Court File No. CI 22-01-36804

THE KING'S BENCH
Winnipeg Centre

BETWEEN:

AMBER LYNN FONTAINE and TRACY LYNN MCKENZIE

Plaintiffs

and

ATTORNEY GENERAL OF CANADA
and THE GOVERNMENT OF MANITOBA

Defendants

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

STATEMENT OF DEFENCE

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STATEMENT OF DEFENCE

OVERVIEW

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

2. The Plaintiffs seek compensation for Canada's policy decisions in the provision of general federal transfer programs on the basis that provincial operational and funding decisions led to discriminatory practices in the provision of services by the province of Manitoba.

3. Canada acknowledges that certain circumstances may give rise to a fiduciary duty between the Federal Crown and an Indigenous collective and accordingly, may require the performance of specific duties by the Federal Crown; however, no such fiduciary duties arise in the circumstances set out in the Consolidated Statement of Claim ("Claim").

4. Manitoba has legislative jurisdiction under section 92 of the *Constitution Act, 1867* with respect to the welfare, protection, and care of all children in the province, including Indigenous children residing off-reserve. At all material times, Manitoba, and not Canada, exercised its jurisdiction through provincial entities acting pursuant to its child and family services legislation. For its part, Canada did not exercise jurisdiction or have control over the child welfare or essential services at issue and provided no direct funding for the provision of off-reserve child welfare services. It follows that the circumstances set out in the Claim do not give rise to any duties in law or equity as against Canada.

5. Ultimately, this claim relates to provincial responsibility in relation to certain services provided to Indigenous children and families. The claims made against Canada should be dismissed.

SPECIFIC RESPONSES TO THE PARAGRAPHS OF THE STATEMENT OF CLAIM

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

7. Canada admits the assertions in paragraphs 25, 27, 28, 29 (first sentence only), 38, 40, 41, 111 (first sentence only), and 131.

8. Canada has no knowledge of the assertions in paragraphs 11 - 22, 31 - 33, 37, 42 – 45, 47, 51, 54 – 62, 78, 83, 86, 106, 130, 133 and 134.

9. Canada denies the assertions in paragraphs 2-10, 23, 24, 26, 29 (second sentence), 30, 34 – 36, 39, 46, 48, 49, 50, 52, 53, 63, 64, 65, 66 – 77, 79 – 82, 84, 85, 87 – 105, 107 – 110, 111 (second sentence), 112 – 129, 132, and 135 – 156.

10. Canada denies the assertions in paragraphs 3-10, 46, 49, 50, 66 – 74, 77, 79 – 82, 84 – 98, 101 – 103,105, 107, 109, 113- 116, 126, 132, 135 – 139, 142 – 145, 147 –

153, 155 and 156 only in so far as they pertain to Canada. These paragraphs also contain assertions against Manitoba, the other defendant in this action. Canada has no knowledge of assertions that are not directed at Canada.

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

TERMINOLOGY

12. Following the responses and the terminology set out in the Plaintiffs' response to Canada's Demand for Particulars, dated December 21, 2023, this Defence will use the following terms to describe the individuals making up the proposed classes and referred to in the Claim and throughout this Defence:

a. The term First Nations refers to people in Canada who have Indian status pursuant to the *Indian Act,* are entitled to be registered under section 6 of the *Indian Act,* and met band membership requirements under section 10-12 of the *Indian Act,* such as where their respective First Nation community assumed control of its own membership by establishing membership rules and the individuals were found to meet the requirements under those membership rules and were included on the Band List by the date of certification;

b. The term Inuit refers to Indigenous peoples in Canada who were apprehended while resident in Manitoba and who are registered in an Inuit land claim organization or that meet the membership requirements to be so registered;

c. The term Métis refers to Indigenous peoples in Canada who were apprehended while resident in Manitoba who have membership in, or meet the membership requirements of, one of the following Métis organizations: Manitoba Métis Federation, Métis Nation Saskatchewan, Métis Nation British Columbia, Métis Nation of Ontario, or Métis Nation of Alberta; and

d. The term Indigenous peoples is an inclusive term to describe First Nations, Inuit, and Métis.

13. For clarity, the federal government department currently responsible for on-reserve child and family services and the administration of Jordan's Principle is Indigenous Services Canada ("ISC"). This department has at various times been called:

a. The Department of Indian Affairs and Northern Development ("DIAND");

b. Aboriginal Affairs and Northern Development Canada ("AANDC"); and

c. Indian and Northern Affairs Canada ("INAC").

