for summary judgment. Put simply, if it is plain and obvious (even when all facts pleaded are assumed to be true) that a claim cannot succeed, it is not coherent to suggest that it can then be concluded on a merits consideration of the reformulated common issues, that there remains no genuine issue for trial.

[398] Accordingly, following my analysis as to certification and my application of s. 4 of the ***CPA*** to all of the proposed claims brought by the plaintiffs, I will be considering on summary judgment, the only viable claim and related Stage 1 reformulated common issues that will have been certified: the claim brought under s. 35 of the ***Constitution Act***.

The Certification Motion

Based on the Application of s. 4 of the CPA, to What Extent if at all, Ought this Court to Certify this Action as a Class Proceeding on the Basis of the Now Reformulated Common Issues?

[399] The claims being advanced by the plaintiffs for which they seek certification can be discerned from the pleadings. They are also identified in the reformulated common issues.

[400] The plaintiffs' claims and what they suggest are viable causes of action relate to the following:

a) Section 2(a) of the ***Charter***;

b) Section 15(1) of the ***Charter***;

c) Section 35 of the ***Constitution Act***;

d) Section 36 of the ***Constitution Act***;

e) Honour of the Crown;

f) A *sui generis* fiduciary duty;

g) An *ad hoc* fiduciary duty; and

h) Negligence.

[401] I will address each and every one of these proposed claims with reference to the governing legal framework respecting the certification of Class proceedings.

The Governing Statutory Provisions and Legal Principals

[402] On a certification motion, the Court performs a gatekeeper function (see ***Soldier***, at para. 21). While the certification stage addresses the form of the action as opposed to the action's likelihood of ultimate success, the Court is still required to determine

whether the claim should appropriately proceed as a Class proceeding (see ***Hollick***, at para. 16).

[403] In order for a Class proceeding to be certified, the plaintiffs must establish the criteria outlined in s. 4 of the ***CPA***. For convenience, I once again set out the relevant section and criteria:

> **Certification of class proceeding**
>
> 4 The court must certify a proceeding as a class proceeding on a motion under section 2 or 3 if
>
> (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 a common issue, whether or not the common issue predominates over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and
>
> (e) there is a person who is prepared to act as the representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and
>
> (iii) does not have, on the common issues, an interest that conflicts with the interests of other class members.

[404] It is necessary for the plaintiffs to satisfy all of the criteria set out in s. 4 respecting each individual claim before those claims can be certified (see ***Soldier***, at para. 5).

[405] Evidence is not to be considered when addressing the criterion at s. 4(a) namely, whether the pleadings disclose a cause of action. This requirement is assessed on the

same standard of proof that applies on a motion to strike. The test is whether, assuming all facts pleaded to be true, it is "plain and obvious" that the plaintiffs' claim cannot succeed (see ***Pro-Sys***, at para. 63).

[406] Concerning the remaining four criteria for certification set out in ss. 4(b) through 4(e) of the ***CPA***, the plaintiffs are required to show "some basis in fact" to satisfy each requirement. While this evidentiary standard is relatively low, it is worth noting the caution expressed by Rothstein J. in ***Pro-Sys*** when he noted that certification must still function as a "meaningful screening device" (at para. 103), and that:

> [104] … There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of s. 4(1) of the *CPA* not having been met.

[407] In ***Hollick***, the Supreme Court of Canada addressed the nature of a common issue under s. 4(c) of the ***CPA***. It was in ***Hollick*** that McLachlin C.J. noted that a common issue must be a substantial ingredient of each class member's claim:

> 18 … As I wrote in *Western Canadian Shopping Centres*, the underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" (para. 39). Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial . . . ingredient" of each of the class member's claims.

[408] As it relates to the requirement for "some evidence in fact" respecting the proposed common issues, the British Columbia Supreme Court in ***Bosco v Mentor Worldwide LLC***, 2024 BCSC 1931, recently commented as follows:

> [91] The Court of Appeal, citing various seminal authorities, recently explained the requirement for "some basis in fact" on certification in *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338 at paras. 133 – 139:

a) The court must consider the language of the proposed common issue and whether there is some evidence to support the argument that it is a common issue across class members;

b) There is a low threshold;

c) The standard is simply to ensure that the action is suited to a class proceeding and does not entail a robust analysis of the merits of the claim;

d) The Court must undertake more than superficial scrutiny of the sufficiency of the evidence;

e) This standard requires an evidentiary basis to show that the plaintiff has met the certification requirements; and

f) The requirement for "some basis in fact" is better understood in contrast to no basis in fact.

[92] The requirement that there be some basis in fact to support the proposed common issues is there to provide the certification judge with some level of confidence that certification will be of practical benefit when, in the future, the claims reach trial, as opposed to being simply a procedural complication for claims that are not truly common. It also helps the judge determine if a class proceeding is in fact a preferable procedure: *Nissan Canada Inc.* at para. 139.

[409] Having set out the governing legal framework, I now turn to the plaintiffs' specified claims and the application of that framework and the specific s. 4 certification criteria.

Application of the Certification Criteria to the Plaintiffs' Claims

Can the Proposed Class Members have Certified, Pursuant to s. 4 of the CPA, the Proposed Claim Brought Under s. 2(a) of the Charter?

[410] Section 2(a) of the ***Charter*** states:

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion…

The Plaintiffs' s. 2(a) *Charter* Claim

Position of the Plaintiffs

[411] The plaintiffs as collective entities submit that they can assert a claim under s. 2(a) of the ***Charter*** based on the communal aspects of religious beliefs and practice. Specifically, in their FASC, they plead (at para. 140) that, "[f]reedom of religion includes both individual and collective aspects", and that, "First Nations' collective claims to freedom of religion are rooted in the sharing of teachings and ceremonies with the next generation, which is a foundational aspect of First Nations' spiritual practices, and a collective right."

[412] The plaintiffs submit that their position is consistent with the British Columbia Court of Appeal's decision in ***Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations),*** 2015 BCCA 352 ("***Ktunaxa CA***"). They also reference the Supreme Court of Canada's decision in ***Loyola High School v. Quebec (Attorney General)*** *,* 2015 SCC 12, in which the majority of the Court held that "[r]eligious freedom under the *Charter* must therefore account for the socially imbedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions" (at para. 60). While recognizing that the majority in ***Loyola*** did not find it necessary to decide whether Loyola High School, a religious non-profit corporation, could advance a s. 2(a) ***Charter*** right on its own behalf, the plaintiffs nonetheless suggest that there is support for their position in the majority's statement that "individuals may sometimes require a legal entity in order to give effect to the

constitutionally protected communal aspects of their religious beliefs and practice, such as the transmission of their faith" (at para. 33).

[413] The plaintiffs assert that the above statement from the majority decision in ***Loyola*** has application in the present case in that First Nations' traditional spiritual practices require a group or community to make these practices meaningful, and the participatory rights to these practices must be exercised collectively. They assert that Canada and Manitoba have infringed the rights of First Nations to transmit their beliefs to the next generation (which they say is part of their s. 2(a) ***Charter*** right) through the manner in which they have funded, regulated and provided child welfare and child protection services in Manitoba. The plaintiffs underscore that the manner of funding, regulating and providing has resulted in the removal of First Nations children from First Nations communities. When children are removed from First Nations communities and are unable to participate (or fully participate) in these communities' traditional practices, say the plaintiffs, First Nations communities can no longer pass on those practices to their children. The plaintiffs insist that this affects not just individual members, it also impacts the cultural survival of the First Nation as a whole.

[414] In arguing for certification on their s. 2(a) ***Charter*** rights claim, the plaintiffs also point to the Federal Court's recent decision in ***Fisher River***. In certifying a Class proceeding against Canada in respect of its funding, operation, supervision, and control of the on-reserve FNCFS program, the Court in ***Fisher River*** accepted (for the purposes of certification) that the plaintiffs had established that a First Nation, as a collective, can advance a s. 2(a) ***Charter*** rights claim.

Position of the Defendants

[415] Manitoba does not dispute the plaintiffs' ability to advance a s. 2(a) ***Charter*** rights claim. Canada, however, does argue against certification saying that the plaintiffs' pleadings do not disclose a viable action. Specifically, Canada argues that the pleadings do not identify the spiritual or religious beliefs or practices held or practiced by First Nations themselves (as distinct from the religious or spiritual beliefs of the individuals who comprise those First Nations), and further, that First Nations cannot claim this right for themselves separate from individual members of a First Nation. According to Canada, religion and beliefs are a personal and individual decision; they do not belong to a First Nation, nor can they be claimed by a First Nation on behalf of the rights holders.

Do the Pleadings Disclose a Cause of Action based on s. 2(a) of the *Charter?*

[416] As it pertains to certification of the plaintiffs' s. 2(a) ***Charter*** rights claim, the very basic and first question I must answer is whether the law supports the plaintiffs' ability, as First Nations and collective entities, to advance a s. 2(a) ***Charter*** rights claim as they have contemplated in their pleadings. If it is clear, at law, that the plaintiffs cannot advance such a claim, then it will be plain and obvious that this cause of action has no prospect of success, and the Court will refuse to certify any issues in relation to the plaintiffs' s. 2(a) ***Charter*** rights claim.

[417] I remain mindful that the assessment to be conducted pursuant to s. 4(a) of the ***CPA*** proceeds with the Court assuming all the facts as pled to be true. That said, those facts "assumed to be true" must ground a legal action that has a basis in law.

[418] As it relates to the plaintiffs' claim brought under s. 2(a) of the ***Charter***, I am not satisfied that such a basis exists. Based on the pleadings which reveal that nature of the plaintiffs' s. 2(a) ***Charter*** rights claim and given the current state of the governing jurisprudence, I have concluded that the plaintiffs' pleadings with respect to s. 2(a) of the ***Charter*** do not reveal a viable cause of action.

[419] The unique nature of the plaintiffs' s. 2(a) ***Charter*** rights claim is evident throughout the plaintiffs' pleadings. For example, in the FASC, the plaintiffs plead:

- That, "[t]he Defendants prevented First Nations from passing on their distinct and sacred teachings, receiving essential spiritual guidance, and knowing and taking pride in their true identity and culture" (at para. 12);
- That, "[t]he Defendants' policies, actions, and failures … have also prevented Class members from sharing traditional cultural and spiritual practices with First Nations children, and jeopardized the survival of these practices, contrary to section 2(a) of the *Charter*" (at para. 15); and
- That, "[b]y perpetuating assimilation of First Nations children and severing them from their First Nations, culture, and spirituality, Manitoba and Canada have breached Class members' right to freedom of religion, which includes ancestral teachings and traditional ceremonies" (at para. 139).

[420] The plaintiffs explain that, "First Nations Elders, grandparents, aunts and uncles, parents, and other helpers have inherent roles and responsibilities to guide and care for children, and teach them about their distinct culture, spirituality, connection to the land, and First Nations identity" (at para. 62). Thus, when the plaintiffs plead that "the

Defendants prevented First Nations from passing on their distinct and sacred teachings," (at para. 12) the asserted interference with the First Nations' religious freedom is in the separation of the children from those other community members and the inability of those community members, as a collection of individuals, to transmit their religious or spiritual beliefs to those children. It is suggested that this separation also severs the children's relationship to their identity and to their First Nations.

[421] The plaintiffs' pleadings suggest, probably quite correctly, that there is a certain indivisibility between the individuals that comprise a First Nation and the First Nation itself. The further implication however, is that the s. 2(a) ***Charter*** right conferred on individuals is equally conferred upon the collective. While such a conception may fit somewhat more comfortably within the paradigm of s. 35 of the ***Constitution Act***, it is not clear, at least at this point in the development or evolution of the jurisprudence, that such a conception fits within the ambit of s. 2(a) of the ***Charter***. There appears to be an important legal, even philosophical, distinction as between some of the rights set out and protected by the ***Charter*** and those recognized and affirmed by s. 35 of the ***Constitution Act***. Apart from what is unquestionably those obviously distinct and purposefully enacted provisions of the ***Charter*** recognizing and protecting collective rights, much of the ***Charter*** was constructed and is conceived as an instrument guaranteeing rights to individuals. While certain ***Charter*** rights may have a communal dimension, including freedom of religion, many ***Charter*** rights are less equipped to accommodate the kind of communal rights paradigm the plaintiffs are claiming in the context of their claim under s. 2(a). Indeed, it has been said that s. 35 of the

Constitution Act, and, relatedly, s. 25 of the ***Charter***, were drafted and incorporated in response to Indigenous leaders' concerns about the potential impact the ***Charter*** would have on Aboriginal rights, given the constitutional primacy the ***Charter*** would afford individual rights.

> … Needless to say, in the lead-up to the passage of the *Constitution Act, 1982*, many Indigenous leaders were wary of the idea of a *Charter of Rights and Freedoms*. Mindful of its liberal philosophical underpinnings, with a simultaneously individualizing and universalizing worldview, these leaders perceived the *Charter* as incompatible with Indigenous political and legal traditions and the recognition and preservation of distinct collective rights for Indigenous peoples.
>
> (see Jeremy Patzer & Kiera Ladner, "Charting Unknown Waters: Indigenous Rights and the *Charter* at Forty" (2022) 26:2/27:1 Rev Const Stud 15 at p. 18 - 19).

[422] In other words, although the ***Charter*** does address and provide protection for Aboriginal rights, it is s. 35 of the ***Constitution Act*** that is meant to more obviously provide a special constitutional guarantee of the collective rights of Aboriginal peoples. To import or seek to apply, as the plaintiffs do, the paradigm of s. 35 of the ***Constitution Act*** to their conception of the right protected by s. 2(a) of the ***Charter,*** is not only not currently supported in the jurisprudence, but it also represents an approach that may risk hollowing out that which makes the distinct Aboriginal rights recognized and affirmed by s. 35 of the ***Constitution Act***, so unique and deserving of special protection.

[423] When considering the plaintiffs' pleadings and the viability of their claims (and how they are being advanced), an important distinction must be drawn between the concept of First Nations as a conglomeration of individuals (or indeed, as a geographical place) and First Nations as entities, in and of themselves, akin, at law, to an organization or corporation. In the present case, the plaintiffs are not meant to be advancing their s. 2(a) or s. 15(1) ***Charter*** rights claims, or, indeed, any of the claims they are making in this

proceeding, on behalf of their members. The Carriage Order in respect of this proceeding confirms that this matter was permitted to proceed only as a collective claim advanced by and on behalf of First Nations and the AMC (see ***Fontaine et al. v. The Government of Manitoba et al.***, 2023 MBKB 84, at para. 89). The pleadings support this proposition. In that regard, I note the following paragraphs from the plaintiffs' FASC, each of which confirms a clear intent to advance communal claims for the First Nations themselves:

> [25] Chief Kent brings suit on behalf of Black River First Nation and on behalf of all the members of the Black River First Nation in asserting a communal claim.
>
> ...
>
> [34] Chief Monias brings suit on behalf of Pimicikamak Cree Nation, and on behalf of all the members of the Pimicikamak Cree Nation in asserting a communal claim.
>
> ...
>
> [41] Chief Cook brings suit on behalf of Misipawistik Cree Nation, and on behalf of all the members of the Misipawistik Cree Nation in asserting a communal claim.
>
> [emphasis added]

[424] It is worth noting as well, the definition of the Class members in the plaintiffs' FASC:

> [58] The members of the proposed "Class" are Black River First Nation, Pimicikamak Cree Nation, Misipawistik Cree Nation and any other First Nation located in Manitoba that elects to join this action…
>
> [59] For the purpose of defining the Class, each "First Nation" is composed of one or more "bands" within the meaning of the [*Indian Act*] or Indigenous people of Canada, other than Inuit or Métis peoples, with a modern treaty…

[425] In other words, the Class for which the plaintiffs are advancing their claims, are First Nations themselves. The Class does not include First Nations acting in any representative capacity on behalf of individuals nor is the Class meant to capture what

are effectively the collective individual claims arising from those First Nations. I do acknowledge that the Carriage Order stayed this action only to the extent it overlaps with the other action contemplated in ***Fontaine,*** and that in ***Fontaine,*** the proposed Class members are limited to children in care, together with their parents and grandparents. Nevertheless, I am not persuaded that it necessarily follows that it is open to the plaintiffs in the present case to argue that all other individuals not included in the Class in ***Fontaine*** are therefore, by extension, caught up by the plaintiffs in this action. Such an argument and approach risks undermining the intention of the Carriage Order and the conceptual distinction it has made as between causes of action that may be advanced by individuals and those that may be advanced by a collective entity in and of itself.

[426] Even if, on a generous reading of the plaintiffs' pleadings (where the facts are assumed to be true), I could assume that First Nations, in and of themselves, hold beliefs that have a nexus with religion, I am certainly not satisfied that the law supports the plaintiffs' capacity, akin to that of an organization or corporation, to advance a s. 2(a) ***Charter*** rights claim on their own behalf.

[427] The Supreme Court of Canada has been asked many times to consider the nature of the right guaranteed by s. 2(a) of the ***Charter***. It has consistently defined freedom of religion as, "the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination" [emphasis added] (see ***R. v. Big M Drug Mart Ltd.***, 1985 CanLII 69 (SCC), [1985] 1 SCR 295, at para.94; ***Ross v. New Brunswick School District No. 15***, 1996 CanLII

237 (SCC), [1996] 1 SCR 825, at para. 72; ***Syndicat Northcrest v. Amselem***, 2004 SCC 47, ("***Amselem***"), at para. 40; ***Reference re Same-Sex Marriage***, 2004 SCC 79, at para 57; ***Multani v. Commission scolaire Marguerite-Bourgeoys***, 2006 SCC 6, at para. 32; ***Bruker v. Marcovitz***, 2007 SCC 54, at para. 71; ***Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)***, 2017 SCC 54, ("***Ktunaxa SCC***"), at para. 62).

[428] In discussing the definition of freedom of religion, the Supreme Court has also made the following observations:

- "… freedom of religion ensures that every individual must be free to hold and to manifest without State interference those beliefs and opinions dictated by one's conscience…" [emphasis added] (see ***Ross***, at para. 72);
- "… This Court has long articulated an expansive definition of freedom of religion, which revolves around the notion of personal choice and individual autonomy and freedom…" [emphasis added] (see ***Amselem***, at para. 40;
- "… freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith…" [emphasis added] (see ***Amselem***, at para. 46); and
- "… The purpose of s. 2(*a*) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of

being…" [emphasis added] (see ***R. v. Edwards Books and Art Ltd.***, 1986 CanLII 12 (SCC), [1986] 2 SCR 713, at para. 97).

[429] In short, the jurisprudence tends to define and emphasize s. 2(a) of the ***Charter*** as a right held by individuals, not communities. Despite the undeniable recognition and entrenchment of some collective rights, this accords with the general thrust of the ***Charter*** as an individual rights instrument, in the same way as the Universal Declaration of Human Rights ("UDHR"), G.A. Res. 217A, 3 U.N. GAOR., pt. 1, U.N. Doc. A-810 (1948), adopted by the General Assembly of the United Nations on December 10, 1948. Article 1 of that Declaration provides that, "[a]ll human beings are born free and equal in dignity and rights" [emphasis added]. Notably, the UDHR also guarantees freedom of religion. Article 18:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.
>
> [emphasis added]

[430] There are some suggestions that the law in this area is beginning to evolve such that greater accommodation may eventually be made for the assertion of claims under s. 2(a) of the ***Charter*** based on the communal aspects of religious belief and practices. I note, for example, that the text of the UNDRIP may imply more of a communal dimension to this right for Indigenous peoples. Article 12 of that international instrument states in part, "Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies" [emphasis added]. I further note that in the preamble to the ***UNDRIP Act***, Parliament affirmed UNDRIP as a

source of interpretation of Canadian law, and at s. 4(a) of that ***Act***, confirmed that UNDRIP has application in Canadian law.

[431] There are also suggestions that the ***Charter*** jurisprudence itself in this area is evolving. The Supreme Court of Canada has made clear that freedom of religion has a "communal aspect" although it has also indicated that "the communal aspects of freedom of religion do not, and should not, extend s. 2(*a*)'s protection beyond the freedom to have beliefs and the freedom to manifest them." (see ***Ktunaxa SCC***, at para. 74). The Supreme Court of Canada also observed in ***Law Society of British Columbia v. Trinity Western University***, 2018 SCC 32, at para. 99, that "[f]reedom of religion protects the rights of religious adherents to hold and express beliefs through both individual and communal practices." The majority of the Supreme Court in ***Loyola*** further recognized that "an essential ingredient of the vitality of a religious community is the ability of its members to pass on their beliefs to their children, whether through instruction in the home or participation in communal institutions." (at para. 64).

[432] The plaintiffs point to the above jurisprudence in arguing that distinct from the individuals who comprise those First Nations, the First Nations themselves are capable of holding a s. 2(a) ***Charter*** right and no less so, that the First Nations themselves, are entitled to its protection.

[433] Despite what is the suggested evolution as signalled by some of the relevant jurisprudence respecting the nature of the s. 2(a) ***Charter*** right and how and by whom such a related claim might be advanced, the Supreme Court of Canada's judgment in ***Trinity Western*** suggests a cautious approach need be taken to any perceived

evolution. The claim in that case had been advanced by Trinity Western University ("TWU") as a private religious institution in and of itself, as well as by an individual student of that institution. The majority declined to find that TWU possessed rights under s. 2(a) of the ***Charter***, preferring instead to decide the matter on the basis that the religious freedom of TWU's members (i.e., the individuals who comprised the TWU community) had been engaged and infringed (at para. 61). In other words, when presented with an opportunity to embrace, for example, the minority's reasoning in ***Loyola***, and confirm that an organization could, indeed, avail itself of the right under s. 2(a) of the ***Charter***, the Supreme Court elected not to do so.

[434] I do note the Federal Court's recent decision in ***Fisher River,*** in which that Court, in certifying a Class proceeding, accepted for the purposes of certification that the plaintiff had established that a First Nation, as a collective, can advance a s. 2(a) ***Charter*** rights claim. In ***Fisher River***, the Federal Court decided to certify on the basis that First Nations have "religious and spiritual beliefs that are communally held, practiced, and shared with the intention of passing them onto future generations." (at para. 55). While I readily acknowledge, and in no way dispute, that First Nations do indeed have religious and spiritual beliefs that are, broadly speaking, communally held, practiced and shared with the intention of passing them onto future generations, many other communal religious organizations can say (and have argued) the same. What remains at issue is whether the law has evolved to the point where freedom of religion, as guaranteed under s. 2(a) of the ***Charter***, is a claim that can be advanced by a collective, rather than the individual. In my view, it has not.

[435] ***Loyola*** and ***Trinity Western*** make plain that the Supreme Court has already and previously grappled with the question as to whether entities, in and of themselves, separate from the individual members that comprise their ranks, may rely upon and enjoy the protection of s. 2(a) of the ***Charter***. Thus far, the answer to that question has been no.

[436] When I examine the judgment in ***Fisher River***, I must respectfully disagree with the Federal Court's characterization of the plaintiffs' s. 2(a) ***Charter*** rights claim as being a novel one (at para. 56). While future evolution in this area of the law – as in every area – is possible, perhaps even desirable, a repeated argument based on admittedly unique and compelling facts, cannot by itself, transform a familiar issue into a novel claim. This is especially so when the argument has already been advanced and thus far, rejected.

[437] In summary, based on the foregoing, I find that the plaintiffs' pleadings do not disclose a cause of action and that it is plain and obvious that the plaintiffs' claim under s. 2(a) of the ***Charter*** has no prospect of succeeding.

[438] Given that every criterion under s. 4 of the ***CPA*** must be established in order for a claim to be certified, having determined that the plaintiffs have not satisfied s. 4(a), it will be unnecessary for me to consider the remaining provisions of s. 4 of the ***CPA*** as it relates to this claim.

[439] I am accordingly declining to certify the Stage 1 common issues questions in relation to the plaintiffs' s. 2(a) ***Charter*** rights claim.

Can the Proposed Class Members have Certified, Pursuant to s. 4 of the CPA, the Proposed Claim Brought Under s. 15(1) of the Charter?

[440] Section 15(1) of the ***Charter*** states:

> 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.

The Plaintiffs' s. 15(1) *Charter* Claim

Position of the Plaintiffs

[441] The plaintiffs assert that the case law supports their ability to advance a s. 15(1) ***Charter*** equality rights claim communally. They rely on the Federal Court of Appeal's decision in ***Ermineskin Indian Band and Nation v. Canada (F.C.A.)***, 2006 FCA 415, as authority for this principle, stating that the Court, in that case, recognized that First Nations have "standing to advance s. 15(1) claims, even though First Nations are not themselves individuals" (see Plaintiffs' Brief, at para. 395, relying on ***Ermineskin,*** at paras. 300 - 302).

[442] They also rely on a more recent decision of the Federal Court, ***St. Theresa Point First Nation v. Canada,*** 2025 FC 1926 ("***St. Theresa Point #2***"), a Class proceeding initiated by two First Nations and their individual members. In that case, the First Nations and members advanced a s. 15(a) ***Charter*** equality rights claim on behalf of themselves and their members. The First Nations and members argued that Canada had a duty or obligation to Class members to ensure that they were provided with, or alternatively, to not have impeded their access to adequate housing on reserve. The plaintiffs cite this case as additional authority for the position that First Nations can assert s. 15(1) ***Charter*** equality rights claims on their own behalf.

Position of the Defendants

[443] Both Manitoba and Canada take issue with the plaintiffs' position. Based on a plain language reading of s. 15(1) of the ***Charter,*** Manitoba argues that a s. 15(1) ***Charter*** equality rights claim cannot be advanced communally. Canada takes a similar position. Both Canada and Manitoba also refute the plaintiffs' assertion that the Federal Court of Appeal's decision in ***Ermineskin*** stands for the principle that First Nations can make a s. 15(1) ***Charter*** equality rights claims on their own behalf.

Do the Pleadings Disclose a Cause of Action based on s. 15(1) of the *Charter*?

[444] As with the plaintiffs' s. 2(a) ***Charter*** rights claim, the key question for the Court to answer at the certification stage, is whether the plaintiffs, as First Nations, are able to advance a s. 15(1) ***Charter*** equality rights claim on their own behalf, rather than on behalf of their members, given the terms of the Carriage Order in ***Fontaine*** and the plaintiffs' own pleadings, which exclusively pursue communal claims on behalf of the First Nations and the AMC. If it is clear, at law, that the plaintiffs cannot advance such a claim, then the pleadings do not disclose a cause of action, and it will be plain and obvious that the proposed cause of action has no prospect of success. If such is the case, the Court will refuse to certify any issues in relation to the plaintiffs' s. 15(1) ***Charter*** equality rights claim.

[445] Section 15(1) of the ***Charter*** clearly states that "Every individual is equal before and under the law" [emphasis added]. Courts have previously addressed the question as to whether claimants other than individuals may advance a s. 15 ***Charter*** equality rights claim. Courts have regularly concluded that entities other than individuals are unable to

do so. I note, for example, the Supreme Court of Canada's decision in ***Canada (Attorney General) v. Hislop***, 2007 SCC 10, in which the Court found that s. 15(1) ***Charter*** equality rights claims cannot be advanced by an estate (at paras. 72 and 73), as well as the Supreme Court of Canada's decision in ***Edmonton Journal v. Alberta (Attorney General)***, 1989 CanLII 20 (SCC), [1989] 2 SCR 1326, in which the Court found that s. 15(1) ***Charter*** rights claims cannot be advanced by a corporation. I also note the Ontario Superior Court's decision in ***Muslim Association of Canada v. Attorney General of Canada***, 2023 ONSC 1923, where they held that s. 15(1) ***Charter*** rights claims could not be advanced by a registered charity or non-profit (at paras. 35 and 36).

[446] Although I accept that First Nations are, in so many respects unique, such that it is inappropriate to consider them akin to an estate, a corporation, or a registered charity or non-profit organization, that uniqueness does not, however, change what I see as a consistent body of law. Based on that governing law, I am not satisfied, as the plaintiffs would have me conclude, that First Nations are able to advance a s. 15(1) ***Charter*** equality rights claim on their own behalf.

[447] Importantly, I am not convinced that ***Ermineskin*** and ***St. Theresa Point #2*** stand for the principle that First Nations are able to advance a s. 15(1) ***Charter*** equality rights claim on their own behalf. In both cases, the relevant courts found that First Nations had standing to seek relief under s. 15(1) of the ***Charter*** when they are seeking to assert those rights on behalf of individuals in a representative capacity, not on their own behalf. At various points in its decision in ***Ermineskin,*** the Federal Court of Appeal

clarified that First Nations have standing to bring a s. 15(1) ***Charter*** equality rights claim, if they are doing so on behalf of their individual members (at paras. 133, 134, and 300 - 302). Similarly, the Federal Court in ***St. Theresa Point #2***, in relying on ***Ermineskin***, stated "when rights are asserted on behalf of individuals by a representative, relief under section 15 is available provided the factual elements of discrimination are present" [emphasis added] (at para. 265).

[448] When I examine the jurisprudence cited by the plaintiffs, including the above cases, I note that in the present case, an important distinction is the fact that the First Nations and AMC are advancing the s. 15(1) ***Charter*** equality rights claim solely on their own behalf.

[449] As both Manitoba and Canada have persuasively argued, the ***Charter*** right protected under s. 15 is inherently individual and can, therefore, only be properly advanced by individuals.

[450] In my view, it is plain and obvious, based on the wording of s. 15(1) of the ***Charter***, and the current and governing jurisprudence, that the plaintiffs' claim in relation to s. 15(1) of the ***Charter*** has no prospect of success.

[451] Given that the plaintiffs must satisfy each criterion under s. 4 of the ***CPA,*** and having failed to do so at s. 4(a), I find it unnecessary to consider the remaining provisions of s. 4 of the ***CPA*** as it relates to this claim. Accordingly, I will therefore not certify any issues in relation to the plaintiffs' s. 15(1) ***Charter*** equality rights claim.

Can the Proposed Class Members have Certified, Pursuant to s. 4 of the CPA, the Proposed Claim Brought Under s. 35 of the Constitution Act?

[452] Section 35 of the ***Constitution Act*** states as follows:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

The Plaintiffs' s. 35 Claim

Position of the Plaintiffs

[453] The plaintiffs claim Manitoba and Canada have breached First Nations' rights under s. 35 of the ***Constitution Act***, which, they say, recognizes and affirms Indigenous cultural and social rights, including First Nations' rights associated with land and transmission of culture and language. The plaintiffs insist that these are collective rights belonging to First Nations as a whole. In their submissions, the plaintiffs characterize the specific s. 35 right at issue in the present case as an Aboriginal right to raise their children in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions. The plaintiffs further plead that the defendants' conduct (i.e., their funding, provision, and operation of child welfare and child protection) breached this Aboriginal right by disregarding the cultures and languages of Manitoba First Nations and depriving them of the ability to teach and pass on their cultures, languages and traditions to the next generation. The plaintiffs also contend that in their conduct in this regard, the defendants failed to meaningfully consult with and accommodate Manitoba First Nations with respect to this right, in accordance with the

fiduciary relationship between the Crown and Aboriginal people, and the honour of the Crown.

Positions of the Defendants

[454] Manitoba concedes the plaintiffs' Aboriginal right described above but argues such a right is subject to certain internal limits. Namely, they say that this right is subject to Manitoba's statutory obligations to apprehend children in cases where they are found to be in need of protection under its child welfare regime. To that end, Manitoba argues its child apprehensions cannot infringe a s. 35 right. They do not, however, oppose certification of the plaintiffs' s. 35 claim on that basis.

[455] Canada makes no such concession. Rather, Canada submits the plaintiffs have failed to plead with sufficient specificity that they have such a right under s. 35 of the ***Constitution Act*** and have failed to plead the material facts to establish either the scope of the right or a *prima facie* infringement by Canada. More particularly, Canada argues the plaintiffs' pleadings, and indeed their evidence, are too generic. They argue that, to establish the existence of an Aboriginal right for "all First Nations in Manitoba," the pleadings must reflect specific practices in relation to specific First Nations. Consequently, Canada submits the plaintiffs' s. 35 claim does not disclose a cause of action and should not be certified on that basis.

Do the Pleadings Disclose a Cause of Action based on s. 35 of the *Constitution Act*?

[456] Section 35(1) of the ***Constitution Act,*** recognizes that Canada's Aboriginal peoples (First Nations, Inuit and Métis peoples, pursuant to s. 35(2)) have certain *sui generis* rights that belong to them on the basis that, "when Europeans arrived in North

America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries." [emphasis in original] (see ***Van der Peet***, at para. 30). Unlike many of the ***Charter*** rights, which focus primarily on individuals and the exercise of rights by individuals, Aboriginal rights under s. 35, while frequently exercised by individuals, are generally understood as being collective or communal in nature, belonging to an Aboriginal community as a whole (see ***Behn v. Moulton Contracting Ltd.***, 2013 SCC 26, at paras. 33 - 36). For the purposes of certification, and specifically, satisfying s. 4(a) of the ***CPA*** (i.e., that the pleadings disclose a cause of action), the plaintiffs' pleadings need to disclose a right capable of being recognized as a s. 35 Aboriginal right, and further, a *prima facie* infringement of that right.

[457] The framework for establishing an Aboriginal right was first formulated by the Supreme Court of Canada in ***Van der Peet*** in 1996. That framework requires a court to consider whether a particular practice, custom or tradition of an Indigenous community, which is integral to its distinctive culture today, has continuity with the practices, customs and traditions of pre-contact times (see ***Van der Peet***, at paras. 45 - 47 and 60 - 67). In other words, and as the Supreme Court has more recently observed, the court must consider whether the practice, custom or tradition, "helps to define the way of life or distinctiveness of the particular aboriginal community" (see ***R. v. Sappier; R. v. Gray***, 2006 SCC 54, at para. 24). Courts are required to take a generous, liberal interpretation when interpreting s. 35(1) of the ***Constitution Act***, and in affirming Aboriginal rights (see ***Van der Peet***, at para. 24). If the test can be satisfied, then the court must consider

whether there has been a *prima facie* infringement of that right. That determination involves a consideration of three questions, namely: (1) whether the impugned limitation is unreasonable; (2) whether it imposes undue hardship; and (3) whether it denies holders of the right their preferred means of exercising the right (see ***Tsilhqot'in Nation v. British Columbia***, 2014 SCC 44, at para. 104). All three questions, each while important to consider, need not be answered affirmatively to find a *prima facie* infringement has taken place (see ***R. v. Gladstone***, 1996 CanLII 160 (SCC), [1996] 2 SCR 723, at para. 43). The plaintiffs' onus to establish a *prima facie* infringement is "fairly low" (see ***Gladstone***, at para. 151).

[458] As noted above, Canada takes the position that the plaintiffs' s. 35 claim does not disclose a reasonable cause of action, essentially because the pleadings fail the ***Van der Peet*** test. For the reasons that follow, and which I expand upon and further clarify later in this judgment when rendering summary judgment on the plaintiffs' s. 35 claim, I am unpersuaded by Canada's position. For the purpose of certification, I have determined that it is not plain and obvious the plaintiffs' s. 35 claim cannot succeed. Rather, I have concluded that the plaintiffs' pleadings disclose a right capable of recognition as a s. 35 right. I make that determination based on, amongst other things, an evolution in the jurisprudence that enables this Court to depart from a strict application of the ***Van der Peet*** test such that the specific facts Canada says the plaintiffs must have pled to evidence the right (and which Canada says are absent) are not necessary in this case. I also find that the pleadings establish a *prima facie* infringement of that right such that the plaintiffs' s. 35 claim does, in fact, satisfy s. 4(a) of the ***CPA***.

[459] In coming to this conclusion, it is important to acknowledge that a threshold element of the ***Van der Peet*** test requires the court to first characterize the right being claimed. In other words, the court must "identify the precise nature of the First Nation's claim to an Aboriginal right based on the pleadings" (see ***Lax Kw'alaams Indian Band v. Canada (Attorney General)***, 2011 SCC 56, at para. 46). As the Supreme Court of Canada explained in ***Van der Peet***:

> [53] To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of t he governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right. …

[460] The plaintiffs characterize the s. 35 right at issue as an Aboriginal right to raise their children in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions. The plaintiffs' s. 35 claim is premised on a child-centric worldview in which the "physical, emotional, mental, and spiritual wellbeing of First Nations children is at the heart of healthy families and communities." (see the FASC, at para. 61). This worldview also appears to treat the relationship between children and their families and communities as interrelated, even symbiotic. "The latter cannot exist without the former." (at para. 61). The plaintiffs' s. 35 claim is further premised on the facts as pled that "First Nations have always had responsibility to care for children and First Nations laws have always taught how to care for children," and that, "First Nations did not cede or surrender these sacred responsibilities" through the Treaty-making process (at para. 61). The plaintiffs further explain that, prior to colonization, "it would have been unthinkable to remove a child from their family, land, First Nation, and culture" (at para. 63). In other words, on a generous and liberal reading

of their pleadings, the plaintiffs ground their s. 35 claim on the basis that all First Nations have, since time immemorial, a distinctive, communal approach to childcare, guided by unique laws and customs, and that despite the defendants' imposition of a child welfare system, First Nations never fundamentally surrendered their right to care for their own children in their own way. Tellingly, the plaintiffs do not plead facts respecting the ways in which each of the plaintiff First Nations (Misipawistik Cree Nation, Black River First Nation, and Pimicikamak Cree Nation) exercised this responsibility to care for their children, or of the laws specific to each First Nation governing childcare. Rather, based on their pleadings, it would appear the s. 35 right claimed by the plaintiffs is a common one shared by all First Nations.

[461] As I discuss later in these reasons, despite a differently stated or characterized s. 35 Aboriginal right by the plaintiffs, I find that based on the pleadings, the Aboriginal right actually being claimed by the plaintiffs is, in fact, best characterized as the right to self-government in the area of CFS. I reach this conclusion in part based on how I find the plaintiffs have premised their s. 35 claim as discussed above. I also reach this conclusion having regard to the pleadings, which disclose at length, the ways in which the defendants have involved themselves in the funding, provision and operation of child welfare and child protection for First Nations. Despite this involvement by the defendants, the facts as pled also reveal that First Nations have always had their own distinctive, communal approach to childcare, guided by their own unique laws and customs.

[462] In my view, it would appear that the plaintiffs have conceived and characterized their purported right in somewhat of a vacuum. That conception or characterization

deemphasizes a more basic link to the right of self-government. In other words, how else but through self-government in the area of CSF could the plaintiffs raise their children in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions?

[463] As was noted earlier in these reasons, Parliament enacted the 2019 ***Act***. Importantly, amongst other things, the 2019 ***Act*** establishes minimum national standards for the provision of CFS to Indigenous peoples. In addition and no less significant, one of the purposes of the 2019 ***Act*** is to "affirm the inherent right of self-government, which includes jurisdiction in relation to child and family services" (at s. 8(a)). The Supreme Court of Canada rightly notes that the preamble to the 2019 ***Act*** places this purpose in the broader context of what the 2019 ***Act*** affirms is Indigenous peoples' "right to self-determination" which includes "the inherent right of self-government" (see ***C-92 Reference Decision #2***, at para. 43). In the Preamble to the ***UNDRIP Act***, the Government of Canada also recognizes that "all relations with Indigenous peoples must be based on the recognition and implementation of the inherent right to self-determination, including the right of self-government".

[464] In the context of the modern Canadian polity, this contemporary affirmation of Indigenous peoples' right to self-determination is best understood as a form of "internal self-determination", which the Supreme Court of Canada has characterized as a "people's pursuit of its political, economic, social and cultural development within the framework of an existing state" (see ***Reference re Secession of Quebec***, 1998 CanLII 793 (SCC),

[1998] 2 SCR 217, at para. 126). In its broadest sense, self-government is the means by which Indigenous peoples make manifest that pursuit within Canada.

