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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

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.

A N D B E T W E E N:

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., Jeremy McKay and William S. Klym
for the plaintiffs
(CI 18-01-18438)

Jim Koch, Deborah Carlson, Denis Guenette and Sarah Zagozewski
for the defendant/respondents
(all proceedings)

Kris Saxberg, Shawn Scarcello and Katherine Olson
for the applicants
(CI 18-01-14043 and CI 20-01-29221)

Byron Williams and Dayna Steinfeld
for the applicants
(CI 20-01-29002)

JUDGMENT DELIVERED:
May 18, 2022

A N D B E T W E E N:)
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.)
)
A N D B E T W E E N:)
CI 20-01-29002)
)
ASSEMBLY OF MANITOBA CHIEFS,)
applicant,)
- and -)
)
ATTORNEY GENERAL OF MANITOBA,)
respondent.)

EDMOND J.

Introduction

[1] Four proceedings which address common issues were heard together as directed by previous reasons for decision delivered April 20, 2021.

[2] A proposed class action proceeding was commenced by Elsie Flette, as litigation guardian on behalf of minor children, E.F. and I.F. and Lee Malcolm-Baptiste as plaintiffs against the Government of Manitoba ("Manitoba") as the defendant in Queen's Bench File No. CI 18-01-18438 (the "Action").

[3] 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 ("CFS Agencies"), and 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.

[4] 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").

[5] The Action, the Animikii Application and AMC Application seek constitutional determinations and remedies including declaratory relief relating to certain actions of Manitoba. As I will explain, these proceedings address the constitutional validity of legislation and certain actions by Manitoba dealing with provincial funding of Manitoba's system of child protection and welfare.

[6] The proceedings allege certain inappropriate conduct by Manitoba relating to the administration of the Children's Special Allowance (the "CSA Benefit"), 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 provincial Government, as described in the ***Children's Special Allowances Act***, S.C. 1992, c. 48 (the "***CSA Act***").

[7] The CSA Benefit is intended to be equivalent to the Canada Child Benefit (the "CCB") and the Child Disability Benefit (the "CDB"), which are provided under the ***Income Tax Act***, R.S.C., 1985, c. 1.

[8] I previously heard submissions to have the common questions of law and fact raised in the Action, the Animikii Application, and the AMC Application tried together. 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. I issued reasons for decision on April 20, 2021, making the following findings and directions:

a) 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) 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 and 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 Benefit and whether those actions amount to a breach of law, including the ***Canadian Charter of Rights and Freedoms***, (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 Benefit, 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 Benefit 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 Benefit, 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 (except 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.

[9] The parties worked cooperatively to file evidence required to seek rulings from the court regarding the common issues. The parties filed an Agreed Book of Documents, an Agreed Statement of Facts and a Book of Government Reports on Child Welfare. As well, affidavits were filed and the deponents were cross-examined on the affidavits. Transcripts of the cross-examinations are part of the court record.

[10] The capitalized terms in this decision are the same as the defined terms of the Agreed Statement of Facts.

[11] The applicants and plaintiffs describe this case as about whether off-Reserve Indigenous children, who have been removed from their families, have had their constitutional rights and freedoms violated by Manitoba by virtue of Manitoba's policies and actions of requiring remittance of CSA Benefits from CFS Agencies into Manitoba's consolidated fund. It is also about the constitutional validity of ***BITSA***, enacted by Manitoba, in part, to insulate it from liability for the policies and actions taken regarding the CSA Benefits.

The *CSA Act*

[12] The relevant provisions of the ***CSA Act*** provide:

> **Monthly special allowance**
> 3(1) Subject to this Act, there shall be paid out of the Consolidated Revenue Fund, for each month, a special allowance in the amount determined for that month by or pursuant to section 8 in respect of each child who
>
> (a) is maintained
>
> (i) by a department or agency of the government of Canada or a province, or
> (ii) by an agency appointed by a province, including an authority established under the laws of a province, or by an agency appointed by such an authority, for the purpose of administering any law of the province for the protection and care of children,

and who resides in an institution, a group foster home, the private home of foster parents or in the private home of a guardian, tutor or other individual occupying a similar role for the month, under a decree, order or judgment of a competent tribunal; or

(b) is maintained by an institution licensed or otherwise authorized under the law of the province to have the custody or care of children.

Use of special allowance
(2) A special allowance shall be applied exclusively toward the care, maintenance, education, training or advancement of the child in respect of whom it is paid.

. . . .

Recipient of special allowance
5 Where payment of a special allowance is approved in respect of a child, the special allowance shall, in such manner and at such times as are determined by the Minister, be paid to the department, agency or institution referred to in section 3 that maintains the child or, in the prescribed circumstances, to a foster parent.

. . . .

Special allowance not to be assigned or charged
7 A special allowance is not subject to tax under any Act of Parliament and shall not be assigned, charged, attached, anticipated or given as security, and a special allowance is payable subject to those conditions.

. . .

9(1) Any person, department, agency or institution that has received or obtained by cheque or otherwise payment of a special allowance under this Act to which the person, department, agency or institution is not entitled, or payment in excess of the amount to which the person, department, agency or institution is entitled, shall, as soon as possible, return the cheque or the amount of the payment, or the excess amount, as the case may be.

Recovery of amount of payment as debt due to Her Majesty
(2) Where a person, department, agency or institution has received or obtained payment of a special allowance under this Act to which the person, department, agency or institution is not entitled, or payment in excess of the amount to which the person, department, agency or institution is entitled, the amount of the special allowance or the amount of the excess, as the case may be, constitutes a debt due to Her Majesty.

Deduction from subsequent special allowance
(3) Where any person, department, agency or institution has received or obtained payment of a special allowance under this Act to which the person, department, agency or institution is not entitled, or payment in excess of the amount to which the person, department, agency or institution is entitled, the

> amount of the special allowance or the amount of the excess, as the case may be, may be deducted and retained in such manner as is prescribed out of any special allowance to which the person, department, agency or institution is or subsequently becomes entitled under this Act.

[13] CFS Agencies applied for and received CSA Benefits to be used for the care, maintenance, education, training or advancement of the specific child for whom they were paid in accordance with the ***CSA Act***.

Section 231 of *BITSA*

[14] Section 231 of ***BITSA*** was enacted on November 6, 2020 and provides:

> **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*.
>
> **"minister"** means the minister appointed by the Lieutenant Governor in Council to administer The *Child and Family Services Act*.
>
> **"special allowance"** means the special allowance under the *Children's Special Allowances Act* (Canada) and the regulations made under that Act.
>
> **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.

[15] Section 231 is deemed to have come into force on April 1, 2019. It retroactively addresses the provincial "Rates for Services" that were payable to CFS Agencies for the "funding period" (January 1, 2005 to March 31, 2019). In effect, it formalizes into

legislation a provincial funding practice that was started by Manitoba in 2005. ***BITSA*** does not apply in the future as effective April 1, 2019, Manitoba changed the practice of requiring CFS Agencies to remit the CSA Benefits to Manitoba. The 2019 budget document issued by Manitoba states: "Commencing in Budget 2019, CFS Agencies will retain the CSA to support the needs of children in care. Agencies will retain approximately $33 million in CSA funding, and Manitoba will no longer budget for the revenue or expenditures associated with the CSA."

[16] Among other things, s. 231:

a) fixes the Rates for Services payable by Manitoba during the funding period by accounting for the total amounts paid by Manitoba, the amount of CSA Benefits received by a CFS Agency, and the amount of the holdbacks made by Manitoba;

b) deems the effective dates of notice of the Rates for Services;

c) deems that funding received by a CFS Agency from Manitoba during the funding period in excess of the rates set by s. 231(4) are an "overpayment" and that remittance of CSA Benefits by a CFS Agency or holdbacks by Manitoba of funding are to be considered a recovery of the "overpayment";

d) subsections 231(8) to 231(15) take away or extinguish existing and potential causes of action against Manitoba and other persons arising from Manitoba's policy and actions during the funding period and the application of s. 231.

Funding for CFS Agencies

[17] The Agreed Statement of Facts and affidavits describe the funding of CFS Agencies in detail. Manitoba and CFS Authorities have distinct roles relating to the distribution of funding for services within the child and family services system in Manitoba.

[18] CFS Agencies are responsible for delivering child protection and child welfare services to children and families in need of those services. CFS Agencies have specific powers and responsibilities in relation to the provision of services to children and families as described in ***The Child and Family Services Act***, C.C.S.M. c. C80 (the "***CFS Act***"). The evidence filed provides background on funding to provide context to characterize the law and address the constitutional and ***Charter*** challenges advanced by the applicants and plaintiffs.

[19] The applicants and plaintiffs allege the CFS funding model in place is inadequate and not fair and equitable, specifically as it relates to Indigenous children in care. While I accept that a large volume of evidence has been filed addressing that allegation, it is unnecessary to decide whether the funding is inadequate to rule on the common issues that must be determined in this case. The CFS funding model is complicated and the funding provided to children in care depends on the needs of each child in care. I agree the factual background relating to CFS funding is, nevertheless, important to understand the dispute and the policies and actions invoked by Manitoba.

[20] In general, CFS Agencies have two primary sources of funding:

a) the Government of Canada (through the Department of Indigenous Services (Canada) ("ISC" previously referenced as "INAC")); and

b) Manitoba.

[21] Canada provides funding for operational costs and Maintenance costs directly to Indigenous CFS Agencies respecting services to Federal Children, which is referred to as "on-Reserve funding".

[22] Manitoba provides funding for operational costs and Maintenance costs to Indigenous CFS Agencies in relation to Provincial Children, referred to as "off-Reserve funding".

[23] There are some exceptions to this as set out in the Agreed Statement of Facts (at paras. 38 and 39), including Animikii Ozoson Child and Family Services ("Animikii CFS"), Métis Child, Family and Community Services, and Michif Child and Family Services who only receive Child Welfare funding from Manitoba. Except for those three Indigenous CFS Agencies, Manitoba does not provide funding for Maintenance costs for Federal Children.

[24] The affidavit of Andrew Lajeunesse describes in detail the process undertaken to determine the level of funding for Child Welfare and Protection Services (Affidavit of June 29, 2021, at paras. 15-33)

[25] Manitoba is the primary funder respecting provincially-funded children in care whether Indigenous or non-Indigenous. Section 6.6 of the ***CFS Act*** deals with Rates for Services and the fact that the Minister may fix the rates payable for services provided under the ***CFS Act***. (the "Rates for Services")

[26] Numerous affidavits address the Rates for Services for Child Maintenance including: basic maintenance, special needs funding, and exceptional circumstances funding.

[27] Basic maintenance has two components:

a) a rate paid directly to the foster parent or group home maintaining a child in care; and

b) the agency allowance.

[28] The portion paid to the foster parents or group home cannot be retained by the CFS Agency. The agency allowance may be retained by the CFS Agency.

[29] CFS Agencies that receive funding from Canada, receive funding that is similar, if not identical, to the basic maintenance rates paid by Manitoba to off-Reserve children. Canada did not require First Nation CFS Agencies to remit CSA Benefits to Canada in respect of on-Reserve children in care.

[30] The Rates for Services payable for basic maintenance were frozen by Manitoba from 2012 to April 1, 2019. During that period, Canada increased the CSA Benefits payable for children in care in 2016, 2017, 2018 and 2019.

[31] In or about 2010, Manitoba, Canada and Indigenous representatives negotiated a new funding model and agreed in relation to funding by Canada and Manitoba for costs for children and family services, including for Indigenous CFS Agencies and Indigenous CFS Authorities (the "2010 Harmonized Operational Funding Model"). The result was an increase in funding by Canada and Manitoba for Operational Funding available to Indigenous CFS Agencies. (Manitoba Child and Family Services Funding – An Explanatory Guide, CSA Agreed Book of Documents, Tab 5)

[32] On March 18, 2011, Canada and Manitoba entered into a Memorandum of Understanding (the "2011 MOU") (CSA Agreed Book of Documents, Tab 6) regarding the integration of funding for First Nations Child and Family Services Agencies in Manitoba. It covered the period from October 1, 2010 to March 31, 2015. The parties confirmed

the commitment to a new model of funding for First Nation CFS Agencies in Manitoba in accordance with several principles, including the principle that governments should provide services for children in care in a manner that is reasonably comparable both on-Reserve and off-Reserve. The 2011 MOU specifies the guiding principles and describes each of the essential elements of the new funding model. The 2011 MOU does not specifically address the CSA Benefit.

Devolution

[33] The evidence filed refers to a process called "devolution" that was initiated through legislative amendments to the ***CFS Act*** in 2003. Devolution was implemented as a result of recommendations made by the Aboriginal Justice Inquiry-Child Welfare Initiative.

[34] Prior to devolution, Provincial Children received services under the ***CFS Act*** through CFS Agencies that provided services almost exclusively to children who were placed into care from a residence located off-Reserve.

[35] Children who were funded by Canada, were Federal Children who received services from First Nations CFS Agencies that provided services almost exclusively to children who were placed into care from a residence located on-Reserve. Although funded by Canada, the CFS Agencies were created pursuant to the ***CFS Act*** and provided services through agreements executed by Manitoba, Canada, and First Nations' organizations.

[36] Devolution recognized the need for culturally appropriate care to be provided to First Nation and Metis Children. As a result, the responsibility for providing services to provincially funded Indigenous Children in care shifted from Manitoba to independent statutory Child and Family Service Authorities ("CFS Authorities") and to Indigenous CFS Agencies. Devolution was accomplished through amendments to the ***CFS Act***, the

introduction of ***The Child and Family Services Authorities Act***, C.C.S.M. c. C90 ("***CFSA Act***") and a variety of agreements between the parties. (See the Memoranda of Understanding and Protocol Agreements between the Government of Manitoba, the Assembly of Manitoba Chiefs, the Manitoba Metis Federation, and Manitoba Keewatinowi Okimakanak (Agreed Book of Documents, Tabs 2 a - f))

[37] The determination of which CFS Authority provides services to a particular child is governed by the "Authority Determination Protocol". The geographic boundaries of the CFS Authorities are set by the Agencies Mandates Regulation 184/2003.

[38] During the devolution process, up to and including the 2005/2006 fiscal year, CFS Agencies providing services to provincially funded First Nations children in care were not required to remit CSA Benefits to Manitoba.

[39] On November 2, 2005, Mr. Peter Dubienski, on behalf of Manitoba Child and Family Services, wrote to Ms. Elsie Flette, Chief Executive Officer of First Nations of Southern Manitoba Child and Family Services Authority and Mr. Walter Spence, Interim Chief Executive Officer of First Nations of Northern Manitoba Child and Family Services Authority, advising of Manitoba's position regarding the Child Tax Benefit (which is a former reference to the CSA Benefit). His letter states in part as follows (see CSA Agreed Book of Documents, Tab 3):

> … I realize that it was your position that you should be allowed to retain the CTB as well as receive additional funding to rectify the under funding that you have experienced. We have discussed this previously and I informed you that the Department was not in a position to provide both. You informed me that if that was the case it was your preference that the under funding be rectified by way of a grant rather than partial retention of the CTB.
>
> I am writing to confirm the following commitment:
>
> - The Department has requested permission to substitute grant authority for the previous approval to retain a portion of the CTB.

- The Department will not require the First Nations Authorities to remit any portion of the CTB accrued in 2005/06. This arrangement is intended to address your concern regarding the agencies affected needing to make necessary program and accounting adjustments for 2006/07.

