**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*, CCSM c C130

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# STATEMENT OF DEFENCE OF THE DEFENDANT THE GOVERNMENT OF MANITOBA

FILED 100
DEC 28 2023

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## STATEMENT OF DEFENCE

1. The defendant, the Government of Manitoba ("**Manitoba**"), admits the allegations contained in paragraphs 34 and 47 of the fresh as amended statement of claim (the "Claim").

2. Manitoba has no knowledge in respect of the allegations contained in paragraphs 11, 12, 13, 15, 17, 21, 22, 78, 79, and 97 of the Claim.

3. Manitoba denies the allegations contained in paragraphs 67, 105, 106, 107, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, and 146, and all other allegations of fact in the Claim except as are hereinafter expressly admitted, and denies that the plaintiffs are entitled to the relief claimed in paragraph 2 of the Claim, or to any relief at all.

4. In answer to the Claim as a whole and, in particular, paragraphs 3, 5, 6, 7, 9, 10, 14, 23, 24, 29, 31, 32, 33, 41, 50, 51, 55, 56, 57, 58, 59, 60, 64, 65, 66, 77, 78, 83, 84, 87,

91, 105, 106, 108, 110, 111, 112, 116, 117, 118, 119, 120, 121, 122, 123, and 124, much of the plaintiffs' claim is presented in a narrative format that contains allegations based on opinions, all of which Manitoba has no knowledge of, and/or are intertwined with evidence and argument. Manitoba says paragraphs 3, 5, 6, 7, 9, 10, 14, 23, 24, 29, 31, 32, 33, 41, 50, 51, 55, 56, 57, 58, 59, 60, 64, 65, 66, 77, 78, 83, 84, 87, 91, 105, 106, 108, 110, 111, 112, 116, 117, 118, 119, 120, 121, 122, 123, and 124 contain evidence and/or argument.

**Overview**

5. In answer to paragraph 1 of the Claim, Manitoba adopts the capitalized terms referred to by the plaintiffs as defined terms in Manitoba's statement of defence for ease of reference. Further, to the extent that any of the defined terms in paragraph 1 constitute allegations of fact, Manitoba:

(a) does not admit or in any way concede or affirm the substantive meaning proposed by the plaintiffs in their defined terms at subparagraphs 1(h) and 1(i) ("**Class**", "**Removed Child Class**", "**Essential Services Class**", "**Estates Class**", "**Family Class**", and "**Class Period**"), and says that all determinations respecting these definitions must be made by this Honourable Court in the context of a certification hearing pursuant to *The Class Proceedings Act,* CCSM c C130 (the "*CPA*");

(b) admits the substantive meaning of the plaintiffs' definitions in subparagraph 1(d), save and except for the plaintiffs' definitions of:

(i) "**CSA Benefit**", which Manitoba says is incorrect and/or incomplete;

(ii) "**Maintenance Costs**", which Manitoba says is incomplete;

(iii) "**Manitoba**", which Manitoba says has the meaning ascribed to it at paragraph 1 herein;

(iv) "**Southern Authority**", which is in fact called the Southern First Nations Network of Care; and

(c) admits the substantive meaning of the other definitions set out by the plaintiffs in this paragraph.

6. In further answer to paragraphs 3, 9, 10, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 104, 113, 114, 115, and 116 of the Claim, Manitoba:

(a) admits that past harms have been perpetuated against Indigenous peoples by the federal government prior to the time period material to the Claim (January 1, 1992 to date, and hereinafter referred to as the "**Material Time**");

(b) says that the historic laws, policies, and practices referenced in these paragraphs are not at issue in this action;

(c) acknowledges that colonialism, residential schools, the 60's Scoop, and other national policies introduced by Canada caused or contributed to poverty, lower education rates, and conditions of social and familial functioning on First Nations and among Indigenous peoples off-reserve;

(d) says that the poverty issues and related harms set out above existed before the beginning of the Material Time, and were not caused by the CFS system;

(e) admits that the historic wrongs perpetrated by Canada toward Indigenous peoples, including but not limited to those set out in paragraphs 25, 26, 27,

28, and 30 of the Claim, has resulted in Indigenous children being overrepresented in Manitoba's child welfare system, and says that such overrepresentation is not a result of discriminatory policies, practices, or legislation;

(f) denies that its management of child welfare within the province during the Material Time has been conducted in a manner to assimilate Indigenous children, or that it has employed discriminatory practices to destroy Indigenous families or cultures throughout the Material Time as alleged, or at all, and says that the child welfare system has always prioritized the best interests of the children;

(g) denies that it deprived Indigenous children who needed provincial health, social and other services and products of equal access throughout the Material Time as alleged, or at all;

(h) says that Indigenous children who reside off-reserve, are provided with equivalent opportunities to access provincial services as non-Indigenous children;

(i) in the alternative, says that the harms alleged by the plaintiffs are not compensable through this action; and

(j) admits that it commissioned the Kimelman Report (1985) and the AJI Report (1991), and says that these reports speak for themselves.

