Date: 20210420
Docket: CI 18-01-18438
CI 18-01-14043
CI 20-01-29002
CI 20-01-29221
(Winnipeg Centre)
Indexed as: Flette et al. v. The Government of Manitoba et al.
Cited as: 2021 MBQB 84

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN: CI 18-01-18438 ELSIE FLETTE, AS LITIGATION GUARDIAN ON BEHALF OF MINOR CHILDREN, E.F. AND I.F. AND LEE MALCOLM-BAPTISTE, plaintiffs, - and - THE GOVERNMENT OF MANITOBA, defendant. **AND BETWEEN:** CI 18-01-14043 PEGUIS CHILD AND FAMILY SERVICES, ANIMIKII OZOSON CHILD AND FAMILY SERVICES, SOUTHEAST CHILD AND FAMILY SERVICES, SANDY BAY CHILD AND FAMILY SERVICES, MICHIF CHILD AND FAMILY SERVICES, AND METIS CHILD, FAMILY AND COMMUNITY SERVICES, applicants, - and - THE GOVERNMENT OF MANITOBA, respondent.	)	**APPEARANCES:** Brian Meronek, Q.C. and Jeremy McKay for the plaintiffs (CI 18-01-18438) Jim Koch, Deborah Carlson and Sarah Zagozewski, Articling student for the defendant/respondent Kris Saxberg, Shawn Scarcello and Joshua Tallman for the applicants (CI 18-01-14043 and CI 20-01-29221) Bryan Williams and Dayna Steinfeld for the applicants (CI 20-01-29002) Judgment delivered: April 20, 2021

AND BETWEEN:)
CI 20-01-29221)
)
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)
AND 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.)
)
AND BETWEEN:)
CI 20-01-29002)
)
ASSEMBLY OF MANITOBA CHIEFS,)
applicants,)
- and -)
)
ATTORNEY GENERAL OF MANITOBA,)
respondent.)

EDMOND J.

Introduction

[1] Three different proceedings are being case managed and all three proceedings address common issues. A proposed class action proceeding was commenced with Elsie Flette, as litigation guardian on behalf of minor children, E.F. and I.F. and Lee Malcolm-Baptiste as plaintiffs and the Government of Manitoba ("Manitoba") as a defendant in Queen's Bench File No. CI 18-01-18438 (the "Action").

[2] A notice of application was filed in Queen's Bench file No. CI 20-01-29221 by a number of Indigenous Child and Family Services Agencies (the "Agencies"), certain authorities and the Southern Chief's Organization Inc. as applicants and Manitoba as the respondent (the "Animikii Application"). The Animikii Application originated by notice of application filed November 27, 2020 and is further to a prior related application filed in Queen's Bench File No. CI 18-01-14043.

[3] A third proceeding was filed by notice of application in Queen's Bench File No. CI 20-01-29002 by the Assembly of Manitoba Chiefs as applicant and the Attorney General of Manitoba as a respondent (the "AMC Application").

[4] The Action, the Animikii Application and AMC Application seek among other things, constitutional determinations and remedies including declaratory relief relating to the actions of Manitoba.

[5] The scope of each proceeding varies, as does the nature of the relief sought. However, each of the proceedings challenge the constitutionality of s. 231 of ***The Budget Implementation and Tax Statutes Amendment Act***, 2020 S.M. 2020, c.

21 ("***BITSA***") on a variety of grounds, some of which are shared between the three proceedings.

[6] Manitoba submits that an order should be made pursuant to Queen's Bench Rule 6.01(1) to have the Action, the Animikii Application and the AMC Application in respect of the common questions of law or fact tried together. Manitoba takes the position that an order should be issued substantially in the form appended at Tab A of Manitoba's book of documents. Manitoba's proposed draft order is attached as Schedule A to this decision. Without reviewing each paragraph of the draft order, Manitoba submits that the proceedings should be heard together or consolidated for the purpose of considering a threshold issue, namely: is s. 231 of ***BITSA*** constitutionally valid? Manitoba submits that dealing with the threshold issue of the constitutional validity of s. 231 will promote the just and most expeditious way of advancing the litigation, given the complexities and overlap of the three proceedings. Further, the determination of any other issues beyond the constitutional validity of s. 231 of ***BITSA***, will depend on whether or not the legislation is valid. Accordingly, Manitoba submits that the other issues are more appropriately addressed at a later time once the constitutional validity of s. 231 of ***BITSA*** is determined.

