FILED NOV 2 7 2020

File No. CI 20-01- 29221

THE QUEEN'S BENCH
Winnipeg Centre

BETWEEN:

ANIMIKII OZOSON CHILD AND FAMILY SERVICES, WEST REGION CHILD AND FAMILY SERVICES, INTERTRIBAL CHILD AND FAMILY SERVICES, PEGUIS CHILD AND FAMILY SERVICES, SANDY BAY CHILD AND FAMILY SERVICES, SAGKEENG CHILD AND FAMILY SERVICES, SOUTHEAST CHILD AND FAMILY SERVICES, AWASIS AGENCY OF NORTHERN MANITOBA, CREE NATION CHILD & FAMILY CARING AGENCY, ISLAND LAKE FIRST NATION FAMILY SERVICES, KINOSAO SIPI MINISOWIN AGENCY, NIKAN AWASISAK AGENCY INC., OPASKWAYAK CREE NATION CHILD & FAMILY SERVICES, SOUTHERN CHIEF'S ORGANIZATION INC., SOUTHERN FIRST NATIONS NETWORK OF CARE, FIRST NATIONS OF NORTHERN MANITOBA CHILD & FAMILY SERVICES AUTHORITY, METIS CHILD AND FAMILY SERVICES AUTHORITY, MICHIF CHILD AND FAMILY SERVICES and METIS CHILD FAMILY, AND COMMUNITY SERVICES

Applicants,

- and -

THE GOVERNMENT OF MANITOBA

Respondent.

NOTICE OF APPLICATION
CIVIL UNCONTESTED LIST
HEARING DATE: Monday, the 14th day of December, 2020, at 10:00 a.m.

COCHRANE SAXBERG LLP
Barristers and Solicitors
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NOTICE OF APPLICATION

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicants. The claim made by the Applicants appears on the following page.

THIS APPLICATION will come on for a hearing before the presiding judge on Monday, December 14, 2020, at 10:00 a.m., at the Law Courts Complex, 408 York Avenue, Winnipeg, Manitoba, R3C 0P9.

IF YOU WISH TO OPPOSE THIS APPLICATION, you or a Manitoba lawyer acting for you must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the Court office where the Application is to be heard as soon as possible, but not later than 2:00 p.m. on the day before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

November 27, 2020

Issued by _____
Deputy Registrar
408 York Avenue
Winnipeg, Manitoba R3C 0P9

J. WIGGETT
DEPUTY REGISTRAR
COURT OF QUEEN'S BENCH
FOR MANITOBA

TO: **The Government of Manitoba**
Manitoba Justice
Civil Legal Services
730 – 405 Broadway
Winnipeg, Manitoba R3C 3L6

APPLICATION

1. THE APPLICANTS MAKES APPLICATION for:

a) A declaration that the Applicants bring this Application on their own behalf, and also on behalf of the off-reserve Indigenous children in the care of the Applicant Agencies for whom they have the statutory capacity or guardianship and a legal duty to act for, including with respect to the determination, advancement and protection of their *Charter*, Constitutional, statutory and common law rights.

b) A declaration that Indigenous people, including Indigenous children, have inherent rights with respect to their children, including the inherent right to self determination and the inherent right to self-government, which includes jurisdiction in relation to child and family services, all which are recognized and affirmed by s. 35 of the *Constitution Act*, 1867.

c) A declaration that the Government of Manitoba ("Manitoba") has contravened the honour of the Crown, breached the Principles of Reconciliation and breached its fiduciary and Constitutional duties to off-reserve Indigenous children who are or who were wards of the Applicant Agencies.

d) A declaration that Manitoba has acted and is acting unlawfully and without Constitutional competence by making use of, converting to its own use, anticipating, assigning to itself, applying a charge, applying set-offs and stacking limits to benefits granted to the Applicant Agencies pursuant to the *Children's Special Allowances Act* S.C. 1992, c. 48 (the "CSA Act") and the regulations thereunder.

e) A declaration that Manitoba has unjustifiably denied and still denies substantive equality and equal benefit of the law under s. 15 of the *Canadian Charter of Rights and Freedoms* ("the *Charter*") to off-reserve Indigenous children who are or were in the care of the Applicant Agencies on the individual and/or enumerated grounds of 'race, 'ethnic origin', 'nationality', and the analogous grounds of 'family status', "Aboriginality-residence" as it

pertains to off-reserve band member status, 'children in care' and 'Indigenous children in care' by virtue of its misappropriation and misuse of CSA Benefits.

f) A declaration that Manitoba has acted and is acting unlawfully and without Constitutional competence by misusing the CSA Benefits by failing and/or refusing to apply those benefits exclusively toward the care, maintenance, education, training or advancement of the child in respect of whom the benefits were paid in violation of the CSA Act.

g) A declaration that Manitoba acted unlawfully and without Constitutional competence by denying substantive equality to off-reserve Indigenous children in care by its misappropriation and misuse of CSA Benefits in contravention of *An Act respecting First Nations, Inuit and Metis children, youth and families, S.C. 2019, c. 24.*

h) Damages under s. 24(i) of the *Charter* for off-reserve Indigenous children who are or were in the care of the Applicant Agencies.

i) A declaration that Manitoba has discriminated against off-reserve Indigenous children who are or have been in the care of the Applicant Agencies in violation of the common law and *The Human Rights Code*, C.C.S.M. c. H175.

j) A declaration that Bill 2, Part 10, Division 4, s. 231 of *Budget Implementation and Tax Statutes Amendment Act*, 2020, 3rd Sess, 42nd Leg, Manitoba 2020, assented to on the 6th of November 2020, as a whole, and each of its discretely enumerated provisions (hereinafter referred to as "s. 231 of *BITSA*" or "s. 231"), are unconstitutional, ultra vires, inoperable and in contravention of the *Constitution Act, 1867*, the *Constitution Act 1982*, and the *Charter* are therefore of no force and effect.

k) A declaration that by purporting to bar all actions or other proceedings relating to Manitoba's actions concerning CSA Benefits, s. 231 invalidly infringes the core or inherent jurisdiction of the superior courts and thereby impermissibly impinges on s. 96 of *The Constitution Act, 1867* and is therefore of no force and effect.

l) A declaration that s. 231 violates the rule of law and is therefore unconstitutional and of no force and effect.

m) A declaration that s. 231 does not bar legal proceedings based on either Constitutional and/or *Charter* claims from proceeding in Manitoba's superior courts.

n) A declaration that s. 231's total ban on actions or other proceedings, including Constitutional or *Charter* claims, is in contravention of s. 24 of the *Charter* and s. 52 of the *Constitution Act, 1982* and is therefore of no force and effect.

o) A declaration that the actions and proceedings identified as Court of Queen's Bench File No. CI18-01-14043 and File No. CI18-01-18438 are not dismissed in accordance with s. 231 and that Court of Queen's Bench File No. CI18-01-14043 is joined or consolidated with this Application, with necessary and appropriate amendments to the pleadings, including amendments with respect to "single envelope funding" which was supposed to commence on April 1, 2019 after Manitoba declared it would no longer claw back or force remittance of CSA Benefits.

p) A declaration that s. 231 unjustifiably denies substantive equality and equal benefit of the law under s. 15 of the *Charter* to off-reserve Indigenous children who are or were wards of the Applicant Agencies on the individual and/or enumerated grounds of race, ethnic origin, nationality, and the analogous grounds of 'family status', "Aboriginality-residence" as it pertains to off-reserve band member status, 'children in care' and 'Indigenous children in care'.

q) A declaration that Manitoba did not have the Constitutional competence to enact s. 231 as it denies substantive equality to off-reserve Indigenous children in care in contravention of *An Act respecting First Nations, Inuit and Metis children, youth and families, S.C. 2019, c. 24* and s. 231 is therefore unconstitutional, ultra vires, inoperable and of no force and effect.

r) A declaration that Manitoba cannot immunize or pardon itself for its unlawful actions in relation to the CSA Benefits through the enactment of s. 231.

s) A declaration that Manitoba is not entitled at law and does not have the Constitutional competence to recover any further monetary amounts from the Applicant Agencies in relation to CSA Benefits that the Applicant Agencies receive, received or were eligible to receive for off-reserve Indigenous children who are or were wards of the Applicant Agencies.

t) A declaration that Manitoba's actions and conduct described herein are arbitrary, deliberate, callous, highhanded, and reckless.

u) A declaration that Manitoba's *Charter* breaches and violations cannot be reasonably and demonstrably justified in a free and democratic society.

v) Punitive damages.

w) Solicitor and his own client costs on a full indemnity basis.

x) Such further and other relief as this Honourable Court may order.

2. **THE GROUNDS FOR THE APPLICATION are:**

Defined Terms

In addition to terms defined elsewhere in this Notice of Application, the following terms are defined:

I. **Indigenous child and family services agency (or "Indigenous Agency or Agencies")** means First Nation Child and Family Services and Metis Child and Family Services Agencies established and mandated by the Southern First Nations Network of Care, the First Nations of Northern Manitoba Child and Family Services

Authority, or the Metis Child and Family Services Authority, to provide protection and care for Indigenous children who become wards of those agencies. The Applicant Agencies are Indigenous Agencies.

II. **child and family service agency (or "CFS Agency")** means a child and family services agency as defined in *The Child and Family Services Act* C.C.S.M. c. C80, whether Indigenous or non-Indigenous, established to provide protection and care for children who become wards of a CFS Agency.

III. **non-Indigenous child and family services agency** or **non-Indigenous CFS Agency** or **Non-Indigenous Agency** means a CFS Agency in Manitoba that is not an Indigenous Agency.

IV. **off-reserve Indigenous children** are children who are or were wards of the Applicant Agencies or any other Indigenous Agency between January 1, 2005 and March 31, 2019 and for whom Manitoba had a legal obligation to fund.

V. **wards** mean children who are or were under apprehension, under the temporary guardianship and/or under the permanent guardianship of a CFS Agency.

VI. **stacking** and **stacking limits** means the maximum level of funding to a recipient from all sources, including federal, provincial, territorial, and municipal, for any one activity, initiative, or project.

VII. ***Children's Special Allowances Act*** and **CSA Act** means the *Children's Special Allowances Act*, S.C. 1992, C.48 and amendments thereto.

VIII. **maintenance costs** or **maintenance** or **child maintenance** refers to the costs required for the care of a ward, including housing, food, clothing, education, training, extra-curricular activities and special needs.

IX. **operational costs** or **operation costs** refers to the costs of operating a CFS Agency, primarily for salaries, commercial leases, and training.

X. **Reserve** has the same definition as the term Indian Reserve is defined to have pursuant to the *Indian Act*, R.S.C., 1985, c. I-5 (the "Indian Act"), meaning land held by the Crown that is for the use and benefit of the respective Band for which the land was set apart.

XI. **Canada Child Benefit** means the tax-free monthly payment made by the Minister of National Revenue, on behalf of Canada, to eligible families to help them with the cost of raising children under the age of 18 pursuant to s. 122.6 of the *Income Tax Act*, R.S.C., 1985, c. 1 (the "*Income Tax Act*") and the federal taxation scheme. The Canada Child Benefit was at times provided under its predecessor names, those being the Canada Child Tax Benefit, the National Child Benefit, the Universal Child Care Benefit. All references to the Canada Child Benefit herein implicitly include a reference to its predecessor names and programs as they existed from time to time.