14. ISC's administration of Jordan's Principle is through the First Nations and Inuit Health Branch, ("FNIHB"). Responsibility for FNIHB was transferred to ISC from Health Canada in 2017.

THE PARTIES

A. The Plaintiffs

15. With respect to paragraphs 11 to 22 of the Claim, at this time Canada has no knowledge of the specific circumstances asserted by the Plaintiffs. The Plaintiffs have pleaded that Amber Lynn Fontaine and Tracy Lynn McKenzie are members of the removed child class.

16. The Plaintiffs have not pleaded that either Amber Lynn Fontaine or Tracy Lynn McKenzie are Métis or Inuit persons. The Plaintiffs have not pleaded any material facts that support that either of the representative Plaintiffs are representatives of the essential services class.

B. The Defendants

17. In response to paragraph 1(q), Canada acknowledges that the Government of Manitoba represents His Majesty the King in Right of Manitoba pursuant to section 10 of *The Proceedings Against the Crown Act*, C.C.S.M. c. P140.

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

STATUTORY AND POLICY CONTEXT

19. Manitoba's jurisdiction to legislate with respect to, and administer, child welfare services in the province is based on the *Constitution Act*, *1867*, ss 92(13) and (16).

20. With respect to paragraph 111, on June 21, 2019, *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c. 24 ("*Act*"), received Royal Assent, and came into force on January 1, 2020. The *Act* sets out principles applicable, on a national level, to the provision of child and family services in relation to Indigenous children.

21. The *Act* also recognizes the inherent right of First Nations to exercise self-government, which includes jurisdiction in relation to child and family services. As set out in s. 4 of the *Act*, it was designed to leave space for the operation of provincial laws of general application, provided they do not conflict with or are not inconsistent with the provisions of the Act.

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

THE DEVELOPMENT OF CHILD WELFARE LEGISLATION AND POLICY IN CANADA

23. With respect to the entirety of the Claim, the Plaintiffs do not distinguish between the roles of Canada and provincial and territorial governments in their description of the administration of child welfare for Indigenous children residing off-reserve. Each province and territory has its own legislation that governs the delivery of services to children and families in need. Canada was not in control of the administration of child-welfare programs for children residing off-reserve. A province or territory is responsible for all children, including Indigenous children, within the province or territory. In this matter, Manitoba is responsible for all children, including Indigenous children, within the province of Manitoba.

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

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

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

    c. commencing in 1995 the Canada Assistance Plan and the Established Programs Financing was combined into a block transfer arrangement called the Canada Health and Social Transfer, which was split into the Canada Health Transfer and the Canada Social Transfer in 2004.

The allocation of the funds referred to in subparagraph 26(c) between provincial programs is entirely in the discretion of Manitoba. Canada has no knowledge of how Manitoba allocates these funds.

25. In 1989, DIAND developed its program to provide funding for child welfare costs for Indigenous peoples on reserve and in the Yukon, and, in 1991, introduced the First Nations Child and Family Services ("FNCFS") program.

26. With respect to paragraph 39 of the Claim, Canada states that the FNCFS Program has never directly administered child and family services and was created and operates as a funding program to provide funding to First Nations agencies with delegated authority from the relevant province or territory for the provision of child and family services.

27. With respect to paragraph 125 of the Claim, Canada admits that the House of Commons unanimously passed Motion 296 ("Motion") and also admits to the expressed content of the Motion. However, Canada denies that the Motion or its passing was in response to any violation of rights of the proposed classes or affirmed existing constitutional and quasi-constitutional equality rights on the part of the proposed classes to substantively equal access to essential services.

28. With respect to paragraph 126 of the Claim, Canada has no knowledge of whether Manitoba addressed any long-standing problems in child welfare programs, as asserted by the Plaintiffs. Canada denies that it adopted a policy of neglect and avoidance, as alleged.

CANADIAN HUMAN RIGHTS TRIBUNAL DECISIONS AND OTHER CHILD WELFARE AND ACCESSIBILITY DECISIONS

29. With respect to paragraphs 66 and 127-129 of the Claim, Canada acknowledges the complaint brought by the Assembly of First Nations and First Nations Child and Family Caring Society of Canada to the Canadian Human Rights Tribunal

("CHRT") but denies the implications of the decision as set out by the Plaintiffs. This Claim should be understood in relation to a complex series of CHRT decisions, described below, on child welfare programs on reserve, and access to government services by First Nations children.