[7] The plaintiffs in the Action and the applicants in the Animikii Application and AMC Application take issue with limiting the hearing set to proceed in October 2021 to determine only the constitutional validity of s. 231 of ***BITSA***. These parties seek an order that all constitutional issues should be heard by way of a joint hearing and

propose another form of order attached as Schedule B to this decision. Paragraph 1 of the jointly proposed order states the issues to be decided as follows:

> a. Are Manitoba's actions regarding the Children's Special Allowance from January 1, 2005 to March 31, 2019 and with respect to the enactment of s. 231 of The Budget Implementation and Tax Statutes Amendment Act (2020) ("s. 231") in breach of the Constitution Act, 1982, the Constitution Act, 1867, the Rule of Law, the honour of the Crown, the constitutional right to restitution, and/or the Children's Special Allowance Act S.C. 1992, c. 48?
>
> b. If the answer to (a) is yes, in whole or in part, what is the appropriate remedy?
>
> c. The parties agree that pecuniary remedies are not common issues and are therefore not within the scope of the Consolidated Hearing.

[8] The parties seek a procedural order and all agree that the general principle that should be applied is set forth in Queen's Bench Rule 1.04(1) which provides as follows:

> **General principle**
> 1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

Background Facts

[9] The background facts are summarized in Manitoba's motion brief at paras. 10 – 24 inclusive. It is unnecessary to review the background facts in detail in order to decide this motion. I will, however, briefly review some of the facts underlying these proceedings.

[10] The three proceedings allege certain inappropriate conduct by Manitoba relating to the administration of the Children's Special Allowance (the "CSA"), which is a Federal, Statutory, tax free monthly payment that is payable in respect of each child who is

maintained by a department or agency of the federal or a provincial government, as described in the ***Children's Special Allowances Act***, S.C. 1992, c. 48. ("***CSA Act***")

[11] The CSA is meant to be equivalent to the Canada Child Benefit and the Child Disability Benefit, which are provided under the ***Income Tax Act***, R.S.C., 1985, c. 1. Manitoba submits that the CSA was intended to confer two government bodies or other care providers the benefits available to parents of children who are under the age of 18, as afforded to them under the ***Income Tax Act***.

[12] Prior to April 1, 2019, when a new funding structure for child welfare was implemented, there were two primary sources of funding for Agencies that provided child welfare services to First Nation communities. These included:

a) General operating funding; and

b) Child maintenance funding.

Manitoba is the primary funder of operating funding for Agencies within Manitoba.

[13] The federal government is solely responsible for funding the direct child maintenance related to the placement of First Nations' children into temporary or permanent care out of the parental home, where the parents or guardians of the children have or are eligible to have treaty status while normally resident on reserve.

[14] Prior to April 1, 2019, Manitoba required Agencies to remit to Manitoba an amount equivalent to the CSA respecting all children in care who were maintained by an Agency and whose maintenance funding was provided by Manitoba.

[15] Some Agencies remitted the full amount required by Manitoba while other Agencies provided partial remittance and others refused to remit the amounts required

by Manitoba. Beginning in 2011, Manitoba applied a holdback as against incremental increases to operating funding respecting Agencies that did not make the remittances. The requirement imposed by Manitoba for Agencies to remit an amount equivalent to the CSA continued until March 31, 2019.

[16] On November 6, 2020, ***BITSA*** received Royal Assent and subsection 231(2) sets out the purpose which is to address Manitoba's actions concerning the CSA that Agencies received or were eligible to receive for children in their care during the period January 1, 2005 to March 31, 2019, inclusive.

[17] ***BITSA*** retroactively deems the rates of services paid by Manitoba to have been reduced by an amount proportional to amounts remitted by Agencies to Manitoba and/or held back by Manitoba in respect of the CSA. The net effect of s. 231 is that any monies received or held back by Manitoba are confirmed to be provincial funds and the CSA received by the Agencies remain with the Agencies, to be used for maintenance or other purposes as contemplated in the ***CSA Act***.

[18] Subsection 231(13) of ***BITSA*** deems that the Action and the application filed in 2018 prior to the applications filed in 2020 be dismissed, without costs. The subsection states:

> **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.

[19] On or after November 6, 2020, the following occurred:

a) The AMC Application was filed and the relief sought includes:

(a) Determining the rights of any child or former child in the care of an agency under *The Child and Family Services Act* at any time between January 1, 2005 and March 31, 2019 ("children in care") or those acting on their behalf, under *The Proceedings Against the Crown Act*, *The Queen's Bench Rules*, the *Constitution Act, 1982*, the *Constitution Act, 1867* and the common law, to proceed with an action or proceeding related to the clawback, remittance, denial or failure to provide their special allowance under the *Children's Special Allowances Act* ("CSA") and to seek remedy from Her Majesty the Queen in right of the Province of Manitoba (the "Crown" or "Manitoba") or any agency or authority within the meaning of subsection 1(1) of *The Child and Family Services Act* ("agency" or "authority");