[465] Of course, self-government is not without its limits. In ***Mitchell***, in concurring reasons, Binnie J. viewed an Indigenous right to self-government as a right to govern its internal affairs (see ***Mitchell*** at paras. 165 and 169). As the Quebec Court of Appeal has said in ***C-92 Reference Decision #1***, about which I shall say more later in these reasons, the scope of this right of self-government "is not an absolute or unlimited right" (at para. 364). As a form of internal self-determination that involves the governing of internal affairs, it must operate within the framework of Canada's existing constitutional architecture. In other words, as the Quebec Court of Appeal has explained, any form of self-government must not be "inconsistent with the assertion of sovereignty by the Crown" (at para. 458).

[466] Despite the limits noted above, when the 2019 ***Act*** affirms Indigenous peoples' inherent right to self-government, which includes jurisdiction in relation to CFS, the 2019 ***Act*** is effectively affirming Indigenous peoples' right to their own systems, structures and institutions, as well as their own laws and regulations. Together those things enable the exercise of a governmental function over that specific area in furtherance of the broader pursuit of their own political, economic, social and cultural development. Therefore, when the plaintiffs claim a s. 35 right to raise their children in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions, their ability to do so is fundamentally contingent on having the jurisdiction necessary to exercise their own governmental control over CFS. It is for this reason that the more

specific right being asserted by the plaintiffs need be seen through the prism of self-government.

[467] In coming to the conclusion I have respecting what I see is the actual Aboriginal right being claimed by the plaintiffs (the right to self-govern in child welfare), I have determined for reasons that I later explain, that the plaintiffs' initial characterization of the right at issue (the right to raise their children in their culture and community, with connection to their land, and immersed in their languages and spiritual traditions) more properly describes the *scope* of the right as I have characterized it. Alternatively, the plaintiffs' initial characterization of the right could be considered as an articulation of a right that is incidental to the right of self-government in the area of CFS. In other words, the plaintiffs' initial characterization of the s. 35 right (as pled) would appear to be a natural and inevitable corollary of the right to self-govern in the area of CFS. Indeed, one of the natural objectives of being able to exercise a s. 35 right to self-govern in the area of CFS would be to ensure and secure the ability to raise their children in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions.

[468] As earlier noted, there is already legislative recognition for the right as I have characterized it. Parliament explicitly affirmed Indigenous peoples' inherent right to self-government (which includes jurisdiction in relation to CFS) with the enactment of the 2019 ***Act***. Manitoba did the same in 2024, with the coming into force of ***An Act Respecting Child and Family Services (Indigenous Jurisdiction and Other Amendments)***, S.M. 2024, c. 36 ("***Act re CFSIJOA***"). I note as well, UNDRIP, and

significantly, Canada's legislation incorporating that international treaty into Canadian law, the ***UNDRIP Act***. All of the above serves to reinforce the notion that the s. 35 right being identified in the present case is one that has already been legislatively recognized and affirmed.

[469] It is worthy of note that some courts, as well, have also already recognized the right to self-government as an existing s. 35 right. In ***Campbell et al v. AG BC/AG Cda & Nisga'a Nation et al***, 2000 BCSC 1123 ("***Campbell***"), the British Columbia Supreme Court recognized self-government as an existing Aboriginal right, recognized and affirmed by s. 35(1) of the ***Constitution Act***, to which Indigenous communities and the Crown can give meaning and content through treaty. More specifically, the Quebec Court of Appeal found that self-government in the area of CFS is a s. 35 Aboriginal right belonging to all of Canada's Indigenous peoples (see ***C-92 Reference Decision #1***). Although the Supreme Court of Canada in hearing the appeal of the Quebec Court of Appeal's decision in ***C-92 Reference Decision #1*** did not go as far as the Quebec Court of Appeal so as to determine that a right to self-government in relation to CFS is recognized and affirmed by s. 35, importantly, the Supreme Court of Canada did not disturb the Quebec Court of Appeal's finding in that regard. Instead, it concluded that it did not need to undertake such an analysis in order to decide the constitutionality of the 2019 ***Act*** (see ***C-92 Reference Decision #2***).

[470] As it relates to this Court's task in the present case (requiring it to determine whether to establish, confirm or reaffirm a specific s. 35 right), I note that the Supreme Court of Canada has signalled, through its evolving decisions in ***Delgamuukw v. British***

Columbia, 1997 CanLII 302 (SCC), [1997] 3 SCR 1010, and ***R. v. Powley,*** 2003 SCC 43, that the ***Van der Peet*** framework itself (for establishing Aboriginal rights) may require modification, depending on the nature of the right claimed or the nature of the Indigenous community claiming it. This perhaps should not be all together surprising given that, historically, the ***Van der Peet*** test was applied to find or recognize specific Aboriginal rights in the context of discrete claims in relation to the use and occupation of certain land for a specific purpose, or in the context of harvesting a particular resource from that land (or water). The right claimed in the present case is, in so many respects, very different in nature and kind from the rights for which the ***Van der Peet*** test was originally formulated.

[471] I acknowledge that in the present case, a strict application of the ***Van der Peet*** test (upon which Canada relies to argue that it is plain and obvious the plaintiffs' s. 35 claim cannot succeed) would suggest that for the plaintiffs to be able to advance their s. 35 claim, something more would have been required in their pleadings. Each Manitoba First Nation, and certainly the individual plaintiffs in this case, would have needed to plead material facts in relation to their own specific practices, customs and traditions as it relates to childcare. They would have needed to explain how these practices were integral and distinctive to their own individual societies, and how they represent modern day versions of pre-contact practices. Having not done so in this case, on a strict application of ***Van der Peet***, it could be said – as Canada does say – that the pleadings disclose no cause of action. In my view however, that argument and rigid insistence on

applying what is an ill-fitting ***Van deer Peet*** test to the unique questions of the present case, fails to recognize an important evolution in the jurisprudence and the legislation.

[472] For the above reasons and for reasons that I discuss later in this judgment, I have determined that in the particular circumstances of the plaintiffs' claim to a s. 35 Aboriginal right, both the jurisprudence respecting the relevant test and the applicable legislation have evolved. Indeed, that evolution is sufficent so as to enable me to conclude that the facts as pled by the plaintiffs, establish that the s. 35 right being claimed is a right to self-government in the area of CFS. Incidental to that s. 35 Aboriginal right, or as part of the scope of that right, is the right to raise their children in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions.

[473] I have also determined that the plaintiffs have pled sufficient material facts (which are assumed to be true) to suggest that over the Class period in question, the defendants' conduct may constitute a *prima facie* infringement of that right.

[474] Accordingly, as part of my consideration on the question of certification, I have determined that the plaintiffs' pleadings do disclose a cause of action based on the s. 35 of the ***Constitution Act*** Aboriginal right identified above. The plaintiffs have thus satisfied s. 4(a) of the ***CPA***.

Have the Remaining s. 4 Criteria for Certification been Met?

[475] Having concluded that the plaintiffs' s. 35 claim satisfies s. 4(a) of the **CPA**, I will now consider in relation to that s. 35 claim, the remaining criteria under s. 4 of the **CPA**.

Is there an Identifiable Class in Relation to the Plaintiffs' s. 35 Claim?

[476] Under s. 4(b) of the ***CPA***, there must be an identifiable class of two or more persons. The class must be "capable of clear definition" and state "objective criteria by which members of the class can be identified." The class should also "bear a rational relationship to the common issues asserted by all class members", though the "criteria should not depend on the outcome of the litigation" (see ***Dennis v. Canada (AG) et al. (No. 2)***, 2022 MBQB 72, at para. 21, citing ***Western Canadian Shopping Centres Inc. v. Dutton***, 2001 SCC 46, at para. 38). Ultimately, the class definition serves to "[fulfill] the purpose of identifying persons who are entitled to notice, who may be entitled to relief and who would be bound by any result." (see ***Weremy***, at para. 56).

[477] The plaintiffs' proposed Class definition is as follows (see Plaintiffs' Brief):

> 234 …
>
> (a) Black River First Nation, Pimicikamak Cree Nation, Misipawistik Cree Nation and any other First Nation located in Manitoba that elects to join this action within a period of time to be prescribed by this Honourable Court (together, "First Nation Class Members");
>
> (b) Where:
>
> (i) each "First Nation" is composed of one or more "bands" within the meaning of s. 2(1) of the Indian Act, R.S.C., 1985, c. 1-5 (the "Indian Act") or Indigenous people of Canada, other than Inuit or Métis peoples, with a modem treaty, being a land claims agreement within the meaning of s. 35 of the Constitution Act, 1982, entered into on or after January 1, 1973; and
>
> (ii) the "Class Period" runs from January 1, 1992 to the last day for Class members to opt into this class proceeding.

[478] The proposed Class is composed of First Nations in Manitoba which elect to opt into the proceeding. These Class members are easily identifiable. There are 63 First Nations in Manitoba, and the AMC actively represents all 63 of them.

[479] The proposed Class definition uses objective criteria to determine Class membership, which is neither overly broad nor under-inclusive, and is rationally connected to the common issues. Each First Nation Class member has a claim against Canada and Manitoba for a breach of their s. 35 right to self-government in relation to CFS. As such, the proposed Class definition satisfies the requirement of s. 4(b) of the ***CPA*** for the purpose of the plaintiffs' s. 35 claim.

Do the s. 35 Claims of the Class Members Raise a Common Issue?

[480] Earlier in these reasons, I reformulated the plaintiffs' common issues. In so doing, the question, as it relates to s. 4(c) of the ***CPA***, is whether the following issues, as I have reformulated them, can be considered "common issues" for the purposes of certification. For ease of reference, the reformulated common issues as they relate to s. 35 of the ***Constitution Act*** are as follows:

> Section 35 of the *Constitution Act, 1982*
>
> 3(a) Do the Class Members have an existing Aboriginal right under section 35 of the *Constitution Act, 1982*, to raise their children in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions?
>
> 3(b) If the answer to question 3(a) is yes, have the defendants, during the Class Period and through their Impugned Conduct, infringed this right?
>
> 3(c) If the answer to question 3(b) is yes, was the infringement justified (i.e., related to a compelling and substantial legislative objective and consistent with the honour of the Crown and the Crown's fiduciary duty to Indigenous people)?

[481] The ***CPA*** defines "common issues" as:

> 1 …
>
> (a) common but not necessarily identical issues of fact, or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

[482] As the Supreme Court of Canada explained in ***Western Canadian Shopping Centres***:

> 39 … The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action….

[483] Keeping in mind that the defendants' objections to the common issues were in relation to the manner in which the plaintiffs had originally framed them (and not how I have reformulated them), I nevertheless note that Canada argues that individual issues of fact and law overwhelm the proposed common issues. Canada argues that the Court will be overwhelmed by the fact that attaching to each First Nation are unique considerations such as geographic location, remoteness, impact of access to housing, healthcare, education, employment, traditional practices, and more. Canada notes that this is significant in that these unique considerations will impact issues in relation to any alleged breach of an Aboriginal right and those will require extensive individual determination.

[484] While some of what Canada has identified above may in some instances be true, the concerns and arguments raised in the present case are overstated and not persuasive. First, that argument could be made of any Class of First Nations. Second, to make such an argument is to suggest that no Class proceeding on behalf of First Nations could ever be reasonably advanced. Such a position is not tenable given that a number of First Nations Classes have been certified and litigated on a national basis. Unlike some of those cases certified and litigated on a national basis, this proposed proceeding in the present case is limited to First Nations in Manitoba and it fits comfortably within the existing jurisprudence. The experience of each First Nation may be relevant when calculating damages, but until that time, the issues related to s. 35, as I have reformulated them, are common and can be advanced in a Class proceeding. This is particularly so when one considers that the plaintiffs have pled that this s. 35 right - which I have recharacterized as one of self-government in relation to CFS - is one that they argue all First Nations share. Manitoba quite reasonably concedes this point.

[485] As noted previously, I strongly suspect that Canada's position and concerns about the issues of fact overwhelming the common issues are informed by its position on the strict applicability of the ***Van der Peet*** test for establishing a s. 35 right. As I have already noted and as will become apparent later in these reasons, I find this position, given the evolution of the jurisprudence, to be unduly rigid and misplaced. As it relates to the s. 35 right advanced by the plaintiffs in this case, I am not at all persuaded that the individual issues of fact overwhelm. Rather, I am satisfied that the Class members'

claims to a s. 35 right most certainly do share a substantial common ingredient such so as to justify a Class proceeding.

[486] Canada further argues that, where questions relating to causation or damages are proposed as common issues, the plaintiffs must demonstrate, with supporting evidence, that there is a methodology for determining such issues on a Class-wide basis. Canada takes the position that the evidence tendered by Dr. O'Gorman does not satisfy this requirement. Canada argues that Dr. O'Gorman's opinion fails to distinguish the harms to First Nations resulting from Residential Schools, the Sixties Scoop, and now the FNCFS program. Canada further contends that the proposed methodology is inappropriate because it involves consulting with individual First Nations about the harms they have suffered.

[487] Importantly, the actual quantification of damages is a Stage 2 concern. For certification, all the plaintiffs are required to show is that there is a plausible methodology for the calculation of common damages. As the Supreme Court of Canada has explained in ***Pro-Sys***:

> [115] …The requirement at the certification stage is not that the methodology quantify the damages in question; rather, the critical element that the methodology must establish is the ability to prove "common impact" … It is not necessary at the certification stage that the methodology establish the actual loss to the class, as long as the plaintiff has demonstrated that there is a methodology capable of doing so.…
>
> [118] In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. … The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.

[488] I find that the O'Gorman et al. report provides such a plausible methodology. Dr. O'Gorman and her colleagues propose a multi-stage analysis to estimate the harm to First Nations arising from excess child apprehensions. The methodology is also plausible for quantifying the damages associated with those harms on a community level for the proposed Class period.

[489] At the first stage of their analysis, Dr. O'Gorman proposes to quantify the number of excess child apprehensions for First Nations in Manitoba (on the assumption that some level of child apprehension can be expected given child abuse and neglect in any population). They define excess child apprehension as, "the number of First Nations apprehensions that would not have occurred for non-Indigenous families with the same socio-economic characteristics" (O'Gorman Affidavit, at para. 22). As Dr. O'Gorman explains:

> 24. We will isolate the expected level of apprehensions for the First Nations population by extrapolating from the level of apprehensions in Manitoba's non-Indigenous population over the same period. That is, we will use propensity score matching to determine the socio-economic factors (these are risk characteristics) which are associated with child apprehension in the non-Indigenous population in Manitoba. We expect that such characteristics will include low incomes, for example. We will then calculate the number of child apprehensions in the First Nations population that have occurred with the same risk characteristics, which could be denoted as expected apprehensions. Then for the First Nations population, we will subtract from the total number of apprehensions the expected apprehensions to arrive at an estimate of excess apprehensions.
>
> 25. The excess apprehensions variable gauges the degree to which children in a given First Nation were unnecessarily taken into CFS ...

[490] At the second stage of their analysis, Dr. O'Gorman proposes using microeconomic data – data on individuals – to estimate harms related to excess child apprehensions, and to then aggregate those estimates up to the community level to gauge community harm,

which, as Dr. O'Gorman explains allows that, "the apprehension of one child may have effects (for example, lower incomes) not only for that child's family but for other families or for the nation as a whole (what economists call 'externalities')" (at para. 27).

[491] At the third stage of their analysis, Dr. O'Gorman's methodology aims to put a dollar figure on those harms to quantify possible compensation. In her affidavit she testifies that standard techniques to value intangible harms are well-established by substituting the value of non-market losses with suitable alternatives available in the market. However, she acknowledges that, "these standard techniques are unable to determine the relative value of a wide range of non-market losses, especially when those relative valuations involve a cultural lens only available to the affected community" (at para. 33). In such cases, which are present here, Dr. O'Gorman proposes to rely upon the "multi-attribute utility theory" to determine culturally appropriate compensation. She explains:

> 34. This approach proceeds as follows: it starts by a) eliciting from community members the list of harms associated with child apprehensions; b) gauging the relative significance of each of these harms; c) determining the monetary value of one harm – we can call this the numeraire, a harm for which there is a monetary value at a point in time. In the present matter, this could be the aggregate earning losses associated with excess placements in CFS; d) for each harm, multiplying the monetary value found in c) by that harm's relative weight compared to the numeraire to find a monetary value for each harm; e) summing across all monetary values to determine the total compensation value.

[492] Finally, Dr. O'Gorman proposes to measure the impact of child welfare devolution, to test whether devolution of the CFS system in Manitoba caused a structural change in the relationship between harms and excess child apprehensions, and, if so, to what extent.

[493] As earlier stated, I find Dr. O'Gorman's methodology plausible. She, herself, acknowledges it is novel, but only insofar as no study has yet attempted to empirically examine the magnitude of effects stemming from child apprehensions for First Nations. However, as Dr. O'Gorman testified, other studies have similarly looked at North American contexts generally.

[494] I also find Canada's criticism of the multi-attribute utility theory unconvincing. Canada frames Dr. O'Gorman's approach as relying on community members' subjective interpretations of their own harm. As I understand it, yes, the third stage of their methodology would involve interviewing members from First Nations communities to identify the harms that have purportedly flowed from the disproportionate apprehension of Indigenous children from those communities. However, as I also understand it, the approach does not solely rely on the interviewees' subjective interpretation of those harms. Rather, as Dr. O'Gorman has testified, the methodology involves identifying a numeraire (i.e., a harm for which there is a monetary value) against which other harms are then weighted (presumably by the economists undertaking the analysis). This would appear to be a reasonable approach, particularly so given that Dr. O'Gorman herself has acknowledged that there are no available market comparators against which to value "non-market" losses.

[495] I should add that when I consider some of the criticisms identified above, I cannot help but note that a methodology that would reach conclusions about what harms have been suffered by First Nations communities without actually consulting those communities, could properly be impugned as both paternalistic and insensitive.

[496] In addition to a plausible methodology, there need be some evidence of the availability of the data to which the methodology is to be applied. Dr. O'Gorman testified to the fact that the data to quantify damages is available to be used for the assessment of the Stage 2 common issues, and Manitoba's witness, Mr. Rodgers, confirmed the same.

[497] Of note, the Federal Court in ***Fisher River*** declined to certify as a common question whether that Court could "make an aggregate assessment of damages suffered by the Class as part of the common questions trial and, if so, in what amount?" (at para. 89m). It is also worth noting that the Federal Court's rationale in that case related to the absence of an appropriate methodology for quantifying such damages in the aggregate. That is not the case here. To my mind, the O'Gorman et al. report, meets the requirements set out by the Supreme Court in ***Pro-Sys***. Therefore, I find that there is a methodology for determining damages on a Class-wide basis.

[498] For the above reasons, I have determined that the plaintiffs have met the requirements of s. 4(c) of the **CPA** for the purpose of their s. 35 claim.

Is a Class Proceeding the Preferable Procedure to Resolve the Plaintiffs' s. 35 Claim?

[499] Under s. 4(d) of the ***CPA***, an action will be certified where a Class proceeding would be a preferable procedure for the fair and efficient resolution of the common issues. Although the ***CPA*** does not provide specific guidance on the preferability analysis,

Manitoba courts have adopted the following approach as stated in ***Anderson*** (citing ***Hollick***, at paras. 27 and 28):

> [55] …
>
> > [I]n the absence of legislative guidance, the preferability inquiry should be conducted through the lens of the three principal advantages of class actions – judicial economy, access to justice, and behaviour modification.
>
> [56] …
>
> > [F]irst, "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, whether the class proceedings would be preferable "in the sense of preferable to other procedures"…

[500] Canada disputes that a Class proceeding is a preferable procedure. Canada submits there is no judicial economy or enhanced access to justice to be achieved in a class proceeding as compared to individual actions, or an ordinary action. Canada takes the position that the plaintiffs' proposed Class proceeding is better suited to a public inquiry. Even then, Canada maintains that such a process would be redundant because some of the same subject matter has already been canvassed by Canada in the Royal Commission on Aboriginal Peoples, the Truth and Reconciliation Commission, and the National Inquiry into Missing and Murdered Indigenous Women and Girls.

[501] I have considered carefully whether a Class proceeding in the unique and particular circumstances of the plaintiffs' s. 35 claim would be a preferable procedure to resolve the common issues related to that claim. I have determined that it would.

[502] The proposed Class proceeding in the present case advances judicial economy by allowing all First Nations in Manitoba - up to 63 in total - to advance those common claims within a single proceeding, thereby eliminating duplicative litigation on those common

issues. The proceeding also advances access to justice by allowing all First Nations in Manitoba to participate by opting into an existing proceeding led by the plaintiffs. Those plaintiffs have already built the evidentiary foundation required to litigate the Stage 1 common issues.

[503] In the context of the above discussions, I wish to turn to the question of whether an opt-in proceeding is appropriate. The plaintiffs seek certification of an opt-in Class proceeding (i.e., that those Class members who wish to join the Class proceeding may elect, at their discretion, to do so, rather than having to opt-out of any such proceeding certified as a Class proceeding). Manitoba does not oppose such an approach. Canada, however, does oppose the opt-in approach. In challenging the opt-in structure, Canada argues not only that such an opt-in process will be slow and costly and take years to resolve, Canada also goes so far as to suggest that this Court lacks jurisdiction to certify the proceeding on this basis. I find Canada's opposition on this point to be without merit.

[504] I acknowledge that various sections of the ***CPA*** contemplate an "opt-out" structure to Class proceedings in Manitoba (see ss. 8(1)(f), 16 and 19(6)(b)). However, the ***CPA*** also provides as follows:

> **Court may determine conduct of proceeding**
>
> 12 The court may at any time make any order that it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

In other words, broad discretion is conferred upon the Court to make orders with respect to the conduct of a Class proceeding. I find such a provision provides me with ample

discretion to override the presumption of an opt-out scheme and to make this Class proceeding an opt-in one.

[505] I agree with the plaintiffs (and Manitoba) that an opt-in structure is preferable because it accommodates the sovereignty of First Nations: each First Nation must consent to surrender their litigation autonomy by opting into the Class proceeding, rather than being automatically bound to an opt-out structure.

[506] In summary, I find that in the circumstances of the present case, when I consider both relative and absolute preferability, a Class proceeding is a fair, efficient and manageable method for the resolution of the common issues and the claims of the First Nations Class members. In a case involving alleged systemic wrongs, it is the preferred vehicle for advancing access to justice, judicial economy and behaviour modification. In these circumstances, I find that a Class proceeding would be the preferred vehicle to advance the plaintiffs claims under s. 35 of the ***Constitution Act*** because of its ability to facilitate widespread participation among First Nations in respect of the common claims. I am also persuaded that the opt-in scheme available to First Nations Class proceedings is also best suited for the affording of the requisite respect for the sovereignty and self-determination of First Nations in Manitoba, which in the context of the proposed approach, would permit each to decide whether they wish to participate in this litigation.

Is There a Suitable Representative Plaintiff?

[507] The proposed representative plaintiffs are the AMC, Chief Cook on behalf of Misipawistik Cree Nation, Chief Monias on behalf of Pimicikamak Cree Nation, and

Chief Kent on behalf of Black River First Nation. Manitoba does not take issue with the proposed representative plaintiffs. Canada similarly concedes that Chiefs Cook, Monias, and Kent all satisfy the requirements of s. 4(e) of the ***CPA***. However, as noted earlier in these reasons, Canada has objected to the participation of the AMC as a representative plaintiff; a position I have already considered and rejected.

[508] I need not spend a great deal of time on this criterion. Put simply, as I explain below, I find that the proposed representative plaintiffs will indeed fairly and accurately represent the interests of the Class. I find as well, that they have produced a plan for the Class proceeding that sets out a workable method of advancing the Class proceeding on behalf of the Class. I am also satisfied that there is a plan for notifying Class members of the Class proceeding. Finally, I have no concerns that the proposed representative plaintiffs have any conflict with any Class members in respect of any issues advanced in this proceeding.

[509] As it relates to representation, I find that the proposed representative plaintiffs will fairly and adequately represent the interests of the Class members. Each has long-standing involvement in child welfare and First Nations governance throughout the proposed Class period. Each has played a role in this action since it was commenced in October 2022. Each has given evidence on the motions at bar and have been cross-examined. I also accept that each has demonstrated not only a willingness and commitment to consult Class members to ensure they are acting in the best interests of the Class throughout this litigation, but also, to keep Class members apprised of its

progress. They have also been actively engaged in directing Class counsel throughout the litigation and are prepared to continue to do so.

[510] Respecting notice, I find the litigation plan sets out a reasonable means of notifying First Nations Class members of the certification of a Class proceeding. The proposed notice plan will involve insofar as possible, direct notice through the Grand Chief of the AMC, inviting leadership from all First Nations in Manitoba to join the proceeding. The proposed notice plan also provides indirect notice through multiple forms, including targeted online advertisements, publication in newspapers, dedicated webpages for the Class proceeding, and distribution of information to all partner organizations of the FNFAO.

[511] I also find that the plan offers a workable and potentially flexible method for advancing the case. It sets out the steps to resolve the plaintiffs' motions for certification and summary judgment, following which it proposes that the plaintiffs will work with the defendants and the Court to fix a timetable for the steps required to resolve all remaining matters.

[512] Having satisfied myself that none of the plaintiffs have any conflict with any Class member in respect of the s. 35 claim, I am satisfied that the plaintiffs have met the requirements of the final criterion under s. 4 of the ***CPA***, that of s. 4(e).

[513] Given my determinations with reference to the s. 4 ***CPA*** criteria, I will be certifying the plaintiffs' claim and the reformulated common issues in respect of s. 35 of the ***Constitution Act***.

Can the Proposed Class Members have Certified, Pursuant to s. 4 of the CPA, the Proposed Claim Brought Under s. 36 of the Constitution Act?

[514] Section 36(1) of the ***Constitution Act*** states:

> 36. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to
>
> (*a*) promoting equal opportunities for the well-being of Canadians;
>
> (*b*) furthering economic development to reduce disparity in opportunities; and
>
> (*c*) providing essential public services of reasonable quality to all Canadians.

<u>The Plaintiffs' s. 36 Claim</u>

Position of the Plaintiffs

[515] The plaintiffs claim s. 36(1) obligates the defendants to: (a) promote equal opportunities for First Nations children relative to other Canadian children; (b) further the economic development of First Nations children and reduce the disparity in their opportunities relative to other Canadian children; and (c) provide essential public services of reasonable quality to First Nations children. In respect of all of these alleged obligations, the plaintiffs argue the defendants were and are in breach.

[516] The plaintiffs acknowledge there is little jurisprudence interpreting s. 36 of the ***Constitution Act***. They do, however, point to two appellate court decisions which, they argue, hold that s. 36 may be justiciable and give rise to enforceable rights. The plaintiffs rely on ***Manitoba Keewatinowi Okimakanak Inc. v. Manitoba Hydro-Electric Board***, 1992 CanLII 8479 (MB CA), 91 DLR (4th) 554, where the Manitoba Court of

Appeal stated that "a reasonable argument might be advanced that [section 36] could possibly have been intended to create enforceable rights." (at para. 10). They also cite ***Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)***, 2009 NSCA 44, in which the Nova Scotia Court of Appeal observed that the word "committed" referenced in s. 36(1), "could, in appropriate circumstances, connote a justiciable obligation." (at para. 50).

[517] The plaintiffs argue that they are uniquely positioned to make this claim under s. 36 because of the government-to-government relationship that exists between First Nations and the Crown. As it specifically relates to s. 36(1)(c) and the defendants' obligations, the plaintiffs argue that the Supreme Court of Canada has already characterized the work in child protection as an "essential public service" (see ***B.J.T. v. J.D.,*** 2022 SCC 24, at para. 64) and that the CHRT has already provided a standard by which to determine when such essential public services are of a "reasonable quality" to First Nations children (see ***Caring Society***, at para. 457).

Positions of the Defendants

[518] Manitoba argues that the jurisprudence does not support the sort of claim being advanced by the plaintiffs under s. 36. They argue that the obligations delineated in s. 36, if any, do not create enforceable rights against the federal or provincial governments capable of exercise by individuals or municipalities. Rather, to the extent such a claim can even be contemplated, the only entities entitled to litigate such claims are Canada and the provincial governments, as against one another. Manitoba points to the Federal Court decision in ***Langlois v. Canada (Attorney General)***, 2018 FC 1108. In that

case, the Court dismissed an individual's application for judicial review of his pension benefits. The application was brought in part, on the basis of a s. 36 infringement (at para. 15). Manitoba also relies on the Nova Scotia Court of Appeal's decision in ***Cape Breton*** in support of their position.

[519] Canada similarly rejects the plaintiffs' claim under s. 36. It points to the decision of the British Columbia Supreme Court in ***The Canadian Bar Association v. HMTQ et al.***, 2006 BCSC 1342, for the proposition that s. 36 is not justiciable because the section contains only a statement of "commitment" (at paras. 118 and 119). In agreeing with that proposition, Canada also points to the legislative history of s. 36 and notes that the provision's text, context, and legislative intent speak only to a commitment as between the federal and provincial governments. It contemplates no commitment as between governments and individual Canadians or other entities.

Do the Pleadings Disclose a Cause of Action Based on s. 36 of the *Constitution Act*?

[520] As with the certification decisions in relation to the plaintiffs' ss. 2(a) and 15(1) ***Charter*** rights claims, there are key questions that would need to be answered in the affirmative before the Court could certify common issues in relation the plaintiffs' claim under s. 36 of the ***Constitution Act.*** The first is whether s. 36 gives rise to legally enforceable rights at all, and the second, which arises only if the answer to the first question is "yes," is the question relating to whom exactly these rights belong. If this Court determines that s. 36 of the ***Constitution Act*** does not give rise to legally enforceable rights, or alternatively, that it does or may, but that the plaintiffs cannot advance these rights, then it will be plain and obvious that the plaintiffs' claim in relation

to s. 36 cannot succeed, and the Court will refuse to certify any questions in relation to s. 36.

[521] I find the following paragraphs of ***Cape Breton*** instructive and not helpful to the plaintiffs' argument:

> [62] … *s. 36* codifies an agreement among the federal and provincial governments respecting the principles of equalization and the redress of regional disparities. The standards in paras. (*a*), (*b*) and (*c*) of *s. 36(1)*, including the references to opportunities, well-being and reasonable public services to Canadians, are the benchmarks of the commitments among the federal and provincial governments…
>
> ...
>
> [80] Thus, when it comes to legislative intent, it appears that *s. 36* represents a legislative compromise with commitments by and for only the negotiating parties - namely the federal government and the provinces. It offers no support for the concept of a commitment to municipalities.
>
> ...
>
> [86] … In an appropriate context, *s. 36* might represent a justiciable commitment, but only among the federal and provincial governments who were privy to the agreement that is represented by *s. 36*. It is not actionable by an individual or municipality…

[522] The plaintiffs argue that First Nations are themselves a form of government and that if not incorporated by reference into the meaning of s. 36, there would be created something of a legal lacuna.

[523] Despite the noted absence of jurisprudence respecting s. 36, on the basis of the jurisprudence that does exist and what I find are the persuasive submissions of the defendants, I am not persuaded in this case that the plaintiffs have a viable claim under s. 36 of the ***Constitution Act***.

[524] I find the Nova Scotia Court of Appeal decision in ***Cape Breton,*** which attempted to define the meaning and scope of s. 36, compelling. It strongly suggests that to the extent that the "commitment" contemplated under s. 36 creates enforceable legal obligations - which appellate courts in British Columbia and Manitoba have opined is a possibility - any claim to enforce such obligations can only be made by Canada or the provinces, as against one another. In other words, s. 36(1) does not create enforceable rights against the federal or provincial governments capable of exercise by individuals or other entities.

[525] I have, as a result, determined that it is plain and obvious that the plaintiffs' claim in relation to s. 36 of the ***Constitution Act*** has no prospects of success and it therefore does not satisfy s. 4(a) of the ***CPA***.

[526] Given that it is necessary to meet each criterion of s. 4 of the ***CPA***, and given that the plaintiffs have failed to meet s. 4(a) for the purpose of their s. 36 claim, I find it unnecessary to consider the remaining provisions of s. 4 of the ***CPA***.

[527] I will accordingly not be certifying the plaintiffs' s. 36 of the ***Constitution Act*** claim or the Stage 1 common issues in relation to the plaintiffs' s. 36 claim.

Can the Proposed Class Members have Certified, Pursuant to s. 4 of the CPA, the Proposed Claim Brought Under the Honour of the Crown?

The Plaintiffs' Honour of the Crown Claim

Position of the Plaintiffs

[528] From the plaintiffs' pleadings, Canada and Manitoba have discerned that the plaintiffs appear to be bringing a distinct claim on the basis of the honour of the Crown.

To the extent that this interpretation of the plaintiffs' pleadings is accurate, I will deal with such a claim in this section.

[529] The plaintiffs do clearly and properly suggest that Manitoba and Canada do have a duty to uphold the honour of the Crown. The plaintiffs stipulate that positive duties or obligations may be owed by the defendants to the plaintiffs arising out of the concept. They state that the honor of the Crown - which is at stake in all of the Crown's dealings with First Nations - can inform existing duties or give rise to new ones. In support, the plaintiffs cite the Supreme Court of Canada's judgments in ***Manitoba Metis Federation*** and ***Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan***, 2024 SCC 39.

Positions of the Defendants

[530] Manitoba acknowledges that the honour of the Crown establishes a fiduciary relationship between Manitoba and Indigenous peoples, but argues that since it is not independently actionable, it should not be certified as a stand-alone common issue. Rather, it should be considered as a principle that animates or underpins the *sui generis* fiduciary obligations that the Crown may owe to Indigenous people in respect of an existing s. 35 Aboriginal right. Alternatively, it can be considered when there has been an assumption of discretionary control over a specific Aboriginal interest. In other words, the concept of the honour of the Crown dictates how duties owed to First Nations at law must be carried out (see ***Manitoba Metis Federation***, at para. 73).

[531] Canada takes no position regarding this claim. Instead, it relies on its more general arguments that certification should not proceed on any issues advanced by the plaintiffs as none of them disclose a reasonable cause of action.

Do the Pleadings Disclose a Cause of Action Based on the Honour of the Crown?

[532] I have reviewed the relevant jurisprudence and in particular, ***Manitoba Metis Federation*** and ***Pekuakamiulnuatsh***. I find ***Manitoba Metis Federation*** particularly instructive:

> [73] The honour of the Crown "is not a mere incantation, but rather a core precept that finds its application in concrete practices" and "gives rise to different duties in different circumstances": *Haida Nation*, at paras. 16 and 18. It is not a cause of action itself; rather, it speaks to *how* obligations that attract it must be fulfilled. Thus far, the honour of the Crown has been applied in at least four situations:
>
> (1) The honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest (*Wewaykum*, at paras. 79 and 81; *Haida Nation*, at para. 18);
>
> (2) The honour of the Crown informs the purposive interpretation of s. 35 of the *Constitution Act, 1982*, and gives rise to a duty to consult when the Crown contemplates an action that will affect a claimed but as of yet unproven Aboriginal interest (*Haida Nation*, at para. 25);
>
> (3) The honour of the Crown governs treaty-making and implementation (*Province of Ontario v. Dominion of Canada* (1895), 1895 CanLII 112 (SCC), 25 S.C.R. 434, at p. 512, *per* Gwynne J., dissenting; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, at para. 51), leading to requirements such as honourable negotiation and the avoidance of the appearance of sharp dealing (*Badger*, at para. 41); and
>
> (4) The honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples (*R. v. Marshall*, 1999 CanLII 665 (SCC), [1999] 3 S.C.R. 456, at para. 43, referring to *The Case of The Churchwardens of St. Saviour in Southwark* (1613), 10 Co. Rep. 66b, 77 E.R. 1025, and *Roger Earl of Rutland's Case* (1608), 8 Co. Rep. 55a, 77 E.R. 555; *Mikisew Cree First Nation*, at para. 51; *Badger*, at para. 47).
>
> [emphasis added]

[533] Assuming that the plaintiffs are in fact arguing and asking this Court to determine whether the honour of the Crown is, itself, a cause of action, it seems clear from

Manitoba Metis Federation, that it is not. It is also clear that while the honour of the Crown gives rise to a fiduciary duty towards Indigenous peoples in certain circumstances, it is not a concept to be considered separate and apart from that duty. Rather, and more precisely, the concept will amongst other things, inform an evaluation of how the duty is performed and carried out.

[534] Based on ***Manitoba Metis Federation***, it is plain and obvious that an independent and distinct cause of action against the defendants arising from the honour of the Crown does not currently exist in law. The plaintiffs have therefore failed to satisfy the requisite criterion at s. 4(a) of the ***CPA***. Given my determination that the pleadings do not disclose a cause of action, and given that all criteria under s. 4 of the ***CPA*** need be satisfied, it will be unnecessary to consider the remaining provisions of s. 4 of the ***CPA*** as it relates to any claim brought by the plaintiffs respecting the honour of the Crown.

[535] I will accordingly not be certifying a separate plaintiffs' claim respecting the honour of the Crown or any related common issues connected to any such claim.

[536] Despite this perhaps obvious determination at the certification stage that the honour of the Crown is a core concept and not a cause of action, it should be equally obvious that the concept of honour of the Crown will and must be considered when the Court examines issues in relation to the plaintiffs' s. 35 Aboriginal rights claim.

Can the Proposed Class Members have Certified, Pursuant to s. 4 of the CPA, the Proposed Claim Brought under a sui generis Fiduciary Duty?

The plaintiffs' *sui generis* Fiduciary Duty Claim

Position of the Plaintiffs

[537] The plaintiffs argue that the defendants owe them a *sui generis* fiduciary duty to maintain a child welfare system that promotes the wellbeing of First Nations children. They say it is a duty that must permit First Nations children to remain in their communities wherever possible, and which would maintain the connection between First Nations children and their reserve lands, including a connection to their cultures, languages and traditions therein. The plaintiffs assert that this duty arises from the defendants' discretionary control over the plaintiffs' specific or cognizable Aboriginal interest in their reserve lands, and in maintaining their children's connection to those lands and land-based practices. The plaintiffs further assert that both defendants have exercised significant discretionary control over the plaintiffs' specific or cognizable interest through the funding and administration of various child welfare schemes both on and off reserve.

[538] The plaintiffs also argue the defendants have breached this duty by failing to, amongst other things, prioritize prevention over apprehension, address systemic shortcomings in their policies that disproportionately result in the apprehension of First Nations children, ensure funding keeps pace with inflation, provide culturally appropriate care, and foster connections between First Nations children and their families, communities, and First Nations. The plaintiffs assert that this is the content of the duty that they are owed.

Positions of the Defendants

[539] Both Manitoba and Canada deny the existence of a *sui generis* fiduciary obligation owed to the plaintiffs in the present case. Manitoba argues the plaintiffs' interest does not constitute an interest in land such that it gives rise to the specific or cognizable interest inherent in a *sui generis* fiduciary duty. Manitoba takes the position that the plaintiffs' claimed interest in maintaining First Nations children's connection to their reserve lands is simply too remote from their interest in their reserve lands themselves so as to constitute a specific or cognizable interest in land.

[540] Canada rejects that the plaintiffs have a specific or cognizable interest. Canada also insists that even if one existed, Canada does not have any discretionary control over that interest given that Canada's general responsibilities that do arise under s. 91(24) of the ***Constitution Act, 1867***, s. 35 of the ***Constitution Act***, and or the 1982 Tripartite Agreement, do not create undertakings or agreements that give rise to a fiduciary duty as between Canada and the plaintiffs. Canada also points to what is now s. 88 of the ***Indian Act***, which provides that provincial laws are applicable to "Indians" (as that term is used in the ***Act***). Consequently, Canada argues, any discretionary control lies with Manitoba.