XII. **Children's Special Allowance** and **CSA Benefit** mean payments made by the Minister of National Revenue, on behalf of Canada, to CFS Agencies that successfully applied for those benefits (as determined by the Minister of National Revenue) and which benefits are to be used exclusively for the care, maintenance, education, training or advancement of the specific child for whom they were paid in accordance with and by virtue of the CSA Act. The CSA Benefit is and has always been the mirror equivalent of the Canada Child Benefit. The purpose of the CSA Benefit is to ensure that children in care are not discriminated against by not being eligible to receive the Canada Child Benefit just because they are in care.

Purpose

1. The Applicants bring this Application for a determination of the rights of off-reserve Indigenous children who are or were wards of the Applicant Agencies in relation to CSA Benefits granted by the Minister of National Revenue, on behalf of Canada, to Applicant Agencies, which benefits were to be used exclusively for the care, maintenance, education, training or advancement of the specific child for whom they were paid in accordance with and by virtue of the CSA Act.

2. Since 2005, Manitoba has forcibly and illegally obtained and misused over $338 million (and counting) in CSA Benefits from Indigenous Agencies in Manitoba, including from the Applicant Agencies.

3. Up until at least April 1, 2019 Manitoba forcibly and illegally misappropriated CSA Benefits granted to Indigenous Agencies in Manitoba, including from the Applicant Agencies.

4. The Applicants, other than the Southern First Nations Network of Care, the First Nations of Northern Manitoba Child and Family Services Authority, the Metis Child and Family Services Authority and the Southern Chief's Organization Inc.("SCO"), are each corporations without share capital mandated as child and family services agencies whose purposes are to provide child and family services under *The Child and Family Services Act* C.C.S.M. c. C80 (the "*CFS Act*") and/or *The Adoption Act* C.C.S.M. c. A2 (collectively referred to as the "Applicant Agencies").

5. The Southern First Nations Network of Care, the First Nations of Northern Manitoba Child and Family Services Authority and the Metis Child and Family Services Authority are 'Authorities' as established by s. 4 of *The Child and Family Services Authorities Act*, C.C.S.M. c. C90 (the "*CFS Authorities Act*")(collectively referred to as the "Applicant Authorities").

6. The Applicant Authorities are responsible for administering and providing for the delivery of child and family services in Manitoba.

7. The Southern First Nations Network of Care is responsible for administering and providing for the delivery of child and family services (a) to people who are members of and/or identify with southern First Nations in Manitoba, (b) for children and families in Winnipeg who identify with First Nations in Ontario and who receive services from Animikii Ozoson Child and Family Services, and (c) other persons.

8. The First Nations of Northern Manitoba Child and Family Services Authority is responsible for administering and providing for the delivery of child and family services to people who are members of and/or identify with northern First Nations in Manitoba, as well as other persons.

9. The Metis Child and Family Services Authority is responsible for administering and providing for the delivery of child and family services to people who are and who identify with Metis and Inuit people, as well as other persons.

10. The SCO was established in 1999 and represents 34 southern First Nation communities in Manitoba. Their mission is to protect, preserve, promote and enhance First Nations peoples' inherent rights, languages, customs and traditions through the application and implementation of the spirit and intent of the Treaty-making process.

11. The SCO is statutorily recognized within the child welfare system in Manitoba by having the statutory responsibility for appointing the board of directors for the Southern First Nations Network of Care pursuant to s. 6(1) of *The CFS Authorities Act*.

12. The Applicant Agencies are Indigenous Agencies and are delegated by the Applicant Authorities to provide culturally appropriate child protection and prevention services in accordance with *The CFS Act* and *The CFS Authorities Act*.

13. The Applicant Agencies each have duties imposed upon them by s. 7(1) of *The Child and Family Services Act*, which duties include, but are not limited, to:

    a. Protecting children;

    b. Providing care for children in their care;

    c. Developing permanency plans for all children in their care with a view to establishing normal family life for these children; and

    d. Developing and maintaining childcare resources.

14. In carrying out their statutory duties, the Applicant Agencies must, at times, apprehend children who are in need of protection and place those children into agency care on either a temporary or permanent basis.

15. The Applicant Agencies are legally responsible for the care, maintenance, education and well being of the children they have apprehended for the time period for which they are under apprehension and/or for the time period that each Applicant is appointed as the legal guardian of any such children on a temporary or permanent basis pursuant to sections 25(1) and 48 of *The CFS Act*.

16. Where a CFS Agency, including an Applicant Agency, is the legal guardian of a child, the Agency must act for and on behalf of the child and appear in court to prosecute or defend any action or proceeding affecting the child's status (s. 48 of *The CFS Act*).

17. Indigenous Agencies, including the Applicant Agencies (except for Animikii Ozoson Child and Family Services, Metis Child, Family and Community Services and Michif Child and Family Services as described below), have two sources of funding, those sources being (a) the Government of Canada ("Canada") through Indigenous Services Canada ("ISC")(formally Indigenous and Northern Affairs Canada) and (b) Manitoba.

18. Canada, through ISC, provides funding for both operating costs and for child maintenance costs to Indigenous Agencies who provide services to children who (a) had at least one parent resident on a Reserve in Manitoba at the time those children came into the care of an Indigenous Agency and (b) the children had, or were eligible to have, status under the *Indian Act*. This is widely referred to as "on-reserve funding" and is provided directly to the Indigenous Agencies by ISC.

19. Manitoba provides financial funding to Indigenous Agencies for both operating costs and for child maintenance costs in relation to Indigenous children who do not meet the funding criteria of Canada as set out above and to Animikii Ozoson Child and Family Services, Metis Child, Family and Community Services and Michif Child and Family Services in all circumstances. This is widely referred to as "off-reserve funding" for off-reserve Indigenous children in care.

20. Animikii Ozoson Child and Family Services, Metis Child, Family and Community Services and Michif Child and Family Services only receive child welfare funding from Manitoba ("off-reserve funding" as described above). These three Indigenous Agencies receive no child welfare funding from Canada even in circumstances where the "on reserve funding" criteria are met for a given child. Animikii Ozoson Child and Family Services is and has challenged Canada's refusal to provide child welfare funding for children who meet Canada's "on reserve funding" criteria.

21. Prior to April 1, 2019, Manitoba provided its operational funding to Indigenous Agencies for off-reserve Indigenous children in care through the applicable Applicant Authority as the conduit.

22. Prior to April 1, 2019, Manitoba provided its maintenance funding directly to Indigenous Agencies.

The Canada Child Benefit and Children's Special Allowances

23. The Canada Child Benefit forms part of Canada's federal taxation scheme and, pursuant to s. 122.6 of the *Income Tax Act*, is a tax-free monthly payment made to eligible families to help them with the cost of raising children under the age of 18.

24. The Child Disability Benefit is also part of Canada's federal taxation scheme and, in accordance with the *Income Tax Act*, it provides a tax-free monthly payment to families who care for a child under the age of 18 with severe and prolonged impairment in physical or mental functions.

25. For eligible families, the Child Disability Benefit is included in the Canada Child Benefit by way of an increase or supplement to that benefit.

26. The Canada Child Benefit is paid in respect of all children in Canada whose families net income qualifies them for the benefit whether they are on-reserve or off-reserve. Families with a net income under $31,711 receive the maximum benefit. Families with higher incomes receive a gradually lower benefit.

27. The Canada Child Benefit and the Child Disability Benefit are not payable or available with respect to children who have come into the care of a child welfare agency.

28. Children's Special Allowances ("CSA Benefits") are the mirror equivalent of the Canada Child Benefit, being tax-free monthly payments made to successful applicant CFS Agencies, including Indigenous Agencies, that maintain children in care.

29. The purpose of the CSA Benefit is to prevent discrimination to children in care on the basis of family status by ensuring that children in care receive the equivalent financial benefit from Canada that would be granted for them by Canada if they were not in care.

30. CSA Benefits are equal to the maximum monthly amount of the Canada Child Benefit (including the Child Disability Benefit if applicable).

31. Like the Canada Child Benefit, CSA Benefits are paid in respect of all eligible children in Canada, whether they are in care on-reserve or off-reserve.

32. Applications for CSA Benefits must be made to and approved by Canada's Minister of National Revenue.

33. Applications for CSA Benefits can only be approved when they are made in the prescribed manner by the department, agency or institution that 'maintains' the child for whom the application is made.

34. A child is considered to be 'maintained' by an agency if, at the end of a given month, the child is dependent on the agency for his or her care, maintenance, education, training, and advancement to a greater extent than any other agency or individual.

35. In order to approve an application for CSA Benefits, the Minister of National Revenue must determine and decide that the applicant maintains the specific child with respect to whom the application is made to a greater extent than any other department, agency or institution or any person in accordance with s. 3(1) of the CSA Act and s. 9 of the CSA Act Regulations.

36. Once approval for the CSA Benefit application is granted by the Minister of National Revenue's office, CSA Benefit payments begin to be made by the Canada Revenue Agency to successful applicant agencies with respect to the specific child for whom the CSA Benefit is granted.

37. Pursuant to ss. 3(2) and 7 of the CSA Act, CSA Benefits must be applied exclusively toward the care, maintenance, education, training or advancement of the specific child

in respect of whom they were granted and they cannot be assigned, charged, attached, anticipated or given as security, and they are granted subject to those conditions.

38. The Applicant Agencies maintain each child that is brought into their care in accordance with the definition of the term 'maintenance' as is set out in s. 9 of the CSA Regulation.

39. The Applicant Agencies have applied for, and do apply to, the Minister of National Revenue's office for CSA Benefits for each child that is brought into their care.

40. The Minister of National Revenue's office has granted all applications for CSA Benefits that have been filed by the Applicant Agencies.

41. CSA Benefits have been provided by the Canada Revenue Agency to the Applicant Agencies for each successful CSA Benefit Application. Those payments all began in or around the month after the CSA Benefit Application was granted.

Child Welfare Funding Until April 1, 2019

42. Indigenous children are vastly over-represented in Manitoba's child welfare system.

43. In or around 2005, Manitoba demanded that the CSA Benefits granted to Indigenous Agencies with respect to off-reserve Indigenous children in their care be remitted to Manitoba.

44. Manitoba justified its demand for the CSA Benefits on the spurious basis that it was already providing sufficient maintenance funding to Indigenous Agencies for off-reserve Indigenous children in their care. The Indigenous Agencies refused Manitoba's demand and took the position that the remittance to Manitoba of the CSA Benefits was illegal as the CSA Benefits must be applied exclusively toward the care, maintenance, education, training or advancement of the specific child in respect of whom they were

granted and they cannot be assigned, charged, attached, anticipated or given as security, and they are granted subject to those conditions. CSA Benefits cannot be used for the purpose of off-setting child maintenance payments made by Manitoba.

45. Beginning in 2010, Manitoba began to hold back 20% of the operational funding it provided to Indigenous Agencies as a means of forcibly and wrongfully applying a set-off or charge on those operational funding payments for what Manitoba alleged as a debt owed to them by the Indigenous Agencies for their refusal to hand the CSA Benefits over to Manitoba since 2005 (the "Illegal Claw Back").

46. Manitoba calculated the alleged CSA Benefit debt by estimating what each Indigenous Agency received in CSA Benefit payments from January 1, 2005 to March 31, 2011.

47. Manitoba also required and demanded that all Indigenous Agencies remit to Manitoba any current and future CSA Benefits they received or Manitoba would institute a second and further series of Illegal Clawbacks of operational funding against any Indigenous Agencies who refused.

48. The severe consequences and threats of 20% cuts in operational funding left some Indigenous Agencies with no choice but to remit to Manitoba the CSA Benefits they received for off-reserve Indigenous children in their care ("Forced Remittances"). Indigenous Agencies are non-profit corporations. The operational funding they receive is less than the minimum required to maintain their important operations and meet their legal duties under the CFS Act to protect children and provide welfare services to children and families in Manitoba.

49. Manitoba has not used the CSA Benefits it has received through the Illegal Claw Backs and Forced Remittances exclusively for the care, maintenance, education, training, or advancement of the specific children for whom those benefits were paid. Rather, Manitoba identifies the CSA Benefits as a source of 'revenue'.

50. Manitoba has deposited these CSA Benefits into its General Treasury Account and has used these CSA Benefits to "balance its books."

51. Manitoba used the CSA Benefits as a source of revenue for stacking limit purposes for child welfare and thereby applied an unlawful stacking limit policy to the CSA Benefits granted for off-reserve Indigenous children in care.

52. The CSA Benefit has increased substantially over time and from time to time and Manitoba has received the benefit of those increases.

53. Manitoba has not increased its maintenance funding for off-reserve Indigenous children in care either at the time of or at the level that the CSA Benefit has increased. The increases to the CSA benefit have been to Manitoba's financial advantage alone, with no accompanying or related benefit provided for the off-reserve Indigenous child in care for whom they were granted.

54. Manitoba explicitly prohibits the Canada Child Benefit from being considered as a source of revenue within its stacking limit policy for children and their families who apply for and receive income and social assistance under *The Manitoba Assistance Act*, C.C.S.M. c. A150 (*Assistance Regulation* 404/88R s. 8(1)).

55. Likewise, and in accordance with the CSA Act, Canada prohibits CSA Benefits from being utilized as a source of revenue when calculating its child welfare funding obligations under stacking limit policies.

56. On-reserve Indigenous children in care, therefore, are granted the CSA Benefit and there is no set-off, claw back or deduction in Canada's child welfare funding obligations and maintenance or a reduction to the social services provided to on-reserve Indigenous children in care as a result. On-reserve Indigenous children in care receive the CSA Benefit with no deduction or off-set in funding to the Indigenous Agencies who care for them.

57. For all children and their families in Canada for whom the Canada Child Benefit is granted, there is no deduction in social services funding obligations or reduction of social services provided to them because of receiving the Canada Child Benefit.

58. For off-reserve Indigenous children in care for whom the CSA Benefit is granted, Manitoba reduces its child welfare funding obligations for those children and, for off-reserve Indigenous children in care during the period of January 1, 2005 to March 31, 2019, Manitoba took the CSA Benefit from them except to the extent that Indigenous Agencies did not comply with Manitoba's Illegal Claw Backs.

59. Manitoba thereby directly and adversely discriminated against off-reserve Indigenous children in care by denying them substantive and equal benefit of the law under s. 15 of the *Charter* on the basis that they were children, children in care and off-reserve Indigenous people, and especially because they were the combination of those three vulnerable groups, being off-reserve Indigenous children in care.

60. Manitoba has acted unlawfully and without Constitutional competence by misappropriating the CSA Benefits by failing and/or refusing to apply those benefits exclusively toward the care, maintenance, education, training or advancement of the child in respect of whom the benefits were paid in violation of the CSA Act.

61. Manitoba has also acted unlawfully and without Constitutional competence by denying substantive equality to off-reserve Indigenous children in care by its misappropriation of CSA Benefits in contravention of *An Act respecting First Nations, Inuit and Metis children, youth and families, S.C. 2019, c. 24*

S. 231 of *BITSA*

62. Section 231 was assented to on November 6, 2020. Manitoba mischaracterized s. 231 as budget implementation and tax amendment legislation to wrongfully avoid public consultation on the bill prior to its passing. It is Manitoba's attempt to pardon its prior conduct and place itself above the law.

63. Section 231's stated purpose is to "address the government's actions concerning the special allowances that agencies received or were eligible to receive for children in their care during the period January 1, 2005 to March 31, 2019, inclusive."

64. There are a number of interrelated components to s. 231, including:

    a. It retroactively deems the CSA Benefits received or eligible to have been received by CFS Agencies between January 1, 2005 and March 31, 2019 as contributions for Manitoba to use to fund child welfare generally.

    b. It creates future and current debts owed by CFS Agencies to Manitoba in relation to the CSA Benefits they received or were eligible to receive on behalf of specific children in their care between January 1, 2005 and March 31, 2019 but did not provide to Manitoba through its Illegal Claw Backs and Forced Remittances.

    c. It creates overreaching Crown Immunity by barring any legal proceedings, current and future, related to Manitoba's actions regarding the CSA benefits between January 1, 2005 and March 31, 2019, and by further legislating that there is no cause of action or remedy available as a result of the application of s. 231 in and of itself.

65. S. 231 contravenes the division of powers as set out in the Constitution Act, 1867, ss. 91 and 92, and is therefore *ultra vires*, reasons for which include:

a. The pith and substance of s. 231 is in relation to matters that fall within the exclusive constitutional authority of the Parliament of Canada, including 'The Public Debt and Property', the 'Raising of Money by any Mode or System of Taxation, and 'Indians' pursuant to ss. 91(1A), 91(3) and 91(24).

b. The pith and substance of s. 231 is the derogation from or elimination of extra provincial rights, including rights from the following extra-provincial instruments:

i. The CSA Act.

ii. The *Income Tax Act.*

iii. *United Nations International Covenant on Civil and Political* Rights (ratified by Canada on May 19, 1976).

iv. *United Nations Convention on the Rights of the Child* (ratified by Canada on June 24, 1987).

v. *United Nations International Convention for the Elimination of all forms of Racial Discrimination* (ratified by Canada in 1970).

vi. *United Nations Declaration on the Rights of Indigenous Peoples* (ratified by Canada on November 12, 2010).

c. The pith and substance of s. 231 is to affect an unconstitutional amendment to the CSA Act.

i. The legal rights and statutory duties of CFS Agencies who are granted the CSA Benefits are changed and removed.

ii. The legal rights of off-reserve Indigenous children in care for whom CSA Benefits are granted are removed.

iii. The recipient and beneficiary of the CSA Benefits is changed. In both cases, Manitoba is now the recipient and the beneficiary.

66. S. 231 contravenes the doctrine of federal paramountcy and is therefore unconstitutional and inoperative, reasons for which include:

a. it creates a direct operational conflict with the CSA Act.

i. For the period of January 1, 2005 to March 31, 2019, off-reserve Indigenous children in care do not receive the benefit of the CSA Benefit.

ii. For the period of January 1, 2005 to March 31, 2019, the CSA Benefits are assigned, charged, attached and anticipated by and to Manitoba.

iii. For the period of January 1, 2005 to March 31, 2019, the recipient and beneficiary of the CSA Benefit is now Manitoba in both cases.

iv. For the period of January 1, 2005 to March 31, 2019, the CSA Benefits can be used for purposes that violate the CSA Act.

b. It frustrates the purpose and intent of the CSA Act.

i. The CSA Act no longer prevents discrimination for all children in care.

ii. For the period of January 1, 2005 and March 31, 2019, off-reserve Indigenous children in care are discriminated against in Manitoba despite the purpose and intent of the *CSA Act* to prevent this discrimination.

67. S. 231 is beyond the Constitutional competence of Manitoba and is therefore *ultra vires* as it removes part of the core or inherent jurisdiction of the superior courts in contravention and violation of s. 96 of the *Constitution Act, 1982*. It also offends the rule of law as affirmed by the *Charter*, reasons for which include:

a. It prevents and abolishes access to the courts for off-reserve Indigenous children in care in Manitoba who have disputes with Manitoba that require the determination of their rights.

b. Manitoba does not have the constitutional power to enact legislation that prevents a discrete segment of society (off-reserve Indigenous children in care) from accessing the courts.

c. Manitoba is preventing access to justice through s. 231.

d. Access to justice is fundamental to the rule of law.

e. If off-reserve Indigenous children in care, and their legal guardians and representatives, cannot challenge government actions that impact their rights in a court of law, they cannot hold the state to account, and Manitoba will be, or be seen to be, above the law, which is a breach of the rule of law.

68. S. 231 violates s. 15 of the *Charter* and is therefore of no force and effect, reasons for which include:

    a. S. 231 removes the rights of off-reserve Indigenous children in care and their legal guardians to access just and fair procedures for the resolution of conflicts and disputes with government, as well as to effective remedies for all infringements of their individual and collective rights.

    b. S. 231 removes the rights of off-reserve Indigenous children in care to self determination.

    c. Access to courts and self determination are both rights guaranteed by *The Charter, The Path to Reconciliation Act, the United Nations Declarations on the Rights of Indigenous People, the United Nations Convention on the Rights of the Child and the International Convention on the Elimination of All Forms of Racial Discrimination.*

    d. For the period of January 1, 2005 to March 31, 2019, it is only off-reserve Indigenous children in care and their legal guardians who have their rights regarding the CSA Benefit/Canada Child Benefit, including their rights to access the courts, abolished by s. 231. All other children and their guardians retain these rights.

69. S. 231 violates s. 24 of the *Charter* and s. 52 of the *Constitution Act, 1982* and is therefore *ultra vires* and of no force and effect.

    a. Manitoba does not have the Constitutional competence to extinguish actions seeking the determination of *Charter* and Constitutional rights and/or whether federal laws have been breached by virtue of s. 24 of the *Charter* and s. 52 of the *Constitution Act, 1982.*

b. To the extent that s. 231 prohibits and abolishes these legal actions, it is *ultra vires* and of no force and effect.

70. S. 231's creation of a debt owing to Manitoba for CSA Benefits granted to Indigenous Agencies until March 31, 2019 but not remitted to Manitoba, is unconstitutional, discriminatory and in violation of s. 15 of the *Charter*, reasons for which include:

a. Manitoba did not have the Constitutional competence to take the CSA Benefits in the first place. It therefore does not now have the Constitutional competence to legislate its authority to keep those CSA Benefits.

b. S. 231 is a legislated stacking limit policy that is applied to CSA Benefits, which the Parliament of Canada has explicitly prohibited by the CSA Act and Canada does not apply to reduce its funding obligations for on-reserve Indigenous children in care.

c. The distinction created and continued by s. 231 is that the federal income tax benefit (CSA Benefit/Canada Child Benefit) granted in the name of a child in Canada between January 1, 2005 and March 31, 2019, does not have to be remitted to Manitoba, except in the case of off-reserve Indigenous children in care.

d. The s. 231 legislated stacking limit policy and legislated debt unjustifiably deny substantive equality and equal benefit of the law to the off-reserve indigenous children in care between January 1, 2005 and March 31, 2019 for whom the CSA Benefits were granted.

e. The s. 231 legislated stacking limit policy and legislated debt further contribute to the insufficient child welfare funding provided by Manitoba to Indigenous Agencies as described above, and thereby perpetuates historical disadvantage to off-reserve Indigenous children in care to an even greater degree.

71. Manitoba did not have the constitutional competence to enact s. 231 as it denies substantive equality to off-reserve Indigenous children in care by its misappropriation of CSA Benefits in contravention of *An Act respecting First Nations, Inuit and Metis children, youth and families, S.C. 2019, c. 24.*

Inherent Rights of Indigenous People, Reconciliation, and the Honour of the Crown

72. Indigenous people have inherent rights with respect to their children, including the rights to self-determination and jurisdiction with respect to child welfare services provided to Indigenous children both on and off-reserve, which are recognized and affirmed by s. 35 of the *Constitution Act, 1867.*

73. Manitoba has contravened the honour of the Crown, breached the Principles of Reconciliation and breached its fiduciary and Constitutional duties to off-reserve Indigenous children who are or who were wards of the Applicant Agencies, including for the following reasons:

    a. The honour of the Crown requires Manitoba to protect off-reserve Indigenous children in care, to act in their best interests, to give a broad and purposive interpretation to what is required to protect and achieve their legal rights, including their rights to social services, social benefits, federal tax benefits, their human rights, *Charter* rights and Constitutional rights and to not take action that abrogates from, ignores or removes those rights.

    b. Manitoba has ignored and breached, instead of protected and achieved, the CSA Act rights, human rights, *Charter* rights and Constitutional rights of off-reserve Indigenous children in care.

c. Manitoba has unlawfully "balanced its books" on the backs of off-reserve Indigenous children in care, who are some of the most vulnerable members of our society.

d. Manitoba has removed the legal rights of off-reserve Indigenous children in care, who are some of the most vulnerable members of our society.

e. Manitoba has discriminated against off-reserve Indigenous children in care as per the common law and ss. 9(2), 9(3) and 13(1) of *The Human Rights Code*, C.C.S.M. c. H175.

f. Manitoba is placing itself above the law by legislating an ability to treat one discrete group of its citizens, off-reserve Indigenous children in care, differently than all other citizens in terms of rights and the benefit of the rule of law.

g. Manitoba's conduct as stated above has seriously interfered with and imperilled Canada's exclusive s. 91(24) constitutional jurisdiction over Indians, and Lands reserved for the Indians.

Statutes, International Instruments and Rules to be Relied Upon

a) *The Children's Special Allowance Act* and Regulations.

b) Section 10 of *The Proceedings Against the Crown Act*, C.C.S.M. c. P140.

c) Rule 14.05(2)(b) of the *Queen's Bench Rules*; and

d) *The Court of Queen's Bench Act*, C.C.S.M. c. C280, s. 32; and

e) *Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in R.S.C. 1985, Appendix II, No. 5; sections 91, 92; and 96 and*

f) *Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (UK), 1982, c 11, sections 1, 15, 24, 35 and 52; and*

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

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

i) Bill 2, Part 10, Division 4, s. 231 of *Budget Implementation and Tax Statutes Amendment Act*, 2020, 3rd Sess, 42nd Leg, Manitoba 2020 (assented to on the 6th of November 2020; and

j) *United Nations Convention of the Rights of the Child*; and

k) *United Nations Declaration on the Rights of Indigenous Peoples*; and

l) *United Nations International Covenant on Civil and Political Rights; and*

m) *United Nations International Convention for the Elimination of all forms of Racial Discrimination; and*

n) *The Income Tax Act*, R.S.C., 1985, c. 1, sections 122.6 and 146.1; and

o) *An Act respecting First Nations, Inuit and Metis children, youth and families, S.C. 2019, c. 24; and*

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

q) *The Human Rights Code*, C.C.S.M. c. H175; and

r) *Interpretation Act, R.S.C., 1985, c. I-21.*

s) *The Manitoba Assistance Act*, C.C.S.M. c. A150 and the *Assistance Regulation* 404/88R s. 8(1).

t) Such other and further grounds as the Applicants may advise and this Honourable Court may accept.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Application:

1. The Affidavits of Bryan Hart and Billie Schibler to be affirmed and other Affidavit evidence to be filed, including Affidavit evidence of parties not adverse in interest once filed.

2. Such further and other material as the Applicants may adduce and this Honourable Court may accept.

November 27, 2020

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File No. CI 20-01-29221

THE QUEEN'S BENCH
Winnipeg Centre

BETWEEN:

ANIMIKII OZOSON CHILD AND FAMILY SERVICES, WEST REGION CHILD AND FAMILY SERVICES, INTERTRIBAL CHILD AND FAMILY SERVICES, PEGUIS CHILD AND FAMILY SERVICES, SANDY BAY CHILD AND FAMILY SERVICES, SAGKEENG CHILD AND FAMILY SERVICES, SOUTHEAST CHILD AND FAMILY SERVICES, AWASIS AGENCY OF NORTHERN MANITOBA, CREE NATION CHILD & FAMILY CARING AGENCY, ISLAND LAKE FIRST NATION FAMILY SERVICES, KINOSAO SIPI MINISOWIN AGENCY, NIKAN AWASISAK AGENCY INC., OPASKWAYAK CREE NATION CHILD & FAMILY SERVICES, SOUTHERN CHIEFS' ORGANIZATION INC., SOUTHERN FIRST NATIONS NETWORK OF CARE, FIRST NATIONS OF NORTHERN MANITOBA CHILD & FAMILY SERVICES AUTHORITY, METIS CHILD AND FAMILY SERVICES AUTHORITY, MICHIF CHILD AND FAMILY SERVICES and METIS CHILD FAMILY, AND COMMUNITY SERVICES

Applicants,

- and -

THE GOVERNMENT OF MANITOBA

Respondent.

FILED NOV 3 0 2020

NOTICE OF CONSTITUTIONAL QUESTION
HEARING DATE: Monday, the 14th day of December, 2020, at 10:00 a.m.

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Applicants,

- and -

THE GOVERNMENT OF MANITOBA

Respondent.

NOTICE OF CONSTITUTIONAL QUESTION

TAKE NOTICE that the Applicants challenge the constitutional validity and applicability of Bill 2, Part 10, Division 4, s. 231 of the *Budget Implementation and Tax Statutes Amendment Act*, 2020, 3rd Sess, 42nd Leg, Manitoba 2020 ("s. 231") (attached at **Tab "A"**) by way of Notice of Application, Court of Queen's Bench (Winnipeg Centre) File No. CI 20-01-29221 (the "Notice of Application") (attached at **Tab "B"**).

AND TAKE NOTICE that the Applicants intend to seek remedies pursuant to subsection 24(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") with respect to the application of s. 231 and with respect to The Government of Manitoba's actions concerning the special allowances that the Applicant Agencies received or were eligible to receive for children in

their case pursuant to the *Children's Special Allowances Act*, S.C. 1992, c. 48, Sch. during the period January 1, 2005 to March 31, 2019 inclusive.

AND TAKE NOTICE that the constitutional questions are to be argued before the presiding judge on a date to be determined, the first appearance of this matter being a Case Management Conference before the Honourable Justice Edmond on Monday, December 14, 2020, at 10:00 a.m., at the Law Courts Complex, 408 York Avenue, Winnipeg, Manitoba, R3C 0P9 which may be held by video or teleconference.

AND TAKE NOTICE that the grounds to which the constitutional challenge will be made are:

1) Those grounds as set out in the Notice of Application attached at Tab B and summarized, in part, below.

2) S. 231 as a whole, and each of its discretely enumerated provisions are unconstitutional, *ultra vires*, inoperable and in contravention of the Constitution Act, 1867, the Constitution Act 1982, the Charter and are therefore of no force and effect.

3) The Government of Manitoba ("Manitoba") has contravened the honour of the Crown, breached the Principles of Reconciliation and breached its fiduciary and Constitutional duties to off-reserve Indigenous children who are or who were wards of the Applicant Agencies by enacting s. 231.

4) Manitoba has unjustifiably denied and still denies substantive equality and equal benefit of the law under s. 15 of the *Charter* to off-reserve Indigenous children who are or were in the care of the Applicant Agencies on the individual and/or enumerated grounds of 'race, 'ethnic origin', 'nationality', and the analogous grounds of 'family status', "Aboriginality-residence" as it pertains to off-reserve band member status, 'children in care' and 'Indigenous children in care' by enacting s. 231 which retroactively permits Manitoba's misappropriation of CSA Benefits from off-reserve Indigenous children who are or were in the care of the Applicant Agencies constituting serious adverse differential treatment relative to children who are not off-reserve Indigenous children who are or were in care.

5) Manitoba has acted unlawfully and without Constitutional competence through the enactment of s. 231 by denying substantive equality to off-reserve Indigenous children in care by its misappropriation and misuse of CSA Benefits in contravention of *An Act respecting First Nations, Inuit and Metis children youth and families*, S.C. 2019, c. 24.

6) Manitoba has acted and is continuing to act unlawfully and without Constitutional competence by making use of, converting to its own use, anticipating, assigning to itself, applying a charge, applying set-offs and stacking limits to benefits granted to the Applicant Agencies ("CSA Benefits") pursuant to the Children's Special Allowances Act S.C. 1992, c. 48 (the "CSA Act") and the regulations thereunder and by failing and/or refusing to apply those benefits exclusively toward the care, maintenance, education, training or advancement of the child in respect of whom the benefits were paid in violation of the CSA Act.

7) By purporting to bar all actions or other proceedings relating to Manitoba's actions concerning CSA Benefits, s. 231 invalidly infringes the core or inherent jurisdiction of the superior courts and thereby impermissibly impinges on s. 96 of *The Constitution Act, 1867* and is therefore of no force and effect.

8) S. 231's total ban on actions or other proceedings, including Constitutional or *Charter* claims, is in contravention of s. 24 of the *Charter* and s. 52 of the *Constitution Act, 1982,* and violates the rule of law and is therefore of no force and effect.

9) Manitoba does not have the Constitutional competence to immunize or pardon itself for its unlawful actions in relation to the CSA Benefits through the enactment of s. 231.

10) Manitoba's *Charter* breaches and violations cannot be reasonably and demonstrably justified in a free and democratic society.

AND TAKE NOTICE that the Applicants will be seeking:

1) Those remedies and declarations as set out in the attached Notice of Application, which include, but are not limited to:

a. declarations, confirming the stated grounds herein;

b. a determination that s. 231 as a whole, and each of its discretely enumerated provisions are unconstitutional, ultra vires, inoperable and in contravention of the *Constitution Act, 1867*, the *Constitution Act 1982*, and the *Charter* and are of no force and effect; and

c. damages under s. 24(1) of the Charter for off-reserve Indigenous children who are or were in the care of the Applicant Agencies.

THIS NOTICE is given pursuant to Section 7(2) and 7(3) of *The Constitutional Questions Act*, C.C.S.M. c. C180.

DATED at the City of Winnipeg, in the Province of Manitoba, this 30th day of November 2020.

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HAROLD COCHRANE, Q.C./
SHAWN C. SCARCELLO/
KRIS M. SAXBERG

TO: **THE ATTORNEY GENERAL OF MANITOBA**
c/o The Director of Constitutional Law
715 – 405 Broadway Avenue
Winnipeg, Manitoba R3C 3L6

AND TO: **THE ATTORNEY GENERAL OF CANADA**
c/o The Department of Justice Canada
601 – 400 St. Mary Avenue
Winnipeg, Manitoba R3C 4K5

TAB A

Bill 2 **Government Bill**

3rd Session, 42nd Legislature,
Manitoba,
69 Elizabeth II, 2020

BILL 2

THE BUDGET IMPLEMENTATION AND TAX STATUTES AMENDMENT ACT, 2020

Honourable Mr. Fielding

Projet de loi 2 **Projet de loi du gouvernement**

3e session, 42e législature,
Manitoba,
69 Elizabeth II, 2020

PROJET DE LOI 2

LOI D'EXÉCUTION DU BUDGET DE 2020 ET MODIFIANT DIVERSES DISPOSITIONS LÉGISLATIVES EN MATIÈRE DE FISCALITÉ

M. le ministre Fielding

First Reading / Première lecture : _____

Second Reading / Deuxième lecture : _____

Committee / Comité : _____

Concurrence and Third Reading / Approbation et troisième lecture : _____

Royal Assent / Date de sanction : _____

DIVISION 4
CHILD AND FAMILY SERVICES

Definitions

231(1) The following definitions apply in this section.

"agency" and **"authority"** have the same meaning as in subsection 1(1) of *The Child and Family Services Act*. (« office » et « régie »)

"minister" means the minister appointed by the Lieutenant Governor in Council to administer *The Child and Family Services Act*. (« ministre »)

"special allowance" means the special allowance under the *Children's Special Allowances Act* (Canada) and the regulations made under that Act. (« allocation spéciale »)

Purpose

231(2) This section is to address the government's actions concerning the special allowances that agencies received or were eligible to receive for children in their care during the period January 1, 2005, to March 31, 2019, inclusive (referred to in this section as the "funding period").

Provincial funding framework

231(3) Section 6.6 of *The Child and Family Services Act* provides that the minister may fix rates payable for services provided under that Act. Those rates are effective as of the date that is fixed in the minister's order, which may be retroactive.

Deemed rates for service

231(4) For the funding period, the rates payable for services fixed by the minister for each agency are deemed to have been fixed at the amount determined in accordance with following formula (referred to in this section as "the minister's rates for services"):

$$A - B$$

In this formula,

A is the greater of

(a) the amount of funding that the government provided, directly or indirectly, to the agency during the funding period, and

(b) the amount of funding that the government would have provided, directly or indirectly, to the agency during the funding period, if the government had not reduced or retained by way of set-off some or all of that funding as a result of the agency receiving or being eligible to receive the special allowance for children in its care;

B is the amount of the special allowance that the agency received or was eligible to receive during the funding period for children in its care.

Deemed notice of minister's rates for services

231(5) Each agency and each authority is deemed to have received notice of the minister's rates for services on the following dates:

(a) in the case of an agency, on the later of January 1, 2005, or the day the agency was mandated under the *Agency Mandates Regulation*, Manitoba Regulation 184/2003;

(b) in the case of an authority, on the day *The Child and Family Services Authorities Act* came into force.

Deemed overpayment amount

231(6) Each agency that received, directly or indirectly, funding from the government during the funding period in excess of the minister's rates for services is deemed to have received an overpayment from the government in an amount equal to the excess (referred to in this section as the "overpayment").

Deemed recovery of overpayment amount

231(7)

The following actions taken before or after the coming into force of this section are deemed to be actions taken in respect of the government's recovery of any overpayment that it made:

(a) the government reducing or retaining by way of set-off a portion of the funding it otherwise would have provided, directly or indirectly, to an agency by an amount equivalent to an amount of the special allowance received or receivable by the agency;

(b) an agency remitting to the government, or the government directly or indirectly collecting from the agency, an amount of the special allowance received or receivable by the agency, or the equivalent of such an amount.

No cause of action

231(8) No cause of action arises as a direct or indirect result of the application of this section.

No remedy

231(9) No costs, compensation or damages are owing or payable to any person and no remedy, including but not limited to a remedy in contract, restitution, tort, misfeasance, bad faith or trust or for a breach of fiduciary duty, is available to any person in connection with the application of this section.

Proceedings barred

231(10) No action or other proceeding, including but not limited to any action or proceeding in contract, restitution, tort, misfeasance, bad faith or trust or for a breach of fiduciary duty, that is directly or indirectly based on or related to the application of this section may be brought or maintained against any person.

Definition of "person"

231(11) In subsection (10), **"person"** includes, but is not limited to,

(a) the Crown in right of Manitoba, and its current and former employees and agents and any current or former member of the Executive Council;

(b) each authority and its current and former employees and agents; and

(c) each agency and its current and former employees and agents.

Application — before or after coming into force

231(12) Subsection (10) applies regardless of whether the cause of action on which the proceeding is allegedly based arose before or after the coming into force of this section, and any decision in an action or other proceeding referred to in that subsection is of no effect.

Proceedings dismissed

231(13) Any action or proceeding referred to in subsection (10) commenced before the day this section comes into force is deemed to have been dismissed, without costs, on the day this section comes into force, including, without limitation, Court of Queen's Bench File No. CI18-01-14043 and File No. CI18-01-18438.

No expropriation or injurious affection

231(14) For greater certainty, no taking, expropriation or injurious affection occurs as a result of the application of this section.

No admission, etc.

231(15) Nothing in this section acknowledges, admits, validates or recognizes a cause of action or proceeding referred to in this section.

LEGISLATIVE ASSEMBLY OF MANITOBA
STATUS OF BILLS
THIRD SESSION, FORTY-SECOND LEGISLATURE, 2020-21
(October 7, 2020 to present)

Bill No.	Title	Sponsor	1st Reading	2nd Reading	Committee/ Reported	Amended	Report Stage Amend.	Concurrence and 3rd Reading	Royal Assent	In Effect
	GOVERNMENT BILLS									
1	An Act respecting the Administration of Oaths of Office/Loi sur la prestation des serments d'entrée en fonction	Hon. Mr. PALLISTER	Oct. 7, 2020		FORMAL BILL (not printed)					
2	The Budget Implementation and Tax Statutes Amendment Act, 2020/Loi d'exécution du budget de 2020 et modifiant diverses dispositions législatives en matière de fiscalité	Hon. Mr. FIELDING	Oct. 9, 2020	Nov. 5, 2020	Committee of the Whole **Nov. 5, 2020**	Yes	No	Nov. 5, 2020	Nov. 6, 2020	RA/P
3	The Public Service Act/Loi sur la fonction publique	Hon. Mr. HELWER	Oct. 13, 2020							
4	The Retail Business Hours of Operation Act (Various Acts Amended or Repealed)/Loi sur les heures d'ouverture des commerces de détail (modification ou abrogation de diverses lois)	Hon. Mr. FIELDING	Oct. 13, 2020							
5	The Liquor, Gaming and Cannabis Control Amendment Act (Cannabis Social Responsibility Fee)/Loi modifiant la Loi sur la réglementation des alcools, des jeux et du cannabis (taxe de responsabilité sociale en matière de cannabis)	Hon. Mr. CULLEN	Oct. 14, 2020							
6	The Liquor, Gaming and Cannabis Control Amendment Act/Loi modifiant la Loi sur la réglementation des alcools, des jeux et du cannabis	Hon. Mr. CULLEN	Oct. 14, 2020							
7	The Planning Amendment Act/Loi modifiant la Loi sur l'aménagement du territoire	Hon. Ms. SQUIRES	Oct. 14, 2020							
8	The Pension Benefits Amendment Act/Loi modifiant la Loi sur les prestations de pension	Hon. Mr. FIELDING	Oct. 14, 2020							

TAB B

FILED NOV 2 7 2020

File No. CI 20-01- 29221

THE QUEEN'S BENCH
Winnipeg Centre

BETWEEN:

ANIMIKII OZOSON CHILD AND FAMILY SERVICES, WEST REGION CHILD AND FAMILY SERVICES, INTERTRIBAL CHILD AND FAMILY SERVICES, PEGUIS CHILD AND FAMILY SERVICES, SANDY BAY CHILD AND FAMILY SERVICES, SAGKEENG CHILD AND FAMILY SERVICES, SOUTHEAST CHILD AND FAMILY SERVICES, AWASIS AGENCY OF NORTHERN MANITOBA, CREE NATION CHILD & FAMILY CARING AGENCY, ISLAND LAKE FIRST NATION FAMILY SERVICES, KINOSAO SIPI MINISOWIN AGENCY, NIKAN AWASISAK AGENCY INC., OPASKWAYAK CREE NATION CHILD & FAMILY SERVICES, SOUTHERN CHIEF'S ORGANIZATION INC., SOUTHERN FIRST NATIONS NETWORK OF CARE, FIRST NATIONS OF NORTHERN MANITOBA CHILD & FAMILY SERVICES AUTHORITY, METIS CHILD AND FAMILY SERVICES AUTHORITY, MICHIF CHILD AND FAMILY SERVICES and METIS CHILD FAMILY, AND COMMUNITY SERVICES

Applicants,

- and -

THE GOVERNMENT OF MANITOBA

Respondent.

NOTICE OF APPLICATION
CIVIL UNCONTESTED LIST
HEARING DATE: Monday, the 14th day of December, 2020, at 10:00 a.m.

COCHRANE SAXBERG LLP
Barristers and Solicitors
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Telephone: 204-594-6688
Facsimile: 204-808-0987

File No. CI 20-01-_____

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Winnipeg Centre

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Applicants,

- and -

THE GOVERNMENT OF MANITOBA

Respondent.

NOTICE OF APPLICATION

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicants. The claim made by the Applicants appears on the following page.

THIS APPLICATION will come on for a hearing before the presiding judge on Monday, December 14, 2020, at 10:00 a.m., at the Law Courts Complex, 408 York Avenue, Winnipeg, Manitoba, R3C 0P9.

IF YOU WISH TO OPPOSE THIS APPLICATION, you or a Manitoba lawyer acting for you must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the Court office where the Application is to be heard as soon as possible, but not later than 2:00 p.m. on the day before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

November 27, 2020

Issued by _____
Deputy Registrar
408 York Avenue
Winnipeg, Manitoba R3C 0P9

J. WIGGETT
DEPUTY REGISTRAR
COURT OF QUEEN'S BENCH
FOR MANITOBA

TO: **The Government of Manitoba**
Manitoba Justice
Civil Legal Services
730 – 405 Broadway
Winnipeg, Manitoba R3C 3L6

APPLICATION

1. THE APPLICANTS MAKES APPLICATION for:

a) A declaration that the Applicants bring this Application on their own behalf, and also on behalf of the off-reserve Indigenous children in the care of the Applicant Agencies for whom they have the statutory capacity or guardianship and a legal duty to act for, including with respect to the determination, advancement and protection of their *Charter*, Constitutional, statutory and common law rights.

b) A declaration that Indigenous people, including Indigenous children, have inherent rights with respect to their children, including the inherent right to self determination and the inherent right to self-government, which includes jurisdiction in relation to child and family services, all which are recognized and affirmed by s. 35 of the *Constitution Act*, 1867.

c) A declaration that the Government of Manitoba ("Manitoba") has contravened the honour of the Crown, breached the Principles of Reconciliation and breached its fiduciary and Constitutional duties to off-reserve Indigenous children who are or who were wards of the Applicant Agencies.

d) A declaration that Manitoba has acted and is acting unlawfully and without Constitutional competence by making use of, converting to its own use, anticipating, assigning to itself, applying a charge, applying set-offs and stacking limits to benefits granted to the Applicant Agencies pursuant to the *Children's Special Allowances Act* S.C. 1992, c. 48 (the "CSA Act") and the regulations thereunder.

e) A declaration that Manitoba has unjustifiably denied and still denies substantive equality and equal benefit of the law under s. 15 of the *Canadian Charter of Rights and Freedoms* ("the *Charter*") to off-reserve Indigenous children who are or were in the care of the Applicant Agencies on the individual and/or enumerated grounds of 'race, 'ethnic origin', 'nationality', and the analogous grounds of 'family status', "Aboriginality-residence" as it

pertains to off-reserve band member status, 'children in care' and 'Indigenous children in care' by virtue of its misappropriation and misuse of CSA Benefits.

f) A declaration that Manitoba has acted and is acting unlawfully and without Constitutional competence by misusing the CSA Benefits by failing and/or refusing to apply those benefits exclusively toward the care, maintenance, education, training or advancement of the child in respect of whom the benefits were paid in violation of the CSA Act.

g) A declaration that Manitoba acted unlawfully and without Constitutional competence by denying substantive equality to off-reserve Indigenous children in care by its misappropriation and misuse of CSA Benefits in contravention of *An Act respecting First Nations, Inuit and Metis children, youth and families, S.C. 2019, c. 24.*

h) Damages under s. 24(i) of the *Charter* for off-reserve Indigenous children who are or were in the care of the Applicant Agencies.

i) A declaration that Manitoba has discriminated against off-reserve Indigenous children who are or have been in the care of the Applicant Agencies in violation of the common law and *The Human Rights Code*, C.C.S.M. c. H175.

j) A declaration that Bill 2, Part 10, Division 4, s. 231 of *Budget Implementation and Tax Statutes Amendment Act*, 2020, 3rd Sess, 42nd Leg, Manitoba 2020, assented to on the 6th of November 2020, as a whole, and each of its discretely enumerated provisions (hereinafter referred to as "s. 231 of *BITSA*" or "s. 231"), are unconstitutional, ultra vires, inoperable and in contravention of the *Constitution Act, 1867*, the *Constitution Act 1982*, and the *Charter* are therefore of no force and effect.

k) A declaration that by purporting to bar all actions or other proceedings relating to Manitoba's actions concerning CSA Benefits, s. 231 invalidly infringes the core or inherent jurisdiction of the superior courts and thereby impermissibly impinges on s. 96 of *The Constitution Act, 1867* and is therefore of no force and effect.

l) A declaration that s. 231 violates the rule of law and is therefore unconstitutional and of no force and effect.

m) A declaration that s. 231 does not bar legal proceedings based on either Constitutional and/or *Charter* claims from proceeding in Manitoba's superior courts.

n) A declaration that s. 231's total ban on actions or other proceedings, including Constitutional or *Charter* claims, is in contravention of s. 24 of the *Charter* and s. 52 of the *Constitution Act, 1982* and is therefore of no force and effect.

o) A declaration that the actions and proceedings identified as Court of Queen's Bench File No. CI18-01-14043 and File No. CI18-01-18438 are not dismissed in accordance with s. 231 and that Court of Queen's Bench File No. CI18-01-14043 is joined or consolidated with this Application, with necessary and appropriate amendments to the pleadings, including amendments with respect to "single envelope funding" which was supposed to commence on April 1, 2019 after Manitoba declared it would no longer claw back or force remittance of CSA Benefits.

p) A declaration that s. 231 unjustifiably denies substantive equality and equal benefit of the law under s. 15 of the *Charter* to off-reserve Indigenous children who are or were wards of the Applicant Agencies on the individual and/or enumerated grounds of race, ethnic origin, nationality, and the analogous grounds of 'family status', "Aboriginality-residence" as it pertains to off-reserve band member status, 'children in care' and 'Indigenous children in care'.

q) A declaration that Manitoba did not have the Constitutional competence to enact s. 231 as it denies substantive equality to off-reserve Indigenous children in care in contravention of *An Act respecting First Nations, Inuit and Metis children, youth and families, S.C. 2019, c. 24* and s. 231 is therefore unconstitutional, ultra vires, inoperable and of no force and effect.

r) A declaration that Manitoba cannot immunize or pardon itself for its unlawful actions in relation to the CSA Benefits through the enactment of s. 231.

s) A declaration that Manitoba is not entitled at law and does not have the Constitutional competence to recover any further monetary amounts from the Applicant Agencies in relation to CSA Benefits that the Applicant Agencies receive, received or were eligible to receive for off-reserve Indigenous children who are or were wards of the Applicant Agencies.

t) A declaration that Manitoba's actions and conduct described herein are arbitrary, deliberate, callous, highhanded, and reckless.

u) A declaration that Manitoba's *Charter* breaches and violations cannot be reasonably and demonstrably justified in a free and democratic society.

v) Punitive damages.

w) Solicitor and his own client costs on a full indemnity basis.

x) Such further and other relief as this Honourable Court may order.

2. **THE GROUNDS FOR THE APPLICATION are:**

Defined Terms

In addition to terms defined elsewhere in this Notice of Application, the following terms are defined:

I. **Indigenous child and family services agency (or "Indigenous Agency or Agencies")** means First Nation Child and Family Services and Metis Child and Family Services Agencies established and mandated by the Southern First Nations Network of Care, the First Nations of Northern Manitoba Child and Family Services

Authority, or the Metis Child and Family Services Authority, to provide protection and care for Indigenous children who become wards of those agencies. The Applicant Agencies are Indigenous Agencies.

II. **child and family service agency (or "CFS Agency")** means a child and family services agency as defined in *The Child and Family Services Act* C.C.S.M. c. C80, whether Indigenous or non-Indigenous, established to provide protection and care for children who become wards of a CFS Agency.

III. **non-Indigenous child and family services agency** or **non-Indigenous CFS Agency** or **Non-Indigenous Agency** means a CFS Agency in Manitoba that is not an Indigenous Agency.

IV. **off-reserve Indigenous children** are children who are or were wards of the Applicant Agencies or any other Indigenous Agency between January 1, 2005 and March 31, 2019 and for whom Manitoba had a legal obligation to fund.

V. **wards** mean children who are or were under apprehension, under the temporary guardianship and/or under the permanent guardianship of a CFS Agency.

VI. **stacking** and **stacking limits** means the maximum level of funding to a recipient from all sources, including federal, provincial, territorial, and municipal, for any one activity, initiative, or project.

VII. ***Children's Special Allowances Act*** and **CSA Act** means the *Children's Special Allowances Act*, S.C. 1992, C.48 and amendments thereto.

VIII. **maintenance costs** or **maintenance** or **child maintenance** refers to the costs required for the care of a ward, including housing, food, clothing, education, training, extra-curricular activities and special needs.

IX. **operational costs** or **operation costs** refers to the costs of operating a CFS Agency, primarily for salaries, commercial leases, and training.

X. **Reserve** has the same definition as the term Indian Reserve is defined to have pursuant to the *Indian Act*, R.S.C., 1985, c. I-5 (the "Indian Act"), meaning land held by the Crown that is for the use and benefit of the respective Band for which the land was set apart.

XI. **Canada Child Benefit** means the tax-free monthly payment made by the Minister of National Revenue, on behalf of Canada, to eligible families to help them with the cost of raising children under the age of 18 pursuant to s. 122.6 of the *Income Tax Act*, R.S.C., 1985, c. 1 (the "*Income Tax Act*") and the federal taxation scheme. The Canada Child Benefit was at times provided under its predecessor names, those being the Canada Child Tax Benefit, the National Child Benefit, the Universal Child Care Benefit. All references to the Canada Child Benefit herein implicitly include a reference to its predecessor names and programs as they existed from time to time.

XII. **Children's Special Allowance** and **CSA Benefit** mean payments made by the Minister of National Revenue, on behalf of Canada, to CFS Agencies that successfully applied for those benefits (as determined by the Minister of National Revenue) and which benefits are to be used exclusively for the care, maintenance, education, training or advancement of the specific child for whom they were paid in accordance with and by virtue of the CSA Act. The CSA Benefit is and has always been the mirror equivalent of the Canada Child Benefit. The purpose of the CSA Benefit is to ensure that children in care are not discriminated against by not being eligible to receive the Canada Child Benefit just because they are in care.

Purpose

1. The Applicants bring this Application for a determination of the rights of off-reserve Indigenous children who are or were wards of the Applicant Agencies in relation to CSA Benefits granted by the Minister of National Revenue, on behalf of Canada, to Applicant Agencies, which benefits were to be used exclusively for the care, maintenance, education, training or advancement of the specific child for whom they were paid in accordance with and by virtue of the CSA Act.

2. Since 2005, Manitoba has forcibly and illegally obtained and misused over $338 million (and counting) in CSA Benefits from Indigenous Agencies in Manitoba, including from the Applicant Agencies.

3. Up until at least April 1, 2019 Manitoba forcibly and illegally misappropriated CSA Benefits granted to Indigenous Agencies in Manitoba, including from the Applicant Agencies.

4. The Applicants, other than the Southern First Nations Network of Care, the First Nations of Northern Manitoba Child and Family Services Authority, the Metis Child and Family Services Authority and the Southern Chief's Organization Inc.("SCO"), are each corporations without share capital mandated as child and family services agencies whose purposes are to provide child and family services under *The Child and Family Services Act* C.C.S.M. c. C80 (the "*CFS Act*") and/or *The Adoption Act* C.C.S.M. c. A2 (collectively referred to as the "Applicant Agencies").

5. The Southern First Nations Network of Care, the First Nations of Northern Manitoba Child and Family Services Authority and the Metis Child and Family Services Authority are 'Authorities' as established by s. 4 of *The Child and Family Services Authorities Act*, C.C.S.M. c. C90 (the "*CFS Authorities Act*")(collectively referred to as the "Applicant Authorities").

6. The Applicant Authorities are responsible for administering and providing for the delivery of child and family services in Manitoba.

7. The Southern First Nations Network of Care is responsible for administering and providing for the delivery of child and family services (a) to people who are members of and/or identify with southern First Nations in Manitoba, (b) for children and families in Winnipeg who identify with First Nations in Ontario and who receive services from Animikii Ozoson Child and Family Services, and (c) other persons.

8. The First Nations of Northern Manitoba Child and Family Services Authority is responsible for administering and providing for the delivery of child and family services to people who are members of and/or identify with northern First Nations in Manitoba, as well as other persons.

9. The Metis Child and Family Services Authority is responsible for administering and providing for the delivery of child and family services to people who are and who identify with Metis and Inuit people, as well as other persons.

10. The SCO was established in 1999 and represents 34 southern First Nation communities in Manitoba. Their mission is to protect, preserve, promote and enhance First Nations peoples' inherent rights, languages, customs and traditions through the application and implementation of the spirit and intent of the Treaty-making process.

11. The SCO is statutorily recognized within the child welfare system in Manitoba by having the statutory responsibility for appointing the board of directors for the Southern First Nations Network of Care pursuant to s. 6(1) of *The CFS Authorities Act*.

12. The Applicant Agencies are Indigenous Agencies and are delegated by the Applicant Authorities to provide culturally appropriate child protection and prevention services in accordance with *The CFS Act* and *The CFS Authorities Act*.

13. The Applicant Agencies each have duties imposed upon them by s. 7(1) of *The Child and Family Services Act*, which duties include, but are not limited, to:

    a. Protecting children;

    b. Providing care for children in their care;

    c. Developing permanency plans for all children in their care with a view to establishing normal family life for these children; and

    d. Developing and maintaining childcare resources.

14. In carrying out their statutory duties, the Applicant Agencies must, at times, apprehend children who are in need of protection and place those children into agency care on either a temporary or permanent basis.

15. The Applicant Agencies are legally responsible for the care, maintenance, education and well being of the children they have apprehended for the time period for which they are under apprehension and/or for the time period that each Applicant is appointed as the legal guardian of any such children on a temporary or permanent basis pursuant to sections 25(1) and 48 of *The CFS Act*.

16. Where a CFS Agency, including an Applicant Agency, is the legal guardian of a child, the Agency must act for and on behalf of the child and appear in court to prosecute or defend any action or proceeding affecting the child's status (s. 48 of *The CFS Act*).

17. Indigenous Agencies, including the Applicant Agencies (except for Animikii Ozoson Child and Family Services, Metis Child, Family and Community Services and Michif Child and Family Services as described below), have two sources of funding, those sources being (a) the Government of Canada ("Canada") through Indigenous Services Canada ("ISC")(formally Indigenous and Northern Affairs Canada) and (b) Manitoba.

18. Canada, through ISC, provides funding for both operating costs and for child maintenance costs to Indigenous Agencies who provide services to children who (a) had at least one parent resident on a Reserve in Manitoba at the time those children came into the care of an Indigenous Agency and (b) the children had, or were eligible to have, status under the *Indian Act*. This is widely referred to as "on-reserve funding" and is provided directly to the Indigenous Agencies by ISC.

19. Manitoba provides financial funding to Indigenous Agencies for both operating costs and for child maintenance costs in relation to Indigenous children who do not meet the funding criteria of Canada as set out above and to Animikii Ozoson Child and Family Services, Metis Child, Family and Community Services and Michif Child and Family Services in all circumstances. This is widely referred to as "off-reserve funding" for off-reserve Indigenous children in care.

20. Animikii Ozoson Child and Family Services, Metis Child, Family and Community Services and Michif Child and Family Services only receive child welfare funding from Manitoba ("off-reserve funding" as described above). These three Indigenous Agencies receive no child welfare funding from Canada even in circumstances where the "on reserve funding" criteria are met for a given child. Animikii Ozoson Child and Family Services is and has challenged Canada's refusal to provide child welfare funding for children who meet Canada's "on reserve funding" criteria.

21. Prior to April 1, 2019, Manitoba provided its operational funding to Indigenous Agencies for off-reserve Indigenous children in care through the applicable Applicant Authority as the conduit.

22. Prior to April 1, 2019, Manitoba provided its maintenance funding directly to Indigenous Agencies.

The Canada Child Benefit and Children's Special Allowances

23. The Canada Child Benefit forms part of Canada's federal taxation scheme and, pursuant to s. 122.6 of the *Income Tax Act*, is a tax-free monthly payment made to eligible families to help them with the cost of raising children under the age of 18.

24. The Child Disability Benefit is also part of Canada's federal taxation scheme and, in accordance with the *Income Tax Act*, it provides a tax-free monthly payment to families who care for a child under the age of 18 with severe and prolonged impairment in physical or mental functions.

25. For eligible families, the Child Disability Benefit is included in the Canada Child Benefit by way of an increase or supplement to that benefit.

26. The Canada Child Benefit is paid in respect of all children in Canada whose families net income qualifies them for the benefit whether they are on-reserve or off-reserve. Families with a net income under $31,711 receive the maximum benefit. Families with higher incomes receive a gradually lower benefit.

27. The Canada Child Benefit and the Child Disability Benefit are not payable or available with respect to children who have come into the care of a child welfare agency.

28. Children's Special Allowances ("CSA Benefits") are the mirror equivalent of the Canada Child Benefit, being tax-free monthly payments made to successful applicant CFS Agencies, including Indigenous Agencies, that maintain children in care.

29. The purpose of the CSA Benefit is to prevent discrimination to children in care on the basis of family status by ensuring that children in care receive the equivalent financial benefit from Canada that would be granted for them by Canada if they were not in care.

30. CSA Benefits are equal to the maximum monthly amount of the Canada Child Benefit (including the Child Disability Benefit if applicable).

31. Like the Canada Child Benefit, CSA Benefits are paid in respect of all eligible children in Canada, whether they are in care on-reserve or off-reserve.

32. Applications for CSA Benefits must be made to and approved by Canada's Minister of National Revenue.

33. Applications for CSA Benefits can only be approved when they are made in the prescribed manner by the department, agency or institution that 'maintains' the child for whom the application is made.

34. A child is considered to be 'maintained' by an agency if, at the end of a given month, the child is dependent on the agency for his or her care, maintenance, education, training, and advancement to a greater extent than any other agency or individual.

35. In order to approve an application for CSA Benefits, the Minister of National Revenue must determine and decide that the applicant maintains the specific child with respect to whom the application is made to a greater extent than any other department, agency or institution or any person in accordance with s. 3(1) of the CSA Act and s. 9 of the CSA Act Regulations.

36. Once approval for the CSA Benefit application is granted by the Minister of National Revenue's office, CSA Benefit payments begin to be made by the Canada Revenue Agency to successful applicant agencies with respect to the specific child for whom the CSA Benefit is granted.

37. Pursuant to ss. 3(2) and 7 of the CSA Act, CSA Benefits must be applied exclusively toward the care, maintenance, education, training or advancement of the specific child

in respect of whom they were granted and they cannot be assigned, charged, attached, anticipated or given as security, and they are granted subject to those conditions.

38. The Applicant Agencies maintain each child that is brought into their care in accordance with the definition of the term 'maintenance' as is set out in s. 9 of the CSA Regulation.

39. The Applicant Agencies have applied for, and do apply to, the Minister of National Revenue's office for CSA Benefits for each child that is brought into their care.

40. The Minister of National Revenue's office has granted all applications for CSA Benefits that have been filed by the Applicant Agencies.

41. CSA Benefits have been provided by the Canada Revenue Agency to the Applicant Agencies for each successful CSA Benefit Application. Those payments all began in or around the month after the CSA Benefit Application was granted.

Child Welfare Funding Until April 1, 2019

42. Indigenous children are vastly over-represented in Manitoba's child welfare system.

43. In or around 2005, Manitoba demanded that the CSA Benefits granted to Indigenous Agencies with respect to off-reserve Indigenous children in their care be remitted to Manitoba.

44. Manitoba justified its demand for the CSA Benefits on the spurious basis that it was already providing sufficient maintenance funding to Indigenous Agencies for off-reserve Indigenous children in their care. The Indigenous Agencies refused Manitoba's demand and took the position that the remittance to Manitoba of the CSA Benefits was illegal as the CSA Benefits must be applied exclusively toward the care, maintenance, education, training or advancement of the specific child in respect of whom they were

granted and they cannot be assigned, charged, attached, anticipated or given as security, and they are granted subject to those conditions. CSA Benefits cannot be used for the purpose of off-setting child maintenance payments made by Manitoba.

45. Beginning in 2010, Manitoba began to hold back 20% of the operational funding it provided to Indigenous Agencies as a means of forcibly and wrongfully applying a set-off or charge on those operational funding payments for what Manitoba alleged as a debt owed to them by the Indigenous Agencies for their refusal to hand the CSA Benefits over to Manitoba since 2005 (the "Illegal Claw Back").

46. Manitoba calculated the alleged CSA Benefit debt by estimating what each Indigenous Agency received in CSA Benefit payments from January 1, 2005 to March 31, 2011.

47. Manitoba also required and demanded that all Indigenous Agencies remit to Manitoba any current and future CSA Benefits they received or Manitoba would institute a second and further series of Illegal Clawbacks of operational funding against any Indigenous Agencies who refused.

48. The severe consequences and threats of 20% cuts in operational funding left some Indigenous Agencies with no choice but to remit to Manitoba the CSA Benefits they received for off-reserve Indigenous children in their care ("Forced Remittances"). Indigenous Agencies are non-profit corporations. The operational funding they receive is less than the minimum required to maintain their important operations and meet their legal duties under the CFS Act to protect children and provide welfare services to children and families in Manitoba.

49. Manitoba has not used the CSA Benefits it has received through the Illegal Claw Backs and Forced Remittances exclusively for the care, maintenance, education, training, or advancement of the specific children for whom those benefits were paid. Rather, Manitoba identifies the CSA Benefits as a source of 'revenue'.

50. Manitoba has deposited these CSA Benefits into its General Treasury Account and has used these CSA Benefits to "balance its books."

51. Manitoba used the CSA Benefits as a source of revenue for stacking limit purposes for child welfare and thereby applied an unlawful stacking limit policy to the CSA Benefits granted for off-reserve Indigenous children in care.

52. The CSA Benefit has increased substantially over time and from time to time and Manitoba has received the benefit of those increases.

53. Manitoba has not increased its maintenance funding for off-reserve Indigenous children in care either at the time of or at the level that the CSA Benefit has increased. The increases to the CSA benefit have been to Manitoba's financial advantage alone, with no accompanying or related benefit provided for the off-reserve Indigenous child in care for whom they were granted.

54. Manitoba explicitly prohibits the Canada Child Benefit from being considered as a source of revenue within its stacking limit policy for children and their families who apply for and receive income and social assistance under *The Manitoba Assistance Act*, C.C.S.M. c. A150 (*Assistance Regulation* 404/88R s. 8(1)).

55. Likewise, and in accordance with the CSA Act, Canada prohibits CSA Benefits from being utilized as a source of revenue when calculating its child welfare funding obligations under stacking limit policies.

56. On-reserve Indigenous children in care, therefore, are granted the CSA Benefit and there is no set-off, claw back or deduction in Canada's child welfare funding obligations and maintenance or a reduction to the social services provided to on-reserve Indigenous children in care as a result. On-reserve Indigenous children in care receive the CSA Benefit with no deduction or off-set in funding to the Indigenous Agencies who care for them.

57. For all children and their families in Canada for whom the Canada Child Benefit is granted, there is no deduction in social services funding obligations or reduction of social services provided to them because of receiving the Canada Child Benefit.

58. For off-reserve Indigenous children in care for whom the CSA Benefit is granted, Manitoba reduces its child welfare funding obligations for those children and, for off-reserve Indigenous children in care during the period of January 1, 2005 to March 31, 2019, Manitoba took the CSA Benefit from them except to the extent that Indigenous Agencies did not comply with Manitoba's Illegal Claw Backs.

59. Manitoba thereby directly and adversely discriminated against off-reserve Indigenous children in care by denying them substantive and equal benefit of the law under s. 15 of the *Charter* on the basis that they were children, children in care and off-reserve Indigenous people, and especially because they were the combination of those three vulnerable groups, being off-reserve Indigenous children in care.

60. Manitoba has acted unlawfully and without Constitutional competence by misappropriating the CSA Benefits by failing and/or refusing to apply those benefits exclusively toward the care, maintenance, education, training or advancement of the child in respect of whom the benefits were paid in violation of the CSA Act.

61. Manitoba has also acted unlawfully and without Constitutional competence by denying substantive equality to off-reserve Indigenous children in care by its misappropriation of CSA Benefits in contravention of *An Act respecting First Nations, Inuit and Metis children, youth and families, S.C. 2019, c. 24*

S. 231 of *BITSA*

62. Section 231 was assented to on November 6, 2020. Manitoba mischaracterized s. 231 as budget implementation and tax amendment legislation to wrongfully avoid public consultation on the bill prior to its passing. It is Manitoba's attempt to pardon its prior conduct and place itself above the law.

63. Section 231's stated purpose is to "address the government's actions concerning the special allowances that agencies received or were eligible to receive for children in their care during the period January 1, 2005 to March 31, 2019, inclusive."

64. There are a number of interrelated components to s. 231, including:

    a. It retroactively deems the CSA Benefits received or eligible to have been received by CFS Agencies between January 1, 2005 and March 31, 2019 as contributions for Manitoba to use to fund child welfare generally.

    b. It creates future and current debts owed by CFS Agencies to Manitoba in relation to the CSA Benefits they received or were eligible to receive on behalf of specific children in their care between January 1, 2005 and March 31, 2019 but did not provide to Manitoba through its Illegal Claw Backs and Forced Remittances.

    c. It creates overreaching Crown Immunity by barring any legal proceedings, current and future, related to Manitoba's actions regarding the CSA benefits between January 1, 2005 and March 31, 2019, and by further legislating that there is no cause of action or remedy available as a result of the application of s. 231 in and of itself.

65. S. 231 contravenes the division of powers as set out in the Constitution Act, 1867, ss. 91 and 92, and is therefore *ultra vires*, reasons for which include:

a. The pith and substance of s. 231 is in relation to matters that fall within the exclusive constitutional authority of the Parliament of Canada, including 'The Public Debt and Property', the 'Raising of Money by any Mode or System of Taxation, and 'Indians' pursuant to ss. 91(1A), 91(3) and 91(24).

b. The pith and substance of s. 231 is the derogation from or elimination of extra provincial rights, including rights from the following extra-provincial instruments:

i. The CSA Act.

ii. The *Income Tax Act.*

iii. *United Nations International Covenant on Civil and Political* Rights (ratified by Canada on May 19, 1976).

iv. *United Nations Convention on the Rights of the Child* (ratified by Canada on June 24, 1987).

v. *United Nations International Convention for the Elimination of all forms of Racial Discrimination* (ratified by Canada in 1970).

vi. *United Nations Declaration on the Rights of Indigenous Peoples* (ratified by Canada on November 12, 2010).

c. The pith and substance of s. 231 is to affect an unconstitutional amendment to the CSA Act.

i. The legal rights and statutory duties of CFS Agencies who are granted the CSA Benefits are changed and removed.

ii. The legal rights of off-reserve Indigenous children in care for whom CSA Benefits are granted are removed.

iii. The recipient and beneficiary of the CSA Benefits is changed. In both cases, Manitoba is now the recipient and the beneficiary.

66. S. 231 contravenes the doctrine of federal paramountcy and is therefore unconstitutional and inoperative, reasons for which include:

a. it creates a direct operational conflict with the CSA Act.

i. For the period of January 1, 2005 to March 31, 2019, off-reserve Indigenous children in care do not receive the benefit of the CSA Benefit.

ii. For the period of January 1, 2005 to March 31, 2019, the CSA Benefits are assigned, charged, attached and anticipated by and to Manitoba.

iii. For the period of January 1, 2005 to March 31, 2019, the recipient and beneficiary of the CSA Benefit is now Manitoba in both cases.

iv. For the period of January 1, 2005 to March 31, 2019, the CSA Benefits can be used for purposes that violate the CSA Act.

b. It frustrates the purpose and intent of the CSA Act.

i. The CSA Act no longer prevents discrimination for all children in care.

ii. For the period of January 1, 2005 and March 31, 2019, off-reserve Indigenous children in care are discriminated against in Manitoba despite the purpose and intent of the *CSA Act* to prevent this discrimination.

67. S. 231 is beyond the Constitutional competence of Manitoba and is therefore *ultra vires* as it removes part of the core or inherent jurisdiction of the superior courts in contravention and violation of s. 96 of the *Constitution Act, 1982*. It also offends the rule of law as affirmed by the *Charter*, reasons for which include:

a. It prevents and abolishes access to the courts for off-reserve Indigenous children in care in Manitoba who have disputes with Manitoba that require the determination of their rights.

b. Manitoba does not have the constitutional power to enact legislation that prevents a discrete segment of society (off-reserve Indigenous children in care) from accessing the courts.

c. Manitoba is preventing access to justice through s. 231.

d. Access to justice is fundamental to the rule of law.

e. If off-reserve Indigenous children in care, and their legal guardians and representatives, cannot challenge government actions that impact their rights in a court of law, they cannot hold the state to account, and Manitoba will be, or be seen to be, above the law, which is a breach of the rule of law.

68. S. 231 violates s. 15 of the *Charter* and is therefore of no force and effect, reasons for which include:

    a. S. 231 removes the rights of off-reserve Indigenous children in care and their legal guardians to access just and fair procedures for the resolution of conflicts and disputes with government, as well as to effective remedies for all infringements of their individual and collective rights.

    b. S. 231 removes the rights of off-reserve Indigenous children in care to self determination.

    c. Access to courts and self determination are both rights guaranteed by *The Charter, The Path to Reconciliation Act, the United Nations Declarations on the Rights of Indigenous People, the United Nations Convention on the Rights of the Child and the International Convention on the Elimination of All Forms of Racial Discrimination.*

    d. For the period of January 1, 2005 to March 31, 2019, it is only off-reserve Indigenous children in care and their legal guardians who have their rights regarding the CSA Benefit/Canada Child Benefit, including their rights to access the courts, abolished by s. 231. All other children and their guardians retain these rights.

69. S. 231 violates s. 24 of the *Charter* and s. 52 of the *Constitution Act, 1982* and is therefore *ultra vires* and of no force and effect.

    a. Manitoba does not have the Constitutional competence to extinguish actions seeking the determination of *Charter* and Constitutional rights and/or whether federal laws have been breached by virtue of s. 24 of the *Charter* and s. 52 of the *Constitution Act, 1982.*

b. To the extent that s. 231 prohibits and abolishes these legal actions, it is *ultra vires* and of no force and effect.

70. S. 231's creation of a debt owing to Manitoba for CSA Benefits granted to Indigenous Agencies until March 31, 2019 but not remitted to Manitoba, is unconstitutional, discriminatory and in violation of s. 15 of the *Charter*, reasons for which include:

a. Manitoba did not have the Constitutional competence to take the CSA Benefits in the first place. It therefore does not now have the Constitutional competence to legislate its authority to keep those CSA Benefits.

b. S. 231 is a legislated stacking limit policy that is applied to CSA Benefits, which the Parliament of Canada has explicitly prohibited by the CSA Act and Canada does not apply to reduce its funding obligations for on-reserve Indigenous children in care.

c. The distinction created and continued by s. 231 is that the federal income tax benefit (CSA Benefit/Canada Child Benefit) granted in the name of a child in Canada between January 1, 2005 and March 31, 2019, does not have to be remitted to Manitoba, except in the case of off-reserve Indigenous children in care.

d. The s. 231 legislated stacking limit policy and legislated debt unjustifiably deny substantive equality and equal benefit of the law to the off-reserve indigenous children in care between January 1, 2005 and March 31, 2019 for whom the CSA Benefits were granted.

e. The s. 231 legislated stacking limit policy and legislated debt further contribute to the insufficient child welfare funding provided by Manitoba to Indigenous Agencies as described above, and thereby perpetuates historical disadvantage to off-reserve Indigenous children in care to an even greater degree.

71. Manitoba did not have the constitutional competence to enact s. 231 as it denies substantive equality to off-reserve Indigenous children in care by its misappropriation of CSA Benefits in contravention of *An Act respecting First Nations, Inuit and Metis children, youth and families, S.C. 2019, c. 24.*

Inherent Rights of Indigenous People, Reconciliation, and the Honour of the Crown

72. Indigenous people have inherent rights with respect to their children, including the rights to self-determination and jurisdiction with respect to child welfare services provided to Indigenous children both on and off-reserve, which are recognized and affirmed by s. 35 of the *Constitution Act, 1867.*

73. Manitoba has contravened the honour of the Crown, breached the Principles of Reconciliation and breached its fiduciary and Constitutional duties to off-reserve Indigenous children who are or who were wards of the Applicant Agencies, including for the following reasons:

    a. The honour of the Crown requires Manitoba to protect off-reserve Indigenous children in care, to act in their best interests, to give a broad and purposive interpretation to what is required to protect and achieve their legal rights, including their rights to social services, social benefits, federal tax benefits, their human rights, *Charter* rights and Constitutional rights and to not take action that abrogates from, ignores or removes those rights.

    b. Manitoba has ignored and breached, instead of protected and achieved, the CSA Act rights, human rights, *Charter* rights and Constitutional rights of off-reserve Indigenous children in care.

c. Manitoba has unlawfully "balanced its books" on the backs of off-reserve Indigenous children in care, who are some of the most vulnerable members of our society.

d. Manitoba has removed the legal rights of off-reserve Indigenous children in care, who are some of the most vulnerable members of our society.

e. Manitoba has discriminated against off-reserve Indigenous children in care as per the common law and ss. 9(2), 9(3) and 13(1) of *The Human Rights Code*, C.C.S.M. c. H175.

f. Manitoba is placing itself above the law by legislating an ability to treat one discrete group of its citizens, off-reserve Indigenous children in care, differently than all other citizens in terms of rights and the benefit of the rule of law.

g. Manitoba's conduct as stated above has seriously interfered with and imperilled Canada's exclusive s. 91(24) constitutional jurisdiction over Indians, and Lands reserved for the Indians.

Statutes, International Instruments and Rules to be Relied Upon

a) *The Children's Special Allowance Act* and Regulations.

b) Section 10 of *The Proceedings Against the Crown Act*, C.C.S.M. c. P140.

c) Rule 14.05(2)(b) of the *Queen's Bench Rules*; and

d) *The Court of Queen's Bench Act*, C.C.S.M. c. C280, s. 32; and

e) *Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in R.S.C. 1985, Appendix II, No. 5; sections 91, 92; and 96 and*

f) *Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (UK), 1982, c 11, sections 1, 15, 24, 35 and 52; and*

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

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

i) Bill 2, Part 10, Division 4, s. 231 of *Budget Implementation and Tax Statutes Amendment Act*, 2020, 3rd Sess, 42nd Leg, Manitoba 2020 (assented to on the 6th of November 2020; and

j) *United Nations Convention of the Rights of the Child*; and

k) *United Nations Declaration on the Rights of Indigenous Peoples*; and

l) *United Nations International Covenant on Civil and Political Rights; and*

m) *United Nations International Convention for the Elimination of all forms of Racial Discrimination; and*

n) *The Income Tax Act*, R.S.C., 1985, c. 1, sections 122.6 and 146.1; and

o) *An Act respecting First Nations, Inuit and Metis children, youth and families, S.C. 2019, c. 24; and*

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

q) *The Human Rights Code*, C.C.S.M. c. H175; and

r) *Interpretation Act, R.S.C., 1985, c. I-21.*

s) *The Manitoba Assistance Act*, C.C.S.M. c. A150 and the *Assistance Regulation* 404/88R s. 8(1).

t) Such other and further grounds as the Applicants may advise and this Honourable Court may accept.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Application:

1. The Affidavits of Bryan Hart and Billie Schibler to be affirmed and other Affidavit evidence to be filed, including Affidavit evidence of parties not adverse in interest once filed.

2. Such further and other material as the Applicants may adduce and this Honourable Court may accept.

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