(b) Determining the rights of children in care under *The Proceedings Against the Crown Act*, *The Queen's Bench Rules*, the *Constitution Act, 1982*, the *Constitution Act, 1867* and the common law, to proceed with an action or proceeding related to the failure to apply the CSA exclusively toward the care, maintenance, education, training or advancement of the child in respect of whom it was paid and to seek remedy from the Crown or any agency or authority;

(c) Declaring that s. 231, of Part 10 (Families), Division 4 (Child and Family Services) of *The Budget Implementation and Tax Statutes Amendment Act, 2020* ("s. 231") invalidly infringes the core jurisdiction of the superior courts under s. 96 of the *Constitution Act, 1867* by denying children in care the right to access the Manitoba Court of Queen's Bench and is therefore of no force and effect;

(d) Declaring that s. 231 by purporting to bar actions or proceedings under the *Canadian Charter of Rights and Freedoms* (the "Charter"), s. 35 of the *Constitution Act, 1982* or remedies under s. 24 of the Charter or s. 52 of the *Constitution Act, 1982*, is beyond the constitutional competence of the Crown and is therefore of no force and effect;

(e) A determination that Manitoba owes fiduciary obligations to First Nations children involved in the child and family services system;

(f) A declaration that Manitoba's fiduciary obligations to First Nations children in care requires,

> (i) that the provision of funding to agencies and authorities be conducted in a manner that is responsive to the best interests of First Nations children,
>
> (ii) a balancing between consideration of the conflicting interests of First Nations children and Manitoba taxpayers that reflects First Nations children's particular vulnerabilities, First Nations historic disadvantage, and the comparative positive and negative impacts of the remittance of CSA funds on these two groups,
>
> (iii) a generous and liberal interpretation of the *Children's Special Allowances Act* and of the purpose and intended treatment of CSA funds, and

(iv) the government to refrain from undermining the beneficiaries' abilities to seek recourse for breaches of this duty;

(g) A declaration that Manitoba breached its fiduciary duty owed to First Nations children in its care;

(h) A declaration that Manitoba has violated the honour of the Crown;

(i) A declaration that s. 231 unjustifiably denies substantive equality and equal benefit of the law under s. 15 of the *Charter* to First Nations children in care on the intersecting grounds of race and family status and is therefore of no force and effect within the meaning of s. 52 of the *Constitution Act, 1982*;

(j) Such further and other relief as the Applicant may advise and this Honourable Court may permit; and

(k) Costs.

[20] The Animikii Application was filed seeking the following relief:

a) A declaration that the Applicants bring this Application on their own behalf, and also on behalf of the off-reserve Indigenous children I 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 of 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 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 members 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 demonstrable 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.

[21] The plaintiffs in the Action were granted leave to further amend the statement of claim including a constitutional challenge of s. 231 of ***BITSA***. The amendment was granted during case management without prejudice to Manitoba's position that the plaintiffs have no right to pursue the relief sought given the presumption that s. 231 is constitutionally valid. The relief sought in the "Fresh as Amended Statement of Claim" includes:

> a. An Order certifying this action as a Class proceeding;
> b. A declaration that The Budget Implementation and Tax Statutes Amendment Act, 2020, SM 2020 c.21 does not deny access of Aboriginal children in care to Manitoba's superior courts of justice to claim constitutional and Charter violations or breaches;
> c. Alternatively, a declaration that The Budget Implementation and Tax Statutes Amendment Act, 2020, SM 2020 c.21 s. 231, is constitutionally invalid in that it purports to deny Aboriginal children in care or their representatives access to Manitoba's superior courts of justice as guaranteed by section 96 of the Constitution Act, 1867 and therefore is ultra vires and is of no force and effect and offends the Rule of Law;
> d. A declaration that The Budget Implementation and Tax Statutes Amendment Act, 2020, SM 2020 c.21, s. 231, is constitutionally invalid on the grounds that its operation impermissibly conflicts with the exclusive legislative power of Parliament under s. 91(1A) and s. 91(3) of the Constitution Act, 1867 to spend its own money, and the power to raise by any mode or system of taxation and therefore is ultra vires and is of no force and effect;
> e. A declaration that The Budget Implementation and Tax Statutes Amendment Act, 2020, SM 2020 c.21, s. 231, is inoperative on the grounds that it invalidly conflicts with, or frustrates the purpose of, the Children's Special Allowances Act, SC 1992, c 48, Sch. and Regulations thereto to provide Children's Special Allowance for the exclusive benefit of children in care and therefore is ultra vires and is of no force and effect;
> f. A declaration that the Children's Special Allowance payments obtained by the Defendant through Forced Remittances and/or Claw Backs, pursuant to The Budget Implementation and Tax Statutes Amendment Act, 2020, SM 2020 c.21,