Do the Pleadings Disclose a Cause of Action Based on a *sui generis* Fiduciary Duty?

[541] With respect to the certification of the plaintiffs' *sui generis* fiduciary duty, I must first be satisfied that the pleadings, and the governing law which grounds them, support a determination that the plaintiffs' have a specific or cognizable Aboriginal interest over which the defendants have exercised sufficient discretionary control such that it would

trigger responsibilities on the part of the defendants in the nature of a private law duty. If the law does not support the existence of such a duty, then it will be plain and obvious that this cause of action has no prospect of success, and the Court will refuse to certify any issues in relation to the plaintiffs' *sui generis* fiduciary duty claim.

[542] Again, I note that while the assessment to be conducted pursuant to s. 4(a) of the ***CPA*** proceeds presuming all the facts, as pled, to be true, those facts must be grounded in a legal action that has a basis in law. As I will explain, I am not satisfied that the law supports the recognition of a *sui generis* fiduciary duty of the kind the plaintiffs say exists in this case. I therefore find that the plaintiffs' pleadings with respect to their *sui generis* fiduciary duty claim do not disclose a viable cause of action.

[543] A fiduciary obligation between the Crown and Indigenous peoples may arise in two ways: a *sui generis* fiduciary obligation, which arises from the Crown's discretionary control over a specific or cognizable Aboriginal interest; or as an *ad hoc* fiduciary obligation, which, akin to a private law fiduciary duty, arises where the Crown has undertaken to exercise its discretionary control over a legal or substantial practical interest in the best interests of the alleged beneficiary (see ***Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)***, 2018 SCC 4, at para. 44).

[544] The courts have been clear that while the Crown's relationship with Indigenous peoples is fiduciary in nature (see ***Williams Lake***, at para. 43), the fact that the relationship between the Crown and Indigenous peoples has this character does not mean that every Indigenous interest will trigger fiduciary obligations for the Crown (see

Manitoba Metis Federation, at para. 48). Not every Indigenous interest will give rise to a fiduciary duty (***Wewaykum Indian Band v. Canada,*** 2002 SCC 79, at para. 81; ***Southwind v. Canada***, 2021 SCC 28, at para. 61). As stated by Binnie J. in ***Wewaykum***, "[t]he fiduciary duty imposed on the Crown does not exist at large, but in relation to specific Indian interests" (at para. 81).

[545] As the Supreme Court of Canada explained in ***Restoule***, "*sui generis* fiduciary duties are unique to the Crown-Indigenous relationship, flow from the honour of the Crown, and permit the Crown to balance competing interests" (at para. 222). The Ontario Court of Appeal in their decision in ***Restoule v. Canada (Attorney General)***, 2021 ONCA 779 ("***Restoule CA***"), made a similar point:

> [617] … [t]his is a fiduciary duty that breaks with the traditional tenets of the doctrine as developed by the courts of equity. It arose from case-specific circumstances where Canadian courts found it necessary to impose a higher duty on the Crown in order to protect Aboriginal interests, but where the courts also recognized that the Crown requires some degree of flexibility to undertake its duty to the broader public.

[546] The existence of a public law duty does not necessarily preclude the existence of a *sui generis* fiduciary duty. The latter, however, will only arise where the Crown has exercised discretionary control over a specific or cognizable Aboriginal interest "in a way that invokes responsibility 'in the nature of a private law duty'" (see ***Wewaykum***, at para. 85). Put another way, the Aboriginal interest must be sufficiently independent of the Crown's executive and legislative functions to give rise to responsibility in the nature of a private law duty. Without the Aboriginal interest being sufficiently independent of the Crown's executive and legislative functions, it would only be public law duties and not fiduciary duties that arise (see ***Williams Lake***, at para. 52).

[547] For an interest to be a "specific or cognizable Aboriginal interest", it must be one that is distinctly Aboriginal, communal in nature and integral to the nature of the distinctive Indigenous community that asserts it (see ***Manitoba Metis Federation***, at para. 53).

[548] As the parties to this proceeding have themselves acknowledged, the Supreme Court of Canada has only ever recognized a *sui generis* fiduciary duty in connection with a specific or cognizable Aboriginal interest is in land, or with the occupation, use and enjoyment of the land (see ***Stagg v. Canada (Attorney General)***, 2019 FC 630, at para. 126; ***Guerin; Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)***, 1995 CanLII 50 (SCC), at para. 104; ***Osoyoos Indian Band v. Oliver (Town)***, 2001 SCC 85, at paras. 52 and 55; ***Wewaykum***, at para. 81; ***Manitoba Metis Federation***, at paras. 51 – 59; ***Williams Lake***, at paras. 52 and 53). Nevertheless, I acknowledge this does not foreclose the possibility of a *sui generis* fiduciary duty existing where the Aboriginal interest is not in land; the Supreme Court of Canada has not exhaustively defined the kinds of interests that may give rise to such a duty (see ***Stagg***, at para. 126). However, as the Ontario Court of Appeal has cautioned, "courts must be cautious in expanding the scope of the *sui generis* fiduciary duty where the actions of the Crown are more in the nature of a public law duty rather than a private law duty" (see ***Restoule CA***, at para. 516).

[549] An important distinction between a *sui generis* fiduciary duty and an *ad hoc* fiduciary duty is the stringency of the standard of loyalty each requires of the fiduciary to the beneficiary. It is open to a *sui generis* fiduciary to act in more than one interest

whereas there is no such flexibility to balance competing interests in the *ad hoc* fiduciary context (see ***Restoule CA***, at para. 617). As stated in ***Haida Nation v. British Columbia (Minister of Forests)***, 2004 SCC 73, where the Crown's *sui generis* fiduciary duty is superimposed upon a public law duty:

> 18 ... The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. …

[550] The superimposition of a *sui generis* fiduciary duty upon a public law duty as discussed above is not obvious. The unique features of the *sui generis* fiduciary duty make it particularly complex and challenging for the Crown to fulfil, especially when there are equally vulnerable individuals or groups whose interests or rights the Crown also must safeguard (see ***Wewaykum***, at para. 96).

[551] In the context of their s. 35 claim, I find that the plaintiffs' pleadings establish that all First Nations have, since time immemorial, a distinctive, communal approach to childcare, guided by unique laws and customs. A generous reading of the plaintiffs' pleadings further supports the fact that this distinctive, communal approach to childcare involves children being present on or at least maintaining a connection to the land. In their pleadings, the plaintiffs characterize the land itself "as a teacher" (see FASC, at para. 141). They explain that "[w]hen children are taken away from Misipawistik Cree Nation, they can no longer go out on the lake, attend ceremonies, or hear the language", such that their, "connections to their First Nation's culture are broken" (at para. 39). They also explain that "[w]hen children grow up disconnected from Pimicikamak Cree Nation,

they struggle with a lack of identity and a sense of belonging and do not see themselves as protectors of the First Nation's land, water, and people" (at para. 31).

[552] Notwithstanding the foregoing, I am not satisfied that the pleadings disclose that the plaintiffs have a specific or cognizable Aboriginal interest in land in a way that the Supreme Court of Canada's jurisprudence currently requires they do in order to give rise to a *sui generis* fiduciary duty on the part of the defendants. I can obviously accept that the pleadings disclose that the plaintiffs have an interest in their children and how and where their children are raised, cared for, and educated. Elements of that interest may, on a generous reading of the pleadings, be distinctly Aboriginal, communal in nature and integral to the nature of the distinctive Indigenous community. That said, it is also arguable that that interest – the community's interest in how and where their children are raised – is one that may be held by virtually every society. In either case, however, I do not find that an interest in the presence (or absence) of First Nations children on their reserve lands correlates with the plaintiffs having an interest in land itself over which the defendants have exercised discretionary control.

[553] Even if I were satisfied that the plaintiffs' Aboriginal interest was a specific and cognizable one (despite not being an interest in land), and even if I were to assume, without deciding, that the broad, generalized manner in which the plaintiffs characterize the defendants' conduct (with respect to CFS) amounts to an exercise of discretionary control over the plaintiffs' specific or cognizable Aboriginal interest, I am not satisfied that the law supports that that scenario would give rise to a responsibility on the part of the defendants in the nature of a private law duty.

[554] Based on their pleadings, the plaintiffs appear to suggest not only that the defendants have a *sui generis* fiduciary duty *vis-à-vis* the plaintiffs, but also, that the defendants' *sui generis* fiduciary duty obligates the defendants to take particular and specific steps on behalf of the plaintiffs to safeguard their interest in maintaining their children's connections with their reserve lands. According to the plaintiffs, the *sui generis* fiduciary duty would require that the defendants operate a child welfare system that privileges prevention over apprehension, prioritizes First Nations child welfare more generally, provides culturally appropriate child welfare services, and otherwise spends public funds in specific ways and on particular programs. All of this would be required and done in service of an overarching duty to keep First Nations children in their communities wherever possible, and to otherwise maintain the connection between First Nations children and their reserve lands.

[555] It is one thing to suggest, as the plaintiffs do, that the way in which the defendants have funded, regulated and provided CFS can (and as I will later explain in these reasons do) infringe the plaintiffs' s. 35 Aboriginal rights. It is quite another thing to suggest that the defendants have certain positive obligations to fund, regulate and provide CFS in a particular manner. The latter does not constitute a private law duty, but instead engages the defendants' public law duty that flows from the discharge of their legislative and executive functions, including the formulation of core policies. While the discharge of that public law duty can infringe an Aboriginal right, I am not satisfied it can, in the context of this case, give rise to obligations in the nature of a private law duty that would have the effect of circumscribing or directing the manner in which governments discharge that

public law duty. In other words, a *sui generis* fiduciary duty (or, for that matter, an *ad hoc* one) cannot invoke responsibilities on the part of the defendants in the nature of a public law duty, which is essentially what the plaintiffs' claim seeks to do. On that basis, I find the plaintiffs' *sui generis* fiduciary duty claim has no prospect of success.

[556] Even if I were to accept, which I do not, that the pleadings disclose that the Crown has exercised discretionary control over the plaintiffs' specific or cognizable Aboriginal interest in a way that invokes responsibility in the nature of a private law duty, I would still be left to conclude that such a private law duty is irreconcilable with the defendants' public law duties in the context of child welfare and child protection.

[557] Manitoba's CFS statutory framework effectively imposes sweeping obligations on all those involved in the child welfare system to act exclusively in the best interests of children. Indeed, the "best interests of the child" is the animating principle of the ***CFSA*** and the primary consideration for any decisions or actions taken in the provision of CFS (see ss. 2.1(1) and 2.1(2)). It is also the "paramount consideration" when a decision is being made, or actions are taken related to the apprehension of a child (see s. 2.1(3)). Importantly, the plaintiffs have not challenged the constitutionality of this statutory regime.

[558] The ***CFSA*** identifies a number of factors that must be considered when determining what is in the best interests of the child:

> **Factors to be considered**
>
> 2.1(4) When the best interests of a child are being considered, primary consideration must be given to the child's physical, emotional and psychological safety, security and well-being, as well as to the importance, for that child,
>
> (a) of having an ongoing relationship with their family;

(b) if the child is Indigenous, of having an ongoing relationship with the Indigenous group, community or people to which the child belongs; and

(c) of preserving the child's connections to their culture.

Other factors for consideration

2.1(5) When the best interests of a child are being considered, all factors related to the circumstances of the child must be considered, including

(a) the child's cultural, linguistic, religious and spiritual upbringing and heritage;

(b) the child's needs, given the child's age and stage of development, such as the child's need for stability;

(c) the nature and strength of the child's relationship with their parent, their guardian, the person with primary responsibility for the child's day-to-day care and any member of the child's family who plays an important role in their life;

(d) if the child is Indigenous, the importance to the child of preserving the child's cultural identity and connections to the language and territory of the Indigenous group, community or people to which the child belongs;

(e) if the child is not Indigenous, the importance to the child of preserving the child's cultural identity and connections to the child's language and to the child's ethnic or cultural community;

(f) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;

(g) if the child is Indigenous, any plans for the child's care, including care in accordance with the customs or traditions of the Indigenous group, community or people to which the child belongs;
(h) if the child is not Indigenous, any plans for the child's care, including care in accordance with the customs or traditions of the child's ethnic or cultural community;

(i) any family violence and its impact on the child, including whether the child is directly or indirectly exposed to the family violence as well as the physical, emotional and psychological harm or risk of harm to the child; and

(j) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

[559] As noted above, in the context of Indigenous children, there are particular factors that must be considered when determining what is in their best interests. There may be times when those factors align with the plaintiffs' specific or cognizable interest in maintaining their children's connection to their reserve lands. However, that may not always be the case. Indeed, the plaintiffs themselves have acknowledged there will be instances where the apprehension and removal of a First Nations child from their community may be necessary.

[560] More broadly, governments must also act in a manner that ensures children's individual rights to life, and security of the person (which are guaranteed by s. 7 of the ***Charter***) are protected. Imposing upon the defendants a *sui generis* fiduciary duty to take specific steps or act in a particular manner to safeguard the plaintiffs' specific or cognizable Aboriginal interest may not always align with these constitutional obligations.

[561] Finally, governments have an overarching responsibility to act in the public interest and for the public at large. There are significant budgetary considerations that governments must balance in fulfilling this broad responsibility. A *sui generis* fiduciary duty on the part of the defendants that essentially obligates them to spend public funds in a certain amount or on a particular program to ensure the plaintiffs' specific or cognizable Aboriginal interest is respected, presumes, without nuance, that the interests of the plaintiffs and the interests of First Nations children and families will always align, which may certainly not be the case.

[562] Were I to find that the plaintiffs' *sui generis* fiduciary duty claim disclosed a viable cause of action, this Court would effectively be recognizing that the defendants could be

found to owe responsibilities to the plaintiffs in the nature of a private law duty. Such a duty could not be easily reconciled with their public law duties in the context of child welfare and child protection. I recognize that a *sui generis* fiduciary duty may still provide the Crown some degree of flexibility to undertake its duty to the broader public. I am not, however, satisfied that in the circumstances of this case, the defendants could credibly or capably balance those competing public interests with any concomitant duty to act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. Alternatively, the scope of such a *sui generis* fiduciary duty would need to be narrowed and circumscribed to such an extent that it would call into question whether such a duty could even be considered a fiduciary one. I say that given that any positive, private law duties that might otherwise pertain would have to be effectively stripped away or significantly diluted so as to prevent the duty from trenching on the exercise of the Crown's legislative and executive functions.

[563] For the foregoing reasons, I therefore find that it is plain and obvious that the plaintiffs' *sui generis* fiduciary duty claim will not succeed. And again, because all the criteria outlined in s. 4 of the ***CPA*** must be satisfied, and the *sui generis* fiduciary duty claim does not satisfy s. 4(a) of the ***CPA***, I find it unnecessary to consider the remaining aspects of s. 4 of the ***CPA*** as it relates to this claim. In the result, I will not be certifying any issues in relation to the plaintiffs' claim regarding a *sui generis* fiduciary duty.

Can the Proposed Class Members have Certified, Pursuant to s. 4 of the CPA, the Proposed Claim Brought Under an ad hoc Fiduciary Duty?

The Plaintiffs' *ad hoc* Fiduciary Duty Claim

Position of the Plaintiffs

[564] The plaintiffs submit the defendants also owe them an *ad hoc* fiduciary duty to manage First Nations child welfare in a manner that advances First Nations' communal interest in the wellbeing of their children and the continuity of their nations. The plaintiffs say this is based on what were consistent and repeated undertakings by the defendants to exercise their discretionary control over First Nations child welfare in the best interests of First Nations.

[565] The plaintiffs' pleadings do not meaningfully distinguish between the *sui generis* and *ad hoc* fiduciary duties, or how the material facts as pled speak to how those distinct fiduciary duties are established or breached. Instead, the plaintiffs appear to rely on the same broad material facts as pled to substantiate both fiduciary duty claims and how they have been breached

Positions of the Defendants

[566] For its part, Canada strongly disputes that the plaintiffs' *ad hoc* fiduciary duty claim discloses a cause of action. Canada argues the plaintiffs have not pleaded material facts to show that Canada undertook to act in the best interests of the Class members, or that the Class members were vulnerable to Canada's discretion.

[567] Manitoba does not oppose certification of this issue, essentially conceding that the plaintiffs' *ad hoc* fiduciary duty claim discloses a cause of action. Nevertheless, on the substance of the issue, Manitoba argues it does not owe the plaintiffs an *ad hoc* fiduciary

duty because Manitoba has a public law duty pursuant to its statutory child welfare system to act in the best interests of all children, and that such a public law duty precludes a finding of a fiduciary duty, which is akin to a private law duty of care.

Do the Pleadings Disclose a Cause of Action Based on an *ad hoc* Fiduciary Duty?

[568] An *ad hoc* fiduciary duty, akin to a private law fiduciary duty, will exist where a claimant is able to show there is: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control (see ***Manitoba Metis Federation***, at para. 50, citing ***Alberta v. Elder Advocates of Alberta Society***, 2011 SCC 24, at para. 36; ***Williams Lake***, at para. 44). In suggesting an undertaking to act in the best interests of an alleged beneficiary or beneficiaries, the claimant must also show that the fiduciary has forsaken the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake (see ***Elder Advocates***, at para. 31). This forsaking of interests of all others, distinguishes the *ad hoc* fiduciary duty from the *sui generis* fiduciary duty in that the *ad hoc* fiduciary must act with utmost loyalty.

[569] As both Canada and Manitoba note in their submissions, this undertaking to act in the best interests of an alleged beneficiary or beneficiaries, "will typically be lacking where what is at issue is the exercise of a government power or discretion." If it were otherwise, "fiduciary obligations would arise in most day to day government functions making

general action for the public good difficult or almost impossible." (see ***Elder Advocates***, at paras. 42 and 53). As a result, it can be said that the "Crown's broad responsibility to act in the public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group will be rare" (see ***Elder Advocates***, at para. 44).

[570] At the outset, consistent with my observations with respect to the non-viability of the plaintiffs' *sui generis* fiduciary duty claim, I am not satisfied that what the plaintiffs' pleadings allege is the *ad hoc* fiduciary duty they are owed is in the nature of a private law duty. Rather, as I found in the case of their *sui generis* fiduciary duty claim, I find that the duty the plaintiffs say there are owed, squarely engages the legislative and executive functions of the Crown in respect of how it funds, regulates and provides CFS. For that reason, as I did with respect to the plaintiffs' *sui generis* fiduciary duty claim, I also have determined that the plaintiffs' *ad hoc* fiduciary duty claim similarly has no prospect of success.

[571] Put another way, while I am satisfied that the plaintiffs' pleadings make out the second and third elements necessary to establish an *ad hoc* fiduciary duty (i.e., they are vulnerable to a fiduciary's control, and they have a legal or substantial practical interest that stands to be adversely affected by the fiduciary's exercise of discretion or control), I do not find the plaintiffs' pleadings have satisfied the first element of an *ad hoc* fiduciary duty (i.e., that the defendants undertook to act in the best interests of the plaintiffs).

[572] As noted already, in an *ad hoc* fiduciary relationship, the fiduciary must have forsaken the interests of all others in favour of those of the beneficiary in relation to the specific legal interest at stake. It need be acknowledged that situations where the Crown

will be shown to owe a duty of loyalty to a particular person or group will be rare precisely because of the Crown's broad discretion and responsibility to act in the public interest.

[573] I agree with the defendants that the high bar set for an *ad hoc* fiduciary (to forsake the interests of all others in favour of the beneficiary) is at odds with the defendants' public law duties with respect to the child welfare system. I have already highlighted the sweeping obligations imposed by Manitoba's CFS statutory framework to act exclusively in the best interests of the child. I have also already noted that, in determining what is in the best interests of the child, the defendants' public law and legislative duties prioritize the safety and security of the child, such that other factors (such as the child's culture, tradition, language, and connection to traditional territory) are potentially secondary considerations. As a result, I find that the governing legislative scheme (the constitutionality of which the plaintiffs did not challenge) makes it all but impossible for the defendants to act exclusively in the best interests of the plaintiffs, which would necessarily have obligated them to forsake the interest of all others (including the children themselves). I agree with Manitoba that there will be instances where the duty to preserve and protect the best interests of the child will conflict with other legitimate interests concerning family and cultural continuity, such that Manitoba cannot be found to have acted in the best interests of the plaintiffs. Simply put, and to repeat, in the context of the child welfare system, given their duties to others (particularly the children of Manitoba), I find it difficult to conceive, based on the pleadings and the law, how the defendants could and can act in the best interests of the plaintiffs exclusively in a manner that an *ad hoc* fiduciary duty would require. Having already found that even the existence

of a *sui generis* fiduciary duty in the context of this case would be irreconcilable with the defendants' public law duties, I readily find that same is even more so the case in the context of an *ad hoc* fiduciary duty.

[574] For the above reasons and based on the governing law, the pleadings in my view do not disclose a viable action and it is plain and obvious that the plaintiffs' claim in relation to an *ad hoc* fiduciary duty has no prospect of success. Given that, I have determined that this claim does not satisfy s. 4(a) of the ***CPA***. I find it unnecessary to consider the other criterion under s. 4 of the ***CPA*** as it relates to this claim. Accordingly, I will not be certifying the plaintiffs' *ad hoc* fiduciary duty claim or the common issues in relation to the plaintiffs' *ad hoc* fiduciary duty claim.

Can the Proposed Class Members have Certified, Pursuant to s. 4 of the CPA, the Proposed Claim Brought in Negligence?

The Plaintiffs' Negligence Claim

Position of the Plaintiffs

[575] The plaintiffs allege that the defendants owe a *prima facie* duty of care to Manitoba First Nations to prioritize the interests of First Nations children. The plaintiffs also assert their claim in negligence relates to Canada's and Manitoba's "operational negligence in the implementation of protected core policies, and the crafting of non-core policies" (see FASC, at para. 125). Without saying so explicitly in their pleadings, the plaintiffs appear to claim that the defendants have breached the requisite standard of care and are therefore negligent because they have failed to fund, regulate and provide child and family services in a particular way (i.e., by failing to prioritize prevention over apprehension, address systemic shortcomings in their policies that disproportionately

result in the apprehension of First Nations children, ensure funding keeps pace with inflation, provide culturally appropriate care, and foster a connection between First Nations children and their families, communities, and First Nations).

[576] In their submissions, the plaintiffs argue that the jurisprudence already establishes that they are owed a *prima facie* duty of care in this case. In that regard, they rely on two decisions from the Ontario Superior Court: ***Brown v. Canada (Attorney General)***, 2017 ONSC 251 ("***Brown #2***"), at paras. 78 and 79; and ***Paddy-Cannon v. Attorney General (Canada)***, 2023 ONSC 6748, at para. 125. In the alternative, they say that if the asserted duty of care is a novel one, their claim satisfies the ***Anns/Cooper*** test for establishing a novel duty of care (see ***Anns v Merton London Borough Council***, [1978] AC 728 (HL (Eng)), adopted in ***Cooper v. Hobart***, 2001 SCC 79). In that connection, the plaintiffs argue a relationship of proximity exists as between the defendants and the Class members and that there are no residual policy considerations that exist that would negate a finding of duty of care in this case.

Positions of the Defendants

[577] Manitoba argues as a general proposition that statutory duties aimed at the public good alone will typically not create a private relationship of proximity giving rise to a duty of care (see ***R. v. Imperial Tobacco Canada Ltd.***, 2011 SCC 42, at para. 44). It is Manitoba's position that legislative schemes that have been found to be inconsistent with a type of private law duty of care include those legislative schemes that provide immunity for the public authority, those that create remedies to injured parties other than tort remedies and those that impose duties on the government authority that conflict with a

private law duty of care (see ***Taylor v. Canada (Attorney General)***, 2012 ONCA 479, at para. 198).

[578] Manitoba also insists that the Supreme Court of Canada decision in ***Syl Apps Secure Treatment Centre v. B.D.,*** 2007 SCC 38, serves as a bar to finding the alleged duty of care identified by the plaintiffs. Manitoba also submits that the decision in ***Brown #2*** should not been seen as establishing the proposed duty of care.

[579] In the alternative, Manitoba argues that if ***Syl Apps*** does not act as a bar to the plaintiffs' claim in this case, the plaintiffs' claim nonetheless must fail both stages of the ***Anns/Cooper*** test such that Manitoba does not owe the plaintiffs a novel duty of care.

[580] Canada's position is that the plaintiffs' claim in systemic negligence must fail against Manitoba because Canada was not responsible for administering CFS in Manitoba, either on or off reserve. In other words, Canada takes the position that the plaintiffs' claim in systemic negligence does not involve Canada, only Manitoba.

[581] In the alternative, Canada takes the position that there is no legally recognized Class-wide duty of care owed by Canada to the First Nations themselves and further, such a duty of care is neither existing or novel. In fact, Canada argues that no private law duty of care can arise in this case given the nature of the defendants' conduct that the plaintiffs impugn. As with Manitoba, Canada takes the position that the plaintiffs would fail to satisfy either of the two parts of the ***Anns/Cooper*** test.

[582] In support of its position, Canada relies upon the Supreme Court of Canada's decision in ***Entreprises Sibeca Inc. v. Frelighsburg (Municipality)***, 2004 SCC 61, for the proposition that the government does not owe a private law duty of care in the

exercise of its legislative functions, as that falls within the category of decisions to which Crown policy immunity applies (at paras. 19 - 27). They also point to the Federal Court of Appeal's decision in ***Rebello v. Canada (Justice)***, 2023 FCA 67 (leave to appeal to SCC dismissed, see SCC Docket No. 40752), in which that Court held that, "funding and resource allocations do not establish a duty of care, as the relationship that they engage lacks sufficient proximity" (at para. 22). Canada further says there is no recognized tort of negligent law-making, whether for laws the government enacts or fails to enact (see ***Torrance v. Alberta***, 2010 ABCA 88, at para. 18). Nor, Canada says, is there a private law duty upon a government to enact laws, including regulations, guidelines and policies, which achieves any particular purpose (see ***Edwards v. Rebound Resources Inc.***, 2008 CanLII 41168 (ON SC), at paras. 42 - 44; ***Mancuso v. Canada (National Health and Welfare)***, 2014 FC 708, at para. 131, affirmed 2015 FCA 227, leave to appeal to SCC dismissed, 2016 CanLII 41042 (SCC); ***9255-2504 Québec Inc. v. Canada***, 2020 FC 161, at para. 157, affirmed 2022 FCA 437, leave to appeal to SCC dismissed, 2023 CanLII 49306 (SCC); ***Sumere v. Transport Canada***, 2009 CanLII 55324 (ON SC), at para. 7). With that in mind, they further rely on ***Mancuso*** to underscore that, "there is no cause of action for legislating or failing to legislate in a manner that is adverse to a party's interests or may cause them to incur losses" (at para. 131).

Do the Pleadings Disclose a Cause of Action in Negligence?

[583] I begin my analysis as to this claim with a caution. I note as Manitoba has emphasized, that pursuant to the Carriage Order, the proposed Class members do not have standing to bring any claim, based on systemic negligence or otherwise, on behalf

of First Nations individuals. The carriage of that claim as it pertains to such individuals, including First Nations individuals ordinarily resident off reserve, was assigned to the plaintiffs in the ongoing ***Fontaine*** action. As Manitoba has noted, any such claim as it pertains to First Nations individuals ordinarily resident on reserve was resolved through the settlement reached in ***Moushoom***.

[584] In the circumstances, I will accordingly not be making any determinations in fact or in law as to any duty of care allegedly owed to First Nations individuals. Doing so would abrogate the terms of the Carriage Order, and could result in inconsistent findings between this matter and the ***Fontaine*** action and or perhaps trigger issues of res judicata.

[585] Accordingly, the only issue before this Court is whether it can be said, in the particular circumstances of this case, that Manitoba and or Canada owed a duty of care to the proposed Class members – the First Nations themselves – "to provide child welfare services that prioritized the interests of First Nations children" (see FASC, at para. 10).

[586] As in ***Saadati v. Moorhead***, 2017 SCC 28, It is well established that the elements required to prove a claim in negligence are:

> [13] … (i) that the defendant owed a duty of care to the claimant to avoid the kind of loss alleged; (ii) that the defendant breached that duty by failing to observe the applicable standard of care; (iii) that the claimant sustained damage; and (iv) that such damage was caused, in fact and in law, by the defendant's breach…

[587] In order for the plaintiffs to be able to establish negligence, the required elements remain the same irrespective of whether they are pursued on a systemic basis (see ***Canada v. Greenwood***, 2021 FCA 186, at para. 153). However, to be systemic, the

alleged negligence must have resulted in widespread harm to a class of victims as a group (see ***Bigeagle***, at para. 73).

[588] In order to determine whether a duty of care exists, a court is to first look at whether the particular case at issue clearly falls within a relationship previously recognized in the jurisprudence as giving rise to a duty of care. If the claim alleged is determined to be the same or analogous to an already established category for which a duty of care is owed, a *prima facie* duty of care will be established. Conversely, where the case law has previously determined that the same or an analogous relationship does not create a *prima facie* duty of care, the court will find no duty of care exists, without repeating the analysis (see ***Taylor***, at para. 73).

[589] If the claim does not fall within a category for which a duty of care analysis has already been conducted, the well established ***Anns/Cooper*** analysis is to be used. It is not necessary for the court to undertake a full ***Anns/Cooper*** test where an alleged duty of care is not novel.

[590] On the basis of that two-part ***Anns/Cooper*** test, where applicable, the court is to ask whether:

i) A relationship of sufficient proximity exists, and was it foreseeable that the defendant's failure to take reasonable care would cause harm? and

ii) Are there residual policy reasons why the duty of care should not be recognized?

[591] I have considered carefully the position of all of the parties. I have concluded the defendants do not owe a duty of care to the proposed Class members that would support

their claim in negligence. Specifically, I have determined that the Supreme Court of Canada has already confirmed, in the context of an analogous relationship, that governments do not owe a duty of care to prioritize or consider a third-party interest in the context of child welfare matters where the overarching priority is the best interests of the child (see ***Syl Apps***, at paras. 43 and 46). However, even if the existing jurisprudence did not confirm that no such duty of care could arise in the context of the analogous relationship as between the plaintiffs and the defendants in this case, I am further satisfied that the law does not support the existence of a relationship of sufficient proximity between the plaintiffs and the defendants in the context of this claim that would give rise to a novel private law duty of care.

[592] First, I find that the Supreme Court of Canada's decision in ***Syl Apps*** effectively confirms that no duty of care can arise in what I find to be an analogous relationship as between the plaintiffs and the defendants in this case.

[593] The facts giving rise to ***Syl Apps*** involve the parents, grandparents and three siblings of a subject child who took action against government officials and institutions, alleging that their negligence had caused the apprehended child not to return to her family upon reaching the age of majority. This, they said, deprived the family of a relationship with the child. The Supreme Court of Canada, in rejecting that argument, found that no duty of care can be owed to family members of children in care. The Supreme Court of Canada noted that imposing such a duty would create "a genuine potential for 'serious and significant' conflict with the service providers' transcendent

statutory duty to promote the best interests, protection and well-being of the children in their care." (see ***Syl Apps***, at para. 41).

[594] The Supreme Court in ***Syl Apps*** went on to note that an inherently adversarial relationship between the parents and the state is created when a child is placed in care. In that context, imposing a corresponding duty with respect to parents would leave service providers torn between the child's best interests (which are paramount) and parental expectations (at para. 42). This could result in an inhibiting effect on social workers "who may hesitate to act in pursuit of the child's best interests for fear that their approach could attract criticism – and litigation – from the family." (at para. 50).

[595] I agree with Manitoba's position that given the legitimate interests of First Nations in family preservation and cultural continuity, the same potentially adversarial relationship as was identified in ***Syl Apps***, arises in the context of the present case, where a child's safety and security may require removal from the home but where no appropriate placement exists with other families or in the community. Separate from what might be the procedural duties that flow from s. 35 of the ***Constitution Act***, in such circumstances, the imposition of a private law duty of care seems both inappropriate and inconsistent with the statutory duties and legislative scheme aimed at public good.

[596] For its part, Canada says funding and resource allocations do not establish a private law duty of care, as the relationship that they engage lacks sufficient proximity. As will become more apparent later in these reasons, I reject Canada's characterization of its involvement in the child welfare system in Manitoba as merely that of providing funding or allocating resources. Canada's funding shaped the delivery of services and

constitutes government action capable of interfering with the exercise of the plaintiffs' Aboriginal rights. However, at the same time, I am not satisfied it can give rise to a private law duty of care. Moreover, those services are provided through a provincial statutory framework that makes paramount acting in the best interests of the child. Thus, Canada's funding and resource allocations – and the ways in which they shape the provision of services as a result – must be consistent with this provincial statutory framework. Therefore, much as I have concluded that ***Syl Apps*** effectively establishes that Manitoba cannot owe a duty of care to the plaintiff First Nations in this case, I similarly find the case equally applicable to Canada's involvement. Imposing such a duty of care on Canada has the potential to seriously and significantly conflict with Canada's obligations to structure its funding and resource allocations consistent with Manitoba's statutory child welfare framework, which imposes on service providers a transcendent duty to promote the best interests, protection, and wellbeing of children in care.

[597] I should also note that in respect of both Manitoba and Canada, insofar as the plaintiffs rely upon ***Brown #2***, I am unpersuaded that that judgment is of assistance in the present case. In ***Brown #2***, while a duty of care was found to exist as against Canada, the plaintiffs in that case were individuals, and the Courts found a clear breach of a particular private agreement. There is no breach of agreement in the present case, and accordingly, ***Brown #2*** does not create an established duty of care respecting First Nations plaintiffs.

[598] Second, even if the existing jurisprudence – ***Syl Apps*** in particular – did not confirm that no such duty of care could arise in the context of the analogous relationship

as between the plaintiffs and the defendants in this case, I am further satisfied that the law does not support the existence of a relationship of sufficient proximity between the plaintiffs and the defendants in the context of this claim that would give rise to a novel private law duty of care.

[599] As I have already observed in considering whether to certify the plaintiffs' fiduciary duty claims, I find that the way in which the pleadings conceive of the alleged private law duty of care (and the attendant standard of care and what the plaintiffs say they are owed), squarely engages the legislative and executive functions of the Crown in respect of how it funds, regulates, and provides CFS. Again, the pleadings effectively say that the defendants have a private law duty of care to prioritize the interests of First Nations children and that the requisite standard of that care, requires they operate a child welfare system that privileges prevention over apprehension, prioritizes First Nations child welfare more generally, provides culturally appropriate child welfare services, and otherwise spends public funds in specific ways and on particular programs. It is difficult to conceive of how the above could constitute a private law duty; it speaks directly to the ways in which the defendants are meant to discharge their public law duties in furtherance of the public good, and the policies they have enacted to guide the discharge of those duties.

[600] I accept Manitoba's submission that generally, statutory duties aimed at the public good would not alone create a private relationship of proximity giving rise to a duty of care. As noted by the Supreme Court of Canada in ***Imperial Tobacco***:

> [44] … It may be difficult to find that a statute creates sufficient proximity to give rise to a duty of care. Some statutes may impose duties on state actors with respect to particular claimants. However, more often, statutes are aimed at public goods, like regulating an industry (*Cooper*), or removing children from harmful environments (*Syl Apps*). In such cases, it may be difficult to infer that the

> legislature intended to create private law tort duties to claimants. This may be even more difficult if the recognition of a private law duty would conflict with the public authority's duty to the public: see, e.g., *Cooper* and *Syl Apps*. As stated in *Syl Apps*, "[w]here an alleged duty of care is found to conflict with an overarching statutory or public duty, this may constitute a compelling policy reason for refusing to find proximity"…
>
> [emphasis added]

I also accept Manitoba's submission that legislative schemes have generally been found to be inconsistent with the private law duty of care (see ***Taylor***, at para. 78). The persuasive body of caselaw relied upon by Canada further emphasises this point.

[601] Much as I have concluded in the context of the plaintiffs' fiduciary duty claims, were I to find the plaintiffs' negligence claim disclosed a reasonable cause of action, this Court would effectively be finding that the discharge of public duties could give rise to a relationship of sufficient proximity such that a private law duty could be said to owed.

[602] Before concluding, I wish to make a final point. There is a credible argument that much of what the plaintiffs are impugning engage core policy decisions, which are immune from liability in negligence (see ***Nelson (City) v. Marchi***, 2021 SCC 41, at paras. 42 and 67). Some of those policy decisions concern budgetary decisions by both defendants, which reflect value judgments weighing competing interests (see ***Nelson***, at paras. 63 - 65). That these core policy decisions constitute part of what is being impugned only reinforces my view that the plaintiffs' negligence claim would have no prospect of success.

[603] Therefore, based on the foregoing reasons, and on my review of the plaintiffs' pleadings and the governing jurisprudence, I am not satisfied that the pleadings disclose a cause of action in relation to a private law duty of care. In other words, it is plain and

obvious that the plaintiffs' negligence claim cannot succeed. Given that this claim does not satisfy s. 4(a) of the ***CPA***, it is unnecessary for me to consider the other criteria under s. 4 of the ***CPA***. Accordingly, I will not be certifying the plaintiffs' claim in negligence or the plaintiffs' common issues in relation to that claim.

Summary of Determinations on Certification

[604] For the forgoing reasons, I have determined that only the plaintiffs' claim under s. 35 of the ***Constitution Act*** will be certified.

[605] Except for the claim that will be certified, I have determined – following the consideration and application of the relevant criteria of the ***CPA*** (specifically s. 4(a)), - that the remainder of the plaintiffs' claims cannot be certified as they are not viable causes of action. In other words, even on a generous reading of the plaintiff's pleadings (where the facts are assumed to be true) it is plain and obvious that the plaintiffs' s. 2(a), s. 15(1) and s. 36 ***Charter*** claims are not viable causes of action that have any chance at success.

[606] Similarly, even on a generous reading of the plaintiffs' pleadings (where the facts are assumed to be true) it is plain and obvious that the plaintiffs' claims in negligence and in relation to the *sui generis* and *ad hoc* fiduciary duties and the honour of the Crown, are not viable causes of action that have any chance at success.

[607] As I earlier noted, given that I have determined that apart from the s. 35 claim, it is plain and obvious that the other claims cannot succeed, it will serve little purpose to address those non-certified claims in the context of the plaintiffs' summary judgment motion. Put simply, if it is plain and obvious that a claim cannot succeed it is not coherent

to nonetheless suggest that it can be concluded on a merits consideration of the reformulated common issues, that there remains no genuine issue for trial.

[608] Accordingly, in the next part of the Analysis section dealing with the plaintiffs' motion for summary judgment, I will be considering on summary judgment, the only viable claim and related reformulated Stage 1 common issues that has been certified: the claim under s. 35 of the ***Constitution Act***.

Summary Judgment

[609] The following section of my analysis will address the second principal issue identified for my determination (see para. 9). That issue relates to the plaintiffs' motion for summary judgment and it is expressed in the following question:

> Ought the Court to grant summary judgment regarding the plaintiffs' now reformulated Stage 1 common issues?

[610] Following my earlier explained determinations on the plaintiffs' certification motion, I have certified only the plaintiffs' claim concerning s. 35 of the ***Constitution Act***. As noted in the previous section regarding certification, my analysis concerning the plaintiffs' summary judgment motion will be limited to the now reformulated Stage 1 common issues respecting the claim that has been certified.

[611] For convenience I set out again those reformulated common issues respecting the claim I will be addressing on this motion for summary judgment:

> Section 35 of the *Constitution Act, 1982*
>
> 3(a) Do the Class Members have an existing Aboriginal right under section 35 of the *Constitution Act, 1982*, to raise their children in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions?
>
> 3(b) If the answer to question 3(a) is yes, have the defendants, during the Class period and through their Impugned Conduct, infringed this right?