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

a. that the FNCFS Program and the Directive 20-1 funding formula ("Directive") only apply to First Nations people living on-reserve and in the Yukon, and only applied to First Nations people as a result of their race/ethnic origin;

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

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

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

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

31. In *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 14 ("CHRT Content Decision")[1] the CHRT made the following findings about the content of Jordan's Principle:

a. Jordan's Principle is a child-first principle that applies equally to all First Nations children in Canada, whether resident on or off reserve. It is not limited to First Nations children with disabilities, or those with discrete short-term issues creating critical needs for health and social supports or affecting their activities of daily living.

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

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

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

specified in paragraphs 135(2)(A)(ii) and 135(2)(A)(ii.1) where the service is available, and will make every reasonable effort to ensure funding is provided as close to those timeframes where the service is not available. After the recommended service is approved and funding is provided, the government department of first contact can seek reimbursement from another department/government.

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

e. While Jordan's Principle can apply to jurisdictional disputes between governments (i.e., between federal, provincial, or territorial governments) and to jurisdictional disputes between departments within the same government, a dispute amongst government departments or between

governments is not a necessary requirement for the application of Jordan's Principle.

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

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

33. *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 20, and *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 36 (collectively, the "CHRT Eligibility Decisions") together with the CHRT Merit Decision, the CHRT Content Decision and the CHRT Compensation Decision, ("CHRT Decisions"), clarified the individuals the CHRT said were eligible for consideration under Jordan's Principle:

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

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

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

d. a child who is ordinarily resident on reserve.

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

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

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

c. failed to provide First Nations Children with essential services available to non-First Nation children, or which would have been required to ensure substantive equality under the *Charter*.

35. The Moushoom Class Actions assert discrimination, negligence, and breach of fiduciary duty, included certified classes dating back to 1991. In July 2023, the CHRT issued a decision which indicated that a proposed settlement in the Moushoom Class Actions satisfied the orders in the CHRT's Compensation Decision and related orders. On November 3, 2023, the Federal Court approved the proposed settlement agreement, back dating the approval to October 24, 2023.[2]

36. Throughout the Claim, with respect to the CHRT decisions in particular, the Plaintiffs rely on facts and findings not specific to the time period or class definition proposed for this class proceeding, including those related to individuals who are explicitly excluded from this proposed class action but included in the Moushoom Class Actions.

[2] *Moushoom v Canada (Attorney General)*, 2023 FC 1466

37. In respect of the entire Claim, the Plaintiffs have not provided sufficient particulars on the nature of the essential services, products, supports, and delays at issue. They have not provided sufficient particulars on denial of or gaps in the provision of these services, products, and supports by the Defendants, as they relate to the proposed classes in this action. Canada is therefore unable to provide a detailed response to these assertions.

CONSTITUTIONAL FRAMEWORK

38. In response to paragraph 30 of the Claim, Canada acknowledges that the Parliament of Canada has legislative jurisdiction under section 91(24) of the *Constitution Act, 1867* with respect to "Indians, and Lands reserved for the Indians". Canada also acknowledges that this legislative jurisdiction includes the jurisdiction to legislate with respect to the proposed class members, and in particular First Nations, Inuit and Métis individuals. Constitutional jurisdiction, however, creates no obligation to legislate nor does section 91(24) provide a right to programming. The allocation of a legislative power to one level of government does not create any particular financial or legal obligation for that government. To the extent the Plaintiffs base their claim on Canada's discretionary authority to legislate rather than specific duties, no legal liability can arise from the exercise or non-exercise of such authority in the circumstances of this case.

39. Manitoba has legislative jurisdiction under section 92 of the *Constitution Act, 1867* with respect to the welfare, protection and care of all children in the province, including Indigenous children residing off-reserve. Provincial child and family services statutes are laws of general application. At all material times, Manitoba, and not Canada, exercised this jurisdiction through provincial entities acting pursuant to its child and family services legislation. At all material times, laws of general application in force in the province were applicable to the Plaintiffs and proposed class members.

40. In response to the Plaintiffs' assertions against Canada throughout the Claim, Canada does not have a positive duty to legislate nor is it obligated to intervene where the province has exercised authority. The Plaintiffs do not provide any particulars specifying the nature of such a positive duty, or how it would be exercised.

41. Throughout the Claim, the Plaintiffs attribute to Canada operational and policy decisions made by Manitoba. Canada disagrees with statements at paragraphs 3, 6, 29, 30, 31, 65, 91, 92, 103, 137, 144, 145, 147, and 155 of the Claim equating Canada's conduct today and in the circumstances set out in the Claim to the operation of residential schools and the Sixties Scoop.