This additional funding provision satisfies the Department's commitment to recognize the issue regarding the equitable funding requirements for children who were a responsibility of the Province and transferred to First Nations Agencies prior to the AJI-CWI transfer process.

Should permission not be obtained for grant authority, we will discuss methods of allowing partial retention of the CTB in 2006/07.

[40] As at April 1, 2006, Manitoba directed CFS Agencies within the First Nations of Northern Manitoba Child and Family Services Authority and Southern First Nations Network of Care to remit to Manitoba the CSA Benefits the CFS Agencies applied for and received on behalf of provincially-funded children in their care.

[41] By letter dated July 6, 2006, Manitoba advised the CFS Authorities that effective April 1, 2006, all of the CSA Benefits received on behalf of children in care by the authorities were to be remitted by their mandated agencies payable to the Minister of Finance. The second paragraph of that letter states (see CSA Agreed Book of Documents, Tab 4):

> You will recall that the Province has provided the First Nations of Northern Manitoba Child and Family Services Authority and the First Nations of Southern Manitoba Child and Family Services authority the additional funding for a total amount of $4,800,000.00 in the 2006/07 fiscal year to provide equitable funding.

[42] Some CFS Agencies complied with Manitoba's demand, but many did not. Between April 1, 2006 and October 10, 2010, some CFS Agencies continued to refuse to remit CSA Benefits to Manitoba. Other CFS Agencies refused to remit CSA Benefits from time to time, but not on a consistent basis.

[43] Manitoba took the position that it was owed a debt by the CFS Agencies that failed to comply with the demand to remit CSA Benefits. Manitoba implemented a variety of measures to recover the CSA Benefits that were not paid by the CFS Agencies to Manitoba including:

a) after the 2010 Harmonized Operational Funding Model was put in place, Manitoba held back twenty percent of annual incremental increases in Operational Funding it provided the CFS Agencies if the CFS Agencies did not remit the full amount of the CSA Benefits between 2006 and 2012; and

b) commencing in 2013, and up to March 31, 2019, Manitoba held back an amount from Child Maintenance payments, based upon the estimated number of children in care.

(See Agreed Statement of Facts at paras. 86 to 89 and letter from Manitoba dated September 27, 2014, Agreed Book of Documents, Tab 8)

(the Manitoba action or policy of requiring CFS Agencies to remit CSA Benefits to Manitoba and the measures taken by Manitoba to holdback funding to recover the CSA Benefits during the funding period is hereinafter referred to as the "CSA Policy")

[44] For example, between fiscal years ending in 2006 and 2012, Metis Child, Family Community Services ("Metis CFCS") remitted all CSA Benefits to Manitoba. However, in fiscal year 2013/14, Metis CFCS refused to remit the CSA Benefits received for children in care. In response, Manitoba held back $3,200,000 from Child Maintenance funds due to the Metis CFCS from approved maintenance billings.

[45] In fiscal year 2012/13, Metis CFCS refused to remit the CSA Benefits to Manitoba. Manitoba did not hold back funds in that year respecting the CSA Benefits. Metis CFCS is holding approximately $5,000,000 in disputed CSA Benefits pending the outcome of this proceeding.

[46] The evidence establishes that Manitoba received the sum of $131,537,900 from Indigenous CFS Agencies remitting CSA Benefits during the period from January 1, 2005 to April 1, 2019. Manitoba made holdbacks in the amount of $28,225,000 from the Operational Funding model and $91,121,300 from holdbacks from funding for Child Maintenance costs. During the funding period, Manitoba made CSA recoveries totaling $334,231,734. The sum of $250,884,200 came from Indigenous CFS Agencies, including the applicant CFS Agencies. (See Agreed Book of Documents, Tab 24, as corrected by affidavit of Holly Stewart affirmed November 5, 2021; Agreed Statement of Facts at paras. 93 and 94)

The Auditor General's Reports

[47] The Auditor General of Manitoba ("Auditor General"), prepared two reports that were referenced by the parties in this proceeding. The Auditor General's 2006 report entitled "Audit of the CFS Division Pre-Devolution Child Care Process and Practices", dealt with the CFS funding model in place at that time. The Auditor General concluded, amongst other things, that the CFS funding model at that time did not ensure fair and equitable funding to CFS Agencies consistent with expected service.

[48] Manitoba acknowledged the conclusions made in the Auditor General's 2006 report, accepted the recommendations of the Auditor General, and advised that the

recommendations would complement and strengthen changes underway and planned by Manitoba.

[49] Manitoba sought to deal with the inequity in Operational Funding of CFS Agencies which led to the harmonized funding model as well as the principles referenced in the 2011 MOU. Manitoba and Canada cooperated to develop and implement the harmonized funding model.

[50] Manitoba is the only province that has a harmonized funding model with the Federal Government concerning Indigenous CFS Agencies. However, there is a difference between Manitoba and Canada with respect to CSA Benefits. Canada allows Indigenous CFS Agencies funding on-Reserve children in care to maintain the CSA Benefit for the children in care.

[51] A further report was prepared by the Auditor General in 2019 entitled "Management of Foster Homes – Independent Audit Report".

[52] One of the conclusions in the 2019 Auditor General's report is that the basic maintenance rates in Manitoba are either the lowest or the second lowest in Canada. Regarding the basic maintenance rates, the Auditor General states at p. 42, as follows:

> The basic maintenance rates were first developed prior to 1997 with increases occurring since on an ad hoc basis. The rates have not changed since October 1, 2012. Since then, inflation has occurred in Manitoba at an accumulated rate of 13.6% up to July 2019.
>
> Department, CFS Authority and agency officials expressed concerns that the basic maintenance rates do not adequately compensate foster parents for the costs of caring for children. This was noted by some officials as one of the key risks or challenges facing foster care. …

[53] The Auditor General recommended that CFS promptly, and regularly thereafter, review the basic maintenance rates to ensure the rates cover the costs incurred by foster parents and caregivers.

[54] The 2019 Auditor General's report also states at p. 43:

> Despite concerns that basic maintenance rates were too low, neither the Department, CFS Authorities nor agencies had done detailed analyses to assess the sufficiency of rates. …

[55] The Auditor General did not consider or comment on the CSA Benefit or Manitoba's CSA Policy in relation to the CSA Benefit including the requirement for CFS Agencies to remit the CSA Benefits to Manitoba during the funding period.

[56] Evidence was filed respecting the manner in which other provinces deal with the CSA Benefit. Alberta, Saskatchewan and British Columbia either use the CSA Benefit to directly offset the maintenance expenditures incurred, or divert it directly to general revenues. (See Affidavit of Meeka Kiersgaard, as Exhibit I, p. 2 of 3.)

[57] However, it is important to note that one of the unique differences in Manitoba as compared to the Child and Family Services systems in other provinces is that Manitoba operates under a devolved authority-based model. Thus, in Manitoba, there is a legal separation between the funder of the services (Manitoba) and the entity that delivers the services (the CFS Agencies, foster parents and other caregivers). Manitoba is the only province that had a harmonized funding model with the federal government during the funding period.

[58] Manitoba filed a number of affidavits including the affidavit of Andrew Lajeunesse, affirmed June 29, 2021. Mr. Lajeunesse is a comptroller within the Child and Youth Services Division of Department of Families within Manitoba. He provides extensive evidence regarding the governance of Child and Family Services, the funding of Child and Family Services, Government budgeting, reporting and appropriations, Child Maintenance funding provided by Manitoba, Child Maintenance funding provided to Winnipeg CFS and

rural and northern services, the CSA Benefit, financial reconciliation, the current model of funding and response to the affidavits of the moving parties.

[59] Mr. Lajeunesse was cross-examined on his affidavit on July 28,2021 and gave the following testimony regarding Manitoba's CSA Policy when an Indigenous child comes into care at questions 261-265:

> 261 Q Manitoba's policy means that when children come into care -- provincially-funded children come into care, it'll pay a little less than it would pay if there was no such thing as CSA.
>
> A It could be -- that could be the case.
>
> 262 Q And, however, the federal government, which has the same harmonized funding model and uses the same child maintenance guidelines -- correct --
>
> A Yes.
>
> 263 Q -- to both of those?
> A Yes.
>
> 264 Q -- allows the agencies to retain the CSA benefits. You're aware of that?
>
> A That's correct.
>
> 265 Q So to go back to that 10,268 children that are in care, April 1st, 2019, to the extent that those -- the children are federally-funded, it is a fact, then, that the federal government would pay more for those children's care than the Province would pay for provincially-funded children, correct?
>
> A Sorry, I'm just trying to think how to answer this. Child-specific -- one child at a time, yes.

Issues

[60] Each of the parties lists the common issues to be determined in a slightly different manner. In my view, the common issues to be determined are as follows:

a) Was the CSA Policy implemented by Manitoba during the funding period, and enacting s. 231 of ***BITSA*** in violation of Manitoba's constitutional

jurisdiction having regard to ss. 91 and 92 of the ***Constitution Act***, 1867 (the "***Constitution***")?

b) If the ***CSA Act*** and s. 231 of ***BITSA*** are both valid legislation, is s. 231 of ***BITSA*** rendered inoperative by the doctrine of federal paramountcy?

c) Does s. 231 of ***BITSA*** in whole or in part infringe on the core or inherent jurisdiction of the superior courts under s. 96 of the ***Constitution***?

d) Did the CSA Policy implemented by Manitoba during the funding period, and enacting s. 231 of ***BITSA*** in whole or in part unjustifiably infringe s. 12 or s. 15 of the ***Charter***?

e) If s. 231 of ***BITSA*** violates the ***Charter***, is it saved by s. 1 of the ***Charter***?

f) Did enacting s. 231 of ***BITSA*** in whole or in part violate the rule of law?

g) Did the CSA Policy implemented by Manitoba during the funding period, and enacting s. 231 of ***BITSA*** in whole or in part breach the honour of the Crown, including any fiduciary duty owed by the Crown?

h) If the answer to issues (a) to (d), (f) and (g), in whole or in part, is yes, and the answer to issue (e) is no, what is the appropriate remedy?

Constitutional Challenges (Background)

[61] Before addressing each of the issues outlined above, some context respecting the constitutional challenges is required. I agree with Manitoba that the moving parties rely on several principle categories of constitutional arguments. First, the moving parties submit that the provincial legislature exceeded the constitutional division of powers in ss. 91 and 92 of the ***Constitution*** by enacting s. 231 of ***BITSA***.

[62] If the moving parties are wrong on the first question and the court finds there are two valid laws (s. 231 of ***BITSA*** and the ***CSA Act***) the plaintiffs and the Animikii applicants submit there is a conflict or operational incompatibility between the two Acts, and the doctrine of "paramountcy" applies.

[63] The second principle category of constitutional argument raised is that s. 231 of ***BITSA*** infringes on the core or inherent jurisdiction of superior courts under s. 96 of the ***Constitution***.

[64] The third constitutional challenge relates to alleged violations of ss. 12 and 15 of the ***Charter***.

[65] Finally, the moving parties submit that s. 231 of ***BITSA*** breaches the rule of law and the honour of the Crown, including a fiduciary duty they submit is owed by Manitoba.

[66] I agree with Manitoba that each constitutional question requires its own consideration, according to its own established principles. If the court accepts that the legislation is in breach of the ***Constitution***, then each breach may engage distinct questions of appropriate remedies. For example, the court may consider striking down or reading down some or all of the statutory provisions enacted by Manitoba. With potential ***Charter*** breaches, the potential range of outcomes is different and arguably broader. With this background in mind, I now move to a consideration of the issues.

Issue (a) - Was the CSA Policy implemented by Manitoba during the funding period, and enacting s. 231 of *BITSA* in violation of Manitoba's constitutional jurisdiction having

regard to ss. 91 and 92 of the *Constitution Act*, 1867 (the "*Constitution*")?

[67] The first step in the analysis is to determine whether the impugned law falls within the authority of parliament or a provincial legislature or both. The court must first characterize the law and then, based on that characterization, classify the law by reference to federal and provincial heads of power under the ***Constitution*** (***Reference re pan-Canadian securities regulation***, 2018 SCC 48, [2018] 3 S.C.R. 189 (QL) at para. 86, and ***Reference re Genetic Non-Discrimination Act***, *supra*, at para. 26).

[68] As stated earlier, I must identify the pith and substance of s. 231 of ***BITSA*** as precisely as possible examining the law's purpose and effects.

[69] In their amended joint brief, the plaintiffs and Animikii applicants submit the purpose of s. 231 of ***BITSA*** is "to provide statutory authority for its past practice of mixing federal funds dedicated exclusively to the care of children with Manitoba's other revenues in its consolidated fund." In its brief, AMC describes the pith and substance of s. 231 as follows:

> 253. In pith and substance, s. 231 seeks to intervene in the federal Crown's efforts to promote the well-being of First Nations by providing enhanced supports and resources to First Nations children in care.
>
> 254. On its face, s. 231 has two objects at its core. The first of these is to enable Manitoba to retain for general purposes CSA funds intended for the care and maintenance of First Nations children and youth. As described above, with respect to this first purpose s. 231 treats CSA funds as a contribution, rather than an addition, to provincial funding amounts and deems all excess funds received as debts owed to Manitoba.
>
> 255. Due, however, to the overrepresentation of First Nations children in care, this first purpose disproportionately impacts First Nations children.
>
> 256. The second purpose of s. 231 is to prevent the legal remedying of the detrimental effects on the well-being of First Nations children of Manitoba's actions during the funding period. This is achieved by subsections (8) through (15), which

> retroactively establish maintenance rates for children in care and bar all legal claims related to their implications.

[70] Manitoba submits that s. 231 of ***BITSA*** operates within the realm of child protection and welfare. Manitoba relies upon the definition of "agency" and "authority" as having the same meaning of those terms within the ***CFS Act***, under which CFS Agencies are assigned to perform broad categories of crucial functions under three different parts of the ***CFS Act*** (Part II "Services to Families"; Part III "Child Protection"; and, Part IV "Children in Care").

[71] Manitoba disputes the characterizations provided by the moving parties and submits that they have used the incorrect analytical approach. Manitoba submits that s. 231 is in pith and substance about the provincial side of the funding framework for children in care. Manitoba submits that the purpose of s. 231 of ***BITSA*** is during the "funding period" provincial funding levels to CFS Agencies was reduced by an amount equivalent to the CSA Benefits. In addition, Manitoba submits that subsections 231(8) to 231(15) of ***BITSA*** deal with the private law implications that flow from the operation of subsections 231(3) to 231(7) of ***BITSA***.

[72] I start my analysis of the pith and substance of s. 231 of ***BITSA*** by reviewing s. 231(2), which includes a purpose as follows:

> **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").