> 3(c) If the answer to question 3(b) is yes, was the infringement justified (i.e., related to a compelling and substantial legislative objective and consistent with the honour of the Crown and the Crown's fiduciary duty to Indigenous people)?

[612] Based on the applicable legal framework and for the reasons that follow, I have determined that summary judgment will be granted on the plaintiffs' s. 35 of the ***Constitution Act*** claim. For the reasons set out below, I have determined, after a full consideration of the reformulated Stage 1 common issues respecting the s. 35 claim, there remain no genuine issues requiring a trial.

The Legal Framework for Summary Judgment

[613] These provisions of the Rules will have application respecting the plaintiffs' motion for summary judgment:

> **Summary judgment motion**
>
> 20.01(1) A party may bring a motion, with supporting affidavit material or other evidence, for summary judgment on all or some of the issues raised in the pleadings in the action.
>
> …
>
> **Responding Evidence**
>
> 20.02 In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.
>
> **Granting summary judgment**
>
> 20.03(1) The judge must grant summary judgment if he or she is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.

Powers of a judge

20.03(2) When making a determination under subrule (1), the judge must consider the evidence submitted by the parties and he or she may exercise any of the following powers in order to determine if there is a genuine issue requiring a trial:

(a) weighing the evidence;

(b) evaluating the credibility of the deponent;

(c) drawing any reasonable inference from the evidence;

unless it is in the interests of justice for these powers to be exercised only at trial.

[614] This Court addressed and examined the applicable Rule and governing jurisprudence respecting summary judgment in Manitoba in ***Caspian***. The Court stated the following:

> [185] *Queen's Bench Rule* 20 requires the Court to grant a motion for summary judgment where it is satisfied that there is no genuine issue requiring a trial with respect to the claim or defence. *Queen's Bench Rule* 20.03(2) provides that in making that determination, the Court may weigh evidence, evaluate the credibility of the deponent and draw adverse inferences, unless it is in the interest of justice for these powers to be exercised only at trial.
>
> [186] The test for summary judgment is set out by the Manitoba Court of Appeal in *Dakota Ojibway Child and Family Services et al. v. M.B.H.*, 2019 MBCA 91 (*Dakota Ojibway*). The most pertinent portions of the Court's enunciation of the test (as presented at paragraphs 108 – 111), can be summarized as follows:
>
> a) The moving party must satisfy the motion judge that there can be a fair and just determination on the merits (i.e., that the process will permit him or her to find the necessary facts and to apply the relevant principles and that a trial would not be proportionate, timely or cost-effective) and that there is no genuine issue requiring a trial;
>
> b) Once the moving party meets this burden, the responding party bears an onus to show why the record, the facts or the law, preclude a fair deposition of the matter in a summary way or that there is a genuine issue requiring a trial; and
>
> c) If the responding party fails to show why a trial is required, summary judgment will be granted.

> [187] The comparatively new *Queen's Bench Rule* for summary judgment in the Manitoba Court of Appeal's judgment in *Dakota Ojibway* follows coherently from the transformative Supreme Court of Canada judgment in *Hryniak v. Mauldin*, 2014 SCC 7. In that judgment, the Supreme Court of Canada signaled a culture shift requiring judges to manage amongst other things, the summary judgment process consistent with the principle of proportionality when applying rules like that of *Queen's Bench Rule* 20. As Greenberg J. noted in *Free Enterprise Bus Lines Inc. et al. v. Winnipeg Exclusive Bus Tours Inc. et al.*, 2018 MBQB 64, "[t]he traditional trial is no longer the default position but should be pursued only where the judge cannot "achieve a fair and just adjudication of the issues" on the basis of the evidence produced on the summary judgment motion". In *Hryniak*, Karakatsanis J. was clear when explaining that in the context of the new Ontario rules, they were "designed to transform Rule 20 from a means to weed out unmeritorious claims to a significant alternative model of adjudication." In other words, the subtle but important distinction required noting that the test on a summary judgment motion was no longer whether there is a "genuine issue for trial" but whether there is a "genuine issue requiring trial".
>
> [188] At paragraphs 56 and 57, the Court in *Hryniak* noted:
>
> > [56] While I agree that a motion judge must have an appreciation of the evidence necessary to make dispositive findings, such an appreciation is not only available at trial. Focussing on how much and what kind of evidence could be adduced at a trial, as opposed to whether a trial is "requir[ed]" as the Rule directs, is likely to lead to the bar being set too high. The interest of justice cannot be limited to the advantageous features of a conventional trial, and must account for proportionality, timeliness and affordability. Otherwise, the adjudication permitted with the new powers – and the purpose of the amendments – would be frustrated.
> >
> > [57] On a summary judgment motion, the evidence need not be equivalent to that at trial, but must be such that the judge is confident that she can fairly resolve the dispute. A documentary record, particularly when supplemented by the new fact-finding tools, including ordering oral testimony, is often sufficient to resolve material issues fairly and justly. The powers provided in Rules 20.04(2.1) and (2.2) can provide an equally valid, if less extensive, manner of fact finding.

[615] Having set out the relevant legal framework for summary judgment, I will proceed below with my analysis in relation to the certified claim.

Section 35

Introduction

[616] As outlined in the reasons that follow, I have determined that the plaintiffs have a right to self-govern in the area of CFS, as recognized and affirmed legislatively, first, by Parliament in 2020, and subsequently, by the Manitoba Legislative Assembly in 2024. I have also determined this right necessarily includes the plaintiffs' right to raise their children in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions (the right claimed by the plaintiffs) the latter of which gives scope and content to the plaintiffs' self-government right.

[617] In so concluding, I am mindful of the test for determining the existence of a s. 35(1) Aboriginal right as outlined by the Supreme Court of Canada in ***Van der Peet***. I am also mindful of the fact that the Supreme Court of Canada specified in ***R. v. Pamajewon***, 1996 CanLII 161 (SCC), [1996] 2 SCR 821, that "any asserted right to self-government, must be looked at … in light of the specific history and culture of the aboriginal group claiming the right" (at para. 27). I further acknowledge, as argued by Canada, that the evidence submitted by the plaintiffs supporting the existence of their s. 35 right may not meet the strict requirements of the ***Van der Peet*** test because the plaintiffs have not provided evidence of modern versions of pre-contact practices, customs and traditions in the area of child rearing that are specific and particular to their own First Nations. Instead, the plaintiffs have provided more generalized evidence regarding the practices, cultures and traditions of various First Nations in Manitoba. Despite what may be the inadequacy of the evidence regarding the more narrow

requirements of ***Van der Peet***, I am mindful of the Supreme Court of Canada's decision in ***Canada (Attorney General) v. Bedford***, 2013 SCC 72, in which the Supreme Court held that that lower courts may revisit a precedent set by a higher court "if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate" (at para. 42). I am further mindful of the recent concurring reasons of Côté, Brown and Rowe JJ. (Wagner C.J. concurring) in ***R. v. Kirkpatrick***, 2022 SCC 33, in which they held that "[u]nlike statutes, the meaning of a constitutional provision is 'capable of growth' and may be revisited on the basis of societal change" (at para. 265).

[618] I have determined that the legal and evidentiary issues raised in the matter before me meet the requirements of ***Bedford***, such that a strict application of the ***Van der Peet*** test would be ill fitting in the circumstances of this case. The Supreme Court's own jurisprudence after ***Van der Peet*** (and to ***Pamajewon***), show that modifications to the ***Van der Peet*** test may be appropriate (depending on the nature of the right claimed or the Indigenous group claiming the right). In addition, Parliament's express recognition (in the preamble to the ***UNDRIP Act***) of UNDRIP as a "source of interpretation for Canadian law," allows this Court to recognize the plaintiffs' right of self-government in the area of CFS without each of the three plaintiffs leading evidence regarding child rearing practices, traditions and customs (specific to each of them as First Nations) that existed pre-contact, and which continue to exist in modern form today. This is particularly so, given this particular self-government right has been recognized legislatively by both

defendants, and the right claimed by the plaintiffs has been specifically conceded by Manitoba in these proceedings.

[619] Having recognized the existence of the plaintiffs' s. 35 right for the reasons I set out below, and after examining the defendants' conduct during the period in question (January 1,1992 to the present), I have also determined that the defendants, through the manner in which they have funded, regulated and provided child welfare and child protection in Manitoba over the relevant period, have unjustifiably infringed the plaintiffs' s. 35 right.

[620] In coming to this conclusion, I wish to be clear that during the relevant period, Canada and Manitoba had, and continue to have, a legitimate interest in involving themselves financially, operationally, and legislatively in providing CFS to Manitoba First Nations and their members. The welfare and safety of First Nations children in Manitoba and their best interests, is a matter of deep concern for both levels of government, and protecting these children from harm is a pressing and substantial legislative objective. I also recognize some of the good faith efforts made by both Canada and Manitoba during the relevant period in trying to address concerns expressed in various public reports as to how their funding, legislative and policy choices were detrimentally affecting Indigenous children, families and communities, including the three First Nations plaintiffs. In coming to the conclusion I have regarding the s. 35 breach, it should be assumed that I have reminded myself and appreciate that not every policy or legislative choice made by governments (to address identified concerns) will result in a successful outcome.

[621] I also wish to be clear at the outset that the plaintiffs have not specifically challenged the constitutionality of any statutory provision enacted by either Canada or Manitoba. For example, they have not claimed that provisions of the ***CFSA*** or provisions of the 2019 ***Act*** have infringed their s. 35 right. Rather, they claim that Canada's and Manitoba's actions in funding, regulating and providing child welfare in Manitoba over the relevant period (January 1, 1992 to the present) have infringed their rights.

[622] In coming to the determinations I have, the Court's concern is not with the defendants' involvement in the area of child welfare and child protection *vis-à-vis* the plaintiffs, but rather, it is with the manner of their involvement. Over most of the relevant period, Canada and Manitoba did not demonstrate, through their actions, that they understood the nature and particularity of the plaintiffs' s. 35 right or what the honour of the Crown and the fiduciary relationship between the Crown and Aboriginal peoples required of them in the context of this right. Put plainly, while Canada and Manitoba identified and recognized themselves and each other as highly interested parties in providing CFS to First Nations, they failed to treat First Nations communities, like the plaintiffs, as *equally* interested parties. Until recently, they did not make efforts that recognized First Nations perspectives, worldviews, traditions, and realities when delivering the CFS that they (Canada and Manitoba) genuinely believed were adequate and responsive to the situation at hand. Because of the defendants' inadequate efforts to consult with First Nations and accommodate their interests, the plaintiffs' s. 35 right to self-government in the area of CFS was significantly impaired, and unjustifiably infringed, threatening the plaintiffs' cultural survival as First Nations.

[623] I intend to proceed with my analysis on summary judgment respecting the s. 35 claim addressing the following matters in the chronology that I set out below.

a) I will begin with an outline of the position of the parties in relation to the character and existence of the plaintiffs' s. 35 Aboriginal right. I will also outline the parties' positions - to the extent articulated - on the questions of infringement and justification;

b) I will then consider whether the plaintiffs have an existing Aboriginal right under s. 35 of the ***Constitution Act*** and if so, I will discuss the scope of this right as it might impact the plaintiffs' allegations in the present case. In connection to these questions, I intend to address the legal framework governing s. 35 of the ***Constitution Act***, including the following:

i) The nature, scope and source of Aboriginal rights generally;

ii) The jurisprudential evolution in the ***Van der Peet*** test;

iii) Is there a potential existing s. 35 right in the present case and if so, how should it be characterized?

c) Having determined that the purported Aboriginal right should be recharacterized, I then consider whether the plaintiffs have established the Aboriginal right;

d) Having determined that the plaintiffs have established their recharacterized Aboriginal right, I will then move to consider whether and how the evidence in this case establishes that the identified right has been infringed;

e) Having determined that the plaintiffs have established an infringement of their Aboriginal right, I will move on to consider whether the defendants have shown that this infringement was justified; and

f) Finally, having made my determinations as to the existence of a s. 35 Aboriginal right, its infringement and the absence of a justification, I will return to the governing test for summary judgment in order to determine whether there remain on the plaintiffs' s. 35 claim, genuine issues requiring a trial.

Positions of the Parties on the Plaintiffs' s. 35 Claim

Position of the Plaintiffs

[624] The plaintiffs claim they each have the right, as First Nations, to "raise their children in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions." The plaintiffs argue that this right as they have characterized it, is an existing Aboriginal right, recognized and affirmed by s. 35(1) of the ***Constitution Act***. They say that their approach to child rearing—which involves fostering kinship relationships between children and First Nations community members, as well as teaching First Nations children land-based traditions and spiritual practices in their respective Indigenous languages—is an integral part of their own distinctive cultures as First Nations. They assert that this has been so prior to European contact. The plaintiffs say this approach to child rearing, while varying in detail from First Nation to First Nation (i.e., each culture's practices, while similar, may not be identical), is an integral part of all First Nations cultures in Manitoba and has been since time immemorial.

[625] In setting out their position, the plaintiffs do not directly characterize their s. 35 Aboriginal right as "an inherent right to self-government, which includes jurisdiction in relation to child and family services" (the right Parliament explicitly undertook to recognize through the enactment of the 2019 ***Act***). However, most of the plaintiffs' evidence regarding the defendants' actions both before and during the proposed Class period (and most of the evidence that the plaintiffs have adduced overall) concerns the way the defendants have (together and separately) funded, regulated and provided child welfare and child protection, on and off reserve, in Manitoba.

[626] As evidence of the existence of their s. 35 right, the plaintiffs rely primarily on the affidavits of Dr. Simpson and Elder Paynter.

[627] The plaintiffs claim that the defendants, through the manner in which they have funded, regulated and provided child welfare and child protection in Manitoba, have unjustifiably infringed the plaintiffs' s. 35 Aboriginal right. They say that the defendants have done so by depriving the plaintiffs (and Manitoba First Nations more broadly) of the ability to foster kinship relationships between members of their First Nations, and the ability to teach and pass on their traditional cultural and spiritual practices to the next generation to ensure the continuity of their First Nations. They assert that the defendants' actions infringed the plaintiffs' s. 35 rights in several ways, and specifically by:

a) Perpetuating a system that disproportionately focussed on apprehension of children instead of providing or supporting appropriate preventative services;

b) Imposing incompatible foster care standards, and placing children in culturally inappropriate care, instead of promoting or supporting kinship or community placements and culturally and spiritually appropriate services and care to First Nations children in care of CFS;

c) Failing to increase basic maintenance rates, clawing back the CSA Benefits, and imposing block funding, instead of making sure First Nations children in care of CFS live in environments that afford them the same opportunities as non-First Nations children in Manitoba;

d) Failing to make sure First Nations children in care of CFS can maintain and develop a connection to their distinct cultures, spirituality, identities, traditional territories, and First Nations;

e) Failing to provide or support the provision of appropriate services to help First Nations heal when First Nations children are apprehended and placed in CFS; and

f) Failing to provide or support the provision of appropriate services to help First Nations children and young adults reintegrate and reconnect with First Nations after being in care of CFS.

[628] As evidence of this infringement, the plaintiffs rely on the affidavits of Chiefs Cook, Kent and Monias, Dr. Sinha and Ms. Petti, Dr. Reynolds, and the affidavits and cross-examinations of Canada's and Manitoba's fact witnesses.

[629] The plaintiffs also point to the many publicly available reports that highlight the deleterious effects of the defendants' actions in the area of child welfare and child

protection on First Nations generally. In addition, the plaintiffs rely on the factual findings of the CHRT in ***Caring Society*** as it relates to Canada's role in relation to the FNCFS program.

[630] The plaintiffs acknowledge that both Canada and Manitoba, in funding, regulating and providing child welfare in Manitoba, were acting in accordance with a substantial and compelling legislative objective to protect all children (including all Indigenous children) from harm, and to act in the best interests of these children. However, they also contend that in pursuit of this objective, the defendants "derogated from the Plaintiffs' Aboriginal right without appropriate consultation or accommodation, all of which was inconsistent with the honour of the Crown" (see Plaintiffs' Brief, at para. 357). They say that the defendants' infringement of the plaintiffs' s. 35 right was unjustifiable.

Position of Manitoba

[631] Manitoba concedes the plaintiffs have an existing Aboriginal right under s. 35(1) of the ***Constitution Act***. Manitoba does not express concern with how the plaintiffs have characterized this right (the right to raise their children in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions), nor has it expressed any view on whether it understands this right to be equivalent to the right that Parliament has since recognized legislatively. I note, however, that in 2024, Manitoba itself enacted the ***Act re CFSIJOA***, which amended the ***CFSA***. These amendments included the addition of a long preamble, which states in part, that the Manitoba government "acknowledges and respects the inherent right of self-government of Indigenous Peoples, including jurisdiction for child and family services".

[632] While Manitoba does not dispute the existence of the plaintiffs' constitutionally protected Aboriginal right, it argues this right is subject to certain internal limits. In this connection, Manitoba accepts that the plaintiffs have the right to raise their children in their culture and community (with a connection to their land, and immersed in their languages and spiritual traditions), but it argues, that when apprehending a child in need of protection under the ***CFSA***, it is exercising the *parens patriae* jurisdiction belonging to the Crown as sovereign. Accordingly, Manitoba takes the position that it has not infringed the plaintiffs' right. Manitoba's position seems to suggest that the plaintiffs' s. 35 right is incompatible with the assertion of Crown sovereignty.

[633] In the alternative, Manitoba argues that its actions in relation to the apprehension and protection of Indigenous children represent a justifiable infringement of the plaintiffs' right. Despite that contention and notwithstanding the onus of justifying any such infringement, Manitoba does not substantively engage with this question and does not specifically explain how or why such an infringement is justified.

[634] Manitoba provides a history of the legislative, structural and policy changes it has made to the child welfare system in the province over time. Manitoba highlights measures such as the AJI, devolution, DR/FE, and SEF as relevant efforts. These efforts Manitoba says were undertaken in consultation with Indigenous stakeholders, to do what is best for First Nations (as well as their children and families) in delivering child welfare services. It says that the best interests of the child is (and has always been) the paramount and fundamental statutory principle that governs all its decisions relating to child welfare.

[635] Finally, Manitoba asserts that if the Court decides to grant declaratory relief to the plaintiffs regarding their s. 35 right, this relief cannot and should not involve imposing positive duties on Manitoba to provide greater funding, or different services, or to take specified steps through legislation or policies in relation to the plaintiffs.

Position of Canada

[636] Canada, in contrast to Manitoba, argues the plaintiffs have failed to claim with sufficient specificity that they have an existing aboriginal right under s. 35 to raise their children in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions. Further, they say that the plaintiffs did not tender enough evidence to support their claim. This evidence, Canada insists, is required by the test to determine the existence and scope of an Aboriginal right as set out by the Supreme Court of Canada in ***Van der Peet***. Specifically, Canada argues the plaintiffs merely and inadequately assert a generic right to raise their children as part of their distinctive culture but they have not tendered what Canada asserts is the requisite historical or anthropological evidence to substantiate the existence of that right. For example, Canada is critical of the evidence of Dr. Simpson saying that her evidence concerned the practices and traditions of First Nations in Manitoba generally, rather than in connection to a particular First Nation as required by the ***Van der Peet*** test.

[637] Because Canada claims that the plaintiffs have not established an existing Aboriginal right under s. 35, it advanced little by way of argument or evidence to counter the plaintiffs' assertion that (during the relevant period) Canada had infringed this right. It did, however, point to the 2019 ***Act***, which came into force on January 1, 2020, as

evidence that Canada "acted in accordance with any potential section 35 rights it may have been required to respect" (Defendant (Canada) Brief, at para. 421). In addition, it pointed to the consultation process with Canada's Indigenous peoples that led to the enactment of Bill C-92 as evidence that "Canada took meaningful steps to acknowledge and uphold Indigenous governance in this area rather than infringing upon any asserted right" (at para. 421).

[638] Canada also argued more generally that it could not have infringed the plaintiffs' ***Charter*** or other constitutional rights, or breached a duty of care or fiduciary duty owed to the plaintiffs, because it had no jurisdiction or control over the delivery of child welfare services to First Nations children (whether living on or off reserve) from January 1, 1992 (the beginning of the Class period proposed by the plaintiffs) until the coming into force of the 2019 ***Act*** on January 1, 2020. It was only at that point that Canada says it assumed responsibility for setting minimum national standards for the delivery of child welfare to Indigenous children across Canada (the 2019 ***Act*** contains principles regarding this service delivery).

[639] While not argued directly in connection with the plaintiffs' s. 35 rights claim, I understand Canada's position to be that it cannot have infringed the plaintiffs' s. 35 right to self-government in the area of CFS rights between January 1, 1992 and January 1, 2020, because its sole responsibility throughout that entire period was to provide funding for child welfare services (for which Manitoba retained responsibility for delivery and administration). With the coming into force of the 2019 ***Act***, in January 2020, in addition to continuing to provide funding, Canada became responsible (and continues to be

responsible) for setting national standards for the delivery of child welfare to Indigenous children across Canada. The 2019 ***Act***, Canada argues, does nothing to infringe the plaintiffs' right and to the contrary, recognizes and affirms an inherent right to self-government in the area of CFS.

[640] Having focussed its arguments on the plaintiffs' failure to show the existence of the right the plaintiffs specifically claim, Canada, like Manitoba, did not substantively engage with whether an infringement of the claimed right is justified.

Do the Plaintiffs have an Existing Aboriginal Right under s. 35 of the Constitution Act, and if so, what is the Scope of this Right?

What is the Nature, Scope, and Source of Aboriginal Rights?

[641] Section 35(1) of the ***Constitution Act*** recognizes and affirms the "existing aboriginal and treaty rights of the aboriginal peoples of Canada". To properly understand how the particularity and uniqueness of s. 35 informs my conclusions as to the existence of the right in question, I will briefly review some of the relevant s. 35 jurisprudence, including a brief discussion of the nature, source and scope of s. 35 rights.

[642] While I do not intend to comprehensively review either the history of this constitutional provision or the jurisprudence arising from it, it will suffice to note that the jurisprudence is extensive and it has evolved significantly in the decades since s. 35 was enacted.

[643] The unique nature of Aboriginal rights stems from Canada's history, and the confluence of two distinct legal orders. As noted by Lamer C.J. in ***Van der Peet***:

> 30. In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land,

> and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.
>
> [emphasis in original]

[644] Aboriginal rights are also unique or *sui generis* in that they belong, not to individuals, but to Indigenous communities (see ***R. v. Sparrow***, 1990 CanLII 104 (SCC), [1990] 1 SCR 1075, at p. 1112) and they are communal or collective.

[645] In ***Sparrow***, the Supreme Court of Canada outlined the framework for assessing Aboriginal rights claims under s. 35(1). The analysis involves first determining whether an applicant was acting under an Aboriginal right and whether the right has been extinguished (such that it is no longer an existing right) (at pp. 1091 and 1092). Where an existing Aboriginal right is established, the Court must then determine whether the right has been infringed, and if so, whether the infringement was justified (at pp. 1112 and 1113).

[646] Usually, the Courts' recognition of specific Aboriginal rights has occurred in the context of claims to use and occupy certain land for specific (or general) purposes, or in the context of an assertion of particular resource or harvesting rights. Such claims often involve assertions of infringement through legislative enactment or executive enforcement of a generalized legislative or regulatory scheme in a particular field of law (applicable to all Canadians, or, alternatively, to residents within a particular province or territory).

[647] Before the coming into force of the ***Constitution Act***, Parliament could, and sometimes did, unilaterally extinguish Aboriginal rights. Even then, however, such

extinguishment could only be done through federal legislation demonstrating a clear and express intent to do so (see ***Delgamuukw***, at paras. 173 - 183). Courts have been clear that heavily regulating or circumscribing an Aboriginal right, even in a way that is stringent, narrow, or prohibitive, is not the same as extinguishing it (see ***Gladstone***, at para. 34).

[648] In ***Mitchell***, the Supreme Court of Canada held that Aboriginal rights continue to exist at common law unless they: (a) are incompatible with the assertion of Crown sovereignty (which involves the Crown's ultimate ownership of and underlying title to the land); (b) have been surrendered by a specific group of Aboriginal people through treaty to the Crown; or (c) have been extinguished through legislation (at paras. 9 and 10). Since the constitutional recognition and affirmation of Aboriginal rights through s. 35 of the ***Constitution Act***, federal extinguishment of Aboriginal rights through legislation is no longer possible (at para. 11).

[649] To date, Canadian courts have held that "existing aboriginal rights" can include territorial rights (the right to occupy and use a particular piece of land) as recognized by the Supreme Court of Canada in cases such as ***Calder et al. v. Attorney-General of British Columbia***, 1973 CanLII 4 (SCC), [1973] SCR 313, ***Guerin***, and ***Delgamuukw***. Courts have also recognized the right to engage in certain activities, customs or practices, often, but not always, in connection with the land. Some of those activities, customs or

practices have been recognized as existing Aboriginal rights, both before and after the coming into force of s. 35(1) of the ***Constitution Act***. They include:

- Marriages celebrated in accordance with Aboriginal traditions and customs (see ***Re Noah Estate,*** 1961 CanLII 863 (NWT TC); ***Rex v. Tom Williams,*** 1921 CanLII 623 (BC SC);
- Customary Aboriginal adoptions (see ***Casimel v. Insurance Corp. of British Columbia***, 1993 CanLII 1258 (BC CA);
- Hunting or fishing on particular territory for food, social or ceremonial purposes (see ***Sparrow***; ***R. v. Nikal,*** 1996 CanLII 245 (SCC); ***R. v. Côté***, 1996 CanLII 170 (SCC), [1996] 3 SCR 139; ***Powley***; ***R. v. Desautel***, 2021 SCC 17 (CanLII);
- Commercial fishing on a particular territory (see ***Gladstone***); and
- Harvesting wood for domestic use on a particular territory (see ***Sappier***).

[650] For the most part, courts have recognized and affirmed Aboriginal rights in relation to specific Indigenous communities and on narrow and specific topics, such as the right to hunt moose for subsistence within a specific territory (see ***Powley***) or the right to fish for salmon in a preferred way on a river flowing through a First Nations reserve (see ***Nikal***).

[651] Courts have also grappled with the existence of rights of a different character, including in connection with claims respecting a right of self-government. In ***Campbell***, for example, the British Columbia Supreme Court recognized self-government as an

existing Aboriginal right, recognized and affirmed by s. 35(1) of the ***Constitution Act***, to which the Nisga'a Treaty gave expression (at paras. 137 - 143).

[652] The ***C-92 Reference Decision #1*** arose in the context of Canada's express recognition that self-government, at least as it relates to certain areas of jurisdiction, is a s. 35 Aboriginal right. This recognition came through the enactment of 2019 ***Act***. In the 2019 ***Act***, Canada recognized that "[t]he inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982* includes jurisdiction in relation to child and family services" (at s. 18(1)). Manitoba followed, amending the ***CFSA*** in 2024 so as to recognize that same right. Canada has also expressed this view through policy documents. For example, in a policy framework document entitled "*The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*" (Indian and Northern Affairs Canada, *Federal Policy Guide: Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: INAC, 1995), online: <rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136> (last modified: 1 March 2023), the Government of Canada's Department of Crown-Indigenous Relations and Northern Affairs Canada states:

> **Part 1 – Policy Framework**
>
> **The Inherent Right to Self-Government is a Section 35 Right**
>
> The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*. It recognizes, as well, that the inherent right may find expression in treaties, and in the context of the Crown's relationship with treaty First Nations. Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have

> the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.

[653] As I will discuss further below, in the ***C-92 Reference Decision #1,*** the Quebec Court of Appeal determined that self-government in the area of CFS is indeed an existing s. 35 Aboriginal right (at para. 364). The Court held that the right to self-government is a generic right, more similar to Aboriginal title than it is to the right to engage in a particular custom, practice, or tradition, (at para. 425). The Quebec Court of Appeal also found that as it relates to the right to self-government in the area of CFS, the right belongs more broadly to all of Canada's Indigenous peoples. The Court further determined that given how essential it is to their cultural survival, the identified right includes the generic right to regulate in this area of law (at paras. 486 - 489).

The Jurisprudential Evolution in the Van der Peet Test

[654] In reviewing the specific legal reference points that guide and assist in determining the existence of an Aboriginal right, I will begin, of necessity, with the governing test set out in ***Van der Peet***. I will then consider the modifications to that test that the Supreme Court of Canada has made in later cases in order to address specific circumstances. In that context, I will also consider the evolving case law dealing with the question of the Aboriginal right of self-government and I will address why I have determined that in the circumstances of this case, the ***Van der Peet*** test is ill fitting and must be made to evolve in order to address the unique but important issues that arise in the present claim.

[655] I will draw on the approach articulated by the Quebec Court of Appeal in ***C-92 Reference Decision #1***, to set out what I think is a proper legal framework for my

analysis in connection with the existence and characterization of the right. In determining that self-government in the area of CFS is an existing s. 35 Aboriginal right, the Quebec Court of Appeal conducted a comprehensive historical review and analysis of the jurisprudence. Other than to highlight some of the key cases considered, I do not intend to replicate that analysis here. For the purpose of these reasons, it will be enough to acknowledge that I accept and adopt the reasoning set out in that case as it relates to the determination of this s. 35 right.

The Van der Peet Test

[656] The test for determining the existence of Aboriginal rights was set out by the Supreme Court of Canada in its 1996 judgment in ***Van der Peet***. In that judgment, the Court held that to determine the existence of an Aboriginal right recognized and affirmed by s. 35, a court must direct itself to "identifying the crucial elements of … pre-existing distinctive societies [of Indigenous peoples]". It must aim to identify the "practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans" (at para. 44). These must have "continuity with the practices, customs and traditions of pre-contact times" (at para. 63). The Aboriginal right being claimed must be "integral to the distinctive culture" of the Indigenous community claiming the right. The burden to show these crucial elements rests with the Indigenous community claiming the right (at para. 132). The Supreme Court further stated that in determining the existence of Aboriginal rights, courts should apply these principles:

- In assessing an Aboriginal rights claim, courts must consider the perspective of the Indigenous community claiming the right (at paras. 49 and 50);

- The court has a key role to play in characterizing the right (at paras. 51 – 54);
- The practice, custom or tradition being claimed as an Aboriginal right must be of central significance to this Indigenous society (at paras. 55 - 59);
- The modern version of the practice, custom or tradition being claimed as an Aboriginal right should have sufficient continuity with the pre-contact practices, customs and traditions of the Indigenous community claiming the right (at paras. 60 - 67);
- Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims (at para. 68);
- Claims to Aboriginal rights must be adjudicated on a specific rather than general basis (the existence, scope and content of the right "depend entirely on the practices, customs and traditions of the particular aboriginal community claiming the right" [emphasis in original] (at para. 69);
- The practice, custom or tradition claimed as an Aboriginal right must have independent significance for the Indigenous culture in which it exists (at para. 70);
- While the practice, custom or tradition claimed as an Aboriginal right must be distinctive (i.e., a distinguishing feature of this Indigenous culture), it need not be "distinct" (i.e., unique to that culture) (at paras. 71 and 72);

- The influence of European culture is not relevant to the inquiry unless it can be shown that the practice, custom or tradition is only integral because of that influence (at para. 73); and
- Courts must consider both the relationship of Indigenous people to the land and their distinctive cultures and societies when determining whether the claimed right is an "existing aboriginal right" not just their relationship to the land (at paras. 74 and 75).

[657] The framework set out by the Supreme Court of Canada in ***Van der Peet*** remains the framework used by Canadian courts in most contexts for determining whether a right claimed by an Indigenous person or community is an existing Aboriginal right under s. 35(1) of the ***Constitution Act***. It has provided a workable framework for Canadian courts when called upon to determine discrete, particularized rights, as in ***Van der Peet***, where the Court was asked to determine whether the right to fish commercially was an Aboriginal right distinct and integral to the Sto:lo First Nation (of which Ms. Van der Peet was a member). Despite ***Van der Peet*** being a workable legal framework in many contexts, it can also be ill fitting. Not surprisingly, the ***Van der Peet*** framework has also been the subject of analysis, critique, and changes, some of which I will detail further below.

Pamajewon: Self-government Claims and the Application of Van der Peet

[658] The day after releasing its decision in ***Van der Peet***, the Supreme Court of Canada released ***Pamajewon***, in which the Court seems to have affirmed the applicability of the ***Van der Peet*** framework to self-government claims.

[659] In ***Pamajewon***, the appellants had been convicted under specific provisions of the ***Criminal Code***, R.S.C., 1985, c. C-46, for running high stakes lottery and bingo operations on their respective First Nations reserves. The appellants claimed these provisions had no force or effect as they related to them, because the respective First Nations of which they were members had a broad Aboriginal right of self-government, and had passed Band Council laws allowing them to conduct their gambling operations.

[660] Assuming without deciding that self-government was an Aboriginal right recognized and affirmed by s. 35(1), the Supreme Court of Canada stated:

> 24 … such claims must be considered in light of the purposes underlying that provision and must, therefore, be considered against the test derived from consideration of those purposes. This is the test laid out in *Van der Peet*, *supra*. In so far as they can be made under s. 35(1), claims to self-government are no different from other claims to the enjoyment of aboriginal rights and must, as such, be measured against the same standard.
>
> [emphasis added]

[661] The Supreme Court concluded that the right as characterized by the appellant was too broad. Lamer C.J., writing for the majority, stated:

> 27 … Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right. The factors laid out in *Van der Peet*, and applied, *supra*, allow the Court to consider the appellants' claim at the appropriate level of specificity; the characterization put forward by the appellants would not allow the Court to do so.

[662] After reviewing the evidence, Lamer C.J. recharacterized the right as a right to participate in and regulate gambling activities on reserve. In doing so, the Supreme Court relied on evidence, evidence which seems to have been connected to the significance of gambling to the Ojibwa people (both First Nations were Ojibwa) generally (at para. 26).

The Supreme Court determined that while the Ojibwa people had gambled pre-contact, they had not engaged in high-stakes or commercial gambling, and the right as he characterized it, was not an existing s. 35 Aboriginal right.

Delgamuukw: Modification of the Van der Peet Test for Aboriginal Title Claims

[663] In 1997 the Supreme Court of Canada issued its decision in ***Delgamuukw***, a case involving a claim to Aboriginal title being advanced by the Gitksan or Wet'suwet'en First Nations. In its decision, the Court found certain parts of the ***Van der Peet*** framework to be incompatible with a determination regarding this Aboriginal rights claim.

[664] In ***Delgamuukw*** the Supreme Court held that Aboriginal title was a *sui generis* interest, neither a fee simple interest nor merely a bundle of other Aboriginal rights. Nor, the Supreme Court determined, was it a right to use and occupy the land solely for the purpose of engaging in modern versions of pre-contact practices, as a strict application of the ***Van der Peet*** test would seem to require. Lamer C.J. stated:

> 111 … Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right *per se*; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title. This inherent limit, to be explained more fully below, flows from the definition of aboriginal title as a *sui generis* interest in land, and is one way in which aboriginal title is distinct from a fee simple.

[665] In so concluding, Lamer C.J. acknowledged the need for an adaptation of the ***Van der Peet*** framework:

> 140 ... To date, the Court has defined aboriginal rights in terms of activities. As I said in *Van der Peet* (at para. 46):

> [I]n order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right….
>
> Aboriginal title, however, is a right to the land itself. Subject to the limits I have laid down above, that land may be used for a variety of activities, none of which need be individually protected as aboriginal rights under s. 35(1). Those activities are parasitic on the underlying title.
>
> 141 This difference between aboriginal rights to engage in particular activities and aboriginal title requires that the test I laid down in *Van der Peet* be adapted accordingly.…
>
> 142 …the tests for the identification of aboriginal rights to engage in particular activities and for the identification of aboriginal title share broad similarities. The major distinctions are first, under the test for aboriginal title, the requirement that the land be integral to the distinctive culture of the claimants is subsumed by the requirement of occupancy, and second, whereas the time for the identification of aboriginal rights is the time of first contact, the time for the identification of aboriginal title is the time at which the Crown asserted sovereignty over the land.
>
> [emphasis in original]

[666] The Supreme Court in ***Delgamuukw*** was also asked to determine whether the Gitksan and Wet'suwet'en peoples had a right to self-government in relation to the land over which they had claimed title. Given errors of fact by the trial judge and the resulting need for a new trial, the Court held that it was impossible for it to determine whether a self-government claim had been made out (at para. 170).

Powley: Modification of the Van der Peet Test for Métis Rights Claim

[667] In 2003, the Supreme Court of Canada released its decision in ***Powley***. The Court was asked to determine whether two members of a Métis community had the right to hunt moose for food. In evaluating the appellants' Aboriginal rights claim, the Court determined that the ***Van der Peet*** test would require modification so as to appropriately outline criteria recognizing the distinct existence of the Métis people. The Court

determined that it would not be appropriate or possible to look at pre-contact practices for guidance on whether a Métis community had an Aboriginal right to engage in a particular custom, practice, or tradition, since Métis communities had developed and evolved at the time of European contact. The Supreme Court adapted the ***Van der Peet*** test to "recognize and affirm the rights of the Métis held by virtue of their direct relationship to this country's original inhabitants and by virtue of the continuity between their customs and traditions and those of their Métis predecessors" (at para. 29.). Instead of looking for continuity in practice from the pre-contact period to the present, the Supreme Court held that the starting point in determining the existence of a Metis Aboriginal right would be an examination of "those customs and traditions that were historically important features of Métis communities prior to the time of effective European control" (at para. 18).

Self-government as a s. 35 Right and the "Adaptation" of Van der Peet

[668] Since ***Pamajewon***, I note several cases in which courts have had to consider whether self-government is an Aboriginal right recognized and affirmed by s. 35 of the ***Constitution Act***, and whether ***Van der Peet*** remains an appropriate framework for identifying and adjudicating that right.

[669] In 2000, in ***Campbell***, the British Columbia Supreme Court recognized the right to self-government as an existing s. 35 right, one to which Indigenous communities and the Crown can give meaning and content through treaty. In doing so, the British Columbia Supreme Court rejected a constitutional challenge to the self-government provisions of the Nisga'a Final Agreement between the Nisga'a First Nation, Canada, and British

Columbia. In reaching its conclusion, the Court determined that: (a) the Aboriginal right to self-government, while reduced by the assertion of Crown sovereignty, was not extinguished by it; (b) the ***Constitution Act, 1867*** did not distribute all legislative power between the federal and provincial government, such that the Nisga'a had no remaining Aboriginal right to self government; and (c) s. 35 of the ***Constitution Act, 1982*** operated to constitutionally guarantee the Nisga'a First Nation's remaining Aboriginal right to self-government (at paras. 178 – 181). The Court said as follows:

> [181] Section 35 of *the Constitution Act, 1982*, then, constitutionally guarantees, among other things, the limited form of self-government which remained with the Nisga'a after the assertion of sovereignty. The Nisga'a Final Agreement and the settlement legislation give that limited right definition and content. Any decision or action which results from the exercise of this now-entrenched treaty right is subject to being infringed upon by Parliament and the legislative assembly. This is because the Supreme Court of Canada has determined that both aboriginal and treaty rights guaranteed by s. 35 may be impaired if such interference can be justified and is consistent with the honour of the Crown.

Importantly, the British Columbia Supreme Court did not apply the ***Van der Peet*** framework to determine the scope and content of the Nisga'a right to self-government. Instead, the Court determined it could do so on the basis of the treaty itself (at paras. 171 and 172).

[670] More recently, in ***C-92 Reference Decision #1***, the Quebec Court of Appeal considered the applicability of the ***Van der Peet*** framework in the context of determining the existence of an Aboriginal right to self-government. Ultimately, the Quebec Court of Appeal concluded that a right to self-government in the area of CFS was a s. 35 right belonging to all of Canada's Indigenous peoples, as Parliament had recognized it through the 2019 ***Act***. In so doing, the Quebec Court of Appeal rejected Quebec's argument that, if any such right existed, it would need to be established in court on a case-by-case basis,

with each Indigenous community in Canada substantiating its claim individually with the evidentiary specificity required by ***Van der Peet***.