s. 231, or otherwise, from First Nations and Métis Child and Family Service Agencies are unconstitutional and unlawful;
g. An accounting for all Children's Special Allowance payments unlawfully obtained by the Defendant;
h. A declaration that The Budget Implementation and Tax Statutes Amendment Act, 2020, SM 2020 c.21, s. 231, to the extent it purports to extinguish the Plaintiffs' constitutional and/or private law rights to restitution of Children's Special Allowance unlawfully taken by the Defendant, is invalid and of no force and effect;
i. Restitution of all Children's Special Allowance payments unlawfully or wrongfully taken by the Defendant from First Nation and Metis Child and Family Service agencies;
j. A declaration that, to the extent Financial Administration Act, C.C.S.M. c.F55, specifically s. 15 and s. 40 thereof, purports to deem Children's Special Allowance as overpayments which are deposited or, are to be deposited, as public money into the Consolidated Fund of the Defendant, as a refund or repayment, the Financial Administration Act is constitutionally invalid as it impermissibly conflicts with the legislative power of Parliament under s. 91(1A) of The Constitution Act, 1867 to spend its own money and is therefore ultra vires and is of no force and effect;
k. A declaration that, to the extent The Budget Implementation and Tax Statutes Amendment Act, 2020, SM 2020 c.21, s.231 deems Children Special Allowance payments received or receivable by Aboriginal Child and Family Services Agencies during the funding period to be overpayments, to which the Defendant is entitled, such monies are for the exclusive benefit of Aboriginal children in care and as such does not impact the Plaintiffs' claim for return of the Children's Special Allowance in this action;
l. A declaration that The Budget Implementation and Tax Statutes Amendment Act, 2020, SM 2020 c. 21, s. 231 does not prevent this action from being commenced or continued and cannot purport to dismiss the Plaintiffs' claims of constitutional invalidity and breaches of the Canadian Charter of Rights and Freedoms;
m. A declaration that The Budget Implementation and Tax Statutes Amendment Act, 2020, SM 2020, s. 231 violates s. 52 of the Constitution Act, 1982 in that it purports, directly or indirectly, to prevent the Plaintiffs from advancing and/or continuing a claim under s. 12 and s. 15, and to seek remedies under s. 24(1) of the Canadian Charter of Rights and Freedoms, and is not justified under s.1 thereof and is of no force and effect;
n. A declaration that by the enactment of The Budget Implementation and Tax Statutes Amendment Act 2020, SM 2020 c. 21, s. 231, the Defendant is in breach of s. 12 of the Canadian Charter of Rights and Freedoms by imposing cruel and unusual punishment on Aboriginal children in care, as an identifiable vulnerable group in society, in denying them their rightful and lawful access to benefits and that such cruel and unusual punishment is not justified under s. 1 thereof;
o. A declaration that, by the enactment of The Budget Implementation and Tax Statutes Amendment Act 2020, SM 2020 c. 21, s. 231, the Defendant is in breach of s. 15 of the Canadian Charter of Rights and Freedoms by

> discriminating against Aboriginal children in care on the basis the enumerated grounds of "race", "ethnic origin" or "nationality" or the analogous grounds of "family status", or "residence of a parent" and/or "lack of Indian or Treaty status or eligibility for Indian or Treaty status under the Indian Act" or "children in care" or "Aboriginal children in care" and that such discrimination is not justified under s. 1 thereof;
> p. A declaration that The Budget Implementation and Tax Statutes Amendment Act 2020, SM 2020 c. 21, s. 231 is in conflict, or is inconsistent, with s. 11 of an Act respecting First Nations, Inuit and Métis children, youth and families S.C. 2019 c. 24 by creating substantive inequality between Aboriginal children in care and other children;
> q. Damages under s. 24(1) of the Canadian Charter of Rights and Freedoms;
> r. In the alternative, an aggregate award of money pursuant to Division 2 of The Class Proceedings Act, C.C.S.M. c. C130 for breach of trust, fiduciary duty, negligence, restitution for unjust enrichment wrongdoing and/or breach of public law for said constitutional violations;
> s. Damages regarding such an amount as this Court finds appropriate for the cost of administrating the plan of distribution of the recovery awarded;
> t. Punitive damages;
> u. Disgorgement of monetary benefits;
> v. Interest at a compound compensatory rate; and,
> w. Costs on full indemnity basis.

[22] By consent of the parties, a hearing has been set for October 25 – 29, 2021, to address the common issues of law and fact. The parties propose to file a combination of agreed upon evidence and affidavit evidence.

[23] Unfortunately, the parties have not agreed upon the scope of the common issues to be heard during the October hearing dates.

[24] These reasons for decision address which of the common issues ought to be adjudicated during the October hearing dates.

Issue

[25] The parties agree that an order should be granted that the Action, the Animikii Application and the AMC Application be heard together or consolidated to decide certain constitutional issues. However, the parties disagree on which constitutional issues

should be decided during the October hearings. In my view, the issue to be determined is what procedural order should be granted to avoid multiplicity of proceedings and to secure the just, most expeditious and least expensive determination of these proceedings.

Applicable Law

[26] The parties agree on the applicable law and legal principles, but disagree on the application of the legal principles. The applicable legal principles can be summarized as follows:

a) ***The Court of Queen's Bench Act***, C.C.S.M. c. C280, provides that a multiplicity of proceedings shall be avoided (s. 94);

b) The Court of Queen's Bench Rules authorize two or more proceedings be consolidated or heard at the same time in circumstances where there is a question of law or fact in common (Queen's Bench Rule 6.01(1));

c) Court of Queen's Bench Rule 1.04 set out above, applies to every proceeding " … to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."; and

d) Queen's Bench Rule 1.04(1.1) states that " … the court is to make orders and give directions that are proportionate …" based on the criteria set forth in the Rule;

e) In ***EllisDon Corp. v. Winnipeg Airports Authority Inc.***, 2014 MBQB 92, 304 Man.R. (2d) 280 (QL), the court summarized the principles applicable to joinder of proceedings as follows:

26 In addition to the relevant provisions and rules set out above, the judgment in ***Thames Steel Construction Ltd. v. Portman*** (1980), 28 O.R. (2d) 445 (Ont. Div. Crt.) continues to constitute a leading decision in respect of joinder of actions. In ***Thames Steel***, Griffiths J. at paras. 26 and 27 stated the principles that may be considered in such an application:

> 26 On the authorities, the principles which should be considered in determining whether the joinder of defendants in one action is appropriate are these:
>
> (1) Whether the claims of the plaintiff arise out of the same transaction or series of transactions as required by Rule 67.
> (2) Whether or not there is a common issue of law or fact of sufficient importance to render it desirable that the claims against the proposed defendant be tried together.
> (3) Whether the expense and delay that would be caused by compelling the plaintiff to bring separate actions against the proposed defendant would be greatly out of proportion to the inconvenience, expense or embarrassment which that defendant would be put if the actions were tried together.
> (4) On the basis of Klein, if the liability of the proposed defendant is contingent upon the plaintiff first establishing that he suffered a loss in respect of the transaction with the named defendant, then the application to join the proposed defendant may be considered premature.
>
> 27 In my view, where the alternative claims arise out of the same transaction or series of transactions and involve a common question of fact or law, then the governing principle in determining whether joinder should be allowed is the third principle set out above, namely, the balance of convenience. The fact that the alternative claim against the defendants may be unnecessary, if the plaintiff succeeds against the main defendants, is only one consideration to be weighed and should not, by itself, be considered a conclusive reason for refusing the joinder. It must not be overlooked that by the concluding words of Rule 67 the Court is given a discretion where defendants have been added, to order separate trials, or make such other order as is deemed expedient if the joinder then appears oppressive or unfair.

f) The Court of Appeal considered the principles applicable to motions for consolidation of proceedings under Queen's Bench Rule 6.01 in ***Kostic v. Merrill Lynch Canada Inc.***, 2010 MBCA 81, 258 Man.R. (2d) 125 (QL) at paras. 42 – 44:

42 Ontario and Prince Edward Island have the same statutory provision as s. 94 of the *QB Act.* See s. 138 of the Ontario *Courts of Justice Act* and s. 64 of the

Prince Edward Island *Judicature Act*. Whether one calls s. 94 a "policy" (see *Griffin v. Dell Canada Inc.*, 2010 ONCA 164) or a "direction" (see *Kelly v. Prince Edward Island (Human Rights Commission)*, 2008 PESCAD 9, 276 Nfld. & P.E.I.R. 336), it is a principle that is well known and fundamental to our civil justice system. The fact that the legislature saw fit to state this principle in the *QB Act* underscores its importance.

43 QB Rules, such as the joinder provisions in QB Rule 5 and the consolidation provisions in QB Rule 6, give effect to the principle. Spivak J. wrote of this in *Alexander v. Halley et al.*, 2006 MBQB 57, 202 Man.R. (2d) 242 (at paras. 29-30):

> .... Generally, the courts have favoured the joinder of related claims and have sought to avoid a multiplicity of proceedings relating to the same matter.
>
> These principles are reflected in the **Queen's Bench Act** and **Rules**. Section 94(1) of the **Queen's Bench Act** provides that "as far as possible a multiplicity of proceedings should be avoided". Queen's Bench Rule 1.04(1) provides that the rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding. A joinder of claims is permitted by Queen's Bench Rule 5.01. Queen's Bench Rule 6.01(1) allows the consolidation of claims where there is a question of law and fact in common and where the relief arises out of the same transaction or occurrence.