[73] The 2019 Manitoba budget document explains the purpose of s. 231 as follows:

> In 2005, the previous government required First Nations and Metis agencies providing mandated services off reserve to apply for the federal Children's Special

> Allowance (CSA) for provincially funded children. At the same time, a practice was adopted that had the effect of reducing provincial child maintenance funding by an equivalent amount. CSA is the equivalent of the Canada Child Benefit that is provided to a parent/legal guardian of a child under the age of 18. In 2011, the previous government re-developed the funding model for the CFS Agencies, in collaboration with the Authorities and the Government of Canada. Under that revised model, the CSA continued to offset child maintenance funding provided by the province.
>
> This approach to the CSA has for many years been a contentious issue with First Nations and Metis CFS agencies. Commencing in Budget 2019, CFS agencies will retain the CSA to support the needs of children in their care. Agencies will retain approximately $33 million in CSA funding, and Manitoba will no longer budget for the revenue or expenditures associated with the CSA. The net decrease of $(15) million printed in this year's budget for Child and Family Services is a result of Agencies no longer retaining the CSA, not a reduction in funding. The net impact will be neutral for CFS agencies and the province, but will significantly reduce red tape and resolve a long standing disagreement.
>
> Budget 2019 includes other funding adjustments to support the Authorities' implementation of block funding, as well as an amendment to statutorily formalize the practice from 2005. Manitoba will provide all three components of CFS funding to the Authorities who in turn will allocate it among their agencies. All agencies will have the flexibility to use this funding to enhance prevention and reinvest any savings into areas of need.

(See Manitoba, *Getting the Job Done Budget 2019, Fiscally Responsible Outcomes and Economic Growth Strategy at p. 23 and 24.*)

[74] At the second reading of Bill 2, the Honourable Scott Fielding (Minister of Finance) addressed the purpose of ***BITSA***:

> The previous administration's funding policy required that CFS agencies remit the CSA received by them to all children deemed to be in provincial care. Amendments to the legislation are required to deem the past collections of the CSA as being part of the rates for services set by the minister and to address any issues associated with the collection of the CSA in previous years.

(See Manitoba Legislative Assembly, *Hansard*, 42nd Leg, 3rd Sess, No 6 (15 October 2020) at 202)

[75] In my view, these references make it clear that the purpose of s. 231 in ***BITSA*** is to address the government's actions concerning the CSA Benefits that CFS Agencies received or were eligible to receive for children in their care during the funding period.

[76] The legal effect of s. 231 of ***BITSA*** is clear. Using the deeming provisions, it retroactively creates an overpayment or debt owed by the CFS Agencies in respect of the CSA Benefits. Section 231 of ***BITSA***:

a) sets "rates payable for services" (s. 231(4));

b) states that funding received by CFS Agencies in excess of these rates is an "overpayment" (s. 231(6));

c) states that Manitoba's actions of setting off CSA Benefits and enforcing the remittance of CSA Benefits are to recover the "overpayment" (s. 231(7)); and,

d) eliminates, dismisses and bars any cause of action arising from Manitoba's actions or policies (s. 231(8)-231(15)).

[77] In effect, the deeming provisions of s. 231 create legal consequences for acts previously done by Manitoba, namely: implementing the CSA Policy.

[78] The actions were a combination of letters and actions of Manitoba during the funding period which required CFS Agencies to remit the CSA Benefits they received for children in care to Manitoba. Section 231 of ***BITSA*** in effect says that the actions during that period were lawful and that Manitoba reduced provincial funding to CFS Agencies by amounts equivalent to the CSA Benefit.

[79] Step two of the analysis requires the court to classify the law by reference to the federal and provincial heads of power under the ***Constitution***.

[80] Manitoba submits that s. 231 of ***BITSA*** falls within the provincial sphere of legislative competence relying on s. 92(13) and "Property and Civil Rights in the Province" and s. 92(16) "Generally all Matters of a merely local or private Nature in the Province".

[81] The plaintiffs and Animikii applicants submit that s. 231 is in pith and substance a statute in relation to the federal spending power and that Parliament has exclusive power to spend its own money and impose conditions or restrictions on the disposition of such funds. The moving parties rely upon s. 91(1A) of the ***Constitution*** and submit that the Parliament of Canada has power to legislate in relation to its own debt and property. Parliament exercised that power by passing the ***CSA Act*** which provides the CSA Benefit subject to conditions. Manitoba enacted ***BITSA*** to undermine and change the conditions placed by Parliament on the CSA Benefit. Specifically, they submit that ***BITSA*** provides a statutory basis for compelling Indigenous CFS Agencies to apply for the CSA Benefit and then require those Indigenous CFS Agencies to redirect those monies into Manitoba's consolidated fund. Therefore, they submit that the legislation is in relation to "the public debt or property" under s. 91(1A) of the ***Constitution***. Manitoba has no jurisdiction to eliminate the federally-created rights which are rights outside its jurisdiction.

[82] AMC submits that s. 231 is a law that falls properly under s. 91(24) of the ***Constitution***. AMC acknowledges that the provision of Child and Family Services is a provincial undertaking. However, AMC submits that s. 231 in pith and substance is not about the operation of the Child and Family Services system, but predominantly addresses and impacts the rights and interests of First Nations Children who were in care during the funding period. AMC submits that s. 231 interferes directly in the relationship between the Crown and First Nations. It asserts control over the federal government's provision

of care and support to First Nations, and by directly impairing opportunities for First Nations' children in care. Accordingly, AMC submits that s. 231 falls under the head of power granted by s. 91(24) of the ***Constitution*** and is *ultra vires* Manitoba.

[83] In classifying the law, it is important to recall, based on the evidence, that child protection and welfare is funded by the two levels of government: provincial and federal. Generally, Canada provides funding for on-Reserve children in care and federal funding includes the CSA Benefit.

[84] I agree with Manitoba that neither of the two governments is the exclusive funder of the system of child protection and welfare. Both levels of government provide funding to the same CFS Agencies and there is no dispute that each legislative body is sovereign over its own budgetary expense decisions. Section 231 of ***BITSA***, in my view, addresses the manner in which Manitoba funds child welfare and protection in Manitoba taking into account funding provided by Canada, namely the CSA Benefit. The subject matter of s. 231 falls within the provincial sphere of legislative competence pursuant to ss. 92(13) and 92(16) of the ***Constitution***.

[85] There is no dispute that Canada has exclusive jurisdiction in relation to First Nations pursuant to s. 91(24) of the ***Constitution***. I disagree with the submission advanced by AMC that s. 231 targets matters clearly within the ambit of s. 91(24) of the ***Constitution***. I certainly agree that Canada has obligations to First Nations, but I disagree that in pith and substance s. 231 is legislation that infringes s. 91(24) of the ***Constitution***.

[86] Child protection and welfare is not expressly delineated in the ***Constitution***. Neither are families or children or family law. However, child protection and families have

been considered provincial spheres of legislative competence for many years and certainly since at least the Supreme Court of Canada decision in ***Reference re: Adoption Act (Ontario)***, 1938 S.C.R. 398 (QL).

[87] One of the leading authorities in constitutional law, Peter W. Hogg, *Constitutional Law of Canada*, 5th ed (Scarborough, ON: Thompson Carswell, 2007) at 27:1, in his text, states:

> … Most provincial power over family law is derived from that expansive phrase in s. 92(13), "property and civil rights in the province", which encompasses property and contract law and other private-law relations, including, for example, matrimonial property, succession, support of spouses and children, adoption, guardianship, custody, legitimacy, affiliation and names.

(See also para. 27:6 and ***British Columbia (Attorney General) v. Smith***, [1967] S.C.R. 702 (S.C.C.))

[88] The decision of ***NIL/TU,O Child and Family Services Society v. British Columbia Government and Service Employees Union***, 2010 SCC 45, [2010] 2 S.C.R. 696, addressed child welfare services provided to certain First Nations children and families in British Columbia. In that case a submission was advanced on the ground that s. 91(24) of the ***Constitution*** applied because the services were designed for First Nations' children and families. The court had to determine whether a child and family services agency which provided child welfare services to certain First Nations children and families in British Columbia should be regulated under Federal or Provincial labour legislation. The Supreme Court of Canada held as follows:

> [37] NIL/TU,O argues that this distinctively Aboriginal component of its service delivery methodology alters the nature of its operations and activities such that it is a federal undertaking, service or business for the purpose of allocating labour relations jurisdiction. In my view, it does not.

> [38] Provincial competence over child welfare is exercised in British Columbia through the *Child, Family and Community Service Act*, and NIL/TU,O's operations are wholly regulated by it. NIL/TU,O is a fully integrated part of this provincial regulatory regime, pursuant to authority that is delegated, circumscribed and supervised by provincial officials. As an organization, it is directly subject to the province's oversight, and NIL/TU,O's employees are directly accountable to the provincial directors, who are empowered to intervene when necessary to ensure statutory compliance. Provincial child welfare workers are, in fact, required to step in when one of NIL/TU,O's cases involves child protection issues since NIL/TU,O's employees are not authorized to provide protection services. Moreover, NIL/TU,O's Constitution and the 2004 Agreement recognize the Act as the statutory authority governing the Society's primary task, namely providing statutory child welfare services. When fulfilling this task, NIL/TU,O must always operate with the Act's two paramount considerations in mind - the safety and well-being of children - and must always comply with the Act as a whole. The province, therefore, retains ultimate decision-making control over NIL/TU,O's operations.
>
> [39] None of this detracts from NIL/TU,O's distinct character as a child welfare organization for Aboriginal communities. But the fact that it serves these communities cannot take away from its essential character as a child welfare agency that is in all respects regulated by the province. Neither the cultural identity of NIL/TU,O's clients and employees, nor its mandate to provide culturally-appropriate services to Aboriginal clients, displaces the operating presumption that labour relations are provincially regulated. As the Court of Appeal pointed out, social services must, in order to be effective, be geared to the target clientele. This attempt to provide meaningful services to a particular community, however, cannot oust primary provincial jurisdiction over the service providers' labour relations. NIL/TU,O's function is unquestionably a provincial one.
>
> . . . . .
>
> [45] The essential nature of NIL/TU,O's operation is to provide child and family services, a matter within the provincial sphere. Neither the presence of federal funding, nor the fact that NIL/TU,O's services are provided in a culturally sensitive manner, in my respectful view, displaces the overridingly provincial nature of this entity. The community for whom NIL/TU,O operates as a child welfare agency does not change *what* it does, namely, deliver child welfare services. The designated beneficiaries may and undoubtedly should affect how those services are delivered, but they do not change the fact that the delivery of child welfare services, a provincial undertaking, is what it essentially does.

[89] The same reasoning applies to this case. The CFS Agencies are delivering child welfare and protection services to children in care and those services are regulated by the Manitoba. Section 231, and the fact that there is federal funding, do not change that.

[90] In ***N. v. F.***, 2021 ONCA 614, 158 O.R. (3d) 481 (QL), the Ontario Court of Appeal stated the principle as follows:

> **153** Under Canadian jurisprudence, the constitutional authority to legislate with respect to child custody and welfare (save for corollary relief orders under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.)) is firmly anchored in the provinces, particularly the provincial legislative power under s. 92(13) of the *Constitution Act, 1867* regarding "property and civil rights in the province": Hogg, at [section]27.5(a); *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 S.C.R. 696, at para. 45; *R. v. S. (S.)*, at p. 279.

[91] The sad reality is that Indigenous children are overrepresented in the child welfare system. That fact, however, does not mean that the child welfare system becomes a matter of exclusive federal legislative jurisdiction pursuant to s. 91(24) of the ***Constitution***.

[92] I also disagree with the submission made by the plaintiffs and Animikii applicants that s. 231 of ***BITSA*** encroaches on or infringes Parliament's exclusive power under s. 91(1A) to legislate in relation to its own debt and property. I agree that Parliament has the power to pass the ***CSA Act***, and provide the CSA Benefit to CFS Agencies subject to certain conditions. Manitoba, as well, has the jurisdiction to enact legislation that deals with the provincial component of funding the child protection and welfare system during the funding period. By passing s. 231 of ***BITSA*** the provincial legislature determined that the level of provincial funding during that period was to be adjusted by the CSA Benefit provided under the ***CSA Act***.

[93] It is trite to say that a provincial government has authority and responsibility to determine provincial expenditures from the provincial treasury. That process is regulated in Manitoba pursuant to the ***Financial Administration Act***, R.S.C., 1985, c. F-11, and annual public expenses are approved under annual appropriation acts.

[94] In ***Lovelace v. Ontario***, 2000 SCC 37, [2000] 1 S.C.R. 950 (QL), the Supreme Court of Canada had to consider issues relating to Ontario entering into casino revenue sharing arrangements that was extended to only First Nations entities, but not to other Indigenous groups. The court addressed the provincial spending power as follows:

> **111** In my opinion there is nothing in the casino program affecting the core of the s. 91(24) federal jurisdiction. The Ontario government is simply using the definition of band found in the federal Indian Act. The province has done nothing to impair the status or capacity of the appellants as aboriginal peoples. Furthermore, in Pamajewon, supra, this Court found that gambling, or the regulation of gambling activities, is not an aboriginal right. Consequently, this casino program cannot have the effect of violating the rights affirmed by s. 35(1) of the Constitution Act, 1982, and does not approach the core of aboriginality. I agree with the Ontario Court of Appeal, therefore, that the casino program falls within the provincial spending power, and the province did not act in any way to encroach upon federal jurisdiction.

[95] The same rationale applies in this case. The CSA Benefit provided pursuant to the ***CSA Act*** is not an Aboriginal right. While I agree ***BITSA*** impacts Indigenous children in care because there are a high percentage of children in care of Indigenous background, ***BITSA*** does not have the effect of violating the rights affirmed by s. 35(1) of the ***Constitution***, and does not encroach the core of Aboriginality. In my view, s. 231 of ***BITSA*** falls within the provincial spending power.

[96] I am satisfied that s. 231 of ***BITSA*** is a valid exercise of provincial legislative competence. The legislation addresses the provincial expense of the child protection and welfare system, which is a matter of provincial legislative competence pursuant to s. 92(13) of the ***Constitution***.

[97] The second part of s. 231 of ***BITSA*** (ss. 231(8) to (15)) address the private law civil implications that Manitoba submits flow incidentally from the funding aspects of ss. 231((3) to (7). The next question to consider is whether these provisions are within

the constitutional competence of Manitoba to enact. Manitoba submits that the private law civil implications are ancillary and incidental to the core aspects of ss. 231(3) to (7). Further, Manitoba submits that the legislation is a valid exercise of provincial legislative competence under s. 92(13), property and civil rights.

[98] Since ***Wells v. Newfoundland***, [1999] 3 S.C.R. 199 (QL), the Supreme Court of Canada has held that a provincial legislature can extinguish rights to compensation provided that clear and express language is used (see also ***British Columbia v. Imperial Tobacco Canada Ltd.***, 2005 SCC 49, [2005] 2 S.C.R. 473; ***Authorson v. Canada (Attorney General)***, 2003 SCC 39, [2003] 2 S.C.R. 40; ***Re Canada Assistance Plan (B.C.)***, [1991] 2 S.C.R. 525 (S.C.C.) (QL)).

[99] In ***Wells***, the court cited the following from a leading text on constitutional law of Professor P.W. Hogg, *Liability of the Crown* (2nd ed. 1989):

> **48** The principled restriction on the Crown's ability to breach contractual obligations without consequence was endorsed by Professor P. W. Hogg, in Liability of the Crown (2nd ed. 1989), at pp. 171-72, where he wrote:
>
> > I acknowledge the possibility that, on rare occasions, the Crown may feel compelled by considerations of public policy to break a contractual undertaking. If there were no doctrines of executive necessity, the ordinary law of contract would apply, and would require the Crown to negotiate with the other party for a variation or release, or to pay damages for its breach of contract. That is surely the right result. It provides compensation for the injured contractor. It requires the public purse to bear the cost of the change of public policy.
> >
> > It is conceivable that a case might arise where the government cannot accept the decision of a court holding the Crown liable for breach of contract. For example, a court might award damages that were so high as to place an intolerable cost on a desired public policy. The solution to this case is legislation. The Parliament or Legislature has the power to cancel a contract, and this power is not limited by any obligation to pay compensation. Similarly, judicial decisions can be retroactively reversed or modified. The Canadian Charter of Rights does not provide any general protection for

> private property or any general prohibition on retroactive laws. Through legislation, therefore, the will of the community can be made to prevail over private contract rights. That is the ultimate safeguard of public policy.