[671] In reaching the conclusion it did, the Quebec Court of Appeal acknowledged the statement in ***Pamajewon*** "that the right to self-government, if it does exist as an Aboriginal right, must satisfy the *Van der Peet* test in order to be recognized as a s. 35 Aboriginal right" (see ***C-92 Reference Decision #1***, at para. 406). However, the Quebec Court of Appeal also relied on the Supreme Court of Canada's determinations in both ***Delgamuukw*** and ***Powley*** that the ***Van der Peet*** test may require adaptation, depending on the right being claimed and the party claiming it. In doing so, it concluded (at para. 422) that Lamer C.J.'s remarks in ***Pamajewon*** should be interpreted in light of his later remarks in ***Delgamuukw*** (where the Chief Justice had acknowledged "[t]his difference between aboriginal rights to engage in particular activities and aboriginal title requires that the test I laid down in *Van der Peet* be adapted accordingly" (at para. 419, citing ***Delgamuukw***, at para. 141)). The Quebec Court of Appeal summarized their view as follows:

> [423] Indeed, although in *Van der Peet* the Supreme Court stated that "[a]boriginal rights are not general and universal" and that "their scope and content must be determined on a case-by-case basis", it significantly nuanced this statement in *Delgamuukw*, concluding that Aboriginal title is a right identical in scope for all holders of that title.
>
> [citations omitted]

[672] Essentially, the Quebec Court of Appeal determined that an Aboriginal right to self-government was a generic right akin to Aboriginal title, rather than a specific right that might vary from community to community (at paras. 422 - 425). In reaching this determination, it also relied, in part, on the work of Professor Brian Slattery (see

Brian Slattery, "A Taxonomy of Aboriginal Rights", in Hamar Foster, Heather Raven and Jeremy Webber (eds.), *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*, Vancouver, University of British Columbia Press, 2007, 111, pp. 113-114 and 121). The Quebec Court of Appeal quotes Professor Slattery as follows:

> [422] … The crucial point to note is that [in *Delgamuukw*] the Supreme Court treats aboriginal title as a *uniform right*, whose basic dimensions do not vary from group to group according to their traditional ways of life. All groups holding Aboriginal title have fundamentally the same kind of right, subject only to minor variations stemming from the inherent limit. In effect, the Court recognizes that Aboriginal title is not a *specific right* of a kind envisaged in *Van der Peet* or even a bundle of specific rights. Aboriginal title is what we may call a *generic right* – a right of a standardized character that is basically in all Aboriginal groups where it occurs. The fundamental dimensions of the right are determined by the common law doctrine of Aboriginal rights rather than by the unique circumstances of each group. …
>
> In light of *Delgamuukw*, it seems more sensible to treat the right of self-government as a generic Aboriginal right, on the model of Aboriginal title, rather than as a bundle of specific rights. In this view, the right of self-government is governed by uniform principles laid down by Canadian common law. The basic scope of the right does not vary from group to group. However, its application to a particular group differs depending on the circumstances.
>
> [emphasis in original]

[673] Despite finding that Aboriginal self-government was a generic right akin to Aboriginal title, the Quebec Court of Appeal was not prepared to recognize (in the case before it) a generic right to self-government in all areas. The Court properly cautioned itself that doing so might be inappropriate. While of the view that a right to self-government could be recognized in a particular context without strict adherence to the ***Van der Peet*** criteria, the Court also recognized that in certain other areas (military matters for example) the assertion of Crown sovereignty may have rendered the right to self-government inoperable (at para. 469).

[674] With the above proviso, the Quebec Court of Appeal was nonetheless prepared to find that a generic right to self-government in the area of CFS was indeed recognized and affirmed by s. 35 of the ***Constitution Act*** (at paras. 468 - 485). In doing so, the Quebec Court of Appeal focussed on the importance of Indigenous jurisdiction over child welfare as an essential aspect of the cultural survival of Indigenous peoples:

> [474] … reconciliation requires, among other things, "ensuring the continued existence of these particular aboriginal societies" and "provid[ing] cultural security and continuity for the particular aboriginal society". The criteria established by the Supreme Court for recognizing an Aboriginal right are strongly influenced by cultural considerations related to Aboriginal identity.
>
> [475] In *Van der Peet*, Lamer, C.J. noted that Aboriginal rights "arise from the fact that aboriginal people are aboriginal," and Binnie, J. in *Little Salmon/Carmacks First Nation*, pointed out that s. 35 represents a commitment by Canadians "to protect and preserve constitutional space for Aboriginal peoples to be Aboriginal." We would add that these rights are also rooted in the fact that Aboriginal peoples are peoples and that the commitment set out in s. 35 is also intended to protect them so they can express themselves and flourish as peoples.
>
> [476] In order to maintain their distinctiveness as peoples and ensure both their cultural security and continuity, Aboriginal peoples are in the best position to decide what measures are required to protect their children, ensure their well-being, and pass on their distinctive cultural values. The ability to protect Aboriginal children and ensure their connection to the distinctive culture of their Aboriginal community is therefore an essential aspect of the survival of Aboriginal peoples as distinct peoples.
>
> [477] It is aboriginal *culture*, *values* and *identity* that form the basis of the distinctiveness of Aboriginal peoples. This culture, these values and this identity can hardly be communicated from one generation to the next if the main transmission link – the family environment – is severed. While caring for children within families is a characteristic of almost all human groups, the evidence shows that in the case of Aboriginal peoples, they were subjected to an organized and sustained attempt at cultural expropriation by weaning children from their families. In the not too distant past, governments literally ripped Aboriginal children from their families in order to cut them off from their culture in a misguided attempt to assimilate them, with all the individual and collective trauma that followed. In contemporary times, government providers of services to Aboriginal children and families, however well-intentioned they may have been, effectively perpetuated, often unconsciously, an ideology of erasing and devaluing Aboriginal culture,

> values, and identity. It is within this factual and historical context that the issue of the right to self-government arises in this reference.
>
> [emphasis in original; citations omitted]

[675] Additionally, as part of its analysis, the Quebec Court of Appeal also looked to UNDRIP to support its finding that s. 35 included a right to self-government in the area of CFS. While it recognized that UNDRIP does not impose binding international law obligations on Canada, the Quebec Court of Appeal noted that both the preamble to the federal ***UNDRIP Act*** (enacted by Parliament in 2021), as well as s. 4(a) of that ***Act***, recognize UNDRIP as "a source for the interpretation of Canadian law" (at paras. 506 and 507). To that end, the Quebec Court of Appeal acknowledged that Article 3 of UNDRIP expressly recognizes that Indigenous people have the right to self-determination and that in exercising this right, they have the "right to autonomy or self-government in matters relating to their internal and local affairs" (UNDRIP, at Art. 4). The Court also noted that Indigenous peoples "have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State" (UNDRIP, at Art. 5).

[676] The Quebec Court of Appeal relied on the Supreme Court of Canada's decision in ***R v. Hape***, 2007 SCC 26, in which the Supreme Court held that Canadian legislation and the ***Charter***, are presumed to conform with international law and Canada's international law obligations absent something in the legislation that says otherwise. The Quebec Court of Appeal determined that there was "no reason for not extending this presumption to s. 35 of the *Constitution Act, 1982*, given that it pertains primarily to the protection of

the fundamental rights of Aboriginal peoples" (see ***C-92 Reference Decision #1***, at para. 509). As the Quebec Court of Appeal explained it:

> [513] Construing s. 35 of the *Constitution Act, 1982* as including, within the existing Aboriginal rights recognized and affirmed by that section, the right of Aboriginal peoples to regulate child and family services seems entirely consistent with the principles set out in the *UN Declaration*. This bolsters and confirms the correctness of such an interpretation.

[677] In reaching the decision that it did in ***C-92 Reference Decision #1***, the Quebec Court of Appeal appears to advance a framework for determining whether s. 35 recognizes and affirms an Aboriginal right to self-government in a particular area without subjecting that claimed right to a ***Van der Peet*** analysis. Instead, the Quebec Court of Appeal appears to endorse a two-stage analysis. First, there is an examination as to whether the claimed right to self-government in a particular area goes to the cultural security and continuity - the cultural survival - of the Indigenous peoples claiming the right. Second, there is an examination as to whether the right is incompatible with the assertion of Crown sovereignty or has been extinguished by federal legislation before 1982. Where, at the first stage, the claimant is able to show that the nature or character of the particular self-government right is tied to the cultural continuity and survival of Aboriginal peoples as distinct peoples generally, it will not be necessary to assess whether a particular Indigenous community's pre-contact "regulation" of a particular area or activity continues to the present day. The Quebec Court of Appeal also appears to confirm that in conducting this two-stage analysis, courts should also be appropriately attentive to UNDRIP as a source for interpreting the claimed right.

[678] The challenges inherent in applying the ***Van der Peet*** framework in the context of certain Aboriginal rights were also recently considered by the Quebec Superior Court

in ***R. c. Montour***, 2023 QCCS 4154 (currently under appeal). While the Court, in that case, characterized the Aboriginal right at issue (the right to trade in tobacco) not as a right of self-government, but rather as a right to pursue economic development, the Court consciously chose to depart from the test in ***Van der Peet*** in determining that the identified right existed. It did so after having considered the ways in which it said "the Supreme Court has developed the current contours of vertical *stare decisis* in three cases in which a lower court departed from a Supreme Court precedent: *Bedford* (2013), *Carter* (2015) and *Comeau* (2018)" (at para. 1145). Relying on the Supreme Court of Canada's decisions in those cases, the Quebec Superior Court concluded that Canada's adoption of UNDRIP in 2007, followed by Parliament's decision in 2021 to enact the ***UNDRIP Act***, suggest not only a new legal issue or development that could have an impact on the s. 35 framework as established by the jurisprudence (at para. 1204), but also, that these developments are "expressions of more profound changes" (at para. 1205). The judgment in ***Montour*** suggests that "[t]he entire societal landscape in which *Van der Peet* was decided has changed" (at para. 1205). It was for these reasons and in this context that the Quebec Superior Court concluded it could depart from ***Van der Peet***.

[679] In taking the approach it did, the Quebec Superior Court also highlighted concerns that had been raised about certain parts of the ***Van der Peet*** test, both by the appellants and by many scholars and academics. Those concerns include:

- That the test perpetuates outdated ideas about how cultures work (i.e., that the practices, cultures and traditions that comprise a culture are all independent from one another and that it is possible to distinguish between

practices that are integral and those that are incidental to that culture). Such an approach, say the critics, is an approach that does not align with how modern scholarship conceptualizes culture, where these features are viewed as interdependent (at paras. 1246 – 1248);

- That the test freezes Aboriginal rights in a court-constructed past. Some scholars and critics suggest that the insistence on drawing correlations between pre-contact and modern practices (before an Aboriginal right can be recognized and affirmed) prevents Aboriginal rights from evolving to the degree that other constitutional rights evolve, just as it further pre-supposes that an Aboriginal culture cannot adopt new elements and remain distinctly Aboriginal (at paras. 1256 and 1263); and,
- That the test focuses too heavily on cultural practices, thus failing to protect economic and political practices of Indigenous peoples (at para. 1265).

[680] In reviewing the various circumstances in which self-government claims and its corollary or connected rights are examined in the context of s. 35 (and the apparent evolution of the ***Van der Peet*** test), I must finally, but importantly, acknowledge the Supreme Court of Canada's decision in the ***C-92 Reference Decision #2***. In that judgment, the Supreme Court heard the appeal of the Quebec Court of Appeal's decision in ***C-92 Reference Decision #1***. The Supreme Court determined that enacting the 2019 ***Act*** in question was within Parliament's jurisdiction over "Indians, and Lands reserved for the Indians" under s. 91(24) of the ***Constitution Act, 1867*** (at paras. 2 and 127). In doing so, it held that the legislation expressed Parliament's understanding

that the right to self-government, including jurisdiction in relation to CFS, was an existing s. 35 Aboriginal right.

[681] Importantly, the Supreme Court did not engage with the Quebec Court of Appeal's s. 35 analysis, which had found that s. 35 did, indeed, recognize and affirm an Aboriginal right to self-government in the area of CFS. The Supreme Court concluded it was unnecessary to do so in order to provide the requested opinion on the constitutionality of the 2019 ***Act***. In so doing, the Supreme Court acknowledged that it "has never had to consider a matter as fundamental to the culture and identity of Indigenous peoples as the field of child and family services" (at para. 112). While not disturbing the lower Court's findings, the Supreme Court stated, "[u]ltimately, it will be for the courts to determine, on the basis of on the evidence adduced, whether s. 18(1) of the Act falls within the confines of s. 35 of the *Constitution Act, 1982*" (at para. 114). At the same time, the Supreme Court also acknowledged that "Indigenous culture will certainly be a major factor" in that analysis (at para. 114). The Supreme Court left it open for all parties, including the provinces, to challenge Parliament's understanding of the scope of the rights recognized and affirmed by s. 35, stating, "[i]ndeed, it is quite possible that a province's reading of s. 35 will differ from the one indicated in s. 18(1) of the Act" (at para. 60). The Supreme Court also confirmed that UNDRIP "has been incorporated into the country's positive law" by virtue of the ***UNDRIP Act*** (at paras. 4, 15 and 85).

[682] Based on the foregoing, I am of the view that the ***Van der Peet*** framework, and the evidentiary burden it imposes, is ill fitting when assessing an Aboriginal rights claim to self-government. Like the Quebec Court of Appeal, I take the view that the Supreme

Court of Canada's 1996 analysis in ***Pamajewon*** needs to be examined and interpreted given its later rulings in ***Delgamuukw*** and ***Powley***. I similarly share the Quebec Court of Appeal's view that an Aboriginal right to self-government is a generic right akin to Aboriginal title, rather than a specific right that might vary from community to community. And, I am also persuaded that in considering whether that generic right to self-government in a particular area is recognized and affirmed by s. 35 of the ***Constitution Act***, s. 35 should be interpreted consistent with international law principles, including UNDRIP, unless there is an express legislative intention to the contrary (see also ***Dickson v. Vuntut Gwitchin First Nation***, 2024 SCC 10, where the Supreme Court of Canada recently relied on UNDRIP in interpreting s. 25 of the ***Charter***). In the result, I find that the circumstances of this case, taken together with legislative developments both federally and in Manitoba, represent significant developments in the law raising new legal issues that justify a departure from the strict application of the ***Van der Peet*** test.

[683] Were I to insist that the plaintiffs provide the evidence that Canada argues must be adduced consistent with ***Van der Peet***, I would engage this Court in an exercise that is not only ill fitting, but it would also be inefficient and inconsistent with the goal of reconciliation underlying s. 35 of the ***Constitution Act***. To do so, as Canada suggests I must, would require the plaintiffs to adduce evidence to show the existence of a right that Parliament has already affirmed through legislation, and whose existence Canada is prevented from challenging given the affirming legislation Canada has already enacted. It would also require the plaintiffs to adduce evidence of a right whose existence Manitoba

has similarly affirmed through legislation, and whose existence Manitoba has conceded in the context of these proceedings. To repeat, this would not only be a highly ineffective use of the Court's time but it would also run counter to the goal of reconciliation underpinning our constitutional framework. The Supreme Court of Canada itself observed that it was reasonable to think that the 2019 ***Act*** would have the "practical effect" of avoiding the "waste of time and resources" associated with litigation or negotiation of at least some of the issues currently before me in the present case (see ***C-91 Reference Decision #2***, at paras. 76 and 77).

[684] Therefore, given Parliament's and Manitoba's legislative affirmations and the Quebec Court of Appeal's ***C-92 Reference Decision #1***, to the extent it is even necessary in this case to determine whether the plaintiffs have established that they have a right to self-government in the area of CFS, for the purposes of my analysis, I adopt the approach and reasoning set out by the Quebec Court of Appeal in ***C-92 Reference Decision #1*** as discussed above.

Is there an Existing s. 35 Right in the Present Case and if so, how Should it be Characterized?

[685] Before moving to a determination as to whether the plaintiffs have established the existence of an Aboriginal right, the Court must first characterize the right in light of the pleadings and the evidence (see ***Desautel***, at para. 51). In characterizing the right, courts need to "take into account the perspective of the aboriginal people claiming the right … however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure" (see ***Van der Peet***, at para. 49). In so doing, courts should consider "the nature of the action which the applicant is claiming was done

pursuant to an aboriginal right, the nature of the government regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right" (see ***Van der Peet***, at para. 53).

[686] The plaintiffs have characterized their Aboriginal right as the right to raise their children in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions. In characterizing any existing right under s. 35, I will remain mindful of that perspective. I am equally mindful of the need to frame that right in terms cognizable to the Canadian legal and constitutional structure.

[687] Upon my review of the pleadings and the evidence, I find that the right being claimed by the plaintiffs is more appropriately characterized as the right to self-government in the area of CFS. I further find that the plaintiffs' more specific characterization more properly describes the scope of that right or that which could be considered incidental to the right of self-government. As noted by the Supreme Court of Canada in ***Côté***, "a substantive aboriginal right will normally include the incidental right to teach such a practice, custom and tradition to a younger generation" (at para. 56), and as further noted by that Court in ***Mitchell***, "[a]n aboriginal right, once established, generally encompasses other rights necessary to its meaningful exercise" (at para. 22).

[688] In reaching this conclusion, I note that the pleadings and the majority of the evidence the plaintiffs have marshalled regarding the defendants' conduct (from 1992 to present) relate to the defendants' collective and individual actions in connection with the funding, provision and regulation of CFS for Indigenous children, families and communities on and off reserve in Manitoba (I will be discussing that evidence in greater

detail later in these reasons). I also underscore my observations from earlier in this decision when I discussed my determinations whether to certify the plaintiffs' s. 35 claim. There I found, based on the pleadings, that the plaintiffs had grounded their s. 35 claim on the basis that all First Nations have a distinctive, communal approach to childcare, guided by unique laws and customs, and that, despite the defendants' imposition of a child welfare system, First Nations never fundamentally surrendered their right to care for their own children in their own way.

[689] The affidavits of Chiefs Cook and Monias further lend themselves to my conclusion that, properly characterized, what the plaintiffs are claiming is a right to self-government in the area of CFS.

[690] Chief Cook explains (see Cook Affidavit):

> 54. We need to resume taking care of our own children. Bill C-92, *An Act Respecting First Nations, Inuit, and Métis Children, Youth, and Families* is only a starting point. It is not enough to address and transform the issues that I have described above. It is a Canadian law that continues to fail to restore jurisdiction to First Nations over our children and families.
>
> …
>
> 59 … The child welfare system needs to be based on our own ways, teachings, and values as First Nations – otherwise, it will continue to fail us. We have a century of evidence which confirms that non-First Nations ways of child welfare do not work for us. The future of child welfare for First Nations in Manitoba must be premised on our own values, and promote healing at its core. This will transform the CFS system from a place of intergenerational harm to a place of love and healing. …

[691] Chief Monias explains (see Monias Affidavit):

> 110. … The century of state officials determining the outcomes of our children, families, communities, and nations must end. The inherit [*sic*] knowledge of First Nations must be respected and honoured, where First Nations determine the best interests of their children. This must be informed by our traditional ways, including how our ancestors nurtured children and supported parents who needed help with fulfilling their roles.

[692] As I asked somewhat rhetorically earlier in these reasons, how else but through self-government in the area of CFS, could the plaintiffs raise their children in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions? Indeed, Chief Cook speaks of the need for First Nations to take care of their own children, and that a precondition of being able to do so is First Nations having the necessary jurisdiction over children and families. Chief Monias similarly decries centuries of state officials exercising control over children and families, and the need for First Nations to be able to play a greater role generally and in determining for themselves the best interests of their children. In my view, these aspirations are only achievable through self-government in the area of CFS; that is, it is achievable if First Nations are able to assume some of the governmental functions currently performed by the defendants in this regard. Therefore, I say again, that my review of the pleadings, the evidence, and the need to frame the plaintiffs' claimed s. 35 right in terms cognizable to the Canadian legal and constitutional structure, leads me to the inexorable conclusion that properly understood, the right being claimed is best characterized as a right to self-government in the area of CFS.

[693] As has been noted already, both Parliament and Manitoba have already recognized this s. 35 right to self-government in the area of CFS. With the 2019 ***Act***, Parliament explicitly recognized this right as a s. 35 right and made that ***Act*** binding on both the federal and provincial Crowns (see ***C-92 Reference Decision #2***, at para. 58). An important consequence of having done so is that Canada is now precluded from denying

that such a right exists. As the Supreme Court of Canada explained (see ***C-92 Reference Decision #2***):

> [62] … one effect of s. 7 of the Act is that the federal government can now no longer assert, in any proceedings or discussions, that there is no Indigenous right of self-government in relation to child and family services. Although few legislative frameworks have thus far circumscribed the Crown's actions with respect to Indigenous peoples (J. Promislow and N. Metallic, "Realizing Aboriginal Administrative Law", in C. M. Flood and P. Daly, eds., *Administrative Law in Context* (4th ed. 2022), 129, at p. 141), Parliament has now established such a constraint through this statutory affirmation that is binding on His Majesty.
>
> [emphasis added]

[694] At the same time, the Supreme Court also said it was open to provinces to challenge Parliament's understanding of the scope of s. 35 (see ***C-92 Reference Decision #2***, at para. 60). However, importantly, Manitoba has not challenged the constitutionality of the 2019 ***Act***. To the contrary, Manitoba amended its own ***CFSA*** in 2024 to acknowledge the "inherent right of self-government of Indigenous Peoples, including jurisdiction for child and family services" (at preamble).

[695] Despite these legislative recognitions, I acknowledge that the plaintiffs did not characterize their right in this way. However, at the time the plaintiffs filed their claim (in 2022), the jurisprudence was still in flux and far from settled. The Quebec Court of Appeal's ***C-92 Reference Decision #1*** had been released only months earlier with an appeal pending before the Supreme Court of Canada. That Court's ***C-92 Reference Decision #2*** had not yet been rendered. It remained unclear whether other parties, including the provinces, would try to challenge Canada's legislated affirmation of the right in question, rather than recognizing and affirming the right themselves (which Manitoba ultimately chose to do in 2024, two years after the plaintiffs first filed their claim). These

factors may have informed the plaintiffs' characterization of the right in the way that they did.

[696] Whatever the reasons for the plaintiffs' characterization, I am convinced that the submissions made by the plaintiffs in their Reply Brief, confirm the Court's understanding that the Aboriginal right that the plaintiffs are claiming is appropriately characterized as a right to self-government in the area of CFS. Responding to Canada's argument that the evidence that the plaintiffs have adduced does not meet the strict requirements of the ***Van der Peet*** test, the plaintiffs state (see Reply Brief):

> 149. It bears mentioning that Canada's position represents a significant reversal. On the Bill C-92 reference to the Supreme Court of Canada, Canada sought to justify its jurisdictional reach by arguing that "s. 35(1) protects Indigenous peoples' inherent right of self-government, 'in relation to child and family services.'" Now, faced with the consequences of that argument in the case at bar, Canada denies the existence of the very right that it once proclaimed.
>
> [emphasis added; citations omitted]

[697] In other words, the plaintiffs appear to understand Canada's position in the context of this proceeding as denying the very right that Canada recognized in enacting the 2019 ***Act***. Given the plaintiffs' obvious and implied understanding of the incidental link and corollary relationship between Bill C-92's recognition of the inherent right of self-government (in relation to CFS) and the imperative that the plaintiffs describe in their own more specific characterization of the s. 35 right being claimed, there is coherence and no inconsistency in the way the Court is recharacterizing the right (and the scope of the right) in question. Therefore, I am satisfied, upon my review of the pleadings and the evidence, that the s. 35 right being claimed by the plaintiffs is best characterized as the right to self-government in the area of CFS, which includes the right to raise their children

in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions.

Based on the Recharacterization of the Purported Aboriginal Right, has the Existence of the Aboriginal Right been Established?

[698] Having determined that the s. 35 right being claimed by the plaintiffs is best characterized as a right to self-government in the area of CFS, I shall now consider whether the plaintiffs have established the existence of that right. In the circumstances of this case, it is reasonable to ask whether this step is even necessary, given, as I have already noted, Parliament's and Manitoba's legislative affirmations, and the Quebec Court of Appeal's conclusion (undisturbed in the Supreme Court of Canada appeal) in the ***C-92 Reference Decision #1***, that a right to self-government in the area of CFS is recognized and affirmed by s. 35 of the ***Constitution Act***. In the event that uncertainty remains, notwithstanding those affirmations and that jurisprudence, I nevertheless find that in the circumstances of this case, the plaintiffs have established the existence of this right. I make that finding using the Quebec Court of Appeal's framework and reasoning in ***C-92 Reference Decision #1***. As mentioned, that framework and reasoning (involving a two-stage or two-aspect approach) recognized and affirmed the Aboriginal right in the area it did without subjecting the claimed right to the more rigid and ill fitting ***Van der Peet*** test.

[699] In making the determination I have, I acknowledge that the plaintiffs' evidence may fall short of what is required under ***Van der Peet***. The plaintiffs have not provided the Court with evidence of pre-contact practices, customs and traditions specific and unique to each of their First Nations that are of central significance to their particular First

Nations today. Instead, the evidence of Elder Paynter, Dr. Simpson, and the three Chiefs, supports a finding that all First Nations in Manitoba have had, since time immemorial, a distinctive, communal, land-based approach to childcare, guided by unique laws and customs, and that, despite the defendants' imposition of a child welfare system, First Nations never fundamentally surrendered their right to care for their own children in their own way. In other words, there is a right of all Manitoba First Nations to self-government in the area of CFS.

[700] On my analysis, the evidence further supports a finding that this right was and remains integral to the wellbeing of Manitoba First Nations and their continued existence as First Nations. This evidence includes:

- Elder Paynter's evidence that:
    - Historically, First Nations have had their own governance systems, and cared for their own children according to their own laws, and, in so doing, imparted their own teachings about language, cultural practices, and spiritual traditions;
    - The wellbeing of First Nations children is integral to the wellbeing of First Nations families, cultures, and nations, as each child stands at the center of a circle that ripples outward from family to community, nation, and all of creation;
    - First Nations laws teach the seven stages of life, which are rites of passage attained through ceremonies and teachings that take a person from birth to their elder life;

- The ceremonies associated with the seven stages of life are designed to reinforce and perpetuate miinigowiziwin (the source of the sacred gifts given by the Creator to First Nations) and mino-bimaadiziwin (the good life), which are organizing principles in the lives of all First Nations and their peoples;
- Some of the rites of passage associated with these seven stages of life in different First Nations communities include the naming ceremony, the walking out ceremony, berry fasts and vision quests;
- Mino-bimaadiziwin includes the continuation of culture, language, and beliefs, as well as the ability to practice land-based ceremonies and to pass them on to future generations; and
- Negative impacts arise from denying First Nations children the ability to take part in the rituals and practices associated with the seven stages of life, access to kinship relationship and teaching. These impacts are experienced not only by First Nations children and families, but by First Nations in a way that threatens their cultural survival.

- Dr. Simpson's evidence that:
  - While Anishinaabe, Cree, Oji-Cree, Dene and Dakota cultures are distinct and unique, their relationship to the land and land-based practices are similar in terms of their approach to education, culture, and identity. Anishinaabe, Cree, Oji-Cree, Dene and Dakota peoples

share similar worldviews, laws, ethics and philosophies and these principles and practices are congruent with other Indigenous cultural groups and First Nations in Canada;

- The land informs and grounds First Nations governance and political systems, as well as traditional economies, law, education, and healthcare. These systems are generated, maintained, and learned by being on the land with land-based practitioners and Elders and through active participation in land-based practices in childhood and as an adult;
- A connection to the land and land-based practices is of central importance to First Nations cultural practices, language and spiritual traditions because it is through those land-based practices that such culture, language and spirituality are transmitted; that it is through these land-based practices, transmitting culture, language and spirituality from one generation to the next, that First Nations secure their futures;
- The idea of mino-bimaadiziwin (the good life) is an organizing philosophy that helps First Nations people to weave their lives onto that of the natural world;
- Certain Indigenous practices and traditions of, and beliefs commonly held by, First Nations peoples have existed since time immemorial. It is of the utmost importance to maintain the connection between

children and their First Nations in preserving these practices, traditions and beliefs;

- Land-based practices include: ceremony and storytelling; harvesting practices, like hunting, fishing, trapping and gathering medicines and plants; gardening; travelling the land and waterways; and, creative practices, like hide tanning, sewing, drumming, singing, dancing, making tools and building canoes and shelters. These land-based practices have existed since before colonization and have been passed from one generation to the next through their continued practice through language, storytelling, and ceremonies on the land;
- First Nations have their own practices and traditions associated with raising of children, from birth through to adulthood, which involve the entire community and are intimately connected to the land;
- Removing children from First Nations communities causes collective harm to the communities themselves, by weakening First Nations languages and knowledge systems, ceremonial practices and traditional economic systems, as First Nations communities have no one to whom they can pass on their teachings (including their traditional forms of governance and legal systems); and
- "Spiritually and culturally, when a link in the chain is broken [by removing a child from their family and First Nations community], nindaanikoobijiganag (the community) loses a great grandchild and

a great grandparent, and the flow of a particular branch of knowledge is broken for seven generations with the removal of a single child" (see March 13, 2024 "Expert Opinion The Importance of Land" Report of Dr. Simpson ("Simpson Expert Report"), at p. 58).

- The evidence of Chief Kent, who explains (see Kent Affidavit) that:

> 39. Black River is a special place. We are stewards of the land. Family connections are strong here: aunties, uncles, brothers and sisters spend time together and teach our values.
>
> 40. When children are born and raised in Black River, they call this place home for the rest of their lives—no matter where they go. They have a deep connection to the land, the water, the lake, the forest. They identify with our ancestors who have been here for generations. They feel connected to the rivers that our ancestors used for transportation. They know where they come from.
>
> 41. When children are apprehended and removed from Black River, they lose that connection and identity…

- The affidavit evidence of Chiefs Cook and Monias, as discussed above, essentially characterizes the Aboriginal right they have claimed as one of self-determination in relation to child welfare (i.e., the need for the child welfare system in Manitoba, both on and off reserve, to be grounded in First Nations teaching and practices).

[701] Read together, I find that the evidence of Elder Paynter, Dr. Simpson, and the three Chiefs, satisfies the first stage or aspect of the Quebec Court of Appeal's framework for determining whether there is a right to self-government in a particular area. The evidence supports a finding that the plaintiffs' claimed right, as I have characterized it, to self-government in the area of CFS, is "intimately tied—if not essential—to the cultural

continuity and survival of Aboriginal peoples as distinct peoples, whether as a whole or taken individually" (see ***C-92 Reference Decision #1***, at para. 489).

[702] The second aspect of the Quebec Court of Appeal's framework asks whether the rights question, (in this case, to self-government in the area of CFS) is incompatible with the assertion of Crown sovereignty or whether it has been extinguished by federal legislation before 1982. I find the Quebec Court of Appeal's comments instructive (see ***C-92 Reference Decision #1***):

> [490] Moreover, although Aboriginal child and family services have been heavily regulated in the past by governments, this does not mean that such non-Aboriginal regulation has extinguished the right of Aboriginal peoples to regulate these services themselves, nor does it mean that this right cannot be reaffirmed in a contemporary form …
>
> [491] The Supreme Court has reiterated that regulation of an Aboriginal right, however narrow and prohibitive, is not sufficient to extinguish it. Parliament's conduct must reveal a clear and plain intention to extinguish the right. The standard is "quite high". Parliament, however, has never passed any legislation related to child and family services in an Aboriginal context. The federal government's assimilationist policies in the 19th and 20th centuries, including the residential school system, were certainly significant impediments to the exercise of the right of Aboriginal self-government in relation to child and family services. Be that as it may, Parliament never officially endorsed these policies. There is no legislation that clearly and plainly states Parliament's intention to extinguish this right. Moreover, as noted above, it cannot be argued that the right of Aboriginal self-government in relation to child welfare services was extinguished as a result of the refusal of governments to recognize this right. As Lamer, C.J. noted in *Gladstone*, "the failure to recognize an aboriginal right, and the failure to grant special protection to it, do not constitute the clear and plain intention necessary to extinguish the right".
>
> [492] In any event, as Rowe, J. seems to have suggested in *Desautel*, it would be contrary to the purpose of s. 35 to conclude that an Aboriginal right can be extinguished through non-use if the fact it could not be exercised resulted from assimilationist policies that impeded that exercise. This would be tantamount to perpetuating "the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect the distinctive cultures of pre-existing aboriginal societies".
>
> [493] Lastly, unlike the regulation of military activities discussed by Binnie, J. in *Mitchell*, it cannot seriously be argued that Aboriginal regulation of their own child

> and family services would pose an existential threat to Canadian sovereignty or to the Canadian legal order, or that it would be incompatible with either of those.
>
> [494] It follows that the regulation of child and family services is an existing Aboriginal right for purposes of s. 35 of the *Constitution Act, 1982* and that it is a generic right that extends to all Aboriginal peoples.
>
> [emphasis and citations omitted]

[703] I similarly conclude there is nothing about the right to self-government in the area of CFS that is incompatible with the assertion of Crown sovereignty. Nor do I find that the right has been extinguished. Rather, the reverse is true. Canada has recognized this right through the enactment of the 2019 ***Act***, and Manitoba has followed suit by amending the ***CFSA*** to do likewise.

[704] Finally, in assessing whether the existence of the claimed right has been established, I have turned my mind to the guidance provided by UNDRIP. Article 3 of UNDRIP explicitly declares that Indigenous peoples have the right to self-determination, while Article 4 specifies that self-determination includes self-government in matters relating to their internal and local affairs. I also note the Supreme Court of Canada's comments in ***C-92 Reference Decision #2***:

> [14] … The UNDRIP gives particular recognition to "the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child" … Article 7(2) of the UNDRIP states that "Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group." Article 13(1) of the UNDRIP recognizes that Indigenous peoples have "the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures", a right that is reinforced by the correlative duty of states to take measures to ensure that it is protected (art. 13(2))…

[705] Like the Quebec Court of Appeal, I similarly find that it would be entirely consistent with UNDRIP to construe s. 35 of the ***Constitution Act*** as including, within the existing Aboriginal rights recognized and affirmed by that section, the right of Aboriginal peoples to regulate CFS.

[706] Having concluded that the right in question is directly connected to the plaintiffs' cultural survival, that it is unextinguished, that it is compatible with the assertion of Crown sovereignty, and that it is supported by the recognition found in UNDRIP, I have determined that the plaintiffs have established a right to self-government in the area of CFS, which, based on the plaintiffs' evidence, includes the right to raise their children in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions.

Have the Defendants, by Virtue of how They have Regulated Child Welfare and Child Protection - Including Through Their Actions in Funding, Designing, and Delivering Child Welfare Services in Manitoba from January 1, 1992, to the Present - Infringed the Plaintiffs' Aboriginal Right?

[707] In this section, I will address what is alleged to have been the defendants' failings in their respective involvement in regulating child welfare and child protection in Manitoba during the Class period. In addition to setting out what is required in order to establish the infringement of an Aboriginal right, I will specifically review those areas of failing and inadequacy (and the evidence of same) that the plaintiffs suggest establish the infringement of their s. 35 right. I begin immediately below with a discussion of the legal reference points for establishing such an infringement.

What is Required to Establish the Infringement of an Aboriginal Right?

[708] Under the ***Sparrow*** test, a claimant must first establish *prima facie* interference with their asserted s. 35 right - a requirement for which the burden is "fairly low" (see ***Gladstone***, at para. 151). There will be *prima facie* interference when the Crown's conduct constitutes a "meaningful diminution" of the claimant's right (see ***Gladstone***, at para. 43). To determine this, the Court must answer three questions: first, whether the impugned limitation on rights is unreasonable; second, whether it imposes undue hardship; and third, whether it denies rights holders their preferred means of exercising the right (see ***Tsilhqot'in Nation***, at para. 104). Importantly, while the answer to each question is significant to the analysis, all three questions need not be answered affirmatively for the Court to find that a rights infringement has taken place (see ***Gladstone***, at para. 43).

[709] As I will go on to explain when discussing the defendants' alleged failings and inadequacies in my reasons below, I find that the plaintiffs have established a *prima facie* infringement of their s. 35 right to self-government in the area of CFS. More specifically, I find that the ways in which the defendants involved themselves in the funding, regulation and provision of CFS for Manitoba First Nations children and families, unreasonably limited the plaintiffs' s. 35 right. I also find that the cumulative impact of the defendants' respective conduct on the plaintiffs' s. 35 right has imposed significant and sustained undue hardship on the plaintiffs, and has denied the plaintiffs their preferred means of exercising the right.

[710] As a preliminary matter, before addressing the alleged specific failings and inadequacies that constitute the defendants' violative conduct, I shall consider whether the defendants' respective conduct (in conjunction with the funding, regulation and provision of CFS for First Nations children and families in Manitoba) could infringe the plaintiffs' s. 35 right. In other words, whether Canada and Manitoba were capable of infringing the right, given their respective roles and positions within Manitoba's child welfare and child protection system.

Did Canada and Manitoba have the Capacity to Infringe the Plaintiffs' s. 35 Aboriginal Right?

[711] In respect to this question, both Canada and Manitoba have argued that their actions are incapable of infringing the plaintiffs' s. 35 Aboriginal rights. Before examining whether their actions have done so, it is necessary to deal with these capacity-related arguments.

[712] While there is some merit to Canada's position *vis-à-vis* its role in funding child welfare services in Manitoba for First Nations children living off reserve (Canada's sole involvement for most of that period was to share costs with Manitoba for Manitoba's delivery of social services to Manitobans at large), I do not accept Canada's position as it relates to the way it funded the FNCFS program on reserves. In so concluding, I rely on the reasoning of the CHRT in its 2016 ***Caring Society*** decision, which although not binding on this Court, I find persuasive, and which findings Canada has accepted. In the ***Caring Society***, the CHRT was asked to determine whether the way Canada had funded the FNCFS program on reserve was a discriminatory provision of a "service," contrary to s. 5 of the ***CHRA***. During that hearing, Canada advanced similar arguments to the ones

it advances here: that merely funding the FNCFS program could not be considered providing a service. The CHRT disagreed. It stated:

> [66] Aboriginal Affairs and North Development Canada (AANDC)] has a "Shared Responsibility for Child Welfare" with the FNCFS Agencies and the provinces/territory (see the *NPR* at p.88). It not only provides funding, but policy and oversight as well. It works as a partner with the FNCFS Agencies and provinces/territory to deliver adequate child and family services to First Nations on reserves. It is not a passive player in this partnership, whereby it only provides funding: it strives to improve outcomes for First Nations children and families. …
>
> [emphasis added]

[713] The CHRT further found:

> [71] … the manner and extent of AANDC's funding significantly shapes the child and family services provided by the FNCFS Agencies and/or the provinces/territory. ... suffice it to say AANDC's involvement in the FNCFS Program and other related provincial/territorial agreements determines whether and to what extent child and family services are provided to First Nations reserves and in the Yukon.
>
> …
>
> [85] … despite not actually delivering the service, AANDC exerts a significant amount of influence over the provision of those services. Ultimately, it is AANDC that has the power to remedy inadequacies with the provision of child and family services and improve outcomes for children and families residing on First Nations reserves and in the Yukon. This is the assistance or benefit AANDC holds out and intends to provide to First Nations children and families.