44 While this appeal is not framed in reference to either QB Rule 5 or QB Rule 6 for obvious reasons, these rules are nonetheless instructive with respect to when s. 94 comes into play.

g) In ***O'Brien v. Tyrone Enterprises Ltd.***, 2012 MBCA 3, 275 Man.R. (2d) 106 (QL), the Court of Appeal addressed the applicable principles governing when issues should be severed and tried separately. The Court of Appeal referenced the principles outlined in ***Investors Syndicate Limited v. Pro-Fund Distributors Ltd. et al.*** (1980), 12 Man.R. (2d) 104 (Q.B.) (QL) as follows:

1. One party ought not to be harassed at the instance of another by an unnecessary series of trials.
2. There must be some reasonable basis for concluding that the trial of the issue or issues sought to be severed, will put an end to the action.

3. An order for severance should hold the prospect that there will be a significant saving of time and expense.
4. Conversely, severance should not give rise to the necessity of duplication in a substantial way in the presentation of the facts and law involved in later questions.
5. Nothing should be done which might confuse rather than help the final solution of the problem.
6. A plaintiff who forms an action to suit his convenience will seldom be granted the right to sever, if the defendant objects. The objection of a plaintiff to a defendant's application does not bear such heavy significance.

g) In ***O'Brien*** the court went on to outline the following principles:

- An exceptional, extraordinary and clear and compelling case must be made out for severance to be granted (paras. 52, 53);
- The factors to be considered in an application for severance are very much fact driven and there is no obligatory criteria that must be adverted to by a motion's court judge when considering an application for severance (para. 53);
- The fundamental principle to be considered in applications for severance is to determine whether severance is the "just most expeditious and least expensive" resolution (para. 56).

[27] Because the Action is proposed to proceed as a class action proceeding, the plaintiffs and applicants submit that s. 12 of ***The Class Proceedings Act***, C.C.S.M. c. C130 is applicable and they reference the decision of ***Briones v. National Money Mart Co.***, 2016 MBQB 213, [2016] M.J. No. 316 (QL). In ***Briones*** this court reviewed the relevant factors that may be considered in determining whether to hear a pre-

certification motion. At para. 6 of ***Briones***, the court reviewed a non-exhaustive list of some of the factors considered to be relevant to exercise the discretion including:

> (a) whether the motion will dispose of the entire proceeding or will substantially narrow the issues to be determined;
> (b) the likelihood of delays and costs associated with the motion;
> (c) whether the outcome of the motion will promote settlement;
> (d) whether the motion could give rise to interlocutory appeals and delays that would affect certification;
> (e) the interests of economy and judicial efficiency; and
> (f) generally, whether scheduling the motion in advance of certification would promote the "fair and efficient determination" of the proceeding (s. 12).

Analysis and Decision

[28] The motion before the court involves granting an order that three proceedings be consolidated or heard at the same time as well as an order that certain common issues should be severed and heard first. Deciding these issues involves a delicate balancing of the principles outlined above to determine the just, most efficient and least expensive manner to determine the common issues of law and fact.

[29] The parties do not contest that the court should grant an order that the common issues of law and fact be heard together. The more vexing issue is what common issues of fact and law ought to be heard at the same time. Manitoba submits that the threshold issue, namely, the constitutional validity of s. 231 of ***BITSA*** is a shared issue among all proceedings and that issue ought to be decided first.

[30] The plaintiffs and applicants disagree that the October hearing should be limited to the constitutional validity of s. 231 of ***BITSA***. While they agree that the constitutional validity of s. 231 must be determined, they submit that the court should also review whether Manitoba's actions regarding the CSA are in breach of the rule of

law, the honour of the Crown, the constitutional right to restitution and/or the ***CSA Act***. All parties agree that pecuniary remedies are not common issues and are therefore not within the scope of the October hearing.

[31] Applying the legal principles and the relevant Court of Queen's Bench Rules, I make the following findings and directions:

a) The parties agree, as do I, that it is appropriate to order that the Action, the Animikii Application and the AMC Application be heard together and at the same time. Multiplicity of proceedings must be avoided and there are common issues of law and fact of sufficient importance to render it desirable that these proceedings be heard together.

b) Having these matters proceed separately would increase the cost for all parties and be greatly out of proportion to the inconvenience, expense or embarrassment which Manitoba may be put to if the matters are tried together.

c) It is in the best interests of all parties to avoid having a series of hearings dealing with common issues of law and fact.

d) Severance of constitutional and ***Charter*** issues from the damages issues is appropriate in these proceedings as there are not necessarily common issues of law or facts applicable to the damage claims in each proceeding. Further, the Action is a proposed class action proceeding which has not yet been certified.

e) I am satisfied there will be a significant saving of time and expense if the common issues of law and fact are decided at the same time. As well, I am satisfied that it is just and convenient to hear as many of the common issues of law and fact as reasonably possible at the same time.

f) There is a reasonable basis for concluding that deciding the common issues of law and fact may conclude or finally determine the Animikii Application and AMC Application (other than damages) and may be more likely to promote settlement of the Action.

g) While there is some attraction to the submission advanced by Manitoba, because it will address a threshold issue that is common to all proceedings, I am not satisfied that limiting the October hearing to deal with only the constitutional challenge to s. 231 of ***BITSA*** is the most efficient and least expensive manner in which to hear the common issues in dispute. Hearing one constitutional issue now and others later is not an efficient use of the parties or the court's time. As well, I am not satisfied that there is a clear and compelling case for severance of that issue alone.

h) No matter which form of Order is granted, the parties are seeking a form of severance order. I must therefore be mindful that such orders are exceptional, extraordinary and a clear and compelling case must be made for severance. I agree with the parties that determining the pecuniary remedies must be decided at a separate hearing. It is just and convenient

for a separate hearing to decide the applicable pecuniary remedies as the common issues of law or fact are not clearly identifiable.

i) Comparing the two proposed forms of order, Manitoba's proposal does not include the issues which deal with Manitoba's actions concerning the CSA and whether those actions amount to a breach of law including the ***Charter***. If I accept Manitoba's proposal, there may be at least three hearings to determine the following issues:

   i. The constitutional validity of s. 231 of ***BITSA***;

   ii. Whether the actions of Manitoba dealing with the CSA, prior to passing s. 231 of ***BITSA***, amount to constitutional or ***Charter*** breaches or breach of law on numerous grounds; and

   iii. Damages or pecuniary remedies.

j) Subject to being able to file a factual foundation so the court can rule on the other issues, it is my view that all or substantially all of the constitutional issues should be decided at the October hearing. In my view, the just, fair and most efficient approach is to review and consider all, or as many as reasonably possible, constitutional law issues arising from Manitoba's actions concerning the CSA and enacting s. 231 of ***BITSA*** at the October hearing.

k) I agree with the submission of the plaintiffs and applicants that the evidence relating to Manitoba's actions concerning the CSA and the effect of those actions may be relevant to the constitutional arguments being

advanced by the parties. That same evidence is the basis for the allegation that Manitoba's actions breached the ***Charter***.

l) The plaintiffs and the applicants submit that the Animikii Application and AMC's application be heard in their entirety (excepting the claim for damages claimed in the Animikii Application including ***Charter*** damages and punitive damages). Therefore, the October hearing, subject to appeal, may substantially decide the matters at issue in the Animikii Application and AMC Application and deal in part with common issues raised in the Action.

m) I am concerned that Manitoba's proposal will result in more hearings and will not be consistent with the principles of proportionality and ensuring the least expensive determination of the common issues of law and fact. As pointed out by the Supreme Court of Canada in ***Garland v. Consumers' Gas Co.***, 2004 SCC 25, [2004] 1 S.C.R. 629, "litigation by installments" should be avoided.

n) That said, there must be a sufficient factual foundation to permit the court to decide the constitutional challenge to ***BITSA***. In the recent decision, ***Reference re Genetic Non-Discrimination Act***, 2020 SCC 17, 447 D.L.R. (4th) 359 (QL), the majority of the Supreme Court of Canada stated:

- Determining "whether a law falls within the authority of Parliament or a provincial legislature, a court must first characterize the law and

then, based on that characterization, classify the law by reference to the federal and provincial heads of power under the Constitution" (para. 26).

- "Identifying a law's pith and substance requires considering both the law's purpose and its effects" (para. 30).
- "Identifying the pith and substance of the challenged law as precisely as possible encourages courts to take a close look at the evidence of the law's purpose and effects, and discourages characterization that is overly influenced by classification. The focus is on the law itself and what it is really about." (para. 31)
- "To determine a law's purpose, a court looks to both intrinsic and extrinsic evidence. Intrinsic evidence includes the text of the law, and provisions that expressly set out the law's purpose, as well as the law's title and structure. Extrinsic evidence includes statements made during parliamentary proceedings and drawn from government publications." (para. 34)
- "Both legal and practical effects are relevant to identifying a law's pith and substance. Legal effects 'flow directly from the provisions of the statute itself', whereas practical effects 'flow from the application of the statute [but] are not direct effects of the provisions of the statute itself' ". (para. 51)

o) Identifying the pith and substance of s. 231 of ***BITSA*** will require evidence on the purpose and its legal and practical effects.

p) Dealing with the ***Charter*** issues, there is no question that the Supreme Court of Canada has made it clear that relevant facts may cover a wide spectrum dealing with scientific, social, economic and political aspects. As well, expert opinion may be of assistance to the court. ***Charter*** decisions should not be made in a factual vacuum. (***Mackay v. Manitoba***, [1989] 2 S.C.R. 357 (S.C.C.) at paras. 8 and 9).

q) In my view, the just, most efficient and least expensive manner to decide the constitutional and ***Charter*** issues is for the parties to file the appropriate factual foundation and have the issues decided at the same time. I agree with the plaintiffs and the applicants that there is overlapping evidence and the most just, efficient and fair manner to proceed is to have as many constitutional and ***Charter*** issues decided as reasonably possible at the October hearing. I am mindful that deciding these common issues will be complex, but that is not a sufficient basis to bifurcate the hearing of the common issues of law and fact. I am not satisfied that bifurcating the constitutional and ***Charter*** issues and restricting the October hearing to the constitutional validity of s. 231 of ***BITSA*** is the just, most expeditious and least expensive manner to determine the common questions of law and fact in the three proceedings.

Disposition

[32] This procedural ruling is being made in advance of the parties' filing an agreed statement of facts and affidavits identifying the common issues of fact. The decision has been made based on a review of the pleadings and briefs, submissions made, and a consideration of the numerous authorities. As is customary with advance rulings, I reserve the right to revisit this ruling depending on the factual foundation filed in support of the relief claimed. I am mindful that granting the form of order suggested by the plaintiffs and the applicants will require a significant amount of evidence. The parties have agreed to work cooperatively to file evidence by agreement. The agreed upon timeline is aggressive in order to meet the October hearing dates. These proceedings shall remain in case management and if deadlines are not met or the factual foundation is insufficient, I will hear further submissions and make a determination on whether deadlines should be extended or whether the terms of this procedural order should be reconsidered. That said, the agreed upon deadlines are approved and the parties are expected to strictly adhere to the deadlines.

[33] The two proposed forms of order contain a number of similar paragraphs and paragraphs 2 to 10 inclusive of the draft order submitted by Manitoba (Schedule A) are granted. Paragraphs 8, 11 and 13 in the proposed form of order submitted by the plaintiffs and applicants (Schedule B) are not granted. Paragraph 8 only refers to the plaintiffs and the applicants being entitled to use and refer to evidence and in my view, the evidence filed in each of the proceedings may be taken as evidence in all of the proceedings and the draft submitted by Manitoba, paragraph 7 is approved.

[34] It is premature to make a ruling on the motion for certification as suggested in the draft form of order of the plaintiffs and applicants in paragraph 13. Paragraph 13 is not required. In my view, applying the relevant factors considered to exercise my discretion regarding a pre-certification motion apply and this decision promotes the fair and efficient determination of the common issues of law and fact prior to any certification hearing.

[35] The primary difference between the two forms of proposed orders is set forth in paragraph 1 of both proposed orders. In comparing the two proposed drafts, I prefer the form of the statement of the issues in paragraph 1 of the Manitoba proposed order addressing the applicable questions to determine the constitutional validity of s. 231 of ***BITSA***. A second paragraph or sub-paragraph should be added to include Manitoba's actions regarding the CSA from January 1, 2005 to March 31, 2019, which, like Manitoba's draft paragraph 1, should be expressed as questions. Sub-paragraphs b. and c. of the proposed order submitted by the plaintiffs and applicants should be included, although b. will have to be amended to include the answers regarding Manitoba's actions as well as the constitutional validity of s. 231 of ***BITSA***.

[36] Paragraph 2 of the proposed form of order submitted by the plaintiffs and applicants is not required if the questions are set out in paragraph 1.

[37] Paragraph 10 in Manitoba's draft order (paragraph 12 in the plaintiffs and applicants draft order) is granted and reference should be included that the court has the discretion to revisit which of the common issues of law and fact ought to be heard at the October hearing, once the agreed evidence and affidavit evidence is filed.

[38] By letter dated of April 5, 2021, counsel advised me that they had agreed to a revised timetable for completion of the preliminary steps prior to the October hearing. The revised timeline is as follows:

a) Target date for agreed statement of facts - April 19, 2021

b) Moving parties' affidavits - May 17, 2021

c) Manitoba's affidavits - June 15, 2021

d) Moving parties' reply affidavits - June 30, 2021

e) Any cross-examinations on affidavits - by July 30, 2021

f) Moving parties' briefs - August 31, 2021

g) Responding brief from Manitoba - October 1, 2021

h) Reply brief from moving parties - October 15, 2021

[39] If the deadlines are not met and/or issues arise which cannot be resolved by counsel through negotiation and agreement, any of the parties may contact the manager of trial and motion coordination and schedule a further case management hearing.

[40] Paragraph 11 of the proposed order submitted by the plaintiffs and applicants includes an order regarding costs. During oral submissions a request for costs was made by the applicants in the Animikii Application. In my view, at this early stage of the proceedings, the appropriate disposition is to order that costs shall remain in the cause.

_____ J.