[100] The bottom line is that Manitoba has the constitutional right to pass legislation that takes away causes of action and rights to compensation if it does so in clear and express language. The language of ***BITSA*** is clear. The interpretation of similar provisions within ***BITSA*** was recently addressed by this court in ***5185603 Manitoba Ltd. et al. v. The Government of Manitoba***, 2022 MBQB 36, [2022] M.J. No. 69 (QL), in which the court heard appeals from a master's decision to strike a portion of the plaintiff's statement of claim. That case addressed s. 230(9) of ***BITSA***. Section 230 of ***BITSA*** dealt with "800 Adele Avenue lease termination". The court summarized the provisions of s. 230 of ***BITSA*** as follows:

> **16** … However, by way of summary: s. 230(3) terminates the Lease Agreement; s. 230(4) prevents s. 230 from being used as the basis for a cause of action; s. 230(5) eliminates any remedy to any person in connection with the application of s. 230; s. 230(6) bars any proceedings directly or indirectly based on or related to the application of s. 230; and s. 230(9) deems the plaintiffs' action to have been dismissed without costs on the day the section comes into force.

[101] This court followed the principle outlined in ***Wells*** and stated:

> **35** The Supreme Court of Canada had occasion to consider this issue in *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, [1000] S.C.J. No. 50 (QL). That case dealt with the interpretation of legislation enacted by the Government of Newfoundland to restructure the province's Public Utilities Board. Among other things, the legislation eliminated the plaintiff's position as a Board commissioner, but was silent as to whether he was entitled to be compensated for the termination of his employment. Major J., for a unanimous court, wrote at para. 41:
>
> > At the cost of repetition, there is no question that the Government of Newfoundland had the authority to restructure or eliminate the Board. There is a crucial distinction, however, between the Crown legislatively avoiding a contract, and altogether escaping the legal consequences of doing so. While the legislature may have the extraordinary power of passing a law to specifically deny

> compensation to an aggrieved individual with whom it has broken an agreement, clear and explicit statutory language would be required to extinguish the existing rights previously conferred on that party. ...
>
> **36** The need for clear and explicit statutory language to extinguish an individual's existing rights is a necessary consequence of Canada's commitment to the rule of law, Major J. continued at para. 46:
>
> > In a nation governed by the rule of law, we assume that the government will honour its obligations unless it explicitly exercises its power not to. In the absence of a clear express intent to abrogate rights and obligations - rights of the highest importance to the individual - those rights remain in force. To argue the opposite is to say that the government is bound only by its whim, not its word. In Canada this is unacceptable, and does not accord with the nation's understanding of the relationship between the state and its citizens.

[102] The ***5185603 Manitoba Ltd.*** case was about the proper interpretation of s. 230 of ***BITSA***. After reviewing the principles of statute interpretation, the court stated:

> **51** In summary, in this action the plaintiffs allege the Government, by its officers, unlawfully interfered in the plaintiffs' operation of the Lease Agreement, defamed them in the process, threatened to enact and apply legislation which would deprive them of any compensation, and thereby caused them damages. Instead of defending the plaintiffs' action on its merits, the Government used its extraordinary power to enact legislation, s. 230(9) of ***BITSA***, which expresses in clear and unambiguous terms that the action is deemed to have been dismissed on the day the section came into force, November 6, 2020. The Government is under no legal obligation to justify its use of this extraordinary power even where, as here, it is used to abrogate the plaintiffs' important right to seek a determination of their properly pleaded action. The legislative intent of s. 230(9), particularly considered in the context of s. 230 as a whole, is clear. The authorities to which I have referred require this court to respect and give effect to that legislative intent.

[103] The same principles apply to the proper interpretation of ss. 231(8) to (15). Manitoba exercised its extraordinary power to extinguish causes of action and the right to seek compensation or damages from Manitoba in connection with the application of s. 231. Manitoba specifically stated in s. 231(13) that all such actions commenced before

BITSA came into force are deemed to have been dismissed, without costs, including Queen's Bench Files Nos. CI 18-01-14043 and CI 18-01-18438.

[104] I accept that such legislation is extraordinary. ***BITSA*** expresses in clear and unambiguous terms that all such actions are deemed to be dismissed. Applying the principles noted above, I am satisfied s. 231 of ***BITSA*** is within the constitutional power of Manitoba to enact.

[105] The moving parties did not advance the position that the language of ss. 231(8) to (15) was ambiguous. Instead, the moving parties challenged the constitutional validity of s. 231 on numerous grounds, including that the subsections extinguishing or dismissing causes of action infringe s. 96 of the ***Constitution***. That issue will be addressed below. It is also important to note that just because Manitoba had the jurisdiction to enact s. 231 of ***BITSA*** does not mean that it is valid legislation. Each constitutional ground challenging the legislation must be reviewed before that determination can be made.

[106] In my view, the operational and deeming provisions of ***BITSA*** (ss. 231(1) - 231(7)) and the barring provisions of ***BITSA*** (ss. 231(8) - (15)) are inextricably bound with each other. The constitutionality of the barring provisions depends on the constitutionality of the operational and deeming provisions. If Manitoba does not have authority to require CFS Agencies to implement the CSA Policy and pass legislation to make that policy law, Manitoba can not take away or bar the right to sue as a result of the CSA Policy and the enactment of s. 231 of ***BITSA***. If Manitoba does have the authority to enact the operational and deeming provisions, Manitoba can take away or bar the right to sue if it is done in clear and unambiguous terms.

Issue (b) - If the *CSA Act* and s. 231 of *BITSA* are both valid legislation, is s. 231 of *BITSA* rendered inoperative by the doctrine of federal paramountcy?

[107] The plaintiffs and the Animikii applicants submit, in the alternative, that if the court finds that ***BITSA*** is within the Province's legislative authority, it is nonetheless rendered inoperative by the doctrine of federal paramountcy. These parties submit that there is a conflict between s. 231 of ***BITSA*** and the federal ***CSA Act*** such that there is operational conflict or a frustration of the purpose of the federal legislation. Accordingly, they submit that the federal legislation must prevail. AMC did not advance a submission regarding paramountcy. AMC submitted that ***BITSA*** s. 231 is invalid on other grounds.

[108] Since I have found that the federal legislation and ***BITSA*** are both valid legislation, I must determine whether there is a conflict between the two pieces of legislation and whether the doctrine or paramountcy applies.

[109] The test for paramountcy is set out by the Supreme Court of Canada in ***Alberta (Attorney General) v. Moloney***, 2015 SCC 51, [2015] 3 S.C.R. 327 (QL), as follows:

> **17** First and foremost, it is necessary to ensure that the overlapping federal and provincial laws are independently valid: *Western Bank*, at para. 76; *Husky Oil*, at para. 87. This means determining the pith and substance of the impugned provisions by looking at their purpose and effect: *Western Bank*, at para. 27; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at para. 16. Once a provision's true purpose is identified, its validity will depend on whether it falls within the powers of the enacting government: *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113, at para. 24. If the legislation of one level of government is invalid, no conflict can ever arise, which puts an end to the inquiry. If both laws are independently valid, however, the court must determine whether their concurrent operation results in a conflict.

[110] Further, in ***Moloney***, the Supreme Court of Canada summarized the test and provides an overview of its application:

> **18** A conflict is said to arise in one of two situations, which form the two branches of the paramountcy test: (1) there is an operational conflict because it is impossible to comply with both laws, or (2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment.
>
> . . . . .
>
> **25** If there is no conflict under the first branch of the test, one may still be found under the second branch. In *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, the Court formulated what is now considered to be the second branch of the test. It framed the question as being "whether operation of the provincial Act is compatible with the federal legislative purpose" (p. 155). In other words, the effect of the provincial law may frustrate the purpose of the federal law, even though it does "not entail a direct violation of the federal law's provisions": *Western Bank*, at para. 73.
>
> **26** That said, the case law assists in identifying typical situations where overlapping legislation will not lead to a conflict. For instance, duplicative federal and provincial provisions will generally not conflict: *Bank of Montreal v. Marcotte*, 2014 SCC 55, [2014] 2 S.C.R. 725, at para. 80; *Western Bank*, at para. 72; *Multiple Access*, at p. 190; *Hall*, at p. 151. Nor will a conflict arise where a provincial law is more restrictive than a federal law: *Lemare Lake*, at para. 25; *Marine Services*, at paras. 76 and 84; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536 ("*COPA*"), at paras. 67 and 74; *Western Bank*, at para. 103; *Rothmans*, at paras. 18 ff.; *Spraytech*, at para. 35; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 964. The application of a more [page349] restrictive provincial law may, however, frustrate the federal purpose if the federal law, instead of being merely permissive, provides for a positive entitlement: *Quebec (Attorney General) v. Canada (Human Resources and Social Development)*, 2011 SCC 60, [2011] 3 S.C.R. 635, at paras. 32-33 and 36; *Lafarge*, at paras. 84-85; *Mangat*, at para. 72; *Hall*, at p. 153. As will become evident from the discussion below, this appeal involves two laws that directly contradict each other, rather than a provincial law which does not fully contradict the federal one, but is only more restrictive than it: see *M & D Farm*; *Clarke v. Clarke*, [1990] 2 S.C.R. 795.

[111] It must also be understood that the burden of proof rests on the party alleging the conflict and the standard is high as explained in ***Moloney***:

> **27** Be it under the first or the second branch, the burden of proof rests on the party alleging the conflict. Discharging that burden is not an easy task, and the standard is always high. In keeping with co-operative federalism, the doctrine of paramountcy is applied with restraint. It is presumed that Parliament intends its laws to co-exist with provincial laws. Absent a genuine inconsistency, courts will favour an interpretation of the federal legislation that allows the concurrent operation of both laws: *Western Bank*, at paras. 74-75, citing *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 ("*Law Society of B.C.*"), at p. 356; see also *Rothmans*, at para. 21; *O'Grady v. Sparling*, [1960]

> S.C.R. 804, at pp. 811 and 820. Conflict must be defined narrowly, so that each level of government may act as freely as possible within its respective sphere of authority: *Husky Oil*, at para. 162, per Iacobucci J. (dissenting, but not on this particular point), referring to *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785, at pp. 807-8, per Wilson J.

[112] The plaintiffs and the Animikii applicants submit that s. 231 of ***BITSA*** is incompatible with the ***CSA Act*** because:

a) section 231 creates an operational conflict as it is impossible for the CFS Agencies to comply with both ***BITSA*** and the ***CSA Act***; and,

b) the operation of ***BITSA*** frustrates the purpose of the ***CSA Act***.

[113] Manitoba submits that it is difficult to see how there is any operational conflict between ***BITSA*** and the ***CSA Act***. Manitoba submits that there are two streams of funding provided to CFS Agencies, one provincial and one federal. ***BITSA*** s. 231 addresses the provincial stream of funding.

[114] The plaintiffs and the Animikii applicants submit that the purpose of the ***CSA Act*** is to designate funds for specific children and match the CCB. Section 3(2) of the ***CSA Act*** states that the CSA Benefits "shall be applied exclusively toward the ... child in respect of whom it is paid." Once an application has been approved, the CSA Benefit is paid to the department, agency or institution that maintains the child or to a foster parent.

[115] The plaintiffs and the Animikii applicants submit that ***BITSA*** s. 231 frustrates the objectives of the ***CSA Act*** by validating Manitoba's past practice of requiring CFS Agencies to remit CSA Benefits designated by Parliament for specific children into Manitoba's consolidated fund. Thus, the children in care that qualify for CSA Benefits are no longer matched with children who are not in care who receive the CCB and the children in care are no longer designated to receive the federal CSA Benefits. The moving parties submit

that s. 231 frustrates the designating objective and the matching objective of the ***CSA Act***.

[116] I agree with the submission of the plaintiffs and the Animikii applicants. Section 231 of ***BITSA*** retroactively makes law the CSA Policy prescribing what CFS Agencies must do with the CSA Benefit. The ***CSA Act*** states that the CSA Benefit is to be used exclusively toward the care, maintenance, education, training or advancement of the child in respect of whom it is paid. The clear purpose and intent of the ***CSA Act*** is to direct how the CSA Benefit is to be used and to ensure that the CSA Benefit matches the CCB, the federal funding provided to children not in care. In my view, there is an operational conflict as described in para. 18 of ***Moloney*** in the sense that a CFS Agency, group home or foster parent that applies for the CSA Benefit is being told by two different statutes passed by two different levels of government to do inconsistent things with the CSA Benefit.

[117] In my view, since there are two levels of funding, I agree that the province can take into account the CSA Benefits in setting the amount of provincial funding. However, the CSA Policy required the CFS Agencies to remit the CSA Benefit to Manitoba and therefore required the CFS Agencies to take steps that were in direct contravention to the clear intention regarding the use of the CSA Benefit in s. 3(2) of the ***CSA Act***. The CSA Policy and s. 231 of ***BITSA*** do more than simple accounting in relation to provincial funding. Further, the CSA Policy undermines the 2010 Harmonized Operational Funding Model and the funding principles outlined in the 2011 MOU.

[118] As to the second branch of the paramountcy test, I agree with the plaintiffs and the Animikii applicants that the effect of the CSA Policy and s. 231 of ***BITSA*** frustrate and undermine the purpose of the federal law.

[119] The purpose of the ***CSA Act*** is to provide a special allowance for children in care to match the CCB provided directly to parents of children not in care. Contrary to the submission of Manitoba, evidence was filed to support the position advanced by the plaintiffs and Animikii applicants that CFS Agencies were unable to use the CSA Benefits in accordance with s. 3(2) of the ***CSA Act*** as a result of Manitoba's CSA Policy and then the retroactive application of s. 231 of ***BITSA***.

[120] The actions of Manitoba requiring the CFS Agencies to remit the CSA Benefit to Manitoba creates the operational conflict because it prevents the CFS Agencies from complying with s. 3(2) of the ***CSA Act*** regarding the exclusive use directed under the federal legislation. Contrary to Manitoba's submissions, the CSA Policy and the provisions of s. 231 do not just reduce provincial funding by the CSA Benefit. To the extent that ***BITSA*** does reduce provincial funding, I agree that such a provision is not inconsistent with or incompatible with the ***CSA Act***. Actions taken by Manitoba to reduce funding, for policy reasons by the amount of the CSA Benefit received by the CFS Agencies, is not inconsistent with the ***CSA Act***. However, the CSA Policy and provisions of ***BITSA*** that required CFS Agencies to remit CSA Benefits to Manitoba are inconsistent with the ***CSA Act*** and specifically the clear statutory requirement directing the exclusive use of the CSA Benefits in s. 3(2) of the ***CSA Act***.

[121] Legitimizing the process of requiring CSA Agencies to remit the CSA Benefits and retroactively describing that as an "overpayment" is in clear conflict with the objectives and requirements in the ***CSA Act***.