[714] In ***Caring Society***, the way Canada funded CFS on reserve shaped the services delivered. The same is true in this case. The way Canada funded the FNCFS program during the relevant period cannot properly be characterized as merely the "cutting of a cheque". It is government action capable of interfering with the exercise of the plaintiffs' Aboriginal right.

[715] I find Manitoba's argument that it is incapable of infringing the plaintiffs' Aboriginal rights to be similarly unpersuasive. Manitoba argues that "[w]here a child is found to be

in need of protection, the *parens patriae* jurisdiction of the Crown requires that it intervene to protect the child" (see Defendant (Manitoba) Brief, at para. 262). Manitoba argues that when it intervenes in that manner, there can be no infringement of the plaintiffs' right. Leaving aside whether or not it is open to Manitoba to claim it is exercising *parens patriae* jurisdiction when apprehending a child (under s. 27 of the ***CFSA,*** the determination as to whether a child needs protection is made by the Manitoba Court of King's Bench (Family Division) or Manitoba Provincial Court, following a hearing), or whether the CFS Authorities, which are independent agencies and not agents of the Crown, can exercise the *parens patriae* jurisdiction of the sovereignty, one of the main goals of s. 35 of the ***Constitution Act***, is to reconcile Aboriginal rights with the assertion of Crown sovereignty. Only if exercising the plaintiffs' Aboriginal right to self-government in the area of CFS is incompatible with Crown sovereignty would Manitoba's argument have merit. Further, if this were a situation where the plaintiffs' Aboriginal right to self-government over CFS were incompatible with the assertion of Crown sovereignty, the better argument for Manitoba to advance would be to deny the existence of the plaintiffs' right. Manitoba has not done so.

The Alleged Failings and Inadequacies on the Part of the Defendants in Relation to the Funding, Regulation and Provision of Child Welfare in Manitoba

[716] Having determined as I explained immediately above, that the defendants' conduct and role during the relevant period was capable of infringing the plaintiffs' right, I turn now to the plaintiffs' evidence of this breach, which in my view is extensive. Despite this

extensive evidence, I note again, that the threshold for the plaintiffs to establish a *prima facie* infringement of an Aboriginal right is low.

[717] Again, the plaintiffs claim that the defendants, through the way they have funded, regulated and provided child welfare and child protection in Manitoba, have unjustifiably infringed the plaintiffs' s. 35 Aboriginal right. They say that the defendants did so by depriving the plaintiffs (and Manitoba First Nations more broadly) of the ability to foster kinship relationships between members of their First Nations, and the ability to teach and pass on their traditional cultural and spiritual practices to the next generation to ensure the continuity of their First Nations. They assert that a series of actions infringed the plaintiffs' s. 35 rights and the plaintiffs provide evidence supporting each assertion.

[718] I have relied on this supporting and persuasive evidence, much of which I will summarize below, in determining that the plaintiffs established a *prima facie* infringement of their right to self-government in the area of CFS (which necessarily included the right to raise their children in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions). Regarding these alleged failings or inadequacies by the defendants, I note from the evidentiary record some of the earlier concerns raised by the defendants about the lay witnesses' affidavits. It is arguable that at certain points of their evidence, some of what the lay witnesses submit represents a mixture of opinion, argument, unattributed hearsay and anecdotal information. While I take note of the nature of this lay witness evidence and some of that which concerned the defendants, mindful of my earlier observations respecting some of the contested evidentiary issues and impugned witnesses, I find nonetheless, the lay witnesses and

their evidence to be largely reliable and credible. Even if I afford somewhat less weight to some of the evidence of these lay witnesses, when considered along with what is the other independently stronger evidence and or uncontradicted evidence, I have no difficulty making the findings I set out below.

A System Disproportionately Focussed on Apprehension Instead of Prevention

[719] I have summarized below some of the evidence highlighted by the plaintiffs to support their assertion that the defendants' funding, design and delivery of the child welfare system has (from January 1, 1992, to the present) resulted in a disproportionate prioritization of apprehensions over prevention and family support services. This evidence includes:

- Chiefs Cook's and Monias's evidence of:
    - The limited availability of prevention services, with apprehensions being the focus of CFS interventions; and
    - Insufficient funding as a barrier to the provision of prevention and support services by Indigenous agencies (see Cook Affidavit, at paras. 25 – 30 and 34 - 43; Monias Affidavit, at paras. 19 – 23 and 50 - 68).
- The Sinha-Petti's Report, which:
    - Noted that by 2021, 78.2% of the 9,850 children in care in Manitoba were First Nations, and during the last 20 years, have represented over 70% of children in care, even though they have steadily accounted for less than 20% of the children in Manitoba;

- Noted that as many as one-third of First Nations children in Manitoba experience out of home care by the age 18, in contrast to one-thirtieth for non-Indigenous children; and
- Concluded that, "[i]n keeping with the rest of Canada, but in contrast to many other countries, the child welfare system in Manitoba is grounded in child **protection**, rather than a family **services/support** approach, …", and that this approach "persists even though most cases addressed by the child welfare system do not involve allegations or suspicions of child abuse" (at p. 11).

- The Sinha-Petti Supplemental Report, in which they, like Ms. Frank, give the Court and rely upon the findings of Kathleen Kenny et al., "Infant Rates of Child Protective Services Contact and Termination of Parental Rights by First Nations status from 1998 - 2019: An Example of Intergenerational Transmission of Colonial Harm", which observed that, between 1998 and 2019:
  - Canada has among the highest rates of family separation through child protective services, "with a profoundly disproportionate impact on Indigenous (First Nations, Métis and Inuit) families" (at p. 2);
  - The rate of child removal and out-of-home placement in Manitoba is the highest in Canada and almost five times higher than the national average;

- Among the estimated 10,000 children in out-of-home placements yearly in Manitoba, 90% are Indigenous children, of which about 80% are First Nations;
- One in three First Nations infants had an open CFS file before the age of one, compared with only one in 20 for non-First Nations infants, and that one in five First Nations infants were placed in out-of-home placement before age one, as compared with only one in 100 non-First Nations infants;
- Out-of-home placement for First Nations infants within the first six days of life was 5.62 times higher than for other infants, 6.4 times higher in the newborn period of 7 - 27 days, and 7.94 times higher in later infancy (28 - 365 days); and
- First Nations infants in Manitoba have CFS files opened and experience out of home placement at a rate that is almost seven times that for other children, experience the termination of parental rights before the age of five at almost eight times the rate of other children, and had rates of file opening, out-of-home placement, and termination of parental rights that increased more than the rates for other infants during the same period.

- The 2007 *Evaluation of the First Nations Child and Family Services Program* report prepared by the Departmental Audit and Evaluation Branch of Indian and Northern Affairs Canada dated March 2007 (examining the federal

FNCFS program), which concluded that the "limited attention to prevention has put the program out-of-step with its prevention objective and has diminished its achievement of encouraging 'a more secure and stable family envelopment for children on reserve'" (at p. 18).

- The Manitoba Ombudsman's finding in its 2006 report, *Strengthen the Commitment: An External Review of the Child Welfare System*, that:
  - "… despite a set of statutory principles that seems to accord with the Aboriginal philosophy, the first response of the child welfare system is often apprehension …" (at p. 33);
  - "… [t]he Legislation itself, combined with funding structures that requires an agency to take a child into care in order to receive funding to support that child, perpetuates the existence of a reactionary and intervention based service." (at p. 33); and
  - "… prevention services are funded only in a limited sense in the current provincial funding formulas … Funding that is solely tied to protection and that is based on the numbers of children in care runs counter to the principles espoused in the Acts" (at pp. 120 and 121).
- The 2018 Report of the Legislative Review Committee, *Transforming Child Welfare Legislation in Manitoba: Opportunities to Improve Outcomes for Children and Youth*, which noted that:
  - "… child welfare funding models can inadvertently incentivize child apprehensions, which enable CFS agencies to access resources that

may not otherwise be available to children and families" (at p. 8); and

- Changes to funding models were required to "ensure sustainable, equitable and flexible funding and resources to support communities to maximize their role and incentivize the success of prevention, early intervention and family restoration efforts" (at p. 8).

- The 2019 Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, which concluded (at p. 355) that:

  - State funding of child welfare services incentivizes the apprehension of Indigenous children and youth … exemplified by the state's prioritizing funding for foster homes over economic and support services to families; state policies that limit access to specialized support services unless the child is in care; and agency funding models that are predicated on the number of children in the agency's care…

- Confirmation by defendant witnesses on cross-examination of:
  - The need for a greater emphasis on prevention (Dr. Santos and Mr. Rodgers); and
  - The Auditor General of Manitoba's finding that prevention accounted for a small fraction of total funding for CFS (Mr. Lajeunesse);
- Dr. Sinha's testimony on cross-examination that Canada's FNCFS funding model, specifically Directive 20-1, largely determined whether child welfare agencies on reserve could provide prevention services;
- The findings of the CHRT in ***Caring Society***, which specifically included that the Canada's FNCFS program funding formulas (Directive 20-1 and the

EPFA) incentivized the removal of children from their homes "as a first resort rather than a last resort" (at para. 344; see also paras. 349, 384, 386 and 458);

- The Attorney General of Canada's admission, confirmed by Mr. Farthing-Nichol confirmed on cross-examination, that Canada has accepted ***Caring Society***, which further found that Canada had discriminated against First Nations children and families living on reserve and in the Yukon by underfunding CFS under its FNCFS program;
- The March 2009 Report of the House of Commons Standing Committee on Public Accounts, 40th Parliament, 2nd Session, expressing concern that the federal government's FNCFS funding model, Directive 20-1, had been found by many studies not to be working and in need of change with reference to:
    - The 2005 Wen:De Report, which (the Standing Committee noted) found that the funding formula underfunds prevention services, thus contributing to the large numbers of First Nations children entering and staying in care; and
    - The Auditor General of Canada, quoted as saying, "one has to ask why a program goes on for 20 years, the world changes around it, and yet the formula stays the same, preventative services aren't funded, and all these children are being put into care." (at p. 9).

- The Phoenix Sinclair Final Report, in which Commissioner Hughes recommends that Manitoba (and the four child welfare Authorities) adhere to a series of principles in the delivery of child welfare services, including a focus on prevention services.

[720] The plaintiffs emphasize the following evidence supporting their assertion that high rates of apprehension significantly and directly contribute to severing ties between First Nations children, their families and First Nations themselves:

- Dr. Simpson's explanation as to the harm occasioned by the removal of children from their First Nation (see Simpson Expert Report, at pp. 51 and 56):

> When children are removed from their First Nations family, the community and nation has no mechanism to ensure their teachings and way of life is passed down to the next generation. They have no way of fulfilling their responsibilities to mino-bimaadiziwin and this has a negative impact on their own sense of belonging and their own identity since they are no longer a link in the chain, as expressed in the concept of nindaanikoobijiganag. Removing a child from their cultural land-based context is akin to cutting their umbilical cord and disconnecting them from their community, their knowledge systems, and the land from which all meaning flows. The survival of First Nations knowledge systems and languages is entirely dependent upon the next generation of First Nations people learning land-based practices from their Elders.
>
> …
>
> Land-based practices when a child or children are missing are therefore filled with grief and loss because there is nowhere else that this way of life and these practices can be learned. In many regions, land-based practices are threatened and endangered practices because of the impact of colonialism, the residential and day school era, and the child welfare system. Because First Nations knowledge systems are land-based, spiritual, oral, and generated through communal practice, they cannot be learned at a desk in school or by reading books. They can only be learned by engaging in land-based practices over the course of one's lifetime. When children are removed from First Nations communities and families by Child and Family

> Services, they no longer have access to this knowledge, and it becomes impossible for them to uphold their responsibilities to their community.

- Elder Paynter's evidence as to the particular harm resulting from the removal of children at or shortly after birth (see Paynter Affidavit):

> 59. A baby who is apprehended by the child welfare system at birth immediately loses their connection to their family, community, nation and the land. They are unable to go through necessary ceremonies, including their naming and walking out ceremonies which are done to show a child's connection to the land. These early ceremonies are essential to providing a child with a connection to spirit and an understanding of the gifts they carry. With the absence of a name, the child does not know who they are and does not understand their roles and responsibilities in life. Many of our people may not be able to recognize this imperative step because it is no longer in their memory due to the impacts of colonization.

[721] Evidence related to the impacts of the SDM assessment tools included:

- Ms. Kiersgaard's confirmation (on cross-examination) that the SDM tool and its assessment of probability of future harm (introduced in 2010) had not been modified to consider the unique circumstances and history of First Nations peoples in Manitoba, including their experiences with Indian Residential Schools, despite:
    - A recommendation of Manitoba's Office of the Children's Advocate from its 2006 report, "Honouring Their Spirits"—The Child Death Review: A Report To the Minister of Family Services & Housing, to implement risk assessment tools that represent the needs of Manitoba or its various regional areas; and
    - Evidence during the Phoenix Sinclair Inquiry that a validation study of SDM in Minnesota had found an anomaly regarding Native

Americans that resulted in changes to the SDM being made in that jurisdiction.

- Chief Monias's testimony (on cross-examination) that, in his experience, the SDM assessment tool's calculation of probability of future harm considered First Nations families whose experiences in Indian Residential Schools had contributed to a history of involvement with the child welfare system;
- The Sinha-Petti Report, which raises serious questions about the appropriateness of the SDM assessment tool in the Manitoba context, in particular that:
    - These kinds of actuarial risk assessment tools (which include consideration of historical incidents of addiction, family violence, neglect and abuse) would systematically assign higher risk scores to First Nations people than to others; and
    - Despite the caveats that the SDM and other actuarial tools are only meant to guide decision making based on worker judgment, it is difficult to determine the extent to which social workers rely on SDM assessments in forming their own judgments or the extent to which they are comfortable challenging actuarial assessments.
- Ms. Frank's evidence that (according to the research of the FNFAO):
    - Manitoba was the newborn apprehension capital of Canada because of "birth alerts" (birth alerts being the mechanism by which hospitals, having been notified by CFS of expectant mothers considered at risk,

alert CFS at the time of birth resulting in the immediate apprehension of their newborn children); and

- Despite an official end to this practice in 2020, newborn apprehensions continue to occur (101 infants up to three days' old were apprehended in 2020 - 2021, and another 238 infants under one year old were apprehended during that same period).

- The 2019 Final Report of the National Inquiry into Missing and Murdered Indigenous Woman and Girls' determination that (at p. 355):

  - The use of birth alerts against Indigenous mothers, including mothers who were in care themselves, can be the sole basis for the apprehension of their newborn children. Birth alerts are racist and discriminatory and are a gross violation of the rights of the child, the mother, and the community.

- The Sinha-Petti Report confirming these findings, which indicated that such alerts were often triggered by the use of the SDM assessment tool.

[722] Broadly, Manitoba disputes the characterization of the system as one that disproportionately focuses on apprehension instead of prevention. Rather, Manitoba says apprehension only occurs when a child is "in need of protection" and only if doing so is consistent with the "best interests of the child" under the ***CFSA***. Manitoba also relies on the evidence of Mr. Rodgers, Dr. Santos, and Ms. Sanderson, to show that Manitoba implemented and funded prevention programming, both within and outside the CFS system. Manitoba also relies on the evidence of Mr. Rodgers and Mr. Lajeunesse to support the proposition that the shift to SEF was meant to enable agencies to reinvest in prevention programming. Manitoba also points to the evidence of Ms. Kiersgaard, who

explained that use of most of the SDM tools is discretionary, and that the SDM policy manual included a policy-driven decision matrix specific to Manitoba CFS. I also note the evidence of Mr. Rodgers, who explained that Manitoba ended the practice of birth alerts in the spring of 2020. And I further note the evidence of Ms. Kiersgaard, who objects to the plaintiffs' claim that poverty is a basis for apprehension. She points to s. 17(3) of the ***CFSA***, which states:

> **Socio-economic conditions not determinative**
>
> 17(3) To the extent that it is consistent with the best interests of a child, a child must not be found in need of protection solely on the basis of their socio-economic conditions, including poverty, lack of adequate housing or infrastructure or the state of health of their parent or of their care provider as defined in subsection 2.9(3).

She concludes that poverty alone is not used as a pretext to remove children from their homes or communities.

[723] Canada does not seem to take a position regarding the plaintiffs' characterization of the system as one that disproportionately focuses on apprehension. However, Canada points to the evidence of Mr. Farthing-Nichol, which highlighted increases in funding for the FNCFS program following ***Caring Society***, which included increased funding for prevention services.

[724] As I have for all of the defendants' alleged failings, I have reviewed carefully the voluminous evidentiary record provided to establish the allegation that the system disproportionately focussed on apprehension instead of prevention. That evidence comes from some First Nations Chiefs, some qualified expert witnesses, and variously detailed findings in the identified reports. As I noted earlier in this judgment when I addressed the defendants' objections to some of the plaintiffs' evidence, the above evidence has

been found to be admissible. As I also earlier noted, unless otherwise stated and stipulated, this various evidence for the reasons already discussed, can be considered and for my purposes is, otherwise credible and reliable. The defendants have provided little to persuasively challenge or negate that evidence either with evidence of their own or on cross-examination.

[725] I accept as a general proposition that the defendants did not use poverty alone as a pretext for the apprehension of children. I also accept, as the defendants identify, that certain governmental responses and attempted improvements were made to address known problems. However, those efforts and actions did not adequately address the potential for prevention. Regrettably, it is reasonable to conclude that over this class period, this was a situation where the system was disproportionally focussed on apprehension over prevention. For much of the Class period, the evidence would suggest that the system incentivized the apprehension of First Nations children.

Incompatible Foster Care Standards and Culturally Inappropriate Care

[726] Regarding the plaintiff's second assertion, I have summarized below the evidence relied on by the plaintiffs supporting their assertion that incompatible foster care standards and culturally inappropriate placements (instead of promoting or supporting kinship or community placements and culturally and spiritually appropriate services) have contributed to severing the connection between children and their First Nations:

- Chief Cook's and Chief Monias' evidence that foster care home licensing requirements do not consider the realities of housing on reserve, such that certification of foster care homes in First Nations communities becomes very

difficult (for example, requirements that no one in the home may have a criminal record or that any pets in the home must have up-to-date veterinary records, or by placing limits on who and how many people may share a bedroom);

- The Manitoba Ombudsman's 2006 report, *Strengthen the Commitment: An External Review of the Child Welfare System*, which:
    - Acknowledged the concerns of agencies from First Nations communities (particularly in the North) that foster home standards were too restrictive and did not reflect the realities of life in northern or remote communities, and were seen to have a significantly negative affect keeping children in their communities and families together;
    - Recommended that the requirements for foster homes be redeveloped to consider community standards and practices to prevent those requirements being a barrier to keeping children in safe and loving environments within their own communities; and,
    - Identified that the lack of foster homes was a major contributing factor to the high incidence of placements of children in very costly alternatives such as hotels and shelters.
- The Auditor General of Manitoba's 2019 report, *Management of Foster Homes: Independent Audit Report*, which acknowledged concerns that existing foster home licensing standards did not properly account for

community differences, nor were the standards culturally relevant for Indigenous communities, making it difficult to license homes on reserve;

- Chief Cook's and Chief Monias' evidence that children are often sent to culturally insensitive foster homes, where they are often made to feel "other" and do not receive culturally and spiritually appropriate care; and
- Mr. Rodgers acknowledgement (on cross-examination) that, despite the Manitoba Department of Family Services and Housing's 2006 report, *Changes for Children: Strengthening the Commitment to Child Welfare Response to the External Reviews into the Child and Family Services System*, which indicated that the provincial government would continue the development of new emergency foster homes to reduce the reliance on hotel placements (given hotels were considered inadequate in terms of both security and support for children taken into care, and by 2007 provincial standards that prohibited the use of hotel placements except in certain very limited circumstances), it was a matter of controversy and concern that hotel placements continued through 2014 and 2015, including for Tina Fontaine, who was placed in a hotel in 2014 when she was taken into care at 15 years old.

[727] Neither Canada nor Manitoba directly address the plaintiffs' claim that foster care standards were (and are) incompatible with the realities of life in First Nations communities, or that placements have been culturally inappropriate. However, Manitoba points to the enactment of the ***CFSAA*** and its associated regulations, which Manitoba

says devolved to the CFS Authorities the responsibility to develop culturally appropriate standards of services, practices and procedures (see ***CFSAA***, s. 19(c)), and license and supervise foster homes (see ***CFSAA***, s. 19(n)). I also note the evidence of Ms. Mindell, on behalf of Manitoba, who explained that at the time of devolution, efforts were made to staff Indigenous Authorities and Agencies with workers from their home communities capable of providing prevention and protection service in a culturally appropriate manner, and to provide culturally appropriate homes for Indigenous children taken into care. While she acknowledged it was not always possible to do so, as the children's home communities often lacked the social workers, foster families and housing that would allow for it, her evidence was these capacities have since increased over time. I further note the evidence of Ms. Kiersgaard, who acknowledged (at the time of affirming her affidavit on August 6, 2024) that work was underway by Manitoba to develop legislation that would amend the ***CFSA*** to allow for kinship and customary care agreements, which would enable children in care to maintain their Indigenous customs and family connections.

[728] In reviewing all of the evidence as it relates to this alleged failing, much of what Manitoba acknowledges could have been done was not done for the reasons they provided. While some degree of understanding need be afforded Manitoba owing to the challenges they faced (practical and otherwise), the required improvements in this area, despite some efforts, were not sufficiently addressed or realized. Consider, for example, that the same shortcomings in foster care standards identified by the Manitoba Ombudsman in 2006 were still present when Manitoba's Auditor General audited the foster home system over a decade later. Regarding this particularly difficult area, insofar

as incompatible foster care standards and inadequate cultural care constitute part of the larger problem, these shortcomings must be considered as part of my infringement analysis.

Failing to Increase Maintenance Rates, Clawing Back the CSA Benefits and Imposing Block Funding

[729] With respect to the plaintiffs' third assertion concerning the questionable adequacy and approach to funding, the plaintiffs' evidence included:

- Mr. Lajeunesse's evidence that despite Manitoba's efforts to ensure its child maintenance rates kept up with inflation, the basic per diem amounts did not increase from 2012 until SEF was implemented in April 2019;
- The Auditor General of Manitoba's 2019 report, *Management of Foster Homes: Independent Audit Report*, which found that:
    - Since October 1, 2012, no assessment had been undertaken to confirm the adequacy of basic maintenance rates (rates which had not been increased to account for inflation, despite inflation having occurred in Manitoba at an accumulated rate of 13.6% up to July 2019); and
    - Manitoba's basic maintenance rates were the lowest or second lowest among the provinces for all ages (except age 11).
- The federal government's Directive 20-1 funding program, introduced in 1991, which stopped adjusting for inflation by 1995;
- The Manitoba Ombudsman's 2006 report, *Strengthen the Commitment: An External Review of the Child Welfare System*, which had cautioned that the

provincial government's decision to require First Nation CFS agencies to remit their CSA payments would "force the agencies to discontinue the programs they have started or require that the money to run the programs come from other areas that are already under funded" (at p. 123) (which programs had included family support and prevention programs);

- Mr. Lajeunesse's evidence that from 2006 to March 31, 2019, agencies in Manitoba remitted about $355 million of federal CSA payments back to Manitoba;
- This Court's decision in ***Flette #1***, which concluded that Manitoba's policy of clawing back the CSA Benefits was unconstitutional and breached s. 15(1) of the ***Charter*** because of its disproportionate effect on First Nations children;
- A special report by the Manitoba Advocate for Children and Youth in 2021 (*Still Waiting: Investigating Child Maltreatment after the Phoenix Sinclair Inquiry*) which found that:
    - The 2019 shift to a single envelope or block funding model was meant to address issues with the previous funding model (a model which had underfunded prevention services), but which resulted in only a 2.7% increase in funding for prevention services; and
    - Information shared by the Department of Families did not show block funding resulted in a reduction in cases per worker, increased funds

for family enhancement, or increased funds for Indigenous-led community-based organizations.

- Chief Monias' evidence that:
    - Although block funding provided greater creativity as to the ways in which funds could be spent, enforcing government-mandated standards used up the bulk of the funds, leaving little for prevention services and supports;
    - The amount of block funding was inadequate, increasing only by 1% per year, while the number of children in care grew by 6 to 7% per year; and
    - Block funding imposed significant reporting requirements to justify funding expenditures, with a failure to adequately meet those requirements resulting in a risk to First Nations agencies of being placed under third-party management.
- The Sinha-Petti Report, which noted that:
    - While federal funding for First Nations child welfare agencies shifted to a block funding model (EPFA in 2011) which included funds for prevention and support services, because of how maintenance funds were calculated under that new formula, some agencies faced with high child maintenance costs would have to draw on funding that was designated for prevention and support services to cover any maintenance shortfalls; and

- When Manitoba moved to block funding in 2019, the new approach incorporated no mechanism for addressing unexpected maintenance expenses, thus replicating known problems with the federal EPFA model.

- The Auditor General of Canada's 2008 report to the House of Commons which determined that:
  - Funding provided by Indian and Northern Affairs Canada to First Nations child welfare was not based on the actual cost of delivering child welfare services; and
  - Funding was based on a formula first implemented in 1988 that had not been changed to reflect variations among provinces' legislation and child welfare services, or the actual number of children in care.

[730] In ***Caring Society***, the CHRT made these observations about Canada's funding of the FNCFS program through what was then the Department of Aboriginal Affairs and Northern Development Canada:

> [458] AANDC's design, management and control of the FNCFS Program, along with its corresponding funding formulas and the other related provincial/territorial agreements have resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserves. Non-exhaustively, the main adverse impacts found by the Panel are:
>
> - The design and application of the Directive 20-1 funding formula, which provides funding based on flawed assumptions about children in care and population thresholds that do not accurately reflect the service needs of many on-reserve communities. This results in inadequate fixed funding for operation (capital costs, multiple offices, cost of living adjustment, staff salaries and benefits, training, legal, remoteness and travel) and prevention costs (primary, secondary and tertiary services to maintain children safely in their family homes), hindering the ability of FNCFS Agencies to provide provincially/territorially mandated child welfare services, let alone culturally appropriate services to First Nations children

and families and, providing an incentive to bring children into care because eligible maintenance expenditures are reimbursable at cost.

- The current structure and implementation of the EPFA funding formula, which perpetuates the incentives to remove children from their homes and incorporates the flawed assumptions of Directive 20-1 in determining funding for operations and prevention, and perpetuating the adverse impacts of Directive 20-1 in many on-reserve communities.

- The failure to adjust Directive 20-1 funding levels, since 1995; along with funding levels under the EPFA, since its implementation, to account for inflation/cost of living;

- The application of the *1965 Agreement* in Ontario that has not been updated to ensure on-reserve communities can comply fully with Ontario's *Child and Family Services Act*.

- The failure to coordinate the FNCFS Program and other related provincial/territorial agreements with other federal departments and government programs and services for First Nations on reserve, resulting in service gaps, delays and denials for First Nations children and families.

- The narrow definition and inadequate implementation of Jordan's Principle, resulting in service gaps, delays and denials for First Nations children.

[731] Canada's funding decisions, therefore, had consequences on First Nations and those consequences were more than trivial or insubstantial. As determined by the CHRT, "[Canada] does more than just ensure the provision of child and family services to First Nations, it controls the provision of those services through its funding mechanisms to the point where it negatively impacts children and families on reserve." (at para. 457).

[732] Manitoba does not dispute that its policy of requiring payment of the CSA to Manitoba was found to have violated s. 15 of the ***Charter***. Manitoba similarly acknowledges it did not increase basic maintenance rates from 2012 until SEF was implemented in 2019. However, Manitoba says that, broadly, it has made significant increases in funding of the CFS system during the Class period. Manitoba points to the

evidence of Mr. Rodgers, who detailed Manitoba's fiscal commitments arising from its "Changes for Children" initiatives, as well as amendments made to its funding model between 2010 - 2012 to provide workloads relief. Manitoba also relies on the evidence of Mr. Lajeunesse, who discussed Manitoba's approaches to funding before and following devolution, explaining that funding by Manitoba to CFS increased by $236 million between 2006 and 2013, and that the move to SEF led to cash positive positions for CFS. Manitoba also points to the concession made by Dr. Sinha on cross-examination that between 2006 and 2016, the annual funding for off-reserve services provided by Manitoba nearly tripled (a 200% increase), while in the same period the number of children in care increased by far less (85%). I also note the evidence of Ms. Kiersgaard, who said that Manitoba's adoption of the SEF model occurred following "engagement and input from various entities, including MKO, the SCO, and the MMF, as well as the Authorities and Agencies themselves" (see Kiersgaard Affidavit, at para. 66).

[733] Canada primarily relies on the evidence of Mr. Morin to document how federal funding for child welfare was structured and flowed to Manitoba through the FNCFS program. His evidence was that the purpose of the FNCFS program, established in 1991, was to fund FNCFS Agencies and some provinces to "support the delivery of culturally appropriate and reasonably provincially comparable child protection services and prevention services to First Nations children living on reserve." (see Morin Affidavit, at para. 25). He explained this was done between 1991 and 2016 through two models: Departmental Directive 20-1 and the EPFA. Regarding the implementation of the EPFA, Mr. Morin noted that the process began with tripartite discussions between the provinces,

First Nations leadership and Canada, which led to the development of a Tripartite Accountability Framework. While he acknowledged the Tripartite Accountability Framework was not officially signed by the three parties, Canada obtained endorsement by the provinces and participating First Nations through Band Council resolutions or letters of endorsement. He also noted that Manitoba received an additional $177 million dollars to support the implementation of the EPFA over five years, with $42.2 million in annual ongoing funding to support the delivery of protection and prevention services on reserve in Manitoba. Mr. Morin also explained that Canada's funding for the FNCFS program grew to about $1.489 billion in 2020 - 2021, almost doubling investments in on-reserve CFS since 2019. I also again note the evidence of Mr. Farthing-Nichol, that Canada has increased funding for the FNCFS program following ***Caring Society***.

[734] Having reviewed the evidence of the plaintiffs respecting the adequacy of and the approach to funding, and having also reviewed Manitoba's and Canada's response, I am left to note that both Manitoba's and Canada's response implicitly acknowledge an insufficient or inadequate level of funding. In so far as Canada's response or explanation does contest any of the problems or shortcomings with the adequacy (or its approach generally) to funding, I note that much of that response was the subject of criticism and skepticism from the CHRT in ***Caring Society***.

[735] Once again, even allowing for what might be characterized as the defendants sincere attempts at improved funding levels and strategies (however tardy), the level of funding seemed unpredictable and often out of step with the nature of the problems and crises surrounding First Nations child welfare. The level of funding also appears to have

continued to shape and constrain how the system could respond to this ongoing crisis. The evidentiary record provided to establish the defendants' alleged failings is significant. That evidence, coupled with the previous findings in ***Caring Society***, supports the plaintiffs' assertion that failing to increase basic maintenance rates, the clawing back of the CSA Benefits, and the imposition of inadequate single envelope or block funding have negatively affected the First Nations.

Failure to Ensure First Nations Children Remain Connected to Their First Nation and Failure to Help First Nations Heal Following Apprehensions

[736] The plaintiffs' say that the defendants did not adequately ensure First Nations children in CFS could maintain and develop a connection to their distinct cultures, spirituality, identities, and traditional territories. They also say that the defendants inadequately provided services to help First Nations heal when First Nations children are apprehended. The evidence highlighted by the plaintiffs supporting these assertions included:

- Chief Cook's evidence that:
    - CFS does not tell Misipawistik when a child living off reserve is apprehended, nor does CFS assist children in off-reserve care with tasks such as band membership registration;
    - This can lead to the placement of children in non-First Nation homes, permanent disconnection from a child's First Nation, loss of identity, and a negative impact on the funding received by Misipawistik; and

- This in turn, has a negative impact on the services that the First Nation can itself provide (for example, family visits typically occur in a hotel room in Winnipeg, rather than in community, surrounded by extended family, on the land and immersed in the culture).

- Chief Cook's evidence (on cross-examination) that a Misipawistik child in foster care who goes to a powwow in another territory, conducted in another language, does not receive the same benefit as if they had gone to a Misipawistik powwow because they are not immersed in their own culture, surrounded by their own extended family;
- Chief Kent's evidence that:
  - Children removed from their community become disconnected from their First Nation, and lose their sense of home, belonging, cultural and spiritual connection, First Nation identity, and language (for example, a child who had been placed with a Filipino family now speaks Filipino as a second language but cannot communicate with his birth parents in Anishinaabe);
  - Off-reserve placements have a financial impact on the community, since Black River receives funding based on its on-reserve list; and
  - When children are apprehended and placed off reserve, they are considered off-reserve citizens, which results in a decrease in funding to Black River.

- Dr. Simpson's evidence on the concept of mino-bimaadiwizin, which falls apart when children and young people are not present in the community (see Simpson Expert Opinion, at pp. 51 and 56 - 58):

> The concept of mino-bimaadiwizin is an over-arching guiding principle for First Nations life and gives way to land-based practices that align individuals and families with First Nations origin stories like the Seven Fires. Mino-bimaadiwizin is ultimately a practice of sustainability, and when practiced collectively over time, it is a process of gifting this way of life to the next generation. Without children and young people present to learn how to embody the Seven Ancestor Teachings or the Dene Laws, to re-create the foundational teachings of First Nations origin stories in their harvesting practices, the practice of mino-bimaadiwizin falls apart.
>
> …
>
> When children are disconnected from First Nations families, communities and nations, there are tremendous impacts on the family, community and the nation because First Nations life is based upon meaningful, lifelong relationships of respect and reciprocity. Communities and nations not only lose a child they love and are connected to, but also someone who was a teacher for them throughout the Four Hills of Life. Community members and extended families lose the roles and responsibilities they had to that child as a parent, grandparent, sibling, cousin, auntie or uncle, language teacher, Elder or land-based practitioner. Communities lose a living piece of their future. …
>
> …
>
> Removing children from First Nations causes collective harm to First Nations communities. It weakens First Nations languages. It challenges First Nations knowledge systems, traditional forms of governance and political cultures, and prevents First Nations legal systems from being passed along to the next generation. It weakens First Nations ceremonial practices, land-based practices, and traditional economic systems as First Nations members have no one to teach and with whom to pass along their way of life. …
>
> [citations omitted]

- Elder Florence Paynter's evidence that many children apprehended by the child welfare system never return to their families, nations, and the land,

and that placing children in care not only "disrupts children as they are meant to be travelling through our Stages of Life (or Rites of Passages)" (see Paynter Affidavit, at para. 85), but also negatively affects the community as a whole:

> 86. Once children are captured by the child welfare system, their family, community and nation circles are deeply negatively impacted …
>
> 87. … The removal of the child from their family has a negative impact on the whole community and nation surrounding that child. Kinship ties are lost and that child has lost opportunities to develop in their language, emotionally and spiritually. Without kinship, ceremonies, and medicines, the child loses their connection to the Creator. That is a great loss to First Nations families and nations.

[737] In response to this allegation, Manitoba again points to its legislative scheme. Specifically, Manitoba says that, for assessing the best interests of Indigenous children specifically, the current ***CFSA*** expressly identifies the ongoing relationships with the group, community or people to which the child belongs and preserving the child's connections to their culture as primary considerations (see ***CFSA***, s 2.1(4)). Manitoba also notes that the current ***CFSA*** further mandates consideration of other factors when considering the best interests of Indigenous children specifically. This includes "the importance to the child of preserving the child's cultural identity and connections to the language and territory of the Indigenous group, community or people to which the child belongs" (see ***CFSA***, s. 2.1(5)(d)), and, "any plans for the child's care, including care in accordance with the customs or traditions of the Indigenous group, community or people to which the child belongs" (see ***CFSA***, s 2.1(5)(g)). Manitoba also relies on the evidence of Ms. Kiersgaard for the proposition that one of the objectives of devolution was to

deliver child welfare services through governance systems based on cultural affiliation. I also note the evidence of Dr. Santos, Mr. Rogers, Ms. Mindell, and Ms. Kiersgaard, each of whom testified that to the best of their knowledge, Manitoba did not intentionally design or operate CFS with a view to harming First Nations children or their families.

[738] Canada in its response to this allegation, does not appear to take a position regarding the plaintiffs' assertions that children in care have not received the support to maintain connections to their home communities and that First Nations have not received the support they require to heal following apprehensions. This would be in keeping with Canada's general position that its role in on-reserve child welfare services for First Nations individuals is to fund the FNCFS program and that its role off reserve is to provide a general transfer payment for social services. Canada maintains that the actual provision of child and family social services for all Manitoba residents, including Indigenous people, falls to Manitoba.

[739] In reviewing both the plaintiffs' expert and lay evidence, I cannot help but note that much of this evidence goes to the heart of what is at stake for the plaintiffs. Whether it be from the evidence of the three Chiefs, or the opinions offered by the experts, I have little difficulty concluding, that despite the efforts identified by the defendants, it is more than reasonable to recognize that First Nations child welfare in Manitoba during the Class period, operated in a way that contributed to and in some ways made inevitable, the severance or separation of First Nations children from their community. While Manitoba points to certain current factors (specific to Indigenous children) that are to be considered under the ***CFSA*** when determining the best interests of the child, I note that those

amendments to the ***CFSA*** were not made until 2023 (see ***An Act respecting Child and Family Services (Indigenous Jurisdiction and Related Amendments)***, S.M. 2023, c. 26, s. 3 ("***Act re CFSIJOA 2023***").

[740] I have considered carefully the submissions of the defendants respecting this allegation. In the end, despite taking note of their efforts (especially Manitoba's), on the totality of the evidence, I am left to conclude that the apprehensions and the way they occurred, and the defendants' inadequate provision of services to help First Nations heal when First Nations children were apprehended, have contributed significantly to preventing First Nations children from being raised in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions.

Lack of Supports to Assist First Nations Children and Young Adults Reconnect with Their First Nations

[741] Finally, the plaintiffs say that the defendants have not facilitated the reconnection of children with their First Nations. Evidence highlighted by the plaintiffs included:

- Chief Cook's evidence that there are no formal supports to help children released from care return to their communities, the result being that many never return;
- Chief Kent's evidence that:
    - First Nations face challenges in reconnecting with children who have aged out of care, particularly where people who are apprehended at birth were not registered with the First Nation;

- Those children who have been apprehended often have problems accessing federal services, with registration attempts frustrated by backlogs in the system;
- Apprehended children either feel abandoned (and do not want to return to their First Nation), or they face obstacles obtaining registration with the First Nation when they want to return; and
- These barriers are exacerbated by the refusal of CFS to share information with the First Nation to facilitate re-connection.

- Chief Monias' evidence that:
  - CFS support for those who age out of care is inadequate with too little being done to ensure those children reconnect with their communities (children aging out of care are only reimbursed up to $1,000 for basic necessities);
  - Because CFS often fails to register children with parents from Pimicikamak Cree Nation who are apprehended off reserve, there is virtually nothing that his First Nation can do to keep track of those children, making it unlikely those children will ever be reconnected with their First Nation unless they, themselves, register as a member; and
  - This failure to register apprehended children as members of the Pimicikamak Cree Nation means that the First Nation loses out on

potential funding to support those children, including funding for post-secondary education and health benefits.

- The 2012 progress report, *Strengthening our Youth: Their Journey to Competence and Independence: A Program Report on Youth Leaving Manitoba's Child Welfare System*, from the Manitoba Office of the Children's Advocate:
    - Which reported that the research was clear that strategies for preparing youth to leave care must focus on positive outcomes; and,
    - Recommended that a committee with representatives from the Department of Family Services and Housing and the CFS Authorities, along with service providers, youth in care or formerly in care, and stakeholders, be established to develop standards for youth leaving care, including post care services.
- The Phoenix Sinclair Final Report recommendation that the ***CFSA*** be amended to extend services to any child who at the age of majority was receiving services under the ***Act*** (because many young people require support in the transition to adulthood, even past the age of 21);
- The expert report of Dr. Levine reveals that the effects of this dislocation are not benign. Her report found that:
    - First Nations children and youth involved with the child welfare system have reduced educational achievement and employment outcomes compared to those not involved with CFS, as well as higher

probabilities of homelessness, higher rates of negative physical and mental health outcomes, including higher likelihood of substance abuse and of suicide, and an overrepresentation in the criminal justice system; and

- Not only do the children apprehended by the child welfare system experience chronic feelings of ambiguous loss and disenfranchised grief, so, too, do their families; they also experience significant disconnection from their culture, community, and identity.

[742] Neither Canada nor Manitoba directly address the plaintiffs' final assertion that there has been a lack of support to help First Nations children and young adults to reconnect with their First Nations. For Canada's part, this would again be consistent with its position that, essentially, Manitoba has exclusive jurisdiction over the provision of CFS. Though not in respect of this assertion, Manitoba claims, broadly, that the plaintiffs' s. 35 right does not impose on Manitoba positive obligations regarding legislation or the policies it enacts.

[743] Having recognized in relation to the previous discussion respecting what the plaintiffs allege were some of the defendants' failings and inadequacies, the consequential tragedy of the apprehensions that have occurred in First Nations child welfare in Manitoba (and the significant effect it has had in terms of preventing the transmission of connection, language, culture and spirituality to next generations) is clear. It is therefore understandable why the plaintiffs would hope for better support and reconnection with children who are aging or have aged out of care. Such attempts might mitigate some of

the tragic disconnection which threatens the cultural continuity of the First Nations and which is at the core of this proceeding. In that regard, there is an obvious absence of evidence from the defendants that would suggest they have made meaningful attempts to address this legitimate concern. That said, it still remains uncertain - based on the evidence before me - what the defendants could have done, to meaningfully or practically address or mitigate this legitimate concern relating to aging or aged-out children who have been apprehended.

[744] Although I note what it is that justifiably animates and underlies the plaintiffs' allegation concerning disconnection, on a practical level, the more obvious and addressable of the defendants' failings (already noted) relate to those inadequacies and failings that led to and in some instances perpetuated the apprehensions in the first place.

Conclusion as it Relates to Infringement

[745] The evidence highlighted by the plaintiffs and summarized throughout this entire section of the judgment is but a snapshot of the significant evidentiary record before me. When considering each category of the defendants' alleged failings or inadequacies distilled into the summaries included in this section of the judgment, the evidence may not seem to adequately reflect the "source of national shame" described by the plaintiffs in both their written and oral submissions. However, the sheer continuity and depth of this crisis - as identified in the multiple public inquiries, reports and in the repeated interventions by the defendants - suggest that something has gone (and continues to go) terribly wrong in First Nations child welfare. In my view, this is reflected not only in the unfavourable contents of the many public reports tendered in this proceeding but also in

the sheer number of reports that have consistently documented concerns and recommendations in connection with Manitoba's child welfare system.

[746] With that in mind, it is my view, that the evidence requires an assessment which considers the cumulative nature of the impacts of the defendants' actions on exercising of the plaintiffs' constitutionally protected right. That evidence clearly suggests that the defendants' actions or inactions and the resulting impact, infringed and negatively affected the plaintiffs' right to self-govern in the area of CFS just as they infringed and negatively impacted the included and incidental right to raise their children in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions.

[747] I accept the evidence of the plaintiffs' experts that First Nations children in care have been significantly overrepresented in the child welfare system throughout the Class period. Based on the statistical evidence alone, it would not be incorrect to say that the rates of apprehension and numbers of First Nations children in care during the Class period have been and remain staggering. Meanwhile, the extent and scope of the defendants' interventions during this same period serve only to reinforce the existence of a serious and sustained problem, and, frankly, how little those interventions appear to have had any effect in reducing the rates of apprehension or sheer number of First Nations children in care.

[748] In reaching the conclusion I have, I again recognize that during the relevant period, there were funding increases, changes to frontline service delivery, system and policy changes, and efforts by both defendants to address concerns expressed in various

public reports about the ways in which their legislative and policy choices were negatively affecting Indigenous children, families and communities. These efforts were premised upon and motivated by the defendants' legitimate interest in involving themselves financially, operationally and legislatively in the provision of CFS in respect of Manitoba First Nations children and families. However, the issue in the present case is not with the defendants' involvement in the area of child welfare and child protection, but rather in the manner of their involvement and whether it has unreasonably limited the plaintiffs' s. 35 right, imposed undue hardship, and denied them their preferred means of exercising that right.

[749] Considered cumulatively and taken all together, I have concluded that given the particularity, focus and unique purpose of s. 35, the defendants' conduct throughout much of the relevant period (January 1, 1992 to the present) fell short of the special and important obligations owed to the plaintiffs who I find possessed the right to self-govern in the area of CFS with the connected and incidental right to raise their children in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions. That impugned conduct, which I have summarized above, relates broadly to the funding, regulation and provision of CFS. The impugned conduct and the actions or inactions over the prolonged period, collectively constitute an unreasonable limitation on the plaintiffs' s. 35 right to self-government in the area of CFS. In denying First Nations the ability to self-govern in a way that is consistent with both the generic scope of that s. 35 right and the incidental right that I have identified, the defendants have caused undue hardship on the plaintiffs. Most significantly, however, that conduct

has also denied the plaintiffs their preferred means of exercising their right in a way that safeguards their own cultural continuity and survival. Accordingly, I have determined that the plaintiffs have established a *prima facie* infringement of their s. 35 Aboriginal right.

Having Found that the Defendants have Infringed the Identified Existing s. 35 Aboriginal Right, was the Infringement Justified (i.e. Related to a Compelling and Substantial Legislative Objective and Consistent with the Crown's Fiduciary Duty to the Plaintiffs, as First Nations)?

What must Justify the Infringement of an Aboriginal Right?

[750] Having concluded that the defendants have infringed the plaintiffs' s. 35 Aboriginal right to self-government in the area of CFS, (including the right to raise their children in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions), I move on to the next stage of my analysis, which requires me to determine whether the infringement is justified.

[751] Whereas the plaintiffs were required to establish a *prima facie* infringement of their right, at this stage of the analysis, the onus shifts to the defendants.

[752] Once that relatively low *prima facie* threshold is met by the plaintiffs, the defendants must justify the infringement by demonstrating both a valid legislative objective and that it has acted in a manner consistent with the honour of the Crown and its fiduciary relationship with Aboriginal peoples (see ***Sparrow***).

[753] The requirement that the Crown establish a compelling and substantial legislative objective is increasingly similar to the test for justifying the infringement of a ***Charter***

right (see ***R. v. Oakes***, 1986 CanLII 46 (SCC), at paras. 69 and 70). The second part of the test is distinctive as befits the *sui generis* nature of Aboriginal rights.

[754] Under ***Sparrow,*** the factors that the Court will consider in determining whether the Crown infringed a s. 35 right in a way consistent with the honour of the Crown and its fiduciary relationship with Aboriginal peoples will vary, depending on the nature of the right claimed. However, one factor the courts will always consider in determining whether the Crown's infringement of a s. 35 right is justified is whether they have fulfilled their duty to consult and accommodate the Aboriginal rights holder (see ***Sparrow***, at p. 1119). The duty to consult and, where appropriate, accommodate, lies at the heart of the concept of the honour of the Crown.

The Honour of the Crown and the Duty to Consult and Accommodate

[755] The honour of the Crown is a broad legal concept that informs Crown conduct in its various dealings with Indigenous people. As stated by the Supreme Court of Canada in ***Haida Nation v. British Columbia (Minister of Forests)***, 2004 SCC 73:

> 16 … The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, 1996 CanLII 236 (SCC), [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, 1999 CanLII 665 (SCC), [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.

[756] Where the constitutional obligations of the Crown towards Indigenous peoples are engaged, the honour of the Crown requires that governments demonstrate the utmost good faith in their dealings. It requires governments to interpret their constitutional obligations under s. 35 purposefully (to achieve reconciliation between the Crown and

Indigenous peoples), and not legalistically (see ***Manitoba Metis Federation***, at paras. 75 - 83).

[757] The honour of the Crown requires consultation with Indigenous peoples and the accommodation of their rights as part of a process of fair dealing and reconciliation. The legal test for the duty to consult and accommodate was set out by the Supreme Court of Canada in ***Haida Nation*** (see also ***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)***, 2004 SCC 74; ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)***, 2005 SCC 69; ***Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council***, 2010 SCC 43). Courts have often characterized the duty to consult as a procedural right, giving Indigenous communities the right to be heard. That right to be heard, however, cannot and will not ensure or guarantee a particular outcome (see ***Tsleil-Waututh Nation v. Canada (Attorney General),*** 2018 FCA 153, at para. 494; ***Tsilhqot'in Nation***, at para. 77). In other words, the duty to consult provides Indigenous communities the right to be meaningfully heard and accommodated, but it does not provide a veto. That said, where an infringement of an Aboriginal right has occurred, that infringement cannot be justified unless the Crown has met its duty to consult and accommodate (see ***Tsilquot'in Nation***, at para. 77). It is well established that this duty can arise even when the right is not clear, and when the existence of the right has not been confirmed by a court or a treaty (see ***Haida Nation***, at para. 37). This duty requires that the Crown attempt to deal with Indigenous communities "in good faith, and with the intention of substantially addressing" their concerns (see ***Mikisew***, at para. 55; ***Delgamuukw***, at para. 168). The nature and

scope of the duty to consult and accommodate will vary according to the circumstances of each case, but generally, it will be "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" (see ***Haida Nation***, at para. 39).

Other factors to Consider when Determining Whether a s. 35 Aboriginal Rights Infringement is Justified

[758] In ***Sparrow,*** the Supreme Court of Canada noted other factors the Court may wish to consider when determining whether the Crown has infringed a s. 35 Aboriginal right in a way that is in keeping with the honour of the Crown and its fiduciary relationship with Aboriginal peoples. One such factor is whether there has been as little an infringement of the Aboriginal right as possible in order to achieve the desired result (i.e., has the legislation or state action impaired the s. 35 right as little as possible). An additional factor identified in ***Sparrow*** is whether in cases of expropriation, compensation is available (at p. 1119). I note that the Supreme Court, in ***Sparrow***, was quick to clarify that this list is not exhaustive.

[759] Indeed, in ***Tsilhqot'in Nation,*** the Supreme Court of Canada added to the list of factors for courts to consider. In addition to the factor concerning the required minimum impairment of the right (which had been provided as a factor in ***Sparrow***) the Supreme Court suggested that other factors may include whether the incursion is necessary to meet the government's goal (rational connection) and whether the benefits to the public that may be expected to flow from the pressing and substantive objective, affects and impacts the Aboriginal interest in a way that is proportionate (proportionality of impact)

(at paras. 87 and 125). Many of these remaining factors appear imported from the ***Oakes*** test which is used to determine whether an infringement of a ***Charter*** right has been justified, blurring somewhat the distinction between these two tests. However, it is significant to note that in ***Tsilhqot'in Nation***, the Supreme Court also commented on the essence of the justification test in the context of s. 35 rights. In that regard, the Supreme Court observed that "the process of reconciling Aboriginal interests with the broader interests of society as a whole is the *raison d'être* of the principle of justification" (at para. 82).

[760] To summarize, the burden rests with the defendants to show that their infringement of the plaintiffs' s. 35 right is justified. To do so, the defendants must first show that their actions were taken in pursuit of a compelling and substantial objective. Secondly, the defendants must show that their actions were consistent with the honour of the Crown and its fiduciary relationship with Aboriginal peoples. The factors to be considered at the second stage of that justificatory analysis include whether the plaintiffs have been adequately consulted and accommodated, and whether the defendants' conduct has been proportionate to the adverse effects on the plaintiffs' right.

[761] As I go on to explain, I find in the present case that the defendants' infringement of the plaintiffs' s. 35 right cannot be justified. While I am satisfied that the first part of the ***Sparrow*** test has been met (i.e., that the defendants' actions were taken in pursuit of a compelling and substantial objective), I cannot say the same for the second part of that test (i.e., that the defendants' actions were undertaken in a manner consistent with the honour of the Crown and its fiduciary relationship with Indigenous peoples). First, I

am not satisfied that the defendants have shown they have discharged their duty to consult and accommodate. Second, I am also not satisfied that the defendants' conduct has been proportionate to the adverse effects on the plaintiffs' rights. Specifically, though I accept that the defendants' conduct could be said to have been rationally connected to its pressing and substantial objective, I find the evidence does not support a finding that the defendants' conduct was minimally impairing of the plaintiffs' s. 35 right, or that such conduct had a proportionality of impact.

Were the Defendants' Actions Taken in Pursuit of a Compelling and Substantial Objective?

[762] To meet the justification test, the defendants must first show, through evidence, that the infringement of an Aboriginal right is related to a compelling and substantial objective.

[763] Canada's materials make no direct mention of a compelling and substantial objective in connection with a potential breach of an Aboriginal right. It argues that it has no role to play in the delivery of child and welfare services to Manitoba First Nations (insisting that its responsibilities are limited to providing funding and setting standards for service delivery under the 2019 ***Act***). With respect to any analysis in relation to s. 35, Canada focuses its argument on the plaintiffs' alleged failure to show the existence of a s. 35 right.

[764] Manitoba identifies a pressing and substantial objective. It says that when it apprehends a child, and when it makes all decisions relating to child welfare, the child's safety and security are its primary consideration. Manitoba submits that its actions in

relation to child welfare are undertaken in support of a compelling and substantial objective to act in the best interests of the child.

[765] The plaintiffs themselves (appropriately) concede that both Canada and Manitoba, in funding, regulating and providing child welfare in Manitoba, were following a substantial and compelling legislative objective. They acknowledge this objective was to protect all children, including all Indigenous children, from harm and to act in the best interests of these children.

[766] It is not necessary to spend a great deal of time on this first question concerning a compelling and substantial objective. Given all of the evidence adduced by the defendants in this proceeding, I am satisfied (despite Canada not having directly addressed the issue) that the first part of the ***Sparrow*** justification test has been met.

Were the Defendants' Actions Undertaken in a Manner Consistent with the Honour of the Crown and its Fiduciary Relationship with Indigenous Peoples?

[767] Having accepted that the defendants' actions were taken in pursuit of the compelling and substantial objective to act in the best interests of children, I now turn to whether they have met the second part of the ***Sparrow*** test.

[768] I will start by observing (once again) that neither defendant has directly engaged with the question as to whether an infringement of the claimed right is justified. Canada has advanced little argument in relation to the plaintiffs' s. 35 right beyond contending that they have not established that they have one. Manitoba has similarly advanced little in the way of argument, beyond a bare claim that any infringement of the plaintiffs' rights was justified. Neither defendant squarely discusses whether its impugned conduct could

be construed as following the honour of the Crown and its fiduciary relationship with Aboriginal peoples. The positions of Canada and Manitoba respectively, make it difficult for this Court to undertake the requisite justificatory analysis when the defendants, themselves, have not explicitly done so. Still, given that the defendants have elsewhere in their submissions made representations that suggest explanations that could be construed broadly as justifying their impugned conduct in the context of the infringement of the plaintiffs' s. 35 right, I will, with the following questions, proceed to consider whether the defendants' infringement of that right is justified.

Has the Affected Indigenous Group been Adequately Consulted and Accommodated?

[769] I shall first consider whether the defendants have discharged their duty to consult and accommodate.

[770] Canada points to the enactment of the 2019 ***Act***, and the legislative process leading to it, which, Canada says involved "significant consultation with Indigenous communities and stakeholders" (Defendant (Canada) Brief, at para. 421). Canada points to this legislative process as evidence that Canada took meaningful steps to acknowledge and uphold Indigenous governance in this area rather than infringing upon any asserted right. Canada relies on the affidavit evidence of Ms. Peddle, who, in discussing the legislative genesis of the 2019 ***Act***, explained that it was a "product of extensive engagement and collaboration with Indigenous and provincial and territorial partners"

(see Peddle Affidavit, at para. 8). According to her evidence, this "engagement and collaboration" included:

- An emergency national meeting convened in 2018 by the then Minister of Indigenous Services, "to provide an opportunity for federal, provincial and territorial governments and Métis, Inuit and First Nations leaders, Elders, youth, community service organizations and advocates to chart a future path together that will urgently address the child welfare crisis in Canada" (see Indigenous Services Canada, "*A Report on Children and Families Together: An Emergency Meeting on Indigenous Child and Family Services*", (Ottawa: ISC, 2019), at p. 7);
- Over 65 engagement sessions in the year following the emergency national meeting, held by Canada with national, regional, and community organizations representing First Nations, Inuit and Métis, as well as provinces and territories, and individuals including Elders, youth and women;
- A "Reference Group" with representation from the AFN, Inuit Tapiriit Kanatami, the Métis National Council, and Canada;
- A meeting between representatives from Indigenous Services Canada and the AMC's Grandmother's Council and Women's Council in Winnipeg in November 2018; and
- A commitment by Canada to continue engagement directly with s. 35 rights-holders following the coming-into-force of the 2019 ***Act***, which then

involved discussions between Indigenous Services Canada and First Nations, Inuit, and Métis people, communities, and organizations at various levels to discuss the implementation of the legislation.

[771] Manitoba does not make an explicit connection between its consultative efforts described by various of its affiants and its duty to consult in the context of the plaintiffs' s. 35 right. However, this evidence can be construed in this way to support Manitoba's implicit position that it too, sufficiently discharged this duty. In considering Manitoba's position, the evidence I considered included:

- Ms. Kiersgaard's evidence (see Kiersgaard Affidavit):
    - That, following Manitoba's establishment in 1999 - 2000 of the Aboriginal Justice Implementation Commission to review implementation of the recommendations of the AJI, the AJI-CWI was established as a joint initiative of Manitoba, the AMC, the MMF, and the MKO, to "work collaboratively toward the development and implementation of a plan to restructure the CFS system in Manitoba", which eventually led to amendments to the ***CFSA*** and the enactment of the ***CFSAA*** that devolved authority over CFS to agencies and authorities (at para. 18);
    - That, the SEF model, which Manitoba adopted in 2019, was implemented following "engagement and input from various entities, including MKO, the SCO, and the MMF, as well as the Authorities and Agencies themselves" (at para. 66); and

- That, the introduction and subsequent use of the SDM assessment tools were only implemented by Manitoba after, "a period of discussion and collaboration with the Authorities" (at para. 77).

- Mr. Rogers' evidence (see Rogers Affidavit):
  - That, the Implementation Committee for Devolution was tasked with designing and implementing the system for the transfer of Indigenous child welfare that would be acceptable to the First Nations, Métis and Inuit people of Manitoba. This was to be consistent with the recommendations of the AJI-CWI and it involved consultations with Indigenous representatives "[t]hroughout the process of designing and implementing the legislation, regulations and policies", including at town hall meetings. This consultation involved incorporating comments and recommendations from Indigenous representatives into the draft legislation that eventually became the ***CFSAA*** and associated regulations (at para. 14); and
  - That, the Implementation Committee for Devolution also held meetings with Indigenous representatives to review the draft ***CFSAA***, and they did so, continuing to revise the draft "until everyone was accepting of its final form" (at para. 18).

- Mr. Rodgers' evidence that, in December 2017, Manitoba appointed an independent committee to undertake a review of its child welfare legislation, which committee "was composed of seven community leaders

and experts, and was represented by a number of Indigenous community leaders, including one representative from each of the three Indigenous Authorities", and that, following the release of its report in September 2018, Manitoba began work on reviewing the recommendations made in that report, including the creation of a working group "led by Manitoba aimed at drafting new legislation based on the committee's 63 recommendations" (see Rodgers Affidavit, at paras. 80 and 83).

- The evidence of Mr. Lajeunesse, who, in describing the evolution in the ways Manitoba has funded CFS, referenced a collaboration in 2008 with the AMC in the development of the federal government's EPFA (announced for Manitoba in 2010), and the consultations that led to Manitoba's implementation of single envelope or block funding in 2019, which consultations included representation from Indigenous leadership.

[772] Based on the foregoing, I acknowledge that there have been efforts by the defendants over the relevant period to consult with First Nations and to accommodate their interests. This is particularly so, as it relates to the actions of Manitoba. However, given the evidentiary burden that rests with the defendants on the question of justification, I am not satisfied that the evidence adduced by the defendants is enough to demonstrate that the defendants have discharged their duty to consult and accommodate. Importantly, as noted earlier, although the duty to consult does not create a de facto veto for First Nations, the duty does require that the Crown attempt to deal with Indigenous communities in good faith and with the intention of substantially

addressing their concerns. While the nature and scope of the duty to consult and accommodate will vary according to the circumstances of each case, generally, the more serious the potentially adverse effect of a government's conduct on the right, the more expansive and thicker the nature and scope of that duty will be.

[773] The duty also arises when the Crown has real or constructive knowledge of a potential Aboriginal right. Legislative recognition of a s. 35 right to self-government in relation to CFS occurred federally in 2019 and in Manitoba in 2024. However, that does not mean Canada or Manitoba did not have a duty to consult before such legislative recognition. As Mr. Morin explains in his evidence, in the 1970s and 1980s, First Nations tried to create their own agencies to help with child welfare services to First Nations children and families arising from their concerns about the high levels of apprehension. As early as 1982, the first tripartite "Canada-Manitoba-Indian Child Welfare Agreement" acknowledged the "special needs" of First Nations people, the "paramount importance" of preserving their cultural identity, and that the provision of services must "involve" First Nations people. By 1985, the Kimelman Inquiry had already raised the spectre of "cultural genocide" because of the number of Indigenous children in care. The findings of the AJI a short time later, in 1991, reinforced that the child welfare system in Manitoba was failing Indigenous children and families. Along with other things, those findings would have also reinforced for the defendants that First Nations needed to determine for themselves how to care for their own children. By then, both Canada and Manitoba would have had real or constructive knowledge of a potential Aboriginal right, one that should

have triggered them to behave towards Manitoba First Nations in a way consistent with the honour of the Crown and its fiduciary relationship with Indigenous peoples.

[774] Mindful of the above, I find that the nature and scope of the duty to consult with First Nations in the context of conduct that could potentially involve an infringement of their s. 35 right to self-government in relation to CFS is, and ought to have been, on the higher end of the spectrum. I conclude this because CFS is, as the Supreme Court characterized it, "fundamental to the culture and identity of Indigenous peoples" (see ***C-92 Reference Decision #2***, at para. 112). Thus, action by Canada and Manitoba that purports to infringe upon First Nations' right to self-government and which would have, and has had, the potential to seriously adversely affect something that is at the core of their culture and identity, required and requires still robust and ongoing consultation. I am not satisfied the evidence adduced by the defendants sufficiently shows they have done so.

[775] Canada seems to suggest that, before its decision to develop and enact the 2019 ***Act***, it had no duty to consult and accommodate because it merely provided funding for on-reserve child welfare though the FNCFS program and for off-reserve child welfare though general social transfers to the provinces. I have already rejected how Canada has characterized its limited involvement in the child welfare system in Manitoba. I find that Canada's decisions to implement the FNCFS program in 1992, and to devise and implement the funding models for it (i.e., Directive 20-1 and EFPA), required engagement with those First Nations affected by its decisions. Additionally, and particularly as it became clear that those funding models were insufficient, and probably inappropriate,

Canada had a duty to further engage. It is my view that it is not enough for Canada to say, as it does, that it satisfied any duty to consult through its conduct and process leading to the enactment of the 2019 ***Act***. That position ignores the prior decades during which there was little consultative engagement and during which Canada was nonetheless intimately involved in the child welfare of First Nations.

[776] Nor is it clear that Canada sufficiently discharged its duty to consult during the period leading to the enactment of the 2019 ***Act*** itself. While Canada's evidence, adduced by Ms. Peddle, broadly describes the process of consultation that took place, it does not specify the nature of the feedback Canada received or how Canada addressed, maybe even incorporated, the concerns and interests of Indigenous peoples in the draft legislation. I have concerns about Canada's evidence in this regard considering the evidence of Ms. Frank, who disputes Ms. Peddle's evidence that Canada engaged in "extensive engagement and collaboration" with Indigenous groups. In her evidence, Ms. Frank describes at great length the work of the AMC and the FNFAO to develop Manitoba-specific federal legislation that would reassert First Nations inherent jurisdiction over CFS. The anticipated legislation was known as the (draft) Bringing Our Children Home Act (the "BOCHA"). That work was not only a product of extensive consultations facilitated by the FNFAO following ***Caring Society***, but also arose out of a Memorandum of Understanding signed between Canada and the AMC in December 2017, in which Canada and the AMC committed to work together to achieve concrete outcomes that were mutually beneficial and that supported the aspirations of First Nations in Manitoba. Ms. Frank explains that the BOCHA, which she says the AMC repeatedly advised Canada was the desired approach

of First Nations in Manitoba to address the child welfare crisis, was initially supported by Canada. Canada funded the AMC for its development in or around July 2018. However, after giving Canada a draft of the BOCHA by the October 2018 deadline imposed by Canada, Ms. Frank says that the then-Minister of Indigenous Services Canada told the FNFAO that Canada would not introduce the BOCHA as a standalone bill. This despite it having been developed with that understanding. Instead, the work of the BOCHA would be incorporated in what would become the 2019 ***Act***. Ms. Frank's evidence further discusses the efforts of the AMC to oppose that approach and the 2019 ***Act*** before its enactment. It is Ms. Frank's evidence that the AMC has consistently opposed the 2019 ***Act***. While she concedes the system created by the 2019 ***Act*** is an improvement over the previous provincial system, she says that significant flaws remain and it is inconsistent with the ultimate goal of First Nations in Manitoba. Specifically, she says the 2019 ***Act*** imposes on First Nations a pan-Indigenous approach to child welfare that fails to respect the First Nation-Crown treaty relationship. The 2019 ***Act*** provides what she says is a colonial veto by continuing to impose a paramountcy of Canadian law over First Nations laws. The 2019 ***Act*** also imposes upon First Nations what she says are foreign concepts related to the best interests of the child and that are inconsistent with First Nations worldviews.

[777] Manitoba's consultation efforts appear, based on the evidence adduced by Manitoba, to have taken place at several points in time during the proposed Class period. Manitoba appears to have engaged in consultations before the implementation of devolution, and before the implementation of single envelope or block funding. As with

Canada's evidence, however, Manitoba's evidence, while showing that consultations took place, does not specify the nature of the feedback Manitoba received or how Manitoba addressed, maybe even incorporated, the concerns and interests of Indigenous peoples during those consultation efforts. Accordingly, it is difficult to discern whether those consultations could be considered meaningful and whether they were undertaken with the intention to substantially address those concerns and interests. I acknowledge Mr. Rogers' evidence regarding the Implementation Committee for Devolution's clause-by-clause review of the draft ***CFSAA***, which involved revising the draft legislation "until everyone was accepting of its final form". However, it is also important to acknowledge Mr. Rogers' further evidence that "Indigenous representatives were not fully satisfied with the outcome of Devolution as it did not provide for a full transfer of jurisdiction respecting child welfare services for their people" (see Rogers Affidavit, at para. 20). This echoes the evidence of the plaintiffs who similarly object to devolution and the way Manitoba implemented it. In the first 10 years following devolution, during which the number of First Nations children in care went from 4,589 in 2005 to 8,147 in 2016, and Manitoba's rate of child apprehension was the highest in the western world, it is unclear on the evidence whether Manitoba made any efforts to engage with First Nations. Given these metrics alone, one would have thought that Manitoba would have made a concerted effort to continuously engage in an effort to address the concerns and the problems (as the plaintiffs' witnesses have articulated them) with devolution.

[778] I acknowledge that there is evidence before me as to how Manitoba responded to reports during this period, including from the Manitoba Ombudsman, the provincial and

federal Auditors General, and the Office of the Children's Advocate. That said, when a s. 35 right is at issue, that type of response is different from proactively engaging in and discharging the duty to consult and accommodate.

[779] It is similarly difficult to reconcile Manitoba's scant evidence about the consultations that took place before the implementation of SEF. I say this given the plaintiffs' evidence, already discussed, about imposition of block funding and the deficiencies in that approach. I also note the evidence in the Sinha-Petti Report, which observed that agencies taking part in the pilot project preceding the full roll-out of block funding were forced into deficit spending when the number of children in care spiked and advocated for the development of a contingency fund to cover increased spending. The Sinha-Petti Report suggests that the block funding model that was ultimately rolled out did not include a mechanism to address unexpected costs. Chief Cook's evidence echoes this conclusion. As a result, it is difficult to see how it could be said the consultations that took place before the implementation of SEF meaningfully addressed or accommodated the concerns of First Nations when the funding model was, from the outset, so flawed.

[780] I am not satisfied that the defendants have sufficiently established that they have discharged their duty to consult and accommodate in a manner that is consistent with the honour of the Crown. This is especially so considering my conclusion that the nature and scope of the consultation required in this case is on the higher end of the spectrum owing to the right at issue and the potentially significant and consequential impact in the event of a breach of that right. On that basis alone (because of the failure to discharge their duty to consult and accommodate), the defendants' infringement cannot be justified.

However, in the interests of clarity, I shall also briefly consider that part of the ***Sparrow*** test, which the Supreme Court in ***Tsilhqot'in Nation*** characterized as the Crown's obligation of proportionality.

Have the Benefits of the Defendants' Conduct been Proportionate to the Adverse Effects on the Plaintiffs' s. 35 Aboriginal Right?

[781] Neither Canada nor Manitoba have explicitly argued that their respective conduct was necessary to achieve their objectives, that it went no further than necessary to achieve those objectives, and that the benefits of the conduct outweighed the adverse effects. Just as they made no argument in this regard, neither have the defendants led any evidence that addresses those aspects of the test for justification.

[782] As it relates to Canada, the absence of argument or evidence as explained above would seem to follow from Canada's position that the plaintiffs do not have a s. 35 right for Canada to have infringed. It can also be explained by Canada's insistent position that its role in the provision of CFS is limited to general federal transfers (to help Manitoba to deliver social programs) including on- and off-reserve child welfare. Elsewhere and more broadly, however, Canada relies on the evidence of Mr. Morin and Mr. Farthing-Nichol to show how Canada responded to deficiencies in its Directive 20-1 funding model with the implementation of the EPFA, and how Canada further responded to ***Caring Society***, which found significant flaws with both funding models, and the additional funding Canada more recently provided through its FNCFS program. While not specifically in response to the plaintiffs' s. 35 claim or as part of an argument to support any discharge of its burden to justify any alleged breach, I note Canada also draws the Court's attention to the fact that Canada also adopted the ***Indigenous Languages Act***, S.C. 2019, c. 23.

Canada submits that the ***Indigenous Languages Act*** supports Indigenous peoples in their efforts to revitalize, maintain and strengthen their languages. Canada further relies on the affidavit of Ms. Fraser to identify federal funding and programming to promote and revitalize Indigenous languages, culture and traditions. The implication is that Canada's conduct, while maybe imperfect, was well-intentioned and responsive.

[783] Manitoba has broadly characterized the history of CFS in Manitoba as unique, complex and ever evolving, and says that, for Manitoba's part, that history includes significant funding increases, changes to front-line service delivery, system and policy changes, and review and implementation of recommendations made during the proposed Class period. These initiatives and responses are characterized by Manitoba as legislative action and core policy decisions, which it says are immune from liability and not justiciable. Manitoba further says that these initiatives and actions occurred as Manitoba's relationship with First Nations peoples and their leadership, and its understanding of Indigenous issues, developed over time. While Manitoba does not explicitly make these submissions to justify an infringement of the plaintiffs' s. 35 right, they implicitly suggest that in Manitoba's view, its conduct was consistent with the honour of the Crown.

[784] On a charitable reading of the evidence, perhaps the defendants' conduct could be said to have been necessary to achieve their objectives. As I have noted elsewhere, the defendants have had a legitimate interest in involving themselves financially, operationally and legislatively in the provision of CFS to Manitoba First Nations children and families. The welfare and safety of First Nations children in Manitoba is, as it is in relation to all children, a matter of deep concern for both levels of government. Therefore,

it would not be unreasonable to conclude that the manner in which the defendants have funded, regulated and provided child welfare and child protection services, has a rational connection to the defendants' objective of protecting all children - including all Indigenous children - from harm and to act in the best interests of these children. However, on that same reading of all the evidence, it is difficult to conceive how the defendants' conduct could be said to be minimally impairing of the plaintiffs' s. 35 right and that there has been a proportionality of impact.

[785] In many respects, the statistics alone support the above conclusion. Throughout the Class period, Manitoba has had the highest rate of children in care in the country. In the first 10 years after devolution, the number of First Nations children in care nearly doubled and Manitoba's rate of child apprehension was the highest in the western world. Even now, even though they have consistently accounted for less than 20% of the children in the province, First Nations children represent over 70% of the children in care in Manitoba.

[786] These staggering rates of apprehension and children in care are not an accident. As I have found, based on the evidence, decisions by both Canada and Manitoba resulted in a child welfare system that disproportionately prioritized apprehensions ahead of prevention and family support services. This significantly and directly contributed to the severing of ties between First Nations children, their families, and the First Nations themselves. Incompatible foster care standards, culturally inappropriate care, and inadequate supports to ensure children in care maintain their connections to their home communities and to assist people who have aged out of care to reconnect with their First

Nations, have similarly had a significant and direct impact on not just the children themselves, but also on the plaintiff First Nations. Taken in isolation, some of the examples of Manitoba's and Canada's infringing conduct, as set out above, might be minimally impairing. However, in total, the cumulative and compiled instances and scope of the infringement (as I have outlined it above), strongly suggest Manitoba's and Canada's conduct has been more than minimally impairing, and that its impact on the Aboriginal right has been disproportionate to the benefits that may have been expected to flow from the pursuit of that pressing and substantial objective.

[787] I acknowledge the evidence of Manitoba's witnesses, Dr. Santos, Mr. Rogers, Ms. Mindell, and Ms. Kiersgaard, each of whom testified to what I would hope would be obvious: that to the best of their knowledge, Manitoba did not intentionally design or run CFS to harm First Nations children or their families. I similarly want to acknowledge that the conduct of both Manitoba and Canada throughout the Class period evidenced efforts (often in response to a damning public report) to improve the system. While some of these efforts could be construed as an attempt to minimally impair the plaintiffs' s. 35 right they were often late and in the circumstances, inadequate and insufficient. Put simply, given that the Aboriginal right in question is a constitutionally protected one that is fundamental to the culture and identity of Indigenous peoples, Canada's and Manitoba's efforts were not good enough. As I have stated, that conclusion should not suggest that Canada's and Manitoba's efforts must have been perfect, or even largely successful. However, it does mean both Canada and Manitoba were required to ensure that the plaintiffs' constitutional right to self-government in relation to CFS was respected. To the

extent that any infringement of that right was necessary to meet Manitoba's and Canada's goals, any such infringement was required to be minimally impairing and the benefits of their conduct needed to outweigh the detriments. In the circumstances of this case, I cannot so conclude.

[788] In the absence of any compelling evidence by Manitoba or Canada to the contrary, I find that their conduct more than minimally impaired the plaintiffs' s. 35 right. I similarly find that the combined and cumulative negative effects of their conduct have disproportionately outweighed any benefits that might have accrued. Given my earlier determination respecting the defendants' failure to discharge their duty to consult and accommodate, I find that the defendants' infringement of the plaintiffs' s. 35 right cannot be justified.

[789] I have been able to make what I believe are the above fair and just determinations on the merits in the context of a summary judgment motion where the voluminous and rich evidentiary record permits me to find the necessary facts and apply the governing law. In doing so, I have no difficulty or hesitation in concluding that as it relates to the plaintiffs' certified s. 35 claim and the related reformulated Stage 1 common issues, there are now no genuine issues that require a trial.

Availability and Appropriateness of Declaratory Relief

[790] Having granted summary judgment in the plaintiffs' favour in relation to their Aboriginal rights claim under s. 35(1) of ***Constitution Act***, I now turn to the relief that may be granted at this juncture. For the reasons that follow, I have determined that I

may, at this stage of the proceedings, make a declaratory order in respect of the plaintiffs' s. 35 claim.

Position of the Parties

Position of the Plaintiffs

[791] In their FASC, the plaintiffs seek, amongst other things, a declaration that the defendants have violated the rights of the plaintiffs under s. 35 of the ***Constitution Act***. They also separately seek aggravated and punitive damages and further say, that damages also flow from any breach of the defendants' duty to consult and accommodate in connection with their claimed s. 35 right.

[792] The plaintiffs proposed a two-stage process to adjudicate these and their other claims, with each stage dealing with its own discrete common issues. At Stage 1, the plaintiffs conceived of the common issues as serving to define the nature and content of any duties the defendants may owe them, and to determine whether the defendants may have breached those duties. At Stage 2, they conceived of the common issues as serving to determine causation, damages, and any injunctive or supervisory relief that may result from any breaches that are identified at Stage 1. On their motions for certification and summary judgment, the plaintiffs have sought, amongst other things, an order from this Court "[e]ntering judgment answering the Stage 1 Common Issues in favour of the Plaintiffs, with binding effect on any First Nation in Manitoba that opts into the class proceeding" (see FASC, at para. 428(f)). In rendering its decision on the Stage 1 common issues, they say this Court should describe the nature and content of Canada's and Manitoba's duties to the plaintiffs, as well as the breach of those duties. In their oral

submissions, the plaintiffs indicated that they understood that it would be through declarations that this Court would effectively do that. The plaintiffs further suggested that, in making those declarations, the Court should also consider directing the parties to engage in discussions, shaped by the Court's determinations on summary judgment, in the spirit of reconciliation and with a view to reaching resolution such that a trial of the Stage 2 common issues may be avoided or truncated.

Positions of the Defendants

[793] Canada's and Manitoba's positions on the availability and appropriateness of declaratory relief at Stage 1 are intimately connected to their positions on the applicability of limitations legislation in the Ccourt's certification of the plaintiffs' proposed Class proceeding and summary judgment on the Stage 1 common issues. I have already addressed the wider limitations issues at paras. 217 to 251 of my reasons and concluded that those issues are best addressed at Stage 2.

[794] As it relates to the narrower issue of whether and what declarations can be made flowing from my decision on the motion for summary judgment, the defendants' positions appear to differ. Although both Canada and Manitoba opposed this matter proceeding by way of summary judgment, I also note that if the summary judgment motion were to proceed (as it has), neither Canada nor Manitoba has argued that including the determination of breaches at Stage 1 would be inappropriate if limitations determinations are deferred. As such, if, despite their opposition, the summary judgment motion were to proceed, I broadly understand both defendants to have accepted that the scope of my summary judgment may involve making factual findings in respect of the plaintiffs'

claimed s. 35 right, as well as the breach of same. At issue for the defendants, therefore, is not whether I may render summary judgment in the manner I have done, but whether and to what extent this Court may issue declaratory orders arising from those factual findings at this stage in the proceedings.

Position of Canada

[795] In its oral submissions, Canada took the position that it would be inappropriate for this Court to grant any declaratory relief at Stage 1. They took this position on the basis that the plaintiffs' claims for declaratory relief could not be severed from their claims for remedial relief. They further argued that the plaintiffs had not explicitly sought any declarations in the order they requested in their Notice of Motion. Therefore, in oral submissions, Canada appears to have taken the position that any relief, declaratory or remedial, must await the conclusion of a trial at Stage 2, should I render summary judgment in the plaintiffs' favour at Stage 1.

[796] In their subsequent written submissions dealing with limitations issues (which I requested of all parties following the conclusion of the hearing in this matter) Canada further outlined its position on the availability of declaratory relief. It argues that all declarations of breach are, in effect, remedial or coercive in substance. Therefore, like any other form of remedial relief, such as damages or injunctive relief, such relief is subject to limitations, and cannot be granted if it is statute-barred. Canada acknowledges that, in ***Shot Both Sides,*** the Supreme Court of Canada found that limitations legislation cannot bar courts from issuing declarations regarding the constitutionality of Crown conduct. However, at the same time, Canada takes the somewhat confusing position that

it would nevertheless be inappropriate to grant any declarations with respect to the plaintiffs' s. 35 claim at Stage 1. This position may be informed by the way the plaintiffs had initially formulated the common issues. Having reformulated the common issues, as I have done, it is unclear whether Canada would still consider it inappropriate for this Court to grant declaratory relief in relation to the plaintiffs' s. 35 claim at this stage of the proceedings.

Position of Manitoba

[797] Manitoba's position is more conciliatory. As they summarize in their subsequent written submissions on the limitations issues (see Supplemental Submissions of the Defendant The Government of Manitoba (Plaintiffs' Motions for Certification and Summary Judgment) Re: Limitations Arguments, filed February 20, 2026):

> 4. … Manitoba is not relying on limitations defences to argue that any of the plaintiffs' proposed claims fail to disclose a reasonable cause of action. Manitoba is not raising any limitations-related defences respecting the plaintiffs' proposed causes of action alleging breaches of the *Constitution Act, 1982* or breach of fiduciary duty. As to the plaintiffs' systemic negligence and *Charter* claims, Manitoba submits only that the applicable limitations legislation should be applied to limit the length of the Proposed Class Period respecting these claims, and only with respect to the components of the claims that seek remedial relief.

More importantly, Manitoba further says that it is not arguing that any of the plaintiffs' claims for declaratory relief are statute-barred.

[798] It is unclear whether Manitoba opposes the declaration the plaintiffs are seeking at Stage 1. However, it was always known to Manitoba that the plaintiffs were seeking declaratory relief for breaches of, amongst other things, their s. 35 right (in addition to damages for that breach and any other breaches). It was also known to them, based on the way in which the plaintiffs framed the common issues, that Stage 1 of these

proceedings would consider whether their s. 35 right had been breached, and that any determinations about damages would be a matter for Stage 2. As such, I am inclined to understand Manitoba's position to be that it does not oppose this Court making at this stage of the proceedings, the sort of declaratory order the plaintiffs have sought in their FASC.

Legal Framework for Granting Declaratory Relief

Nature of Declaratory Relief

[799] Declaratory relief is a discretionary remedy, and courts have broad discretion in deciding whether to grant it (see ***Manitoba Metis Federation***, at para. 131; ***Shot Both Sides***, at para. 67). They may do so, notwithstanding the absence of any cause of action to support consequential relief (see ***Manitoba Metis Federation***, at para. 143; ***Ewert v. Canada***, 2018 SCC 30, at para. 81). This Court's authority to grant such a remedy is codified in ***The Court of Kings Bench Act,*** C.C.S.M. c. C280, at s. 34.

[800] Although the Court's discretion to issue such relief is broad, declaratory relief has nonetheless been characterized as a "narrow remedy" (see ***Ewert***, at para. 81). This is because of the purpose it is designed to serve, which is to clarify legal relationships. As the Supreme Court of Canada explains in ***Shot Both Sides***, "[t]he essence of a declaratory judgment is a declaration, confirmation, pronouncement, recognition, witness, and judicial support to the legal relationship between parties without an order of enforcement or execution" (at para. 65, citing L. Sarna, *The Law of Declaratory Judgments* (4th ed. 2016), at p. 6).

Availability of Declaratory Relief when Limitations Defences Apply

[801] When a plaintiff seeks declaratory relief, courts must, notwithstanding their broad discretion to grant such relief, grapple with whether it is available in the face of applicable limitations legislation. The answer to this question would appear to largely depend on the wording of the applicable limitations statute and whether such legislation contemplates the availability of declaratory relief even if a cause of action or a claim is statute-barred. Some statutes, for example, expressly exempt claims for declaratory relief from limitation periods (see ***Limitations Act***, RSA 2000, c L-12, at s. 1(i)(i); ***Limitations Act***, 2002, S.O. 2002, c. 24, Schedule B, at s. 16(1); ***Limitation Act***, SBC 2012, c 13, at s. 2(1)(d); Manitoba's ***New Act***, s. 3(1)(c)). In the absence of such an express allowance, all relief, declaratory and consequential, may be statute-barred if the cause of action falls outside the applicable limitation period.

[802] In ***Manitoba Metis Federation***, however, the majority of the Supreme Court affirmed that limitations legislation could not bar a declaration on the constitutionality of the Crown's conduct (at para. 144). In so doing, the Supreme Court confirmed what could be considered an exception or instance where it is clearly unnecessary to consider the applicability of limitations legislation before granting declaratory relief: that exception would include or contemplate those circumstances where the plaintiff is seeking a declaration on the constitutionality of the Crown's conduct. In such cases, as the Supreme Court recently reaffirmed in ***Shot Both Sides,*** declaratory relief is always available (at para. 63. citing ***Manitoba Metis Federation***, at paras. 135, 137, 139 and 143).

[803] A declaration regarding the constitutionality of the Crown's conduct can include a declaration that the Crown has unjustifiably infringed or breached an Aboriginal or treaty right recognized and affirmed by s. 35(1) of the ***Constitution Act*** (see ***Shot Both Sides***, at paras. 63, 64 and 83). Indeed, as the Supreme Court explained in ***Shot Both Sides***:

> [66] Declarations set out the parameters of a legal state of affairs or the legal relationship between the parties. They primarily confirm or deny the legal rights of the parties. Importantly, declarations can also confirm or deny the breach of a right or declare the existence of a new legal state of affairs (see, e.g., *Manitoba Metis*, at paras. 6 and 154; Smith, at p. 15).
>
> [emphasis added]

Such declarations of breach necessarily require the court to also declare the existence of the underlying right (see ***Wesley v Alberta***, 2024 ABCA 276, at para. 184). Indeed, without confirming the nature and content of a right, it is impossible to determine whether that right has been breached. That said, limitations legislation may nevertheless operate to bar a claim for damages resulting from that breach (see ***Shot Both Sides***, at para. 63).

[804] Therefore, to summarize the state of the law in this area, even if the consequential or coercive relief claimed in relation to a breach of an Aboriginal right or treaty is statute-barred, declaratory relief regarding the constitutionality of the Crown's conduct, including whether the Crown has breached an Aboriginal right or treaty, remains available.

Test for Appropriateness of Declaratory Relief

[805] If a court has satisfied itself that declaratory relief is available to a plaintiff, it must next consider whether it would be appropriate, in the circumstances, to order such relief.

As the Supreme Court of Canada recently reaffirmed in ***Shot Both Sides*** (at paras. 67 - 69), such relief will be appropriate if it meets the following factors:

- The court has the jurisdiction to hear the issue;
- The dispute before the court is real, and not theoretical;
- The party raising the issue has a genuine interest in its resolution;
- Other parties have an interest in opposing the declaration sought; and
- The declaration will have some practical utility.

[806] Declaratory relief in the context of Aboriginal right and treaty claims take on a "unique tenor" and courts ought to be particularly mindful of the value of declaratory relief in such cases. As the Supreme Court explained in ***Shot Both Sides***:

> [70] Declaratory relief takes on a "unique tenor" in the context of Aboriginal and treaty rights because it is a means by which a court can promote reconciliation to restore the nation-to-nation relationship ... It relies in part on the government acknowledging the declaration promptly and acting honourably in determining the means for advancing reconciliation … That this assumption can be difficult in breach of treaty cases, as reconciliation efforts often follow decades of dishonourable Crown conduct and adversarial litigation, does not diminish the possible salutary effect of declarations.
>
> [71] The reconciliation process differs from the conflict driven, adversarial litigation process that is often antithetical to meaningful and lasting reconciliation. As the Court noted in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.,* … "[t]rue reconciliation is rarely, if ever, achieved in courtrooms." The Court has repeatedly emphasized the importance of reconciliation between Indigenous peoples and the Crown outside of the courts …
>
> [72] Reconciliation can be fostered by declaratory relief. The non-coercive nature of declaratory relief can help "the parties to the dispute to resolve the issues without an excessively hostile or adversarial approach" and can help to restore the honour of the Crown ... Academic commentary has recognized that this approach "is especially appropriate given the non-adversarial, trust-like relationship Canadian governments are supposed to have with Aboriginal people" … Avoiding expensive, lengthy, and adversarial litigation is an important step for reaching reconciliation-oriented results where Aboriginal and treaty rights are at issue.

> [73] In Aboriginal and treaty rights claims, declaratory relief can assist in providing a clear statement on the legal rights of Indigenous parties, the duties placed on the Crown, and the Crown's conduct in relation to those sacred promises. Clarity on these rights, duties, and conduct can help to uphold the honour of the Crown, guide the parties in the reconciliation process mandated by s. 35(1) of the *Constitution Act, 1982*, and assist with efforts to restore the nation-to-nation relationship.
>
> [citations omitted]

What Declaratory Relief is Available and Appropriate at this Stage of the Proceedings?

[807] At its most basic level, I find that the plaintiffs' proposed two-stage process contemplates declaratory relief at Stage 1 and consequential relief at Stage 2. After all, at Stage 1, the plaintiffs sought to have their claimed rights and any duties they may be owed, defined and the breaches of same determined. At Stage 2, they sought to have liability for those breaches apportioned as between the defendants. At Stage 2 they would further seek awards of damages and injunctive relief as a consequence for those breaches. As I have explained earlier in these reasons, I have reformulated the plaintiffs' Stage 1 and Stage 2 common issues to account for what I considered to be the more appropriate way to frame and approach their various and legally distinct claims. However, in so doing, I respected the plaintiffs' two-stage process, which neither defendant opposed. At the same time, I also determined that limitations issues, including consideration of any limitations defences, would be held over to Stage 2 of these proceedings.

[808] I have now granted judgment in respect of the plaintiffs' one claim that I have certified, a claim that I determined could be appropriately adjudicated in a summary way. The determinative and factual findings I have made in respect of that claim at Stage 1

have several important aspects. First, they recognize that the plaintiffs currently have, and have always had, an Aboriginal right protected by s. 35 of the ***Constitution Act***. Second, those findings and determinations have clarified the nature and scope of that right. Finally, they reveal that the defendants, through their past conduct, have unjustifiably infringed that right. Irrespective of any declaratory relief that may flow from those determinations, the determinative and factual findings I have made in respect of that claim and Stage 1 common issues, appropriately advance the plaintiffs' action as a staged Class proceeding. Class members who opt into the proceedings shall be able to rely on these factual findings, which will not only avoid duplicative litigation on the Stage 1 common issues, but may also help streamline resolution of the remaining common issues at Stage 2.

[809] That said, I am satisfied that at this stage of the proceedings, declaratory relief is available to the plaintiffs in relation to their s. 35 Aboriginal rights claim, even if limitations defences are ultimately found to render other forms of relief (sought by the plaintiffs in the context of that claim) statute-barred. Such a declaration, that their s. 35 Aboriginal right exists and that the defendants have unjustifiably breached it, deals squarely with the constitutionality of the Crown's conduct. Consistent with ***Shot Both Sides***, that declaration is always available.

[810] I am also satisfied that declaratory relief in relation to the plaintiffs' s. 35 Aboriginal rights claim is appropriate at this stage of the proceedings. All the aforementioned factors are met. First, this Court has jurisdiction to hear the issue and to grant such relief. Second, the dispute between the parties in this case is real. Third, the plaintiffs have a genuine

interest in resolving the dispute. Fourth, the defendants have legitimate interests in opposing such a declaration. Finally, and most importantly, there is much practical utility in issuing such a declaration in this case, at this juncture.

[811] The plaintiff First Nations in this case remain in an ongoing relationship with both Canada and Manitoba in the area of CFS. Regardless of whether any consequential relief may be available to the plaintiffs (and those Class members who opt into the Class proceeding) for the defendants' past infringement of their s. 35 right, the clarity that declaratory relief provides "can help to uphold the honour of the Crown, guide the parties in the reconciliation process mandated by s. 35(1) of the *Constitution Act, 1982*, and assist with efforts to restore the nation-to-nation relationship" (see ***Shot Both Sides***, at para. 73). Moreover, because the relationship is an ongoing one, I see no principled reason to defer the granting of such declaratory relief until the conclusion of a trial at Stage 2 (the timeline for which has not yet been set and could take years to conclude). Indeed, granting such relief now may even provide the parties to this action with a platform for negotiation that enables them to truncate or even avoid a Stage 2 trial with respect to this claim.

[812] I therefore make the following declaration in conjunction with the summary judgment I have rendered on the Stage 1 common issues:

- The plaintiffs have an Aboriginal right, recognized and affirmed by s. 35(1) of the ***Constitution Act***, to self-government in the area of CFS, which includes the right of the plaintiffs to raise their children in their culture and

community, with a connection to their land, and immersed in their languages and spiritual traditions; and,

- The defendants have, through the manner in which they have funded, regulated and provided CFS in Manitoba during the relevant period (January 1, 1992, to present), unjustifiably infringed this right.

Procedural Next Steps

[813] I shall now briefly turn to the procedural next steps in this action and the orders that may be required to move this matter forward in a way that follows from the determinations I have now made. These determinations were made with respect to the various preliminary issues and in conjunction with the plaintiffs' concurrent motions for certification and summary judgment.

[814] Based on my determinations, any order or orders should reflect that I have certified the plaintiffs' action as a Class proceeding as it relates to their s. 35 claim, and that I appoint the representative plaintiffs and Class counsel as requested by the plaintiffs. The order or orders should also reflect that I have certified the plaintiffs' s. 35 claim and the reformulated Stage 1 and Stage 2 common issues related to that one claim. Any order or orders should also confirm that the summary judgment rendered in the plaintiffs' favour on those reformulated Stage 1 common issues shall be binding upon the Class. The order or orders should also reflect my certification of the Class definition subject to appropriate clarification from the parties (the plaintiffs in particular) respecting the timeline by which those other First Nations that constitute the Class may opt into the Class proceeding. I recognize that the plaintiffs have sought additional orders and I

acknowledge that those additional orders may also be required in order to give proper effect to the determinations I have made and for the purposes of moving this matter forward.

[815] Accordingly, I invite counsel to draft an order or orders with terms that will reflect that which flows from the relevant determinations of my judgment and that which the parties might still require or wish the Court to address. To the extent that cannot be done by agreement or by consent, I invite counsel to make an appointment to appear before me for any clarifications or determinations that may be required to finalize the terms of such an order.

IX. CONCLUSION AND EXECUTIVE SUMMARY OF THE COURT'S DETERMINATIONS

[816] As I explained at the outset of these reasons, this proposed Class proceeding is an undeniably unique and complex case relating to the child welfare system in Manitoba. Specifically, it considers how Canada and Manitoba, jointly and severally, have funded, regulated and provided CFS through that system for and on behalf of First Nations children and families. In considering how Canada and Manitoba have done so, the Court has been required to assess how (and the extent to which) Canada's and Manitoba's conduct has negatively impacted First Nations Class members during the proposed Class period (from January 1, 1992, to the present day).

[817] The plaintiffs have not only brought a motion for certification of their proposed Class proceeding, they have also brought a concurrent motion for summary judgment in

respect of what they have characterized as the Stage 1 common issues of that proposed Class proceeding. At its highest level, this Court has had to consider two principal issues:

i) Based on the application of s. 4 of the ***CPA***, to what extent if at all, ought this Court to certify this action as a Class proceeding based on the currently formulated (or any reformulated) common issues?

ii) Ought the Court to grant summary judgment in respect of the plaintiffs' currently formulated (or any reformulated) Stage 1 common issues?

Preliminary Issues

[818] Before considering the above two principal issues, this Court was required to contend with a number of preliminary but important and foundational issues of substance, procedure and evidence. Specifically:

i) Evidentiary issues relating to:

   a. The plaintiffs' motion for leave to adduce additional expert evidence and the admissibility of that expert evidence;

   b. The defendants' objection to the admissibility of the affidavit evidence of the plaintiffs' lay witnesses; and

   c. The defendants' objection to the admissibility of public reports;

ii) Issue estoppel and abuse of process;

iii) Opposition to the AMC as a representative plaintiff;

iv) Limitations of Actions issues;

v) The applicability of the ***CLPA*** to claims against Canada;

vi) The problematic formulation of the plaintiffs' common issues; and

vii) The defendants ongoing and persistent opposition to the plaintiffs' motion for summary judgment.

[819] With respect to these preliminary issues, I have made the following determinations:

i) With respect to the evidentiary issues:

a. I granted the plaintiffs' motion for leave to adduce the evidence of additional experts, and further concluded that such expert evidence was admissible. I found that the number of additional experts being proposed was not per se, determinative, given the complexity and scope of this case and that the evidence of each additional expert is unique. I also found that the evidence is relevant, necessary, impartial, and that it is offered by experts that are highly qualified;

b. I rejected the defendants' objections to the admissibility of the affidavit evidence of the plaintiffs' lay witnesses, particularly that of Chiefs Cook, Kent and Monias. I accepted that some of the evidence proffered by the lay witnesses may stretch the boundaries of certain evidentiary rules. However, I concluded that, to the extent some of that evidence did so, it did not warrant the exclusion or categorical disregarding of that evidence. Instead, any issues with that evidence could be addressed through an attentive calibration of the weight that ought to be attributed it; and

c. I rejected the defendants' objection to the admissibility of public reports. I concluded that the contested public reports were admissible, consistent with the proper application of the public documents exception and the principled approach to hearsay more generally. And, given the presence of the hallmarks of reliability and the guarantees of trustworthiness, I further concluded that some or all the reports (or parts of the reports) may indeed be accepted for their truth when rendering summary judgment.

ii) I declined to find that issue estoppel effectively operated to bar Canada from disputing the CHRT's findings in ***Caring Society***. I found that neither the issues nor the parties before this Court were the same as the ones decided by the CHRT in ***Caring Society***, such that two of the three necessary preconditions for issue estoppel to be invoked were not satisfied. I further declined to find that it would be an abuse of process for Canada to disclaim the CHRT's findings in ***Caring Society***, given that such a remedy is an extraordinary one that should only be applied sparingly and only in the clearest of cases, of which this was not one;

iii) I concluded that appointing the AMC as a representative plaintiff was, for amongst other reasons, necessary to avoid a substantial injustice to the Class. I so concluded even though the AMC is not, itself, a First Nation (and therefore not a member of the proposed Class for the purposes of the proposed Class);

iv) I upheld my previous decision of December 12, 2024, that any available limitations defences should be addressed at a later stage of these proceedings. I reached this conclusion for procedural, substantive and practical reasons;

v) I concluded that the ***CLPA***, and specifically s. 9 therein, and the presumption against double recovery do not operate to bar the plaintiffs' claims as against Canada. I found that compensation previously paid by Canada through the Indian Residential School Settlement, the Residential Schools Band Class Settlement Agreement, the Day Scholars Survivor and Descendants Class Settlement Agreement, the Sixties Scoop Settlement Agreement, and the ***Moushoom*** Settlement, while involving some overlap, did not involve sufficiently similar merits, facts, collective claimants, and harms, for which these plaintiffs are seeking compensation in this proceeding;

vi) I exercised my discretion to reformulate the plaintiffs' proposed Stage 1 and 2 common issues. I concluded that doing so was necessary, given the complexity of the issues in this case. As originally formulated, the plaintiffs' common issues improperly grouped together issues of tort, issues of fiduciary duty, the concept of the honour of the Crown, ss. 2(a) and 15(1) of the ***Charter***, and ss. 35 and 36 of the ***Constitution Act***, that ignored unique aspects of each of these areas of law, and glossed over certain preliminary legal determinations that would need to be made with respect

to each of those issues. I also concluded that a reformulation was necessary because the motions for certification and summary judgment were being decided in the same decision, despite there being obviously different tests and standards of proof applicable to the certification of a Class proceeding and for the rendering summary judgment. I was also of the view that a reformulation of many of the issues would assist clarity and efficiency in so far as the plaintiffs were seeking an order that would make the Court's summary judgment ruling binding on any Class member who opts in to the Class proceeding;

vii) I concluded and in fact reconfirmed that summary judgment was neither inappropriate nor premature. I found that the summary judgment process will permit the Court to find the necessary facts and to apply the relevant legal principles in a manner that this case requires without need for a trial. In this case, the Court has a rich record of credible, admissible evidence, both lay and expert, on which to adjudicate the plaintiffs' summary judgment motion. That record includes the cross-examination transcripts of nearly every affiant. I determined I was satisfied that I would be able to weigh this evidence, evaluate the credibility of the affiants, and draw reasonable inferences from both direct and circumstantial evidence without need for a trial. I further concluded that it was appropriate and indeed preferable to render my decisions on Class proceeding certification and summary judgment at the same time. I found that doing so would not

> deprive Class members of their litigation autonomy; rather, it may in fact better position those Class members than is usually the case, to make litigation decisions. I also found that doing so would lead to a swifter determination of the issues, and would advance the goal of judicial economy. Finally, I concluded that it would be legally coherent and judicially economical to render a decision on certification first, and then, render a decision on summary judgment on the Stage 1 common issues for those claims I certified. I determined that if, at certification, any claims did not disclose a reasonable cause of action because it was plain and obvious they would not succeed, it would be unnecessary to render summary judgment on such claims. In other words, if a claim did not disclose a viable cause of action pursuant to s. 4(a) of the ***CPA***, it would not be reasonable to suggest that such a claim could, on summary judgment, present as a claim where there existed no genuine issues requiring a trial.

[820] Having addressed these preliminary but important and foundational issues of substance, procedure and evidence, I then proceeded to consider the two principal issues before this Court: whether to certify this action as a Class proceeding, and whether to grant summary judgment in respect of the plaintiffs' reformulated Stage 1 common issues.

Certification

[821] The plaintiffs sought certification of their collective claims as against Canada and Manitoba under ss. 2(a) and 15(1) of the ***Charter***, ss. 35 and 36 of the ***Constitution***

Act, in relation to the honour of the Crown, on the basis of the defendants owing them both *sui generis* and *ad hoc* fiduciary duties, and for negligence. For each claim to be certified, each claim would need to meet the requisite statutory criteria pursuant to s. 4 of the ***CPA***. I concluded that the only claim that met that criteria and could therefore be certified was the claim for the breach of the plaintiffs' Aboriginal right under s. 35 of the ***Constitution Act***. I found that none of the remaining claims disclosed a reasonable cause of action, and thus failed to meet the first criterion under s. 4 of the ***CPA***. It was plain and obvious, based on the pleadings and the applicable law, that none of these claims could succeed. Therefore, because all criteria must be satisfied to certify a claim, I declined to certify the claims relating to ss. 2(a) and 15(1) of the ***Charter***, s. 36 of the ***Constitution Act***, the honour of the Crown, *sui generis* and *ad hoc* fiduciary duty, and negligence.

***Sections 2(a) and 15(1) of the* Charter**

[822] As it related specifically to the claims under ss. 2(a) and 15(1) of the ***Charter***, I found that the law does not support the plaintiffs, as First Nations and collective entities, being able to advance those claims on their own behalf independent from the individuals that may comprise those First Nations. The jurisprudence has consistently emphasized that s. 2(a) of the ***Charter*** protects the freedom of religion of individuals. While that right may have a communal dimension, the law has not yet evolved to the point where a collective may claim that right for themselves, separate and apart from any claim its individual members may advance. The jurisprudence similarly confirms that the right to equality enshrined by s. 15(1) of the ***Charter*** is also inherently individual and can only

be properly advanced by individuals. While individuals may rely on an entity or organization to advance a claim under s. 15(1) in a representative capacity, entities or organizations, including the plaintiffs, cannot advance a claim under s. 15(1) on their own behalf. These claims, therefore, failed to satisfy s. 4(a) of the ***CPA***.

***Section 36 of the* Constitution Act**

[823] I found that s. 36 of the ***Constitution Act****,* does not create enforceable rights against the federal or provincial governments capable of exercise by individuals or other entities, including the plaintiffs in this case. To the extent s. 36 even creates enforceable legal obligations, any claim to enforce such obligations can only be made by Canada or the provinces, as against one another. As such, this claim similarly failed to satisfy s. 4(a) of the ***CPA***.

The Honour of the Crown

[824] Assuming that the plaintiffs had, in fact, been advancing a stand alone claim arising from the honour of the Crown, I found that no such distinct cause of action exists independently at law. Rather, the honour of the Crown speaks to how obligations that attract it, must be fulfilled. Therefore, to the extent it was being advanced as a stand alone claim, s. 4(a) of the ***CPA*** was not satisfied in respect of this claim.

Sui generis Fiduciary Duty

[825] In declining to certify the plaintiffs' *sui generis* fiduciary duty claim for failing to satisfy s. 4(a) of the ***CPA***, I found first that the pleadings did not establish that the plaintiffs had a specific or cognizable Aboriginal interest in land over which the defendants had exercised discretionary control. I further concluded that, even if the pleadings

established that the interest asserted by the plaintiffs is a specific or cognizable Aboriginal one, without that interest being in land (respecting which I had significant doubt), I was not satisfied that the law supports such a relationship giving rise to a responsibility on the part of the defendants in the nature of a private law duty. That would be my conclusion even if I were to assume, without deciding, that the defendants had exercised discretionary control over that interest. It was my view that what the pleadings described as the defendants' *sui generis* fiduciary duty, squarely engaged the legislative and executive functions of the Crown in respect of how it funds, regulates and provides CFS. Finally, I found that, even if the pleadings had disclosed that the Crown has exercised discretionary control over the plaintiffs' specific or cognizable Aboriginal interest in a way that invokes responsibility in the nature of a private law duty, such a private law duty was irreconcilable with the defendants' public law duties in the context of child welfare and child protection. I therefore concluded that the plaintiffs' *sui generis* fiduciary duty claim did not disclose a reasonable cause of action because it was plain and obvious it had no prospect of success.

Ad hoc Fiduciary Duty

[826] As it related to the plaintiffs' *ad hoc* fiduciary duty claim, I found that the pleadings did not establish that the defendants had forsaken the interests of all others in the context of the child welfare system, given their duties to others (particularly the children of Manitoba). Even though the pleadings may have established that the plaintiffs were vulnerable to the defendants' control, and that they had a legal or substantial practical interest that stood to be adversely affected by the exercise of that control, I found that

the pleadings did not support the conclusion that the defendants had undertaken, or indeed, could have undertaken, to act in the best interests of the plaintiffs. It was therefore plain and obvious the plaintiffs' *ad hoc* fiduciary duty claim had no prospect of success. In other words, it too, did not disclose a reasonable cause of action, contrary to s. 4(a) of the ***CPA***.

Negligence

[827] With respect to the plaintiffs' claim in negligence, I found that the jurisprudence has already confirmed that no duty of care can arise as between the plaintiffs and the defendants in the context of this case; that is, to prioritize or consider a third-party interest in the context of child welfare matters where the overarching priority is the best interests of the child. Even if the jurisprudence had not confirmed no duty of care could arise in this case, I further found that there could be no proximity between the defendants and the plaintiffs giving rise to a private law duty because the nature of the defendants' conduct to fund, regulate and provide CFS, properly understood, squarely engaged the discharge of their public law duties and core policy decisions. I therefore found, based on the pleadings and the governing jurisprudence, that it was plain and obvious the plaintiffs' negligence claim had no prospect of success and, as such, also failed to satisfy s. 4(a) of the ***CPA*** because it, too, did not disclose a reasonable cause of action.

Section 35 of the Constitution Act

[828] Unlike the plaintiffs' other claims, I did find that the plaintiffs' s. 35 claim disclosed a reasonable cause of action, and therefore satisfied s. 4(a) of the ***CPA***. I further found

that the s. 35 claim also satisfied the remaining criteria under s. 4 of the ***CPA***. I therefore found that the s. 35 claim could be certified.

Satisfying s. 4(a) of the *CPA*

[829] With respect to the plaintiffs' s. 35 claim, I found that, properly understood, it was a claim to a right of self-government in the area of CFS. I reached this conclusion in part based on how the plaintiffs had premised their s. 35 claim, and on how the pleadings disclosed, at length, the ways in which the defendants had involved themselves in the funding, regulating and providing of child welfare and child protection for First Nations. I also found it difficult to conceive how the plaintiffs could, as they indeed pled, have the right to raise their children in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions, without having the jurisdiction necessary to exercise some of their own governmental control over CFS. Similarly, I also noted that it was difficult to conceive how or why the Aboriginal right to self-government in this area could exist without the incidental and connected right (and interest) to raise the children in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions.

[830] As it relates to the s. 35 claim, I was also satisfied that the plaintiffs had pled sufficient facts to suggest the defendants' conduct may have constituted a *prima facie* infringement of that right. Because such a right had already received legislative recognition, and in light of the evolving jurisprudence in the context of s. 35 Aboriginal rights, I found it was not plain and obvious that this claim had no prospect of success. I therefore concluded that the claim disclosed a reasonable cause of action.

Satisfying ss. 4(b)-(e) of the *CPA*

[831] In the context of the plaintiffs' s. 35 claim, I further found that that claim also satisfied ss. 4(b)-(e) of the ***CPA***. I found:

- That there was an identifiable Class, based on a definition that used objective criteria to determine Class membership, which was neither overly broad nor under-inclusive, and was rationally connected to the common issues;
- The claim raised common issues (as reformulated), in that the Class members' s. 35 claim share substantial common ingredients to justify a Class proceeding. I was satisfied that the s. 35 right was one that was common to, if not identical for, all Class members, as was the broad manner in which the defendants may have infringed that right. I also found, in conjunction with the common issues associated with this claim, that the plaintiffs had demonstrated that the O'Gorman et al. report provided a plausible methodology for determining questions of causation and damages on a Class-wide basis, and that there was data available to quantify damages in accordance with that methodology;
- That an opt-in Class proceeding was the preferable procedure, in both relative and absolute terms, for the fair and efficient resolution of the common issues (as reformulated). In this case, a Class proceeding would advance judicial economy and access to justice by enabling as many as 63 Manitoba First Nations to opt into an existing action led by the plaintiffs

and, in so doing, to rely on the evidentiary foundation that would be established at Stage 1. I also found that an opt-in structure was preferable because it best accommodates the sovereignty of First Nations Class members, each of which would have to consent to surrender their litigation autonomy by opting into the proceeding rather than being automatically bound by an opt-out structure; and

- That the proposed representative plaintiffs, being Chief Cook on behalf of Misipawistik Cree Nation, Chief Kent on behalf of Black River First Nation, Chief Monias on behalf of Pimicikamak Cree Nation, and the AMC, satisfied s. 4(e) of the ***CPA***. I was satisfied that the proposed representative plaintiffs would fairly and accurately represent the interests of the Class. I was also satisfied they had produced a plan for the Class proceeding that set out a workable method for advancing it and for notifying the Class members. And, I was satisfied that none of them have, on the common issues, an interest that conflicts with the interests of other Class members.

Certifying s. 35

[832] In the result, having satisfied ss. 4(a)-(e) of the ***CPA***, I found that I could certify the plaintiffs' s. 35 claim, including the related reformulated Stage 1 and 2 common issues.

[833] Having declined to certify the other claims after having determined that none of those other claims disclosed a reasonable cause of action, I concluded that it would serve little purpose to address those non-certified claims in the context of the plaintiffs' motion

for summary judgment. As noted, given that I found it was plain and obvious those other claims could not succeed (even when all the facts pled were assumed to be true), it was not reasonable to suggest that I could conclude on summary judgment that in respect of any of those other claims, there remained no genuine issues for trial. As such, I proceeded to render summary judgment on the only viable claim and related reformulated Stage 1 common issues that were certified: the claim under s. 35 of the ***Constitution Act***.

Summary Judgment

[834] At this juncture of my determinations, I will state again that I was satisfied in the circumstances of this case, that a summary judgment motion could be appropriately heard. In other words, having fully reviewed the issues, the evidence, and the applicable law, I concluded there could be on summary judgement, a fair and just determination of the Stage 1 common issues on their merits. As noted already, the Court had a rich record of credible, admissible evidence, both lay and expert, on which to adjudicate the plaintiffs' summary judgment motion. I determined that I would be able to weigh this evidence, evaluate the credibility of the affiants, and draw reasonable inferences from both direct and circumstantial evidence without need for a trial. I therefore found that the summary judgment process would permit me to find the necessary facts and to apply the relevant principles to arrive at a fair disposition of the matters. Because of the foregoing, I further found that a trial of the Stage 1 common issues would not be proportionate, timely or cost efficient. I was not persuaded that a trial would produce more, or better evidence, or, for that matter, further clarify the legal issues arising from that evidence.

On the contrary, I found that a trial of these Stage 1 common issues, particularly considering the evidentiary record that already exists, would be entirely duplicative.

Section 35

[835] In hearing and then rendering summary judgment on the reformulated Stage 1 common issues with respect to the plaintiffs' claim under s. 35 of the ***Constitution Act***, I determined that the plaintiffs have an Aboriginal right to self-government in the area of CFS, which right necessarily includes the plaintiffs' right to raise their children in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions. I further determined that the defendants, through the manner in which they funded, regulated and provided child welfare and child protection in Manitoba between January 1, 1992, to present, unjustifiably infringed this right.

Departing from the Strict Application of the *Van der Peet* Test

[836] In reaching these conclusions, I considered the legal framework governing s. 35 of the ***Constitution Act***, and how the jurisprudence dealing with Aboriginal rights has evolved in a way that permits and indeed requires in some circumstances, a departure from a strict application of the Supreme Court of Canada's ***Van der Peet*** test. As noted, that test has been criticized for its limitations and for how it is ill fitting in a case like this one. That ***Van der Peet*** test and the evidentiary burden it imposes on claimants has provided a workable framework for Canadian courts to adjudicate s. 35 claims in relation to discreet, particularized rights claimed by specific Indigenous communities. However, as already noted, I have determined that in this case, the s. 35 right being claimed or asserted by the plaintiffs was best characterized as one of self-government in the area of

CFS. Acknowledging and discussing as I do the limitations of ***Van der Peet***, given recent and relevant recognition and affirmation in both federal and Manitoba legislation, to the extent it was even necessary to determine whether the plaintiffs had established an existing s. 35 right to self-government in the area of CFS, I endorsed and employed (as it relates to that question) the legal framework proposed by the Quebec Court of Appeal in ***C-92 Reference Decision #1***.

Confirming the Existence of the Right

[837] I found that the evidence established that all First Nations in Manitoba have, since time immemorial, a distinctive, communal, land-based approach to childcare, guided by unique laws and customs, and that, despite the defendants' imposition of a child welfare system, First Nations never fundamentally surrendered their right to care for their own children in their own way. I therefore concluded that all Manitoba First Nations have always had the jurisdiction necessary to exercise their own governmental control over CFS, which was and remains a necessary precondition for these First Nations to be able to raise their children in their culture and community, with a connection to their land, and immersed in their languages and spiritual traditions. The evidence further supported a finding that this right was and remains integral to the cultural continuity and survival of Manitoba First Nations. I further found that nothing about the right to self-government in the area of CFS was incompatible with the assertion of Crown sovereignty, or that the right had been extinguished. I therefore concluded that the plaintiffs had, to the extent it was necessary for them to do so, proved the existence of a right to self-government in the area of CFS, which, based on the evidence adduced, includes the right to raise their

children in the culture and community, with a connection to their land, and immersed in their languages and spiritual traditions.

Finding the Right has Been Infringed

[838] Having found the s. 35 Aboriginal right identified above, I then considered whether the defendants had infringed this right, having determined that both Manitoba and Canada (through the roles they played) did indeed have the capacity to infringe the plaintiffs' s. 35 right during the Class period. Upon my review of the evidence, which was extensive, I found that the defendants' cumulative conduct throughout much of the relevant proposed Class period constituted a meaningful diminution of the plaintiffs' constitutionally protected right to self-government in the area of CFS. Specifically, I determined that the manner in which the defendants funded, regulated and provided child welfare services has caused undue hardship to the plaintiffs and has denied them their preferred means of exercising their right to self-government in the area of CFS. That conduct also compromised an indeed significantly negated the capacity on the part of the plaintiffs to safeguard their own intergenerational and multi-generational cultural continuity and survival. Accordingly, I determined that the plaintiffs established a *prima facie* infringement of their right.

Determining the Infringement Cannot be Justified

[839] Having found the infringement of the s. 35 Aboriginal right identified above, I then considered whether the infringement of the plaintiffs' s. 35 right was justified. I accepted that it could be said that the defendants' actions were taken in pursuit of the compelling and substantial objective to act in the best interests of children. However, I was not

satisfied that the defendants' actions were undertaken in a manner consistent with the honour of the Crown and its fiduciary relationship with Indigenous peoples.

[840] Specifically, I found that the evidence was insufficient to support a finding that the defendants had throughout the proposed Class period, adequately discharged their duty to consult First Nations and to accommodate their interests. I further found on a charitable reading of the evidence, the defendants' conduct may have been rationally connected to a pressing and substantial objective. However, absent any compelling evidence by Manitoba or Canada to the contrary, I found that the combined and cumulative negative effects of the defendants' conduct more than minimally impaired the plaintiffs' s. 35 right, and that its impact on the Aboriginal right has been disproportionate to the benefits that may have been expected to flow from the pursuit of any pressing and substantial objective. In the result and having also found that the defendants failed to discharge their duty to consult and accommodate, I concluded the defendants' infringement of the plaintiffs' s. 35 right was unjustifiable.

Availability and Appropriateness of Declaratory Relief on Summary Judgment

[841] Having granted summary judgment in the plaintiffs' favour in relation to their Aboriginal rights claim under s. 35(1) of ***Constitution Act,*** and the connected and reformulated Stage 1 common issues, I then considered what relief could be granted. I concluded that, at this stage of the proceedings, a declaratory order in respect of the plaintiffs' s. 35 claim was available and appropriate. Even if limitations defences are ultimately found to render other forms of relief sought in the context of the s. 35 claim statute-barred, declarations regarding the constitutionality of the Crown's conduct are

always available. And, in this case, at this juncture, a declaration that the plaintiffs' s. 35 Aboriginal right exists and that the defendants have unjustifiably breached it, would be appropriate. In particular, I found that granting such a declaration would have much practical utility considering the plaintiffs and the defendants remain in an ongoing relationship in the area of child and family services.

[842] Again, I acknowledge that the defendants have had a legitimate interest in involving themselves financially, operationally, and legislatively in the provision of CFS to Manitoba First Nations and their children and families. The issue before this Court was not with the defendants' involvement, but with the manner of that involvement and how it intersected with – and unjustifiably infringed – the plaintiffs' right to self-government in the area of CFS. Granted, that involvement included what I recognize were genuine and good faith efforts to respond to the persistent, sustained and complex combination of crises associated with First Nations CFS. However, at the same time, given the plaintiffs' s. 35 right is fundamental to the culture and identity of Indigenous peoples, the manner of the defendants' involvement, however well intentioned, fell well short of what was required of the defendants to ensure that the plaintiffs' constitutionally protected right was recognized and respected.

X. DISPOSITION

[843] I have determined that only the plaintiffs' claim respecting the alleged breach of s. 35 of the ***Constitution Act*** will be certified. The remainder of the plaintiffs' motion for certification respecting breaches of any fiduciary duty, common law duty of care, ss. 2(a) and 15 of the ***Charter***, and s. 36 of the ***Constitution Act***, is dismissed.

[844] I have determined that summary judgment will be granted respecting the plaintiffs' claim alleging a breach of s. 35 of the ***Constitution Act***. The remainder of the plaintiffs' motion for summary judgment respecting breaches of any fiduciary duty, common law duty of care, ss. 2(a) and 15 of the ***Charter***, and s. 36 of the ***Constitution Act***, is dismissed.

C.J.K.B.