7. In answer to paragraphs 4, 5, 6, 7, 8, and 9 of the Claim, Manitoba acknowledges that Manitoba and Canada have each had a role in funding the child welfare system affecting Indigenous children, with each taking responsibility for funding different categories of Indigenous children and families. Generally speaking, First Nations children

on-reserve who are provided child welfare services are funded by Canada, while First Nations children living off-reserve, Metis and Inuit children, who receive child welfare services are subject to provincial welfare funding. Manitoba denies the plaintiffs' allegation that Canada and Manitoba have each had a role in creating the child welfare system affecting First Nations on or off reserve and says that:

(a) the child welfare system affecting all children off-reserve (including the children of First Nations members situated off-reserve) was initially designed by Manitoba prior to the Material Time, using a process which included considering recommendations and advice obtained from third parties (including Indigenous groups), and ultimately led to:

(i) the dissolution of The Children's Aid Society of Winnipeg and establishment of six new community-based child welfare agencies in 1985;

(ii) the enactment of *The Child and Family Services Act*, CCSM c C80 (the "**CFSA**") which replaced *The Child Welfare Act*, CCSM c C80, in 1986; and

(iii) the CFSA preserved then-existing Children's Aid Societies and child welfare committees as child and family services agencies, and provided for the establishment of First Nations agencies by way of tripartite agreements between Canada, Manitoba and First Nations bands or tribal councils (the "**Tripartite Agreements**");

(b) in both the period immediately prior to January 1, 1992 and throughout the Material Time, Canada and Manitoba have had shared responsibilities with respect to the design and delivery of child welfare services to First Nations

children on-reserve. Canada's only material involvement in this regard was entering into the Tripartite Agreements, by which Canada provided funding to First Nations agencies, and the First Nations agencies delivered child welfare services to children on-reserve following the requirements of the CFSA;

(c) since the Tripartite Agreements and throughout the Material Time, Manitoba has regularly reviewed and assessed the CFS system, in collaboration with Indigenous organizations and First Nations, in order to implement systemic changes as knowledge with respect to best practices evolved; and

(d) Manitoba denies the remaining allegations of fact within these paragraphs.

8. In further answer to paragraphs 6, 8, 68, 77, 80, 81, 88, 89, 90, and 91 of the Claim, Manitoba:

(a) says that all funding decisions of the type referred to in these paragraphs are the function of the executive and legislative branch of government, and constitute core policy decisions outside the jurisdiction of this Court, from which Manitoba is immune from suit;

(b) in the alternative, says that it adequately funded prevention and reunification services throughout the Material Time. While Manitoba set the rates payable for child welfare services, the associated funds were (and continue to be) paid to the individual CFS Authorities and it is the CFS Authorities who were (and continue to be) responsible to allocate the funds to the CFS Agencies (explained in greater detail at paragraph 14 below). Manitoba says that the rates in place throughout the Material Time were,

and that the rates continue to be, sufficient to provide prevention services. Further, and in the alternative, Manitoba says that if there are any issues with respect to how funds were (and continue to be) allocated, all such allocation decisions are the responsibility of the individual CFS Authorities;

(c) in the further alternative, says that prevention services were and are also available from entities outside the provincial child welfare regime, including other provincial departments such as Manitoba Families (other than CFS), Manitoba Health, Manitoba Education and Early Childhood Learning, Manitoba Housing (which, during the Material Time, has operated both under the Department of Families and as a standalone entity), and other provincially funded community organizations, in an effort to prevent the provincial child welfare regime from becoming involved with families and children for whom there are no protection concerns;

(d) in the further alternative, and particularly with respect to children and families in need of prevention services on reserve, says that until recently, few of the prevention services offered by Manitoba through the provincial child welfare regime or outside of it were made available by Canada to First Nations children and families on reserve; and

(e) denies that Manitoba, the CFS Authorities, or the CFS Agencies prioritized (or continue to prioritize) child apprehensions over prevention and reunification services, and says that the final determination of whether children require protection and should remain in care rests with the Court (see paragraph 12 below).

9. In answer to paragraphs 14, 16, and 18 of the Claim, Manitoba:

(a) says that, while Ms. McKenzie was involved with the child welfare system as a minor and subsequently as a parent, the Agencies involved – Winnipeg Child and Family Services ("**WCFS**") while she was a minor, and Animikii Ozoson Child and Family Services ("**AOCFS**") with respect to her children – provided extensive prevention and healing services to Ms. McKenzie and her children;

(b) says that AOCFS continues to be involved with Ms. McKenzie and her three children;

(c) says that at the times of the apprehensions and permanent ward orders issued by the Court respecting Ms. McKenzie and two of her three children, respectively, WCFS and AOCFS were incorporated entities separate and apart from Manitoba. Manitoba was not responsible for the decisions of WCFS and AOCFS at the relevant times; and

(d) denies the remaining allegations of fact in these paragraphs.

10. In answer to paragraphs 19 and 20 of the Claim, Manitoba says that, while Ms. Fontaine was involved with the child welfare system as a minor, the Agencies involved provided extensive prevention and healing services to Ms. Fontaine and her parents. Once the risk factors that caused her apprehension and temporary ward order to be issued by the Court were addressed, she was returned to her parents. Manitoba denies the remaining allegations of fact in these paragraphs.

**Background on Child Welfare Services in Manitoba**

11. In answer to paragraphs 38, 39, 40, and 41 of the Claim, Manitoba says that under the FNCFS Program, Canada undertook to provide, administer, and fund child welfare services provided to First Nations children, youth and families ordinarily resident on-reserve (typically if apprehended on reserve), on Crown land or in the Yukon. Manitoba denies the remaining allegations of fact in these paragraphs.

12. In answer to paragraphs 42 and 43, and the whole of the Claim, Manitoba says:

(a) it regularly reviewed, considered and assessed the child welfare system and the issues identified in the reports referenced by the plaintiffs in light of new and emerging information regarding best practices in the field. Where feasible, Manitoba acted in good faith to implement updates to the child welfare system resulting from same;

(b) as a result of the findings of the AJI Report (1991), Manitoba established the Aboriginal Justice Inquiry-Child Welfare Initiative, with the goal of transferring child welfare services to Indigenous governments and organizations of Manitoba as per the AJI Report (1991)'s recommendations;

(c) this process is what is known as "Devolution", which recognized the need for culturally appropriate care to be provided to Indigenous children;

(d) Devolution involved collaboration with the Manitoba Metis Federation ("**MMF**") on behalf of the Metis people, the Assembly of Manitoba Chiefs ("**AMC**") on behalf of the Southern First Nations, Manitoba Keekatinowi Okimakanak (**"MKO**") on behalf of Northern First Nations and the Government of Manitoba;

(e) a greater exercise of Indigenous oversight of the child welfare system was accomplished through amendments to the CFS Act, the introduction of *The Child and Family Services Authorities Act,* CCSM c C90 (the "**CFSAA**"), and a variety of agreements executed between Manitoba, MMF, MKO, and AMC;

(f) the governance of Manitoba CFS includes two statutes – the CFS Act and the CFSAA – and their regulations, including the the *Child and Family Services Authorities Regulation*, MR 183/2003 (the "**Regulation**");

(g) with the proclamation of the CFSAA on November 24, 2003, the four designated CFS Authorities were established to mandate CFS Agencies under Part I of the CFS Act for the delivery of child and family services, and provide oversight to the CFS Agencies. The CFS Authorities include three Indigenous authorities, being the Northern Authority, the Southern Authority (as defined above), and the Metis Authority, along with one General Authority. Pursuant to the CFSAA, the CFS Authorities are corporations and, subject to the Act, have all the rights and powers and privileges of natural persons;

(h) pursuant to the CFS Act, the CFS Agencies are each corporations without share capital mandated as CFS Agencies, whose purposes are to provide child and family services under the CFS Act and/or *The Adoption Act,* CCSM c A2. With the exception of two CFS Agencies (Winnipeg Child and Family Services and Rural and Northern Child and Family Services), the CFS Agencies are public bodies but do not fall within the governmental structure of Manitoba. They were and are created as separate legal entities

with their own boards of directors and board appointment process as set out in the CFS Act and the CFSAA;

(i) under the CFS Act, the CFS Authorities are legislatively, through the CFS Agencies, responsible for administering and providing for the delivery of child and family services within the province of Manitoba in accordance with the CFS Act, the CFSAA, and the Regulation;

(j) certain of the responsibilities and duties of the CFS Agencies are set out at subsection 7(1) of the CFS Act. The CFS Agencies are the guardians of children in care. The CFS Agencies are responsible for the care and control, maintenance and education of the children in care, and they act for and on behalf of the children in care;

(k) the responsibilities and duties of the CFS Authorities are set out at sections 17 through 21 of the CFSAA, the responsibilities of Manitoba are set out at section 24 of the CFSAA, and both are further particularized in Part 3 of the Regulation. Manitoba says that:

(i) it is responsible for establishing policies and standards for the provision of child and family services pursuant to subsection 24(b) of the CFSAA;

(ii) it is not responsible for developing culturally appropriate standards of services, practices, and procedures, and says that this responsibility lies with the CFS Authorities pursuant to subsection 19(c) of the CFSAA;

(iii) while Manitoba is responsible for establishing province-wide standards of care, it is not responsible for ensuring that CFS

Agencies are providing the standard of services and are following the procedures and practices established, and says that such responsibility lies with the CFS Authorities pursuant to subsections 19(e), 19(f), 19(g), 19(h), 19(i), and 19(k) of the CFSAA;

(l) the procedure for designating a CFS Authority to a child and family in need of protection is prescribed by the Regulation. Generally, the "culturally appropriate authority" (as that term is defined in the Regulation) will be designated, but unless and until the child is made a permanent ward of a CFS Agency by the Court (see below), the child's adult family members – or in the case of a child subject to an independent living arrangement under the CFS Act, a parent or an expectant parent, the child – have the right to choose which CFS Authority will provide child welfare services to the child and family;

(m) the CFS Act (ss. 17, 21, 27, and 38) and the Regulation (s. 37), provide that the CFS Authorities, the CFS Agencies, the Director of Child and Family Services, and peace officers have a collective duty to apprehend a child who is in need of protection, based on reasonable and probable grounds, if apprehension is consistent with the best interests of the child. However, the final determination as to whether an apprehended child requires ongoing protection is made by the Court, not by any CFS entity (CFS Act, s. 38(1)).

**Responses to Plaintiffs' Allegations**

13. In answer to paragraphs 44, 45, 46, 61, and 62 of the Claim, Manitoba:

(a) acknowledges that there have been, and continue to be, a disproportionate number of Indigenous children in care in Manitoba throughout the Material Time;

(b) says that the intention was for any steps taken by the Authorities and the Agencies to protect children to be done in accordance with the legislation and in the best interests of the children;

(c) says that the majority of apprehension decisions respecting First Nations children after implementation of the CFSAA were made by Indigenous-led CFS Agencies;

(d) further, says that the majority of children in care are under the guardianship of Indigenous Agencies, which are overseen by Indigenous-led Authorities;

(e) further, says that not all Indigenous children receive child welfare services through the Indigenous-led Authorities. Families with children in care may choose which CFS Authority they want to work with, and some families with Indigenous heritage choose to receive services through the General Authority (see above);

(f) says that the number of children in care in Manitoba has decreased from March 31, 2021, to March 31, 2023, and that the number of children currently in care is less than 9,850 as alleged; and

(g) denies the remaining allegations of fact in these paragraphs.

14. In further answer to paragraphs 47, 48, 49 and 50 of the Claim, Manitoba:

(a) admits that Animikii Ozoson Child and Family Services, Metis Child, Family and Community Services, and Michif Child and Family Services only receive funding from Manitoba;

(b) says that all Indigenous CFS Agencies other than Animikii Ozoson Child and Family Services, Metis Child, Family and Community Services, and Michif Child and Family Services receive funding from Canada under the FNCFS Program, and funding from Manitoba;

(c) says that with respect to all CFS Agencies providing services off reserve, Manitoba has the power to fix rates payable for services provided under the CFS Act pursuant to subsection 6.6(1) of the CFS Act, but says that a new funding formula was enacted in 2019 pursuant to subsection 24(d) of the CFSAA, whereby Manitoba is only responsible for allocating funding and other resources to the Authorities;

(d) further, says that pursuant to subsection 19(h) of the CFSAA, it is the Authorities' responsibility to determine how funding ought to be allocated among the CFS Agencies they have mandated. Prior to 2019, funding for CFS Agencies' operations was designed using the Manitoba Child and Family Services Funding model by way of grant provided to the Authority, and funding for the care and maintenance of children was determined with Manitoba directly providing funding on CFS Agency submitted billing reports for all children in care including all additional and special rates of payments above the basic maintenance rates. Effective April 1, 2019, all funding is now provided to the CFS Authorities by Manitoba including those for the care of maintenance of children in care, with CFS Authorities now responsible for providing this funding to CFS Agencies. The new formula

means CFS Authorities and CFS Agencies have the autonomy to make funding policies and to reallocate funds;

(e) denies that the amounts payable to Authorities and then allotted to CFS Agencies are correlated to the number of children in care under Single Envelope Funding, which has been Manitoba's funding model since April 1, 2019 (discussed in greater detail below);

(f) further, says that Manitoba also has the ability to make expenditures for public services not foreseen or provided for pursuant to the provisions of *The Financial Administration Act*, CCSM c F55; and

(g) denies the remaining allegation of facts in these paragraphs.

15. In answer to paragraph 51 of the Claim, Manitoba:

(a) says that prior to the implementation of Single Envelope Funding in 2019, Manitoba paid out reimbursement requests for provincial children in care based on billing provided for actual costs incurred, and says that approximately 1.5% of the amounts requested by Indigenous CFS Agencies were rejected as a result of the said reimbursement requests being duplicative of other reimbursement requests, or inappropriate. The other, approximately 98.5%, of the reimbursement requests were approved;

(b) with respect to the allegation that Manitoba has at times "clawed back" 4% of Operating Costs from Indigenous CFS Agencies, says that Manitoba operates on an 8% turnover rate and a turnover allowance is built into the funding model at 3.74%; and

(c) further, says notwithstanding that Indigenous CFS Agencies and Non-Indigenous CFS Agencies are funded using different models, the general availability of services is similar with respect to Indigenous CFS Agencies and Non-Indigenous CFS Agencies, both of which are required to provide services within their allocated budgets in the same manner as all other government-funded agencies and departments.

16. In answer to paragraphs 52 and 53 of the Claim, Manitoba admits that the Legislative Review Committee published a report entitled "Transforming Child Welfare Legislation in Manitoba: Opportunities to Improve Outcomes for Children and Youth" in September 2018. Manitoba says that the excerpts from the report quoted by the plaintiffs are segments of the larger report, and that the whole of the report speaks for itself.

17. In answer to paragraph 54 of the Claim, Manitoba admits that it revised its funding model to Single-Envelope Funding as of April 1, 2019.

18. In answer to paragraphs 54, 55, 56, 57, 58, 59 and 60, and the Claim as a whole, Manitoba:

(a) says that many of the proposed Class members' allegations relate to grievances against the CFS Agencies that provided them with services, for which the plaintiffs and proposed Class members have no standing to advance against Manitoba;

(b) in the alternative, says that from January 1, 2005 to April 1, 2019, there were two primary streams of funding for the CFS Agencies providing services to Manitoba communities: (1) general operating funding ("operating funding") and (2) child maintenance funding. Manitoba was the primary funder of the operating funding for the CFS Agencies through the

CFS Authorities, but Canada provided a level of operational funding in respect of on-reserve First Nations Agencies;

(c) effective April 1, 2019, the funding model employed by Manitoba shifted from a formula-based model of funding to a new model of funding referred to as "Single Envelope Funding";

(d) Single Envelope Funding gives the CFS Authorities control over the distribution of funding, which strengthens the CFS Authorities' ability to deliver culturally appropriate supports and services;

(e) the upfront annual allocation of funds to the CFS Authorities offers a more efficient and predictable funding system, with improved policies and clarity in direction;

(f) Single Envelope Funding also gives the CFS Authorities and the CFS Agencies the flexibility they need to direct resources towards prevention and maintenance services;

(g) since adopting Single Envelope Funding, the number of children in care in Manitoba has decreased, and many CFS Agencies are operating with surpluses; and

(h) Manitoba denies the remaining allegations of fact in these paragraphs, and puts the plaintiffs to the strict proof thereof.

19. In answer to paragraph 63 of the Claim, Manitoba:

(a) says that the CFS Act divides the provision of services into two streams known as "Services to Families", and "Child Protection";

(b) says that the Child Protection stream includes a variety of services and programs, including apprehension as a last resort;

(c) says that prevention services are provided in both the Services to Families and Child Protection streams;

(d) admits that prevention services include the services referred to at subparagraphs 63(b)(i) through 63(b)(v) of the Claim, and says that the prevention services referred to therein include services provided by provincial departments (including CFS and departments other than CFS – see above), and by other provincially funded community organizations; and

(e) denies the remaining allegations of fact in this paragraph.

20. In answer to paragraphs 64 and 65 of the Claim, Manitoba denies the existence of a "first preferred option" as between prevention services and protection services, and says that the most preferred option is always that which best aligns with the best interests of the child. The determination of same is dependent on each child's individual facts and circumstances.

21. In answer to paragraphs 66, 70, 71, 127, 128, and 129 of the Claim, Manitoba says that it was not a party to the CHRT Decision, and that the CHRT Decision speaks for itself.

22. In further answer to paragraph 68 of the Claim, Manitoba denies the allegation that CFS Agencies do not have a statutory obligation to provide prevention services. Pursuant to subsection 7(1) of the CFS Act, every CFS Agency is required to:

(a) work with other human service systems to resolve problems in the social and community environment likely to place children and families at risk (ss. 7(1)(a));

(b) provide family counselling, guidance and other services to families for the prevention of circumstances requiring the placement of children in protective care or in treatment programs (ss. 7(1)(b));

(c) provide family guidance, counselling, supervision and other services to families for the protection of children (ss. 7(1)(c));

(d) provide parenting education and other supportive services and assistance to children who are parents, with a view to ensuring a stable and workable plan for them and their children (ss. 7(1)(k));

(e) develop and maintain child care resources (ss. 7(1)(l));

(f) take reasonable measures to make known in the community the services the agency provides (ss. 7(1)(o)); and

(g) conform to a written directive of the director (ss. 7(1)(p)), which may include provincial standards that outline and establish preventative care.

23. In answer to paragraph 69 of the Claim, Manitoba acknowledges that the stipend referred to therein is available to families for prevention services, but denies that the stipend is the only source of funding available to families for prevention services (see paragraph 8 above).

24. In answer to paragraphs 71, 72, 73, and 74 of the Claim, Manitoba says that the CFS Agencies are mandated and enabled to provide prevention services (see paragraph 22 above). Any failures by the CFS Agencies to provide such mandated services, which failures are not admitted but expressly denied, are not the responsibility of Manitoba, but rather the responsibility of the CFS Authorities pursuant to sections 15, 16 and 19 of the CFSAA Regulation and subsections 19(e), 19(g), 19(h), 19(k) and 19(n) of the CFSAA.

25. In answer to paragraphs 75 and 76 of the Claim, Manitoba acknowledges that it commissioned a number of reports respecting the provincial child welfare system that were released between 1985 and 2021, and says that the reports speak for themselves, but is unable to respond to the remaining allegations in this paragraph without particulars as to which 11 reports the plaintiffs are referring to. Manitoba is unable to respond to the remaining allegations of fact within these paragraphs.

26. In answer to paragraph 82 of the Claim, Manitoba says that:

(a) all matters pertaining to birth alerts are subject to ongoing proposed class proceedings in Manitoba. As a result, the issues raised in paragraph 82 are an abuse of process as against Manitoba as they will be adjudicated in the other proceedings, and the plaintiffs have not sought leave to advance claims respecting these issues in the other proceedings. Manitoba pleads and relies on *The Court of King's Bench Act*, CCSM c C280, and in particular section 94 thereof;

(b) in the alternative, the practice of birth alerts ended effective July 1, 2020;

(c) the decisions to issue birth alerts were initiated by CFS Agencies and not with Manitoba, and that Manitoba was not notified of these decisions until they were made by the Agencies;

(d) the majority of birth alerts issued within the Material Time (i.e., from January 1, 1992 to June 30, 2020) were issued for assessment purposes, and not for apprehension purposes, and that all apprehensions of children following a birth alert were based on decisions of the Agencies – not Manitoba – and subject to a hearing in Court to confirm the decision to apprehend; and

(e) Manitoba denies the remaining allegations of fact in this paragraph.

27. In answer to paragraphs 83, 84, 85, 86, 87, 99, 102, and 103 of the Claim, Manitoba says:

(a) as set out above, the responsibility for developing culturally appropriate standards of services, practices and procedures lies with the CFS Authorities pursuant to subsection 19(c) of the CFSAA;

(b) the Kimelman Report (1985) speaks for itself;

(c) the responsibility to establish hiring qualifications and a training curriculum for Agency workers lies with the Authorities (s. 19(f) CFSAA); and

(d) Manitoba denies all of the remaining allegations of fact in these paragraphs.

28. In further answer to paragraph 91 of the Claim, Manitoba denies the allegation that Indigenous children have been apprehended on the basis of racist assumptions during the Material Time, says that all apprehensions proceed in accordance with legislative authority taking into account the best interests of the child, and the final determination respecting whether apprehended children require protection rests with the Court (see above). Manitoba further denies the existence of any goal or objective to break the links of Indigenous children to their families and culture during the Material Time, and says that Manitoba has received advice from experts, including from Indigenous and First Nations experts, to review the state of child welfare in the province as it relates to Indigenous peoples, in an effort to better serve Indigenous peoples as they recovered from the legacies of colonialism, residential schools, the 60's Scoop, and other national policies which caused or contributed to poverty, lower education rates, and conditions of social and familial functioning among Indigenous peoples.

29. In answer to paragraph 92 of the Claim, Manitoba denies the allegation that it uses (or ever used throughout the Material Time) "discriminatory screening and risk assessment tools". Further, to the extent that the plaintiffs' allegations in this paragraph pertain to Structured Decision-Making ("SDM"), an assessment tool used by Agencies for children in care, Manitoba:

(a) says that the SDM process requires CFS workers to take a nuanced approach to interpretation that considers the whole of the analysis;

(b) denies that SDM is discriminatory with respect to First Nations children in care or their families;

(c) says that SDM was at one time considered to be a best practice in the field;

(d) says that a number of Indigenous CFS Agencies voluntarily use SDM as an assessment tool; and

(e) says that reports relied upon by the plaintiffs in other paragraphs of the Claim recommend the standardized use of SDM as an assessment tool.

30. In further answer to paragraphs 92, 93, 94, 95, and 96 of the Claim, Manitoba:

(a) says that pursuant to section 19(c) of the CFSAA, the responsibility with respect to the development of cultural standards rests with the CFS Authorities;

(b) as particularized above, the CFS Authorities, the CFS Agencies, the Director of Child and Family Services, and peace officers have a collective duty to apprehend a child who is in need of protection, based on reasonable and probable grounds, if apprehension is consistent with the best interests of the child. However, the final determination as to whether an

apprehended child requires ongoing protection is made by the Court, not by any CFS entity;

(c) the CFS Authorities and the CFS Agencies determine where to place children, and Manitoba facilitates placement into group care providers only if the CFS Authorities or their CFS Agencies request same. Pursuant to CFS Standard for Practice – 1.1.1 Placement Priorities, in deciding on a placement resource, the intake worker considers the following caregivers in order of priority:

(i) one of the child's parents;

(ii) with another adult member of the child's family, with an adult who belongs to the same community;

(iii) with an adult who belongs to an Indigenous group, community or people other than the one to which the child belongs;

(iv) with any other adult that can meet the child's needs; or

(v) with or near children who have the same parent as the child, or who are otherwise members of the child's family;

(d) denies the remaining allegations of fact in these paragraphs;

(e) in the alternative, says that:

(i) amendments to the CFS Act were enacted in 2023 that codified existing federal standards calling for placement priorities to protect family and culture connections, along with prevention and pre-natal interventions; and

(ii) Manitoba, the CFS Authorities and the CFS Agencies adopted the above referenced federal standards in practice in 2020, but the substance of prioritizing family-based, community-based, and culturally-based placements in provincial CFS Standard for Practice – 1.1.1 Placement Priorities, was the established method of practice throughout the Material Time.

31. In answer to paragraph 97 of the Claim, Manitoba has no knowledge of the allegations of fact contained therein, because this is a function of the CFS Agencies, and not Manitoba.

32. In answer to paragraphs 98, 99, 100, and 101 of the Claim, Manitoba denies the allegation that it does not provide biological parents of children taken into protective care a realistic opportunity for reunification. Manitoba says that it has legislatively mandated that CFS Agencies are to develop and provide services which will assist families in re-establishing their ability to care for their children (CFS Act, ss. 7(1)(f)). Further, Manitoba says that reunification is a function of the CFS Agencies, not Manitoba, and is ultimately in the discretion of the Court.

33. In answer to paragraph 108 of the Claim, Manitoba admits that the National Inquiry into Missing and Murdered Indigenous Women and Girls published a report in 2019, and says that the report speaks for itself.

34. In answer to paragraphs 109, 113, and 155 of the Claim, Manitoba admits that it received advice and reports from third parties with respect to the third parties' views on child welfare in the province as it relates to Indigenous persons. Manitoba also admits that it receives expert advice, including from Indigenous and First Nations experts, to review the state of child welfare in the province as it relates to Indigenous persons, in an effort to better serve Indigenous persons. Manitoba denies that it failed to consider or take action

on such advice and reports, denies that it chose to knowingly underfund and under-provide child welfare services to Indigenous peoples, and puts the plaintiffs to the strict proof thereof.

35. In answer to paragraphs 110, 111, 112, 116, 117, 118, 119, 120, 121, 122, 123, and 124 of the Claim, Manitoba says the excerpts from the reports quoted by the plaintiffs are segments of the larger reports, and that the whole of the reports speak for themselves.

36. In further answer to paragraphs 114 through 134, and to the Claim as a whole with respect to the plaintiffs' allegations respecting "essential services", Manitoba says that:

(a) it is unable to respond in detail to the plaintiffs' allegations respecting "essential services" without particulars as to which services the plaintiffs allege that the plaintiffs and the proposed Class members needed but did not receive;

(b) in the alternative, to the extent that the plaintiffs' allegations pertain to provincial services (*i.e.*, services provided by provincial departments), these services are subject to provincial legislation, which in many cases provides jurisdiction to administrative bodies to make decisions respecting the provision of provincial services. By way of example, section 10(1) of *The Health Services Insurance Act*, CCSM c H35 (the "**Health Act**"), grants a right of appeal to the Manitoba Health Appeal Board to any person who has been denied an entitlement to a benefit under the Health Act or its regulations, including hospital services, medical services, and other health services;

(c) all claims by the plaintiffs and the proposed Class members that amount to challenges of decisions respecting the provision of provincial services that

otherwise should have proceeded before administrative bodies are an abuse of process as they ought to have proceeded before the administrative bodies tasked with adjudicating those claims; and

(d) in the further alternative, that in both the period immediately prior to January 1, 1992 and throughout the Material Time, Canada and Manitoba have both provided funding for many of the provincial services in the province, and that Canada shares responsibility for any issues with provincial services (the existence of which Manitoba denies) for which it provides funding.

37. In further answer to paragraphs 125, 126, and 130 of the Claim, Manitoba admits that *The Jordan's Principle Implementation Act* was tabled in the 39th Legislature and did not pass into law, but says that it was Bill 203 and not Bill 214 as alleged. Manitoba denies the remaining allegations of fact in these paragraphs.

38. In further answer to paragraphs 131 and 132 of the Claim, Manitoba says that it is not a party to the settlement agreement in the *Moushoom* action, which was approved by the Federal Court on October 24, 2023 (neutral citation: 2023 FC 1466), and is not bound by its decision.

39. In further answer to paragraphs 133 and 134 of the Claim, and in the alternative, Manitoba:

(a) says that CFS does not involve itself with Manitoban families who do not have identified protection concerns, unless a file is opened upon the request of a family, and is therefore barred from providing child and family services to children and/or family members who do not have an active file open to assist them in caring for their children;

(b) denies that Indigenous children and families situated off-reserve have suffered delays, denials, or service gaps in the receipt of provincial services during the Material Time, as alleged;

(c) in the alternative, if there have been any delays, denials, or service gaps in the receipt of provincial services during the Material Time, says that such is not unique to off-reserve Indigenous individuals, but based upon the budgetary limitations and stresses placed upon the delivery of services provided by the province to all Manitobans, regardless of ethnicity or race; and

(d) in the further alternative, says that it bears no responsibility for any delays, denials, or service gaps found respecting the receipt of provincial services by on-reserve First Nations' children and families, and that the responsibility for same rests with Canada.

40. In answer to paragraphs 147, 148, 149, 150, 151, 152, 153, and 154, and the Claim as a whole, Manitoba:

(a) denies that it is in a fiduciary relationship with Indigenous peoples as a result of section 91(24) of *The Constitution Act*, as that section is only binding upon Canada;

(b) says that the plaintiffs have failed to plead an Indigenous (Aboriginal) interest or treaty right that is sufficient to ground a fiduciary duty as between Manitoba and the proposed Class members;

(c) admits that it has a duty of care to provide Manitoba children with child welfare services;

(d) denies that it owed any of the plaintiffs or proposed Class members the fiduciary duties or duties of care as alleged in the Claim, or at all; and

(e) in the alternative, if it is determined that Manitoba owed a duty of care to any of the plaintiffs or proposed Class members, which is denied, Manitoba says that any such duty does not override the statutory duty to ensure the safety, security and well-being of children and their best interests.

41. In answer to paragraphs 155 and 156, and the Claim as a whole, Manitoba:

(a) denies that any of the plaintiffs or proposed Class members suffered damages as alleged, or at all;

(b) in the alternative, says that no act or omission on its part was a legal cause of any injury, loss, and/or damage to any of the plaintiffs or proposed Class members; and

(c) denies that any of the plaintiffs or proposed Class members are owed punitive damages.

42. In further answer to paragraphs 3, 6, 8, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, and 156, and to the Claim as a whole, Manitoba says that all policies referenced therein constitute core policy decisions pertaining to the funding of social services in the province, which are outside the jurisdiction of this Court. Manitoba says that, among other things, all decisions respecting the type and scope of services to be provided to the public – including child welfare services – along with decisions respecting which entities will provide the services, and how the services will be funded, constitute core policy decisions of the executive and legislative branch of government, respecting which Manitoba is immune from suit.

43. Manitoba pleads and relies upon:

(a) *The Proceedings Against the Crown Act,* CCSM c P140;

(b) *The Public Officers Act,* CCSM c P230;

(c) *The Limitations of Actions Act,* CCSM c L 150 (the "*LAA*"), as it may apply to the various claims herein, and particularly with respect to proposed Class members for whom limitation periods provided for under the *LAA* have elapsed since they attained the age of 18;

(d) *The Limitations Act,* S.M. 2021 c. 44, as it may apply to the various claims herein, and particularly with respect to proposed Class members for whom two or more years have elapsed since they attained the age of 18;

(e) *The Child and Family Services Act,* CCSM c C80;

(f) *The Child and Family Services Authority Act*, CCSM c C90;

(g) *Child and Family Services Authorities Regulation*, MR 183/2003;

(h) *The Adoption Act,* CCSM c A2;

(i) *The Court of King's Bench Act*, CCSM c C280;

(j) *The Class Proceedings Act,* CCSM c C130;

(k) *The Court of King's Bench Act,* CCSM c C280;

(l) *The Crown Liability and Proceedings Act,* RSC, 1985 c C50;

(m) *The Financial Administration Act*, CCSM c F55; and

(n) *The Health Services Insurance Act*, CCSM c H35.

44. Manitoba therefore submits that this action should be dismissed against Manitoba, with costs.

December 27, 2023

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