[122] Further, I am satisfied that s. 231 frustrates the objectives of the ***CSA Act*** by legitimizing the CSA Policy of requiring CFS Agencies to remit the CSA Benefits to Manitoba. In my view, the operation of s. 231 is incompatible with the objectives of the ***CSA Act*** and frustrates the purpose of s. 3(2) of the ***CSA Act***.

[123] Subsection 231(7) of ***BITSA*** deems that the actions taken by Manitoba are treated as the government's recovery of an overpayment it made. In my view, this subsection, deeming certain actions to be a recovery of an overpayment specifically in situations in which the CFS Agency remitted the CSA Benefits to Manitoba frustrates the purpose of the ***CSA Act*** requiring the CSA Benefits to be used exclusively for designated children.

[124] The clear purpose of the ***CSA Act*** is to provide federal funds to CFS Agencies and foster parents for children in care, in an amount that is consistent with the CCB provided to parents of children who are not in care. Section 3(2) of the ***CSA Act*** directs how the funds are to be used exclusively and in my view, Manitoba by its CSA Policy and through ***BITSA*** cannot interfere in the manner in which the federal funds are to be used.

[125] In contrast to the CSA Policy implemented by Manitoba, Canada required the Indigenous CFS Agencies to comply with the requirements of the ***CSA Act***. Canada never required Indigenous CFS Agencies to remit the CSA Benefit to Canada.

[126] Prior to 2005, Manitoba also did not require CFS Agencies to remit the CSA Benefit to Manitoba. That requirement commenced after devolution in 2005 when the CFS Agencies applied for and received the CSA Benefits for children in care.

[127] As indicated earlier, some Indigenous CFS Agencies refused to comply with Manitoba's demand to remit the CSA Benefits. In response, commencing in October 2010, Manitoba held back 20 percent of Operational Funding provide to CFS Agencies. In 2013, the 20 percent holdback was applied to Child Maintenance funding paid by Manitoba.

[128] By imposing the holdbacks, Manitoba penalized CFS Agencies for continuing to hold the CSA Benefits as required pursuant to s. 3(2) of the ***CSA Act***. Some Indigenous CFS Agencies (for example, Peguis CFS) remitted the CSA Benefit to Manitoba "reluctantly" and "in fear of" Manitoba's holdback (cross-examination of Clemene Hornbrook, July 21, 2021 at question 25).

[129] The effect of s. 231 of ***BITSA*** deems the holdbacks to be actions taken in respect of the government's recovery of an overpayment. Those CFS Agencies that chose to comply with the ***CSA Act*** still had their funding reduced, which, in my view, also frustrates the purpose of s. 3(2) of the ***CSA Act***.

[130] The retroactive nature of s. 231 and the deeming provisions do not change the analysis. Requiring the CFS Agencies to remit CSA Benefits to Manitoba is contrary to the purpose of the ***CSA Act*** and requires CFS Agencies responsible for administering CSA Benefits to fail to meet the clear requirements of the ***CSA Act***.

[131] Further, in my view, the CSA Policy and specifically the holdbacks implemented by Manitoba are inconsistent with the principles of the new funding model in the 2011 MOU in which both levels of government agreed that "Child and Family Services providers should provide services in a manner that is reasonably comparable both on-Reserve and

off-Reserve, in the geographic area in which the services are being provided." (See Agreed Book of Documents, Tab 6, article 4.1)

[132] While I accept that the onus of establishing paramountcy is not an easy task and the standard is always high, I am satisfied that the paramountcy doctrine applies and s. 231 creates an operational incompatibility with the clear provisions of the ***CSA Act***.

Issue (c) -Does s. 231 of *BITSA* in whole or in part infringe on the core or inherent jurisdiction of the superior courts under s. 96 of the *Constitution*? and Issue (f) Did enacting s. 231 of *BITSA* in whole or in part violate the rule of law?

[133] The moving parties submit that s. 231 of ***BITSA*** is in breach of s. 96 of the ***Constitution*** and violates the rule of law by barring any actions or proceedings and denying access to the courts for an extremely vulnerable group – First Nations children who were or continue to be in care.

[134] The s. 96 argument is directed at ss. 231(8) to (15) of ***BITSA*** which extinguish a cause of action or remedy and bars proceedings respecting the application of s. 231.

[135] The moving parties rely upon the leading authority interpreting s. 96 of the ***Constitution***, ***Ontario v. Criminal Lawyers' Association of Ontario***, 2013 SCC 43, [2013] 3 S.C.R. 3 (QL). The Supreme Court of Canada explained s. 96 as follows:

> **28** … The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*.
>
> **29** All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. However, each branch will be unable to fulfill its role if it is unduly interfered with by the others. In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*,

> [1993] 1 S.C.R. 319, McLachlin J. affirmed the importance of respecting the separate roles and institutional capacities of Canada's branches of government for our constitutional order, holding that "[i]t is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other" (p. 389).
>
> **30** Accordingly, the limits of the court's inherent jurisdiction must be responsive to the proper function of the separate branches of government, lest it upset the balance of roles, responsibilities and capacities that has evolved in our system of governance over the course of centuries.

[136] The moving parties submit that s. 231 of ***BITSA*** violates s. 96 of the ***Constitution*** by removing "a traditional core of superior court jurisdiction" (see ***Canada (Human Rights Commission) v. Canadian Liberty Net***, [1998] 1 S.C.R. 626 (S.C.C.) (QL), at para. 27), including "the powers and jurisdiction essential to [the superior courts'] role as the cornerstone of the unitary justice system and the primary guardians of the rule of law." (***Reference re Code of Civil Procedure (Que.), art.* 35**, 2021 SCC 27, [2021] S.C.J. No. 27 (QL), at para. 63).

[137] The plaintiffs and Animikii applicants submit that s. 231 of ***BITSA*** retroactively validates Manitoba's diversion of CSA Benefits for specific children into its consolidated fund and specifically enacted ***BITSA*** to:

a) deem Manitoba's actions in respect of CSA Benefits to be lawful (s. 231(3) to 231(7));

b) eliminate any causes of action based on Manitoba's actions respecting the CSA Benefits (ss. 231(8) to 231(11) and 231(14) to 231(15));

c) nullifying or dismissing pending litigation, including the previous action commenced by parties in these proceedings (s. 231(13)); and

d) give retroactive effect to the elimination of potential causes of action and the nullification or dismissal of pending litigation (s. 231(12)).

[138] Manitoba submits that s. 231 of ***BITSA*** does not interfere with the role of the superior courts established under s. 96 of the ***Constitution***, their core jurisdiction for resolving disputes, or access to s. 96 courts. Manitoba acknowledges that the moving parties have access to this court to advance their constitutional challenges to ***BITSA*** in this proceeding.

[139] Manitoba submits that it is clearly within the purview of the legislative branch to terminate contracts and civil causes of action, at any stage, even if the legislation targets a specific cause of action or judicial decision. Further, Manitoba submits that superior courts are bound to give effect to legislation that expressly and unambiguously bars a cause of action. Manitoba relies upon several decisions which it submits stands for that proposition. (See ***Alberta v. Kingsway General Insurance Co.***, 2005 ABQB 662, 53 Alta. L.R. (4th) 147 (QL), at paras. 72-77, 84-90, 142, 149-152 – in which the court considered the validity of a statute terminating all existing and future causes of action in respect of insurance amendments, and expressly extinguished Kingsway's pending action; ***Tabingo v. Canada (Citizenship and Immigration)***, 2013 FC 377, [2014] 4 F.C.R. 150, at paras. 22-23, 54-60; and ***Highland Valley Copper v. British Columbia***, 2003 BCCA 440, [2003] B.C.J. No. 1810 at paras. 37, 42-43)

[140] All of the parties reference the ***Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)***, 2014 SCC 59, [2014] 3 S.C.R. 31 (QL) decision of the Supreme Court of Canada. In that case, the Supreme Court invalidated legislation which imposed hearing fees preventing individuals from accessing the superior

courts. McLaughlin C.J. (as she then was), made this observation regarding the task of superior courts:

> **32** The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. As a result, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts.

[141] The moving parties submit that s. 231 of ***BITSA*** is a more extreme measure than the one considered in ***Trial Lawyers Association of British Columbia***. They submit Manitoba has barred litigants from having their disputes resolved by the superior court. Because it denies people the right to have their disputes resolved in court, s. 231 of ***BITSA*** strikes at the core of the jurisdiction of superior courts and is therefore *ultra vires* the province as a violation of s. 96 of the ***Constitution***.

[142] Further, the moving parties submit that Manitoba's authority is to make laws in relation to specified matters defined in the ***Constitution***. They submit that s. 231 of ***BITSA*** is not a law, as it singles out specific cases of pending litigation which are dismissed. Accordingly, they submit that ***BITSA*** is an exercise of a judicial function, not a legislative function of making laws.

[143] The moving parties further submit that s. 231 of ***BITSA*** contravenes the ***United Nations Declaration on the Rights of Indigenous Peoples Act***, S.C. 2021, c. 14 (the "***UNDRIP Act***") which enshrines into Canadian law the rights of Indigenous people, specifically, Article 40, which guarantees Indigenous peoples access to justice.

[144] I agree with the position advanced by Manitoba. There are numerous authorities to support the proposition that a province has jurisdiction to pass legislation to terminate contracts and bar certain civil causes of action.

[145] In ***Kingsway General Insurance Co.***, the province of Alberta passed retroactive legislation explicitly extinguishing Kingsway General Insurance Company's cause of action without costs and barring other similar actions against the Government as a result of reforms that froze auto insurance premiums. The court rejected the constitutional argument that the legislation infringed s. 96 so long as the provincial legislature passes a law dealing in matters of provincial concern, such as property and civil rights. The province has the authority to enact legislation concerning a particular right or property or affecting the ability to bring an action in the superior court. (See ***Johnston v. Prince Edward Island***, [1995] 128 Nfld. & P.E.I.R. 1, [1995] P.E.I.J. No. 32 (QL) at paras. 194-214)

[146] Although slightly different than the present circumstances, many authorities have addressed legislation that retroactively overrides the effect of specific litigation and may deprive a litigant of the benefits of a favourable judgment or order. The primary requirement is that the intention be expressed in clear and unambiguous language. Manitoba references several authorities in support of this principle:

a) ***CNG Producing Co. v. Alberta (Provincial Treasurer)***, 2002 ABCA 207, 317 A.R. 171, at paras. 43-53 - Statute retroactively excluded oil sands royalties. It applied to pending litigation, even without naming specific litigation;

b) ***Proctor & Gamble Inc. v. Ontario (Minister of Finance)***, 2010 ONCA 149, 99 O.R. (3d) 321, at paras. 45, 48-49, 54-56 - retroactive amendment can validly extinguish a judgment provided statutory language is clear;

c) ***Johnson & Johnson Inc. v. Boston Scientific Ltd.***, 2006 FCA 195, [2007] 1 F.C.R. 465 - statute retroactively validated patents regardless of whether an action had been commenced or decided; and

d) ***Balders Estate v. Nova Scotia (Registrar of Probate)***, [1999] 176 N.S.R. (2d) 262 (NSSC) - statute retroactively imposed tax on estate notwithstanding any court order; it expressly overrode a previous judgment obtained by the applicant.

[147] Manitoba also points to other examples of similar legislation barring causes of action and retroactively dismissing pending actions. For example:

a) ***The Gaming Control Local Option (VLT) Act***, C.C.S.M. c. G7, s. 13;

b) ***The Clean Water Act, 2006***, S.O. 2006, c. 22, s. 98;

c) ***The Greenbelt Act, 2005***, S.O. 2005, c. 1, s. 19, JB BOA 13; and

d) ***The Crown Forest Sustainability Act, 1994***, S.O. 1994, c. 25.

[148] Legislation which bars causes of action is also not uncommon. No-fault insurance regimes and no-fault workers compensation legislation are just two examples in which legislation bars recourse to the courts. (See, for example, s. 9(7) of ***The Workers Compensation Act***, C.C.S.M. c. W200, and s. 72 of ***The Manitoba Public Insurance Corporations Act***, C.C.S.M. c. P215)

[149] In my view, legislation, such as the two mentioned, which bar a certain cause of action, is replaced with a different regime or compensation scheme to replace the rights of litigants who can no longer advance a cause of action.

[150] In contrast, s. 231 of ***BITSA*** removes the right of a cause of action and dismisses specific causes of action arguably without replacing the CSA Benefit that CFS Agencies were required to remit to Manitoba. While there is evidence that Manitoba increased funding from time to time, there is no evidence to prove that the CSA Benefit was replaced. In fact, the evidence is to the contrary. The Rates for Services payable for basic maintenance were frozen by Manitoba from 2012 to April 1, 2019. During that period, Canada increased the CSA Benefits payable for children in care in each year from 2016 to 2019, inclusive.

[151] Therefore, I am not satisfied that s. 231 is similar to, or can be compared to legislation passed to replace certain causes of action like the workers compensation scheme and the no-fault automobile insurance scheme in Manitoba.

[152] That said, Manitoba does have the jurisdiction to pass legislation which impacts individuals and deals specifically with the child welfare and protection system and the funding of that system. It is not the court's role to assess the manner in which the legislature determines how funding is provided for child welfare. Clearly, the moving parties take the position that the operation of s. 231 is harsh, unfair, and arbitrary. However, that conclusion, even if accepted, does not support a finding that s. 231 is unconstitutional based on a violation of s. 96 of the ***Constitution***.

[153] I agree with the moving parties that the superior courts have a special constitutional role to play in terms of access to justice. In this case, the moving parties

have access to this court to challenge the constitutional validity of s. 231 of ***BITSA***. As described above, s. 231 of ***BITSA*** eliminates causes of actions based on the actions or policies of Manitoba in relation to CSA Benefits. The legislative branch has the jurisdiction to bar civil causes of action pursuant to its power under s. 92(13). Superior courts are bound to give effect to legislation so long as the law expressly and unambiguously bars a cause of action. Contrary to the submission of the moving parties, s. 231 is a law which clearly defines what does not constitute a legal dispute or matter that may be brought before the court.

[154] The moving parties rely on the ***UNDRIP Act***. UNDRIP was adopted by the United Nations General Assembly on September 13, 2007, and endorsed by Canada in 2016. Manitoba committed to being guided by the principles of UNDRIP through ***The Path to Reconciliation Act***, C.C.S.M. c. R30.5.

[155] Article 40 of UNDRIP states that, "Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights ...".

[156] In my view, there is no doubt that s. 231 of ***BITSA*** affects Indigenous peoples because the vast majority of children in care are Indigenous. Applying Article 40 of UNDRIP does not change the analysis of the constitutional rights noted above. The moving parties have had access to the superior courts through just and fair procedures for the resolution of the conflict in this case.

[157] AMC also submit that s. 231 of ***BITSA*** breaches s. 96 because it interferes with the superior courts' inherent *parens patriae* jurisdiction. AMC submits that this jurisdiction

authorizes the state through its superior courts to act where necessary to "protect the best interests of vulnerable persons" including children. AMC submits that s. 231 denies children the opportunity to benefit from the CSA Benefit and Indigenous children are uniquely vulnerable. Section 231 removes the superior courts' inherent *parens patriae* jurisdiction and violates s. 96.

[158] I am not satisfied the *parens patriae* jurisdiction applies in the circumstances of this case. The inherent *parens patriae* jurisdiction is important and applies in circumstances where there is a gap in the legislation. As explained, by the Court of Appeal in ***M.S. (litigation guardian of) v. Child and Family Services of Western Manitoba***, 2005 MBCA 11, 192 Man.R. (2d) 23 (QL):

> **44** In Manitoba, the principles underlying *parens patriae* now operate statutorily through the system of child welfare agencies. The court retains jurisdiction to intervene on behalf of children where the state has not otherwise done so through legislation or where there is a gap in the legislation. The Supreme Court in *Beson* used *parens patriae* to address the absence of an appeal in the legislation. Just as there was a gap in *Beson*, the Children's Advocate says that there is a gap in these circumstances because the court's role is limited. But an express limit on the court's role is not a silence or gap in the legislation. To the contrary, it is an expression of the legislature's intention. ...

I agree with Manitoba that the legislature has expressed in clear and unambiguous terms its intention to extinguish causes of action that may arise from the application of s. 231. There is no gap in the legislation which permits the operation of the *parens patriae* jurisdiction. Accordingly, I am not satisfied that the submission regarding the *parens patriae* jurisdiction applies or that s. 231 violates s. 96 of the ***Constitution*** in the circumstances.

Issue (d) - Did the CSA Policy implemented by Manitoba during the funding period, and enacting s. 231 of *BITSA* in

whole or in part unjustifiably infringe s. 12 or s. 15 of the *Charter*?

Section 15 of the *Charter*

[159] The moving parties submit that the CSA Policy adopted by Manitoba and s. 231 of ***BITSA*** discriminates on the basis of age, race, national or ethnic origin, Aboriginality-residence, family status, and, for some, physical or mental disability and, therefore, infringes s. 15(1) of the ***Charter***.

[160] Manitoba submits that in applying the two-stage test referenced by the Supreme Court of Canada in ***Fraser v. Canada (Attorney General)***, 2020 SCC 28, 450 D.L.R. (4th) 1 (QL), the CSA Policy, on its face, or in its impact, does not create a distinction based on an enumerated or analogous ground; and, does not impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetrating, or exacerbating disadvantage.

Analysis of s. 15 - *Charter* Principles

[161] Section 15 of the ***Charter*** states:

> **Equality before and under law and equal protection and benefit of law**
> **15 (1)** Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[162] The onus is on the moving parties to prove a *prima facie* violation of s. 15 of the ***Charter***. The moving parties must demonstrate that the impugned law or state action or policy (See ***Fraser*** at para. 27):

- on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and

- imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

[163] The Supreme Court of Canada emphasized in ***Withler v. Canada (Attorney General)***, 2011 SCC 12, [2011] 1 S.C.R. 396 (QL), that "... The focus of the inquiry is on the actual impact of the impugned law [or policy], taking full account of social, political, economic and historical factors concerning the group." (at para. 39).

[164] A violation of s. 15 of the ***Charter*** can be what is referred to as direct discrimination in circumstances where a distinction is made on one or multiple enumerated or analogous grounds and is apparent on the face of the legislation or policy, or may be "adverse impact discrimination" which is when a neutral law or policy impacts certain groups by virtue of the personal characteristics of people in those groups (***Withler***, at para. 64).

[165] Proof of discriminatory intent is not required to prove a violation of s. 15 of the ***Charter***. It does not matter whether Manitoba intended to discriminate when it imposed the CSA Policy. What must be determined is whether the distinction raised by the moving parties relates to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society (***Law Society of British Columbia v. Andrews***, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 (QL), at para. 19 and ***Fraser*** at para. 70).

[166] Further, it is unnecessary for the moving parties to prove that the discrimination affects all members of a protected group in the same manner. Policies or laws that do

not affect all members of a protected group may still be discriminatory (***Fraser***, at paras. 72-75).

Step One Analysis

[167] The moving parties submit that during the funding period an Indigenous child in care in Manitoba who resided "on-Reserve" had more financial resources available for his or her care than an Indigenous child who was determined to be "off-Reserve" during the same period. The financial imbalance was a result of Manitoba's CSA Policy and s. 231 of ***BITSA***, both of which required CFS Agencies to remit to Manitoba the CSA Benefit respecting children in care. In contrast, "on-Reserve" foster parents of Indigenous children in care during the same time period received, or CFS Agencies maintained on their behalf, the CSA Benefits to be used for the children in care.

[168] The moving parties point to the fact that the CSA Policy and s. 231 of ***BITSA*** has a disproportionate impact on Indigenous children, who comprise 88 percent of the children in care in Manitoba.

[169] Manitoba submits that the moving parties' submissions contain two fundamental errors:

a) they focus on the relationship between Manitoba and the CFS Agencies it funds to provide child protection and welfare in the province, as opposed to the mechanisms in place to provide resources to children in care; and,

b) their submission is misleading because it focuses on "basic maintenance" which does not include all funding for children in care.

[170] Manitoba submits that viewing the funding structure as a whole points to a funding system that is capable of responding to the actual needs and circumstances of children

in care. Further, Manitoba submits that the CSA Policy and s. 231 do not draw a distinction based on an enumerated or analogous ground under s. 15. While Manitoba acknowledges that there are a disproportionate number of Indigenous children in care, and that is tragic, it is not sufficient to ground a finding that there has been a distinction for the purposes of s. 15.

[171] To assess whether the CSA Policy and s. 231 of ***BITSA*** creates a distinction based on enumerated or analogous grounds, it is necessary to re-visit the purpose of the ***CSA Act***. It provides the CSA Benefit to CFS Agencies for children who are in care of a CFS Agency equivalent to the CCB provided to parents or legal guardians of children who are not in the care of a CFS Agency. For disabled children in care, the CSA Benefit includes Canada's CDB. The CSA Benefit is provided in the name of a specific child and must be used exclusively toward that child's care, maintenance, education, training and advancement. The CSA Benefit begins in the month following the month when the CSA Benefit application is received and it is not subject to tax and shall not be assigned, charged, attached, anticipated or given as security.

[172] During the funding period, Manitoba required CFS Agencies to remit the CSA Benefits to Manitoba and, therefore, the CFS Agencies were not able to comply with the requirement that the CSA Benefit be used exclusively toward the care, maintenance, education, training, and advancement of a child in care.

[173] As well, during the funding period, disabled children in care funded by Manitoba were unable to receive the CDB as a result of Manitoba's CSA Policy.

[174] For example, during the funding period, no Métis or Inuit children in care in Manitoba received the CSA Benefit granted in their name due to the CSA Policy.

[175] The CSA Policy predominantly applied to children in care who resided off-Reserve, who are disproportionately Indigenous.

[176] Children in care living on-Reserve received their CSA Benefits during the funding period. Canada had a policy that specifically prohibits CSA Benefits from being utilized as a source of revenue or to be used to reduce or offset child welfare funding obligations.

[177] The moving parties also point out, and I agree, that children living on-Reserve, and all other eligible children not in care, and their families received increases in the CCB, CDB and the CSA Benefit in 2016 through to 2019. In contrast, off-Reserve children in care generally did not receive an increase in financial resources available from Manitoba during the same period. As a result of the CSA Policy, Manitoba received or held back an amount equivalent to the CSA Benefit, including the increases, which was to be used exclusively for the specific children in care.

[178] ***BITSA*** was enacted on November 6, 2020. As noted above, the purpose of ***BITSA*** is to address the government's actions concerning the CSA Benefit that CFS Agencies received during the funding period. ***BITSA***, in effect, makes law Manitoba's CSA Policy and bars the rights of off-Reserve children in care and their legal guardians from advancing a cause of action against Manitoba.

[179] In ***Fraser***, the Supreme Court of Canada dealt with the evidence that can be lead to demonstrate a disproportionate impact on members of a protected group. The court states:

> **56** Two types of evidence will be especially helpful in proving that a law has a disproportionate impact on members of a protected group. The first is evidence about the situation of the claimant group. The second is evidence about the results of the law.
>
> **57** Courts will benefit from evidence about the physical, social, cultural or other barriers which provide the "full context of the claimant group's situation" (*Withler*,

> at para. 43; see also para. 64). This evidence may come from the claimant, from expert witnesses, or through judicial notice (see *R. v. Spence*, [2005] 3 S.C.R. 458). The goal of such evidence is to show that membership in the claimant group is associated with certain characteristics that have disadvantaged members of the group, such as an inability to work on Saturdays or lower aerobic capacity (*Homer v. Chief Constable of West Yorkshire Police*, [2012] UKSC 15, [2012] 3 All E.R. 1287, at para. 14; *Simpsons-Sears*; *Meiorin*, at para. 11). These links may reveal that seemingly neutral policies are "designed well for some and not for others" (*Meiorin*, at para. 41). When evaluating evidence about the group, courts should be mindful of the fact that issues which predominantly affect certain populations may be under-documented. These claimants may have to rely more heavily on their own evidence or evidence from other members of their group, rather than on government reports, academic studies or expert testimony.
>
> **58** Courts will also benefit from evidence about the outcomes that the impugned law or policy (or a substantially similar one) has produced in practice. Evidence about the "results of a system" may provide concrete proof that members of protected groups are being disproportionately impacted (*Action Travail*, at p. 1139; Vizkelety, at pp. 170-74). This evidence may include statistics, especially if the pool of people adversely affected by a criterion or standard includes *both* members of a protected group *and* members of more advantaged groups (Sheppard (2001), at pp. 545-46; Braun, at pp. 120-21).
>
> **59** There is no universal measure for what level of statistical disparity is necessary to demonstrate that there is a disproportionate impact, and the Court should not, in my view, craft rigid rules on this issue. The goal of statistical evidence, ultimately, is to establish "a disparate pattern of exclusion or harm that is statistically significant and not simply the result of chance" (Sheppard (2001), at p. 546; see also Vizkelety, at p. 175; Fredman (2011), at pp. 186-87). The weight given to statistics will depend on, among other things, their quality and methodology (Vizkelety, at pp. 178-84).

[180] There is no question that the evidence shows that the CSA Policy and s. 231 of ***BITSA*** disproportionately impact Indigenous children because approximately 88 percent of the children in care in Manitoba during the relevant time frame were Indigenous.

[181] The affidavit evidence, and the reports that have been filed by agreement, provide evidence of social, cultural, economic and other barriers facing Indigenous people generally and Indigenous children in care.

[182] The evidence filed in these proceedings, including the affidavits of Clemene Hornbrook, Greg Besant, and Cora Morgan address the outcomes that the impugned law

and CSA Policy has produced. While Manitoba submits that there is insufficient evidence to establish how the CSA Policy and s. 231 of ***BITSA*** have failed to meet the child welfare needs of children in care, I am satisfied the evidence does address the impact of Manitoba's CSA Policy.

[183] The affidavit evidence and cross-examinations establish that during the funding period:

a) children who reached the age of majority and moved out of care did so with no access to the CSA Benefits to assist with or pay for rent, food, furniture, and educational expenses or otherwise to assist them in obtaining and maintaining a place to live, employment, education, and self-sufficiency;

b) children in care did not have access to the CSA Benefit to pay for expenditures that are not otherwise provided as part of the child welfare funding provided by Manitoba, including expenditures to:

   (i) assist high-risk youth with homelessness and lack of clothing;

   (ii) assist with educational costs and access to parental and family visits;

   (iii) assist with access to Traditional Elder Services;

   (iv) assist with graduation costs;

   (v) allow for attendance and participation in the Métis, Inuit, and Indigenous cultural events;

   (vi) pay for the costs of registration in extra-curricular activities, including sports registration and equipment, camp, music and cultural programs;

(vii) assist with funeral expenses;

(viii) pay for bus passes for part-time jobs;

(ix) contribute to permit a child to go on vacation with their foster family;

(x) allow for the purchase of a Registered Education Savings Plan;

(xi) access the Registered Disability Savings Plan and the Child Disability Savings Bond for disabled children in care.

[184] Since 88 percent of the children in care in Manitoba are Indigenous, it is appropriate to consider the social, cultural and other barriers that have faced Indigenous people and Indigenous children in care. The various reports filed by agreement, affidavits and decisions of courts confirm:

a) Indigenous people have suffered historic injustices as a result of colonization and dispossession of their lands, territories, and resources;

b) Indigenous people have been subject to systemic racism and discrimination and have been denied their inherent right to self-determination (see Canada, Truth and Reconciliation Commission of Canada. *Canada's Residential Schools*: *The Legacy: The Final Truth and Reconciliation Commission of Canada, Volume 5.* Montreal; Kingston; London; Chicago: McGill Queen's University Press, 2015 (Book of Government Reports on Child Welfare at Tab 6));

c) This historic disadvantage and vulnerability of Indigenous peoples has resulted in Indigenous children being vastly overrepresented in Manitoba's child welfare system. (See ***Manitoba (Child and Family Services,***

Director o) v. H.C.H., 2017 MBCA 33, 409 D.L.R. (4th) 90, at para. 88 (QL); ***R v. Friesen***, 2020 SCC 9, 444 D.L.R. (4th) 1, at para. 70 (QL); *Canada's Residential Schools: The Legacy, The Final Report of the Truth and Reconciliation Commission of Canada, Vol 5*, at p 185 – 187, 27 (in Book of Government Reports on Child Welfare at Tab 6); Ted Hughes, *The legacy of Phoenix Sinclair: Achieving the best for all our children*, Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair, Vol 1 (December 2013) at 106 *[Phoenix Sinclair Vol 1]* (in Book of Government Reports on Child Welfare at Tab 7))

(d) Indigenous children in care are vulnerable members of Canadian society, removed from their biological parents, over-represented in the child welfare system and over-represented in the criminal justice system, causing them to have poorer statistical outcomes related to education, crime, and poverty. (See ***R v. Ipeelee***, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 60; ***R v. McKay***, 2019 MBPC 11, [2019] M.J. No. 22, at para. 46; ***R v. H.L.***, 2012 MBPC 80, 286 Man.R. (2d) 54, at para. 53 (QL); *Canada's Residential Schools: The Legacy, The Final Report of the Truth and Reconciliation Commission of Canada* Vol 5, at 233-234 (in Book of Government Reports on Child Welfare at Tab 6); Aboriginal Justice Inquiry - Child Welfare Initiative (1991), Volume 1: The justice system and Aboriginal people: Public inquiry into the administration of justice and Aboriginal people, Winnipeg: Province of Manitoba at Chapter 14, an Evaluation (in Book of Government Reports on Child Welfare at Tab 9))

e) Funding provided by Manitoba to CFS Agencies including Indigenous children residing off-Reserve, in terms of maintenance rates is either the lowest or second lowest in all of Canada. In my view, Manitoba's CSA Policy and s. 231 of ***BITSA*** exacerbated the funding issues facing CFS Agencies. (See 2019 Auditor General's Report, at 42-44 (in Book of Government Reports on Child Welfare at Tab 3); *Canada's Residential Schools: The Legacy, The Final Report of the Truth and Reconciliation Commission of Canada Vol 5,* at 21 & 24 (in Book of Government Reports on Child Welfare at Tab 6); Ted Hughes, *The legacy of Phoenix Sinclair: Achieving the best for all our children*, Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair, Vol 2 (December 2013) at 343 *[Phoenix Sinclair Vol 2]* (in Book of Government Reports on Child Welfare at Tab 8); Meeka Kiersgaard Cross Examination, at Questions 533-534; Andrew Lajeunesse Transcript Cross Examination, Questions 120-145, 194-207))

[185] I am satisfied that the moving parties have met the burden of establishing the impact of the CSA Policy and s. 231 creates a distinction based on the enumerated grounds of race, national or ethnic origin and mental or physical disability and an analogous ground also applies. While I agree with Manitoba that some of the evidence is directed to basic maintenance funding, there is a significant amount of evidence concerning the manner in which the CSA Benefit was used for the benefit of children in care as required by the ***CSA Act***. The CSA Policy required CFS Agencies to remit the CSA Benefit to Manitoba during the funding period and there is insufficient evidence to

establish that Manitoba replaced the CSA Benefit with additional funding. In fact, the evidence is to the contrary.

[186] The next issue that must be addressed in a Step one analysis is whether the CSA Policy and s. 231 of ***BITSA*** discriminate against individuals or a group based on enumerated or analogous grounds. The moving parties refer to a distinction based on age, race, national or ethnic origin, disability, Aboriginality-residence, and family status. Manitoba submits that neither s. 231 nor the CSA Policy draw a distinction based on an enumerated or analogous ground under s. 15. I agree that the CSA Policy and s. 231 apply to all children in care funded by Manitoba equally. On its face the CSA Policy and law do not single out Indigenous children in care. But that does not end the inquiry.

[187] The main thrust of the moving parties' position is that there is a disproportionate number of Indigenous children in care in Manitoba and, as a result, the CSA Policy and s. 231 disproportionately impact Indigenous children.

[188] Manitoba points to the Supreme Court of Canada decision in ***Health Services and Support - Facilities Subsector Bargaining Assn v. British Columbia***, 2007 SCC 27, [2007] 2 S.C.R. 391, and submits the court rejected this argument in the context of labour legislation that was argued discriminated on the basis of sex because the workforce in question was overwhelmingly female. Manitoba submits that applying the same reasoning to this case, the issue is whether a member of a disadvantaged group faces differential treatment because of their membership in the group, not the relative proportion of the larger group that is affected by the CSA Policy and s. 231 of ***BITSA***.

[189] However, in ***Fraser***, the Supreme Court of Canada dealt with the pension plan applicable to RCMP members. The plan drew a distinction between full-time service RCMP

members and RCMP members who temporarily reduced their hours under a job-sharing agreement. The plan classified members in job-sharing agreements as part-time workers who could not obtain full-time credit for their service under the pension plan. Nearly all of the participants in the job-sharing program were women and most of them reduced their work hours because of child care. The Supreme Court of Canada found that full-time RCMP members who job share must sacrifice pension benefits because of a temporary reduction in working hours. That arrangement had a disproportionate impact on women and perpetuated their historical disadvantage. The court found that it was a clear violation of their right to equality under s. 15(1) of the ***Charter***.

[190] Applying the same reasoning in this case, the CSA Policy and s. 231 of ***BITSA*** do not on their face clearly create a distinction on the basis of an enumerated ground. The CSA Policy and s. 231 apply to all children in care. However, in my view, the CSA Policy and s. 231 of ***BITSA*** in their impact do create a distinction based on race, national or ethnic origin and disability. Further, the moving parties submit that two analogous grounds apply to the facts of this case – Aboriginality-residence and family status. I will address each enumerated and analogous ground.

[191] The moving parties raise a number of distinctions based on comparator groups. They compare Manitoba families who receive the CCB to Manitoba families with foster children that did not receive the similar benefit, the CSA Benefit. The moving parties also submit that disabled children in Canada who are not in care, or disabled children in care whose care is not funded by Manitoba, are also good comparator groups. They submit it is easy to see the differential treatment that only applied to off-Reserve children in care.

[192] I agree with the moving parties that the CSA Policy and s. 231 of ***BITSA*** deny Indigenous children in care living off-Reserve to equal benefit of the law. In my view, ***BITSA*** is an example of adverse impact discrimination referenced by the Supreme Court of Canada in the ***Fraser*** decision which "... occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground" (at para. 30). Instead of explicitly singling out off-Reserve Indigenous children in care for differential treatment, ***BITSA*** indirectly places them at a disadvantage as compared to other children who are not in care.

[193] Further, in this case, the historical, economic and sociological disadvantage of Indigenous peoples assists in demonstrating that the law denies a benefit to the Indigenous children in care that is not denied to others. Parents of children not in care are entitled to the CCB or the CDB. However, Indigenous children living off-Reserve during the funding period did not receive the CSA Benefit which included the CDB. I am satisfied that since children in care are predominately Indigenous, the CSA Policy and s. 231 of ***BITSA*** creates a distinction based on the enumerated grounds of race and national and ethnic origin.

[194] I am also satisfied that the enumerated ground of mental or physical disability applies in this case. Children who are not in care and are disabled are entitled to the CDB. The CSA Benefits include the CDB for eligible children. Children in care who were disabled during the relevant period were disproportionately impacted by the CSA Policy and s. 231 taking away their access to the CSA Benefit including the CDB. In contrast, all other disabled children in Canada received the CDB. I agree with the moving parties that the CSA Policy disproportionately impacts disabled children in care.

[195] The adverse impact on disabled children in care is described in the affidavit of Greg Besant, the Executive Director of Metis Child, Family and Community Services. He provides details of the potential lifelong financial impact of the CDB upon disabled children in care. (See paras. 24-38 of Besant affidavit)

[196] While the CDB is not specifically referenced in s. 231 of ***BITSA***, the CDB is part of the CSA Benefit and was caught by the CSA Policy and s. 231 of ***BITSA***. It therefore impacted disabled children in care as the CFS Agencies were required to remit the CSA Benefits to Manitoba.

[197] In effect, the CSA Policy and s. 231 of ***BITSA*** mean that the CDB and potentially other federal grants and benefits, which are available to all other disabled children in Canada were not available to children in care living off-Reserve who were primarily Indigenous children during the funding period.

[198] The moving parties compare children in care who live off-Reserve with children in care who live on-Reserve. Manitoba points out, and I agree, that the funding of children in care on-Reserve is from Canada, over which Manitoba has no control. The impact that must be considered is the impact of the CSA Policy and s. 231 or Manitoba's actions and legislation.

[199] Further, it is difficult to conduct a proper comparison between children in care living on-Reserve and children in care living off-Reserve. The costs of providing services for children on-Reserve arguably exceed the costs of children living off-Reserve. The parties reference the decision of ***First Nations Child and Family Caring Society of Canada v. Canada (Minister of Indian Affairs and Northern Development)***, 2016 CHRT 2, [2016] C.H.R.D. No. 2 (QL), which considered whether Canada discriminated

against children living on-Reserve, when compared to the levels of services provided by the provinces and territories to off-Reserve children in care. The conclusion reached by the Canadian Human Rights Tribunal ("CHRT") appears to be at odds with what the moving parties submit the court should find in this case.

[200] The CHRT stated:

> **464** Not being experts in child welfare, AANDC's authorities are concerned with comparable funding levels; whereas provincial/territorial child and family services legislation and standards are concerned with ensuring service levels that are in line with sound social work practice and that meet the best interest of children. It is difficult, if not impossible, to ensure reasonably comparable child and family services where there is this dichotomy between comparable funding and comparable services. Namely, this methodology does not account for the higher service needs of many First Nations children and families living on reserve, along with the higher costs to deliver those services in many situations, and it highlights the inherent problem with the assumptions and population levels built into the FNCFS Program.
>
> **465** AANDC's reasonable comparability standard does not ensure substantive equality in the provision of child and family services for First Nations people living on reserve. In this regard, it is worth repeating the Supreme Court's statement in *Withler*, at paragraph 59, that "finding a mirror group may be impossible, as the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison". This statement fits the context of this complaint quite appropriately. That is, human rights principles, both domestically and internationally, require AANDC to consider the distinct needs and circumstances of First Nations children and families living on-reserve - including their cultural, historical and geographical needs and circumstances – in order to ensure equality in the provision of child and family services to them. A strategy premised on comparable funding levels, based on the application of standard funding formulas, is not sufficient to ensure substantive equality in the provision of child and family services to First Nations children and families living on-reserve.

[201] During cross-examination of the plaintiff, Elsie Flette acknowledges these findings and distinctions between on-Reserve and off-Reserve communities in Manitoba. The availability of resources, employment opportunities, medical treatment, counselling or therapy, or housing tend to be less available on-Reserve, as compared to off-Reserve communities (see cross-examination of Elsie Flette, pp. 79-80).

[202] The ***First Nations Child and Family Caring Society of Canada*** case dealt with the complaint that Canada had discriminated on the basis of race and/or national or ethnic origin in the manner it managed First Nations Child and Family Services programs, including funding and the delivery of services to on-Reserve communities. The CHRT held a 72-day hearing to address the complaint. This proceeding, based primarily on affidavit evidence and cross-examinations, is based on the CSA Benefit and the impact sustained by off-Reserve and Indigenous children in care. I agree with Manitoba that caution should be exercised in comparing funding for on-Reserve children in care versus funding for off-Reserve children in care. That said, it is clear that the CSA Benefit was available for on-Reserve children in care and not available to off-Reserve children in care during the funding period.

[203] I agree that the court should exercise caution in conducting the comparisons, as pointed out in ***Stadler v. Manitoba (Social Services Appeal Board, St. Boniface-St. Vital, Director)***, 2020 MBCA 46, [2020] M.J. No. 112 (QL). It is important not to narrow or isolate comparator groups based on single distinctions, as doing so can obscure the contextual impact of intersecting grounds of discrimination and fail to capture the nuance of the claimant group's identity (at paras. 60-72).

[204] The moving parties submit that family status is an analogous ground that applies to the facts of this case and should be protected under s. 15(1). The Supreme Court of Canada in ***Fraser*** did not decide the issue and specifically found that the case should not be resolved on the basis of family/parental status. The court did, however, provide some guidance on the issue of whether family status should be recognized as an analogous ground under s. 15(1). The Supreme Court of Canada stated:

> **118** The parties recognized that family status is a protected ground in most provincial human rights statutes, and that while there is no separate express protection for parental status, family status has been defined or interpreted to include protection for parents (British Columbia Law Institute, *Human Rights and Family Responsibilities: Family Status Discrimination under Human Rights Law in British Columbia and Canada* (2012), at p. 26). The question of what constitutes a *prima facie* case of family status discrimination has been the source of considerable "uncertainty and controversy" in the human rights arena (British Columbia Law Institute, at p. 10; see Ontario Human Rights Commission, *The Cost of Caring: Report on the Consultation on Discrimination on the Basis of Family Status* (2006), at p. 4; *Campbell River & North Island Transition Society v. Health Sciences Assn. of British Columbia* (2004), 28 B.C.L.R. (4th) 292 (C.A.); *Brown v. Department of National Revenue* (1993), 93 CLLC 17,013 (C.H.R.T); *Canada (Attorney General) v. Johnstone*, [2015] 2 F.C.R. 595 (C.A.); *Misetich v. Value Village Stores Inc.* (2016), 39 C.C.E.L (4th) 129 (Ont. H.R.T.), at paras. 35-48; see also Shilton (2018); Sheila Osborne-Brown, "Discrimination and Family Status: The Test, the Continuing Debate, and the Accommodation Conversation" (2018), 14 *J.L. & Equality* 87; Lyle Kanee and Adam Cembrowski, "Family Status Discrimination and the Obligation to Self-Accommodate" (2018), 14 *J.L. & Equality* 61).
>
> **119** But there were almost no submissions before us about whether or how the unsettled state of the human rights jurisprudence does or should affect the recognition of family/parental status under the *Charter*, about the definition or possible scope of "family" or "parental" status, or about the possibility of addressing parental or family status discrimination by recognizing other grounds (see *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627, at pp. 722-25, per McLachlin J., dissenting ("separated or divorced custodial parent"); *Canada (Attorney General) v. Lesiuk (C.A.)*, [2003] 2 F.C. 697, at para. 37 ("women in a parental status")).
>
> . . . . .
>
> **123** While recognizing multiple, interactive grounds of discrimination can allow for a fuller appreciation of the discrimination involved in particular cases, the gap in submissions and evidence means that critical questions about the implications of adopting family/parental status as an analogous ground were not explored in the record. That is not to say that this status should not eventually be recognized as an analogous ground, or that we should shy away from recognizing analogous grounds which raise complexities — rarely do enumerated or analogous grounds come neatly packaged — but before we do so, it seems to me to be wiser to have the benefit of sufficient argument and submissions so that the recognition, when it comes, pays full tribute to the breadth of what is at stake.

The Supreme Court of Canada left open the door for family status to be considered as an analogous ground in the proper case.

[205] In ***Corbiere v. Canada (Minister of Indian and Northern Affairs)***, [1999] 2 S.C.R. 203, 173 D.L.R. (4th) 1 (QL), the Supreme Court of Canada made it clear that the

analysis to be conducted to determine if an analogous ground has been established is contextual and that several indicators may assist in the determination of whether a characteristic has discriminatory potential (see paras. 59 and 60):

a) whether from the perspective of a reasonable person in the position of the claimant, it is important to their identity, personhood, or belonging;

b) the fact that a characteristic is immutable or changeable only at an unacceptable personal cost;

c) whether those defined by the characteristic are lacking in political power, disadvantaged, vulnerable to becoming disadvantaged or having their interests overlooked; and

d) whether the ground is included in federal and provincial human rights codes.

[206] From the perspective of a reasonable person in the position of a child in care or foster parents, their family status is important to their identity, personhood, or belonging. I certainly agree that being a child in care as part of a family is an immutable personal characteristic that is important to the individual's personal identity. Children in care are governed by a legal relationship between a CFS Agency, the foster parents, and the child. Clearly, the child in care lacks any power and is disadvantaged and vulnerable (see ***Winnipeg Child and Family Services v. K.L.W.***, 2000 SCC 48, [2000] 2 S.C.R. 519 (QL), at paras. 72-73).

[207] All children in care are entitled to the CSA Benefit and foster parents have a legal right to receive the CSA Benefit just as the parents of a child not in care is entitled to receive the CCB.

[208] I note that family status is a protected ground in nearly every human rights code across the country, including Manitoba (see ***The Human Rights Code***, C.C.S.M. c. H175, s. 9(2)(i)).

[209] While the Supreme Court of Canada has not yet decided whether family status is an analogous ground protected by s. 15(1) of the ***Charter***, the Supreme Court of Canada has suggested in other cases that family status could have been considered (see ***Symes v. Canada***, [1993] 4 S.C.R. 695 (S.C.C.) at paras. 135 and 261; and ***Thibaudeau v. Canada***, [1995] 2 S.C.R. 627 (S.C.C.) at paras. 186 - 87).

[210] In the context of this case, the evidence satisfies me that the CSA Policy and s. 231 of ***BITSA*** create a distinction based on family status. This is an appropriate case to recognize family status as an analogous ground under the step one test.

[211] The moving parties also submit that Aboriginality-residence should be recognized as an analogous ground. The moving parties rely upon the ***Corbiere*** decision in which the Supreme Court of Canada held that Aboriginality-residence as it pertained to whether an Aboriginal band member lived on or off the Reserve was a ground analogous to those enumerated in s. 15(1) of the ***Charter***.

[212] It is clear that a child in care whose Aboriginality-residence determined that his or her care was funded by Manitoba did not receive the CCB or the CSA Benefit during the funding period. Similarly, disabled children of that same group did not receive Canada's CDB. However, children not in care and children in care whose Aboriginality-residence determined they were funded by Canada did receive the federal benefits - either the CCB, the CDB, or the CSA Benefit.

[213] In my view, the CSA Policy and s. 231 of ***BITSA*** impact Indigenous children living off-Reserve by denying them the right to the CSA Benefit. However, Manitoba had no control over the manner in which Canada funded child welfare respecting on-Reserve children and therefore I question whether on-Reserve versus off-Reserve children are proper comparator groups. Given my findings on the enumerated grounds, it is unnecessary to decide whether the analogous ground of Aboriginality-residence should be applied to the facts of this case and I leave that question for another day.

[214] To conclude on the step one analysis, I am satisfied that the moving parties have established that the impact of the CSA Policy and s. 231 of ***BITSA*** creates a distinction based on enumerated and analogous grounds. The distinction is based on race, national or ethnic origin, mental or physical disability and the analogous ground of family status. The evidence establishes a disadvantage resulting from the CSA Policy denying a benefit to the claimant group that is not denied to others. In this case, the denial has an adverse impact on Indigenous children in care and disabled children in care and perpetuates their disadvantage.

[215] Section 15(1) of the ***Charter*** guarantees equal protection and equal benefit of the law without discrimination. The CSA Policy and s. 231 of ***BITSA*** in their impact create a distinction or disadvantage to Indigenous children and disabled children in care.

[216] For the foregoing reasons, the first step of the s. 15 test has been met.

Step Two Analysis

[217] This brings me to second step of the s. 15(1) test.

[218] Whether the law has the effect of reinforcing, perpetuating, or exacerbating disadvantage? The Supreme Court of Canada in ***Fraser*** points out that "there is no 'rigid

templates' of factors relevant to this inquiry". The goal is to examine the impact of the harm caused to the affected group which may include economic exclusion or disadvantage, social exclusion, psychological harms, physical harms or political exclusion and must be viewed in light of systemic or historical disadvantages faced by the claimant (para. 76).

[219] At para. 77, the court in ***Fraser*** identifies the purpose as follows:

> **77** The purpose of the inquiry is to keep s. 15(1) focussed on the protection of groups that have experienced exclusionary disadvantage based on group characteristics, as well as the protection of those "who are members of more than one socially disadvantaged group in society" (Colleen Sheppard, "Grounds of Discrimination: Towards an Inclusive and Contextual Approach" (2001), 80 *Can. Bar Rev.* 893, at p. 896; see also *Withler*, at para. 58). As the Court noted in *Quebec v. A* when discussing the second stage of the s. 15 test:
>
> > The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. [para. 332]
>
> (See also *Taypotat*, at para. 20.)

[220] The affidavits and reports filed by agreement are replete with evidence of the historical discrimination against Indigenous peoples and the barriers facing Indigenous children who have been removed from their families. Over 150 years of colonial policies which removed children from their families and nations is one example of the historical discrimination against Indigenous children.

[221] The affidavits provide evidence of the disadvantages experienced by Indigenous children in care including:

a) Indigenous children in care in Manitoba have limited adult supports, which is especially crucial as they move closer to aging out of care;

b) Indigenous children in care are more likely to experience poor educational outcomes;

c) Indigenous children in care are more likely to experience poverty and/or homelessness; and

d) current and former Indigenous children in care are over-represented in the criminal justice system.

(See affidavit of Clemene Hornbrook and affidavit of Coral Morgan, exhibits O, E, and B; and Government reports filed by agreement noted above)

[222] Regrettably, the great number of Indigenous children in care in Manitoba is the fallout of historical discrimination, including the Indian Residential School System and what has been referred to as the "60s scoop". The consequence of that is that eighty-eight percent of children in care are Indigenous.

[223] While the CSA Policy and s. 231 of ***BITSA*** did not specifically target Indigenous children in care, it overwhelmingly impacts the Indigenous children and disabled children in care. The CSA Policy prevented the claimant group from receiving equal benefit of the law resulting in economic and social consequences to Indigenous children in care.

[224] Section 231 of ***BITSA*** retroactively made CSA Policy law and extinguished the rights of the claimant group to advance any claim against Manitoba.

[225] In my view, the moving parties have met the onus of establishing the second stage of the s. 15 analysis. Before moving to the s. 1 analysis, I will first address the other ***Charter*** breach alleged by the moving parties.

Section 12 of the *Charter*

[226] The plaintiffs and the Animikii applicants submit that the CSA Policy and the enactment of s. 231 of ***BITSA*** amount to a cruel and unusual treatment of Indigenous children in care. They submit that the actions violate s. 12 of the ***Charter***. Manitoba

submits there is no merit to the argument that the CSA Policy or s. 231 of ***BITSA*** amount to anything close to the high standard required to establish an infringement of s. 12 of the ***Charter***.

[227] Section 12 of the ***Charter*** states:

> 12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

[228] A law violates s. 12 if it imposes grossly disproportionate punishment or treatment or if the reasonably foreseeable application of the law will impose grossly disproportionate treatment or punishment on others. The Supreme Court of Canada has established a high bar for such a finding. To be grossly disproportionate punishment or treatment, it must be "so excessive as to outrage standards of decency" and "abhorrent or intolerant to society." (See ***R. v. Lloyd***, 2016 SCC 13. [2016] 1 S.C.R. 130 (QL), at paras. 22-24)

[229] Authorities interpreting s. 12 of the ***Charter*** have been largely in the criminal law context. The Supreme Court of Canada has, however, left open the issue of whether "treatment" that is imposed by the state may apply in a context other than criminal law. The parties agree, as do I, that treatment of a child by the state constitutes conduct that may engage s. 12 of the ***Charter***.

[230] While the CSA Policy and the enactment that s. 231 of ***BITSA*** have impacted the rights of children in care, the evidence falls short of establishing the high standard of gross disproportionality required for a s. 12 violation. There is insufficient evidence to prove that the basic necessities of children in care are not met by Manitoba's child welfare funding system.

[231] As reviewed above, there is significant evidence regarding the impact on children and families respecting the loss of use of the CSA Benefits. However, in my view, the

evidence falls short of establishing the high standard required for a violation of s. 12 of the ***Charter*** that the CSA Policy and enacting s. 231, amount to "cruel and unusual treatment or punishment". Accordingly, that aspect of the claim/application is dismissed.

Issue (e) - If s. 231 of *BITSA* violates the *Charter*, is it saved by s. 1 of the *Charter*?

[232] Section 1 provides:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[233] Section 1 permits the state, in this case Manitoba, to justify a limit on a ***Charter*** right as "demonstrably justified in a free and democratic society." The leading authority in ***R. v. Oakes***, [1986] 1 S.C.R. 103 (S.C.C.) (QL) sets out the test as follows, at paras. 69-71:

> **69** To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": R. v. Big M Drug Mart Ltd., supra, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial [page139] in a free and democratic society before it can be characterized as sufficiently important.
>
> **70** Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": R. v. Big M Drug Mart Ltd., supra, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: R. v. Big M Drug Mart Ltd., supra, at p. 352.

> Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".
>
> **71** With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic [page140] society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

[234] Manitoba has the burden of showing on a balance of probabilities that the three part test has been met. Manitoba submits that the objective of s. 231 of ***BITSA*** is to clarify and ensure consistency in the treatment of CSA Benefits in the Manitoba Child and Family Welfare System and there is a pressing and substantial objective achieved by implementing the CSA Policy and enacting s. 231 of ***BITSA***.

[235] In my view, Manitoba has not identified a pressing and substantial objective, purpose or principle to explain why it chose to require CFS Agencies to remit the CSA Benefit to Manitoba and as a result fail to treat children in care without discrimination.

[236] It is important to note that it is the limitation on the equality of rights that must be justified, not the legislative scheme or s. 231 of ***BITSA*** that must be justified. (See ***Fraser*** at para. 125) Children in care are vulnerable members of society and Manitoba has failed to establish that there is a pressing and substantial objective for limiting the ***Charter*** rights in this case.

[237] The evidence filed does not support the pressing and substantial objective argued by Manitoba of clarifying and ensuring consistency in the treatment of the CSA Benefit. In fact, the evidence shows that the CSA Policy created an inconsistent funding structure in Manitoba with some children receiving their CSA Benefits and others not. Some children receiving the CCB and others not receiving the companion or similar CSA Benefits. The CSA Policy and s. 231 of ***BITSA*** did not rectify the distinction or inequality.

[238] In fact, s. 231 of ***BITSA*** made the CSA Policy law and extinguished any claims against Manitoba as a result of the inconsistent CSA Policy.

[239] Further, the means chosen to achieve the objective must be rationally connected to the objective and minimally impair the ***Charter*** right. I am not satisfied that the means chosen of taking away the right of children in care to the CSA Benefit is rationally connected to the objective. Further, the CSA Policy and enacting s. 231 does not minimally impair the right of every individual to be treated equally before and under the law and to receive equal benefit of the law.

[240] Finally, the evidence presented does not satisfy me on the proportionality between the effects of the CSA Policy and the enactment of s. 231 which are responsible for limiting the ***Charter*** right or freedom, and the objective which has been identified by Manitoba. The objective is simply not of sufficient importance to justify the discrimination and deny children in care to equal benefit of the law.

[241] Since the *prima facie* breach cannot be justified under s. 1, it is a violation of s. 15(1) by Manitoba to preclude children in care from receiving the CSA Benefits and then enacting s. 231 of ***BITSA*** to make the CSA Policy law in Manitoba.

Issue (g) Did the CSA Policy implemented by Manitoba during the funding period, and enacting s. 231 of *BITSA* in whole or in part breach the honour of the Crown, including any fiduciary duty owed by the Crown?

Fiduciary Duty

[242] AMC submits that Manitoba owes a duty to all children in care under the Provincial Child welfare system to ensure their protection and to afford them resources to have a good life. The CSA Policy and s. 231 of ***BITSA***, are an example of Manitoba's failure to recognize and fulfill its fiduciary duty to First Nations' children in care.

[243] AMC submits that the fiduciary obligations arise pursuant to the honour of the Crown which is a constitutional principle integral to the historic and contemporary relationship between First Nations and colonial governments.

[244] AMC refers to the Supreme Court of Canada decision of ***R. v. Sparrow***, [1990] 1 S.C.R. 1075 (S.C.C.) (QL) respecting the Crown's duty and special relationship with the Aboriginal peoples. In ***Sparrow***, the Supreme Court of Canada described the relationship as follows:

> **59** ... the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

[245] AMC submits that the CFS Agencies continue to exist in a "colonial legal environment with specific mandates and standards imposed on them by Manitoba". Further, AMC submits that the application of "colonial laws and policies has created a system incompatible with First Nations' values and priorities in caring for children and contributed to the overrepresentation of First Nations' children in care." AMC maintains

that Manitoba has retained functional authority over the leadership and governance of CFS Agencies contrary to the promise made in the devolution process. (See AMC brief at paras. 291 and 292)

[246] AMC submits that a fiduciary duty is owed by Manitoba to First Nation people with respect to First Nation children in care requiring Manitoba to act diligently and in the best interests of First Nations children including activities over which it possesses control. Manitoba exercised control over funding by imposing deemed Rates for Services and retroactively creating a debt owed by CFS Agencies through the enactment of s. 231 of ***BITSA***. In doing so, Manitoba breached its fiduciary duty.

[247] Manitoba submits that there is a difference between a fiduciary relationship and a fiduciary duty. Manitoba acknowledges that there is a fiduciary relationship between Manitoba and First Nation communities. That however, is distinct from a fiduciary duty. Manitoba cites the Supreme Court of Canada decision of ***Wewaykum Indian Band v. Canada***, 2002 SCC 79, [2002] 4 S.C.R. 245 (QL), regarding the Crown-Aboriginal relationship and the limits respecting the fiduciary duty imposed on the Crown at paras. 81-83:

> **81** But there are limits. The appellants seemed at times to invoke the "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests. In this case we are dealing with land, which has generally played a central role in aboriginal economies and cultures. Land was also the subject matter of *Ross River* ("the lands occupied by the Band"), *Blueberry River* and *Guerin* (disposition of existing reserves). Fiduciary protection accorded to Crown dealings with aboriginal interests in land (including reserve creation) has not to date been recognized by this Court in relation to Indian interests other than land outside the framework of s. 35(1) of the *Constitution Act, 1982*.
>
> **82** Since *Guerin*, Canadian courts have experienced a flood of "fiduciary duty" claims by Indian bands across a whole spectrum of possible complaints, for example:

> (i) to structure elections (*Batchewana Indian Band (Non-resident members) v. Batchewana Indian Band*, [1997] 1 F.C. 689 (C.A.), at para. 60; subsequently dealt with in this Court on other grounds);
> (ii) to require the provision of social services (*Southeast Child & Family Services v. Canada (Attorney General)*, [1997] 9 W.W.R. 236 (Man. Q.B.));
> (iii) to rewrite negotiated provisions (*B.C. Native Women's Society v. Canada*, [2000] 1 F.C. 304 (T.D.));
> (iv) to cover moving expenses (*Paul v. Kingsclear Indian Band* (1997), 137 F.T.R. 275; *Mentuck v. Canada*, [1986] 3 F.C. 249 (T.D.); *Deer v. Mohawk Council of Kahnawake*, [1991] 2 F.C. 18 (T.D.));
> (v) to suppress public access to information about band affairs (*Chippewas of the Nawash First Nation v. Canada (Minister of Indian and Northern Affairs)* (1996), 116 F.T.R. 37, aff'd (1999), 251 N.R. 220 (F.C.A.); *Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs)*, [1989] 1 F.C. 143 (T.D.); *Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs)* (1997), 132 F.T.R. 106);
> (vi) to require legal aid funding (*Ominayak v. Canada (Minister of Indian Affairs and Northern Development)*, [1987] 3 F.C. 174 (T.D.));
> (vii) to compel registration of individuals under the *Indian Act* (rejected in *Tuplin v. Canada* (*Indian and Northern Affairs*) (2001), 207 Nfld. & P.E.I.R. 292 (P.E.I.S.C.T.D.));
> (viii) to invalidate a consent signed by an Indian mother to the adoption of her child (rejected in *G. (A.P.) v. A. (K.H.)* (1994), 120 D.L.R. (4th) 511 (Alta. Q.B.)).
>
> **83** I offer no comment about the correctness of the disposition of these particular cases on the facts, none of which are before us for decision, but I think it desirable for the Court to affirm the principle, already mentioned, that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature (*Lac Minerals, supra*, at p. 597), and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.

[248] Further, Manitoba relies upon the Supreme Court of Canada case in ***Manitoba Metis Federation Inc. v. Canada (Attorney General)***, 2013 SCC 14, [2013] 1 S.C.R. 623, and referred the court to the principles summarized by the Nunavut Court of Appeal in ***Nunavut Tunngavik Inc. v. Canada (Attorney General)***, 2014 NUCA 2, 580 A.R. 75 (QL):

> **32** The law on the subject has evolved, and was most recently summarized in ***Manitoba Métis Federation Inc. v. Canada (Attorney General)***, 2013 SCC 14, [2013] 1 SCR 623. ***Manitoba Métis*** was decided after the decision of the case management judge presently under appeal, and accordingly was not available to him. ***Manitoba Métis*** sets out several principles:

1 While overall the relationship between the Crown and aboriginal peoