File No. CI22-01-36804

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

REPLY

FILED

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COCHRANE SAXBERG LLP
201 – 211 Bannatyne Avenue
Winnipeg, MB R3B 3P2

Shawn Scarcello
sscarcello@cochranesaxberg.com
Harold Cochrane, K.C.
hcochrane@cochranesaxberg.com
Maxime Faille
mfaille@cochranesaxberg.com
Aaron Christoff
achristoff@cochranesaxberg.com
Alyssa Cloutier
acloutier@cochranesaxberg.com

T: (204) 594-6688

SOTOS LLP
180 Dundas St. West, Suite 1200
Toronto, ON M5G 1Z8

David Sterns
dsterns@sotos.ca
Mohsen Seddigh
mseddigh@sotos.ca
Adil Abdulla
aabdulla@sotos.ca

T: (416) 977-0007

MILLER TITERLE + COMPANY
300 – 638 Smithe Street
Vancouver, BC V6B 1E3

Joelle Walker
joelle@millertiterle.com
Tamara Napolean
tamara@millertiterle.com
Erin Reimer
erin@millertiterle.com

T: (604) 681-4112

MURPHY BATTISTA LLP
Suite 2020 – 650 West Georgia Street
Vancouver, BC V68 4N7

Angela Bespflug
bespflug@murphybattista.com
Janelle O'Connor
oconnor@murphybattista.com

T: (604) 683-9621

Lawyers for the Plaintiffs, Amber Lynn Fontaine and Tracy Lynn McKenzie

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1. The Plaintiffs join issue with each and every allegation set forth in both Canada's and Manitoba's Statement of Defence, except where they consist of admissions in material facts pled in the Fresh as Amended Statement of Claim.

2. The Plaintiffs plead and rely upon their allegations and statements made in their Fresh as Amended Statement of Claim.

3. The Plaintiffs admit paragraphs 13, 14, 20, 21 and 22 in Canada's Statement of Defence and also admit Canada's specific assertions in paragraph 1 that historical wrongs have been committed against First Nations people in the provision and administration of child welfare services and that the overrepresentation of First Nations children in care is a national tragedy. The Plaintiffs reply that the same applies to all Indigenous people, including the Inuit and Métis.

4. The Plaintiffs admit paragraphs 16, 19(d), 25, 33, 37, and 40(c) in Manitoba's Statement of Defence.

5. In reply to paragraphs 1 - 5, 23 - 26, 28, 38 - 41, 46, 54 - 56, 59, and 61 - 73, of Canada's Statement of Defence, and in reply to paragraphs 6, 7, 8 and 11 in Manitoba's Statement of Defence, the Plaintiffs say that:

a. Child welfare in the Indigenous context is not only a field in which Parliament and the provinces, including Manitoba, can act, but also one in which concerted action by them is necessary.

b. The importance of cooperation in this area between Canada and the provinces, including Manitoba, 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.

c. Canada and Manitoba have demonstrated a historical tendency to shift responsibility for Indigenous child welfare services to one another; however providing such services is the responsibility of both levels of government, which must act in a concerted fashion.

d. Canada and Manitoba have not acted in a concerted fashion with respect to the provision of Indigenous child welfare services in Manitoba during the proposed Class Period, on or off reserve. They have consistently shifted responsibility to one another and continue to do so in their respective Statements of Defence, which is egregious.

e. In tandem with the residential school system, the child welfare system during the proposed class period became a tool of assimilation and colonization by forcibly removing Indigenous children from their homes and placing them with non-Indigenous families.

f. Canada and Manitoba, at all material times, have failed to take appropriate measures, including legislative measures, to protect the rights of the proposed

class members so as not to subject them to the inherently violent, forcible removal of their children.