42. Canada admits paragraph 27, except that there were 14 federal Indian residential schools operating in Manitoba, not 17.

CHILD WELFARE AND ACCESS TO GOVERNMENT SERVICES

43. For clarity, Canada acknowledges the CHRT Decisions, but denies the statements made in paragraphs 66, 125-128, and 132 as they mischaracterize the findings of the CHRT in the CHRT Decisions and subsequent independent reports related to the conduct of Canada and Manitoba, or of Motion 296 passed by the House of Commons.

44. The statements at paragraph 66 of the Claim are statements of evidence about a funding formula which was enacted by Canada and exclusively applied to the operation and administration of Child Welfare Programs by DIAND to First Nations people who ordinarily reside on reserve and in the Yukon. This is not relevant to the Claim because such individuals are included in the Moushoom Class Actions and therefore explicitly excluded from this Claim.

45. With respect to paragraphs 114 and 115 of the Claim, the pleadings do not provide sufficient particulars of the essential services at issue to allow a proper response. In any event, Canada denies that it had control over any essential services at issue

or that there were inequalities in funding in the provision of essential services as compared to non-Indigenous peoples as a result of Canada's conduct.

46. With respect to paragraph 129 of the Claim, Canada admits that it established the Inuit Child First Initiative in 2018. With respect to paragraphs 129 and 132, Canada says that the Plaintiffs have failed to provide material facts that support any of the Plaintiffs being a member of the Essential Services class, or Métis or Inuit. In any event, Canada denies that it deprived Inuit and Métis children of essential services and says that any detriment suffered by Inuit and Métis children was caused by the provision of services by Manitoba.

EVIDENCE

47. Canada acknowledges that there have been a number of independent and parliamentary reports, and agreements, relating to Indigenous child welfare and the application of Jordan's Principle. To the extent that these reports address Canada's role or actions, they generally demonstrate the types of funding policies Canada had in place at the time and provide some evidence as to the administration of child welfare policies. However, these reports and agreements are evidence. As such, Canada denies paragraphs 26, 34-36, 42, 52, 53, 75, 76, 84, 89, 99, 108-110, 112, and 116-124, and 142 because these paragraphs constitute the pleading of evidence.

48. Many of the above noted reports are not specific to the time period or proposed class in question and include facts with respect to First Nation individuals on reserve, who are explicitly excluded from this proposed class action.

ARGUMENT

49. Paragraphs 2, 3, 23, 24, 29, 30, 63-67, and 104 of the Claim constitute opinion, argument, and statements of legal conclusion and thus contain no discernible facts to admit or deny. To the extent that any of the paragraphs do contain facts, Canada denies these facts.

50. Paragraphs 135-156 of the Claim constitute legal arguments and are addressed in paragraphs 51-79 of this defence.

NO LIABILITY ON THE PART OF CANADA

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

51. In response to paragraphs 2(b), (c) and (d), 135, 142, of the Claim, Canada denies that it breached the honour of the Crown or failed to comply with any legal or constitutional obligations, as stated in the Claim.

52. Canada recognizes that the honour of the Crown guides all its interactions with Indigenous peoples. The honour of the Crown is not a stand-alone cause of action. What specifically constitutes honourable conduct will vary with the circumstances of each case. In the circumstances of this case, the honour of the Crown, while guiding the federal Crown in its conduct with Indigenous collectives, does not give rise to any specific duties.

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

54. Canada denies the existence of any statutory duties owed to the Plaintiffs or members of the class in the circumstances described in the Claim. Canada did not have control over the child welfare, health and essential services at issue in the province of Manitoba, nor could it exercise any control over the decisions and actions of the provincial government. To the extent that the Plaintiffs may assert that any general funding agreements between the province and Canada resulted in such control or liability, Canada denies that there is any basis for this in fact or law in the circumstances of this case.

55. With respect to paragraph 147 of the Claim, while Canada admits Parliament's legislative jurisdiction over "Indians and Lands reserved for Indians" under section 91(24) of the *Constitution Act, 1867*, this jurisdiction does not create a positive duty to legislate, nor does it entail any positive obligation or duty on the federal government to fund or to provide programming. To the extent the Plaintiffs base their claim on discretionary authority to legislate, rather than specific duties, no legal liability can arise from the exercise or non-exercise of such authority in the circumstances of this case. Canada was not required to exercise jurisdiction and did not do so.

56. Canada also denies the breach of any legal rule or obligation and, in any event, asserts that no such breach would be sufficient to ground a claim in the circumstances of this case.

B. No breach of fiduciary duty

57. Canada agrees that the relationship between Canada and the Indigenous peoples of Canada can be fiduciary in nature. However, not every aspect of the relationship gives rise to a fiduciary duty. In response to paragraphs 2(c), 2(e), and 147-150 of the Claim, Canada states that Crown fiduciary duties to Indigenous peoples can arise in two circumstances:

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

b. an *ad hoc* fiduciary duty arises where there is an undertaking by the alleged fiduciary to act in the best interests of alleged beneficiaries; a defined class of beneficiaries vulnerable to the fiduciary's control; and a legal or substantial practical interest of the beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

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

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

60. In sum, Canada denies that any legal rule, any legislative authority, the honour of the Crown or any provision of the *Constitution Act, 1867* gave rise to a fiduciary duty in the circumstances outlined in the Claim.

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

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

C. No Negligence

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

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

65. In any event, Canada denies that it owed a duty of care in the specific circumstances of this case with respect to the Plaintiffs and the proposed classes. In response to paragraph 8 of the Claim, while Canada acknowledges the legislative jurisdiction grounded in section 91(24) of the *Constitution Act, 1867*, and the specific duties established in the *Indian Act* with respect to Indigenous peoples as defined in paragraph 11 of this Defence, this does not in itself create a duty of care. The Plaintiffs have not provided facts or particulars which would support such a duty.

66. Further, considering Manitoba's exercise of jurisdiction and control relating to the provision of child and family services for children living off-reserve in Manitoba, and to the provision of other health and essential services which may be included in the claims relevant to the proposed Essential Services classes, Canada denies sufficient proximity with the proposed classes to create a duty of care in negligence.

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

D. No Liability Under the *Charter*

68. Canada recognizes that certain rights are guaranteed by sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* ("*Charter*"). Canada denies, however, that it breached the Plaintiffs' or any proposed class members' *Charter* rights as asserted, or at all.

69. In response to paragraphs 2(b), 2(d), and 135-146 of the Claim, Canada denies that the Plaintiffs have established Canada's conduct and actions violate section 7 or section 15 of the *Charter*. At all material times, Manitoba, and not Canada, exercised jurisdiction through entities acting under its child and family services legislation. Manitoba has legislative jurisdiction under section 92 of the *Constitution Act, 1867* with respect to the welfare, protection, and care of all children in the province, including Indigenous children, both on and off-reserve. Provincial child and family services statutes are laws of general application.

70. In response to paragraphs 135-141 of the Claim, Canada denies that any of its conduct or policies drew distinctions or produced a discriminatory effect, infringing in any way on the Plaintiffs' or proposed class members' section 15(1) *Charter* rights.

71. In response to paragraphs 142-146 of the Claim, Canada denies it deprived the Plaintiffs or any member of the proposed classes of their right to life, liberty or security of the person. Section 7 does not impose a positive right to benefits.

72. In the alternative, if any action or non-action of Canada deprived Plaintiffs and proposed class members the right to life, liberty or security of the person, then the deprivation accorded with the principles of fundamental justice.

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

E. No Damages

74. With respect to paragraphs 2 and 155-156 of the Claim, Canada acknowledges that the over-representation of Indigenous children in provincial care is a national tragedy. To the extent the Plaintiffs or proposed classes suffered any damage, losses or injuries as set out in the Claim, these were not caused by any acts or omissions of Canada, and Canada is not liable for the damage, losses, or injuries.

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

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

F. Proposed Family Classes

77. Although the Claim seeks compensation on behalf of parents and grandparents, the Plaintiffs have not particularized any legal basis for those claims, separate and apart from bases applicable to children who were removed from their home or who the Plaintiffs say were denied essential services or products. Canada denies that it is liable for any claims in relation to Ms. Fontaine and these proposed class members for the reasons stated above, and in light of the lack of particulars in fact and law establishing Canada's liability with respect to them.

G. Limitations and Laches

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

H. Inappropriate Class Proceeding

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

STATUTES AND REGULATIONS RELIED UPON

80. Canada pleads and relies upon:

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

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

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

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

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

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

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

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

i. *Canadian Charter of Rights and Freedoms*;

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

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

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

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

n. *The Limitation of Actions Act,* R.S.M. 1987, c. L150

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

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

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

r. Such other legislation or regulations as may apply.

RELIEF SOUGHT

81. For these reasons, Canada seeks that this claim be dismissed.

Date: February 29, 2024

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