6. In reply to paragraphs 29-37 in Canada's Statement of Defence, separate and apart from the *Moushoom* Class Action settlement, and also in paragraphs 8, 21, 24, 36 38, 39 in Manitoba's Statement of Defence, the Plaintiffs say that:

a. Compelled by the Canadian Human Rights Tribunal, Canada has in recent years sought to provide non-discriminatory child welfare services to First Nations children ordinarily resident on reserve with Canada funding $20 billion dollars for long term reform nation-wide, which is funding for First Nation child welfare that is not paid to the *Moushoom* Class.

b. At the same time, Canada arbitrarily imposed operational distinctions between First Nations children and families ordinarily resident on-reserve and every other Indigenous child and family in Manitoba (*i.e.* the class members in this case), and Manitoba has not provided the same or even nearly equivalent services to the off-reserve Indigenous children and families, which has accentuated the dire situation of class members for whom Canada and Manitoba effectively deny services expressly because they are First Nations not ordinarily resident on reserve, Inuit or Métis.

c. Despite being under the exact same child welfare system in Manitoba – the same system that has already been found by the Canadian Human Rights Tribunal to have been (a) knowingly discriminatory, (b) failed to comply with Jordan's Principle, and (c) failed to provide First Nation children with essential services available to non-First Nation children, or which would have been required to ensure substantive equality under the *Charter* – Canada and Manitoba have now created a two-tier system, leaving the off-reserve Indigenous children and families to that same discriminatory system that the on-reserve children were in, with both blaming the other for the resulting social injustices, including in this case, where Canada is

saying it is Manitoba's problem and Manitoba is saying Canada created the problem in the first place.

d. Canada and Manitoba have not acted in a concerted fashion to ensure that the off-reserve Indigenous children and families are also protected from discrimination and have their *Charter* rights assessed and addressed. Manitoba has not matched Canada's commitment to programming that is now available only for the on-reserve First Nation population in Manitoba, and Canada has not made the same or equivalent services available to the off-reserve Indigenous population.

e. The consequences of Canada and Manitoba's failure to act in a concerted fashion are a two-tier child welfare system, the results of which can be tragic and highlight the incredible risks and consequences of a child and family system that is knowingly discriminatory, and which results in other essential health and social services being denied to off-reserve Indigenous children and their families.

f. Particulars of the two-tiered system include, but are not limited to, the class member who was tragically murdered in December 2023, just one day after a Manitoba Provincial Court judge decried the lack of housing supports available to the 14-year-old girl, who was then stabbed to death on the streets of Winnipeg the very next day.

g. The deceased girl was taken into care while ordinarily resident off-reserve, making her provincially funded, which meant her social worker could not access specialized housing (or funding for the specialized housing) that met the needs of the child who struggled with serious addiction, frequently ran away from foster homes and was on a waitlist to be assessed for fetal alcohol spectrum disorder. The housing would have been available to her if she had been labeled 'on-reserve' and under what Canada has chosen to cover, despite being in the same singular Manitoba child welfare system.

h. This young girl's case is a tragic example of the detrimental consequences of Manitoba and Canada's failure to act in a concerted manner to ensure equitable services are available to all Indigenous children and families, regardless of residency – Manitoba would not fund the placement the child required, her social worker could not access the federal funding that would have funded the placement if she would have been taken into care while ordinarily resident on-reserve, Canada refused to acknowledge her as a federally funded child because of their on-reserve residency requirements, and Jordan's Principle funding was also not available to her despite applications for same.

7. In specific reply to paragraph 33 of Canada's Statement of Defence, the Canadian Human Rights Tribunal has rejected this narrow conceptualization of eligibility for Jordan's Principle. Specifically, in 2017 CHRT 14, the Tribunal stated that Jordan's Principle "applies equally to all First Nations children, whether resident on or off reserve". In subsequent decisions, the Tribunal confirmed that "Canada had an obligation to all First Nations children, regardless of whether they were eligible for *Indian Act* status or where they lived in Canada". Canada did not seek judicial review of these decisions and is therefore estopped from taking an opposing position in this action.

8. In reply to paragraphs 47-48 of Canada's Statement of Defence, the Plaintiffs say that the existence of the reports and the fact that they were not acted upon is material to whether the Crown knew, or ought to have known, about the harms alleged in the Fresh as Amended Statement of Claim, which is relevant to punitive damages.

9. In specific reply to paragraph 73 of Canada's Statement of Defence, the Plaintiffs say that:

a. There is no justification for Canada to have breached the *Charter* rights of the proposed classes, which are comprised of the most vulnerable, disadvantaged and historically discriminated against members of Canadian society.

b. The proposed class members are the human beings that have suffered from the national tragedy referenced in paragraph 1 of Canada's Statement of Defence.

c. Canada's reliance on a section 1 *Charter* defence to its discrimination of Indigenous children and families is in and of itself a continuation of that discrimination and gives rise to an award of punitive damages.

10. In reply to paragraph 77 of Canada's Statement of Defence, and in addition to what is pled in the Fresh as Amended Statement of Claim, the Plaintiffs say that:

a. The Indigenous child welfare system in Manitoba concerns the Crown's (Canada and Manitoba's) relationship with Indigenous families.

b. The Indigenous child welfare system in Manitoba has breached the rights of all Indigenous peoples during the class period by inhibiting their ability to transmit their histories, languages and cultures to future generations, and has resulted in all of the proposed classes, including the proposed family class, being subjected to acts of violence, including the forcible removal of their children from their families and communities to other families and communities, which has caused undeniable harm, including intergenerational trauma, to each of the proposed classes.

11. In reply to paragraph 78 of Canada's Statement of Defence, and in reply to paragraph 43(c) of Manitoba's Statement of Defence, the Plaintiffs say that:

a. The limitation period has not yet begun, as all of the acts or omissions at issue in the Fresh as Amended Statement of Claim are continuous, and/or involve a series of acts or omissions respecting the same obligations of both Canada and Manitoba, which are to work in concert in order to provide Indigenous child welfare services that are adequately funded, not negligent and meet the *Charter* rights of the proposed classes, and which comply with Jordan's Principle, and to provide

off-reserve Indigenous children with essential services available to non-First Nation children and to on-reserve First Nation children, or which would have been required to ensure substantive equality under the *Charter*.

b. The Plaintiffs plead and rely on sections 7(a), 8(a) (11)(1)(a + b) of *The Limitations Act*, SM 2021, C 44 (the "*Limitations Act*").

c. They also plead and rely on the rules for discoverability and the suspension of limitation periods for minors and persons under a disability, as the case may be for individual class members, pursuant to sections 7(a), 13 and 14(1) of *The Limitations Act*.

d. They also plead and rely on the rules for discoverability and the suspension of limitation periods for minors and persons under a disability, as the case may be for individual class members, pursuant to sections 7(1) and 7(2) of *The Limitations of Actions Act*, CCSM c L 150.

12. In further reply only to paragraph 78 of Canada's Statement of Defence, the Plaintiffs say that:

a. They have not acquiesced or unduly delayed in bringing their claims.

b. The equitable defences pleaded by Canada do not apply in the circumstances of this case.

c. Canada suffers no prejudice, there is no principled basis and evidence to support the defence.

d. No limitation period or equitable doctrine was applied to the Manitoba *Moushoom* class members, despite being in the same child welfare system in Manitoba during the same proposed class period as in the within claim, again the

distinction being that they are on-reserve First Nations individuals and have been treated more favourably with their rights addressed on their merits.

13. In reply to paragraphs 8 and 42 of Manitoba's Statement of Defence and paragraph 64 of Canada's Statement of Defence, neither defendant is immune from liability. First, the defendants' impugned conduct particularized in the Fresh as Amended Statement of Claim was in bad faith, an abuse of power, negligent, and willfully blind. Second, the impugned policies in question were not core policy decisions about the allocation of resources, but rather a program under which, within existing resources, the provincial child welfare system in Manitoba negligently allocated all resources to funding Indigenous children's placement in state care, while severely underfunding prevention services aimed at keeping those children in their homes and families. The result is the gross overrepresentation of Indigenous children in the Manitoba child welfare system.

Date: April 2, 2024

HAROLD COCHRANE/SHAWN SCARCELLO
COCHRANE SAXBERG LLP
On behalf of the Plaintiffs, Amber Lynn Fontaine and Tracy Lynn McKenzie

TO: **JIM KOCH**
Counsel for the Defendant, the Government of Manitoba

AND TO: **BERNICE BOWLEY / ARI HANSON / MEGHAN PAYMENT**
Counsel for the Defendant, the Government of Manitoba

AND TO: **DAVID CULLETON / LAURI MILLER / KEVIN STASKA / SAMANTHA GERGELY**
Counsel for the Defendant, Attorney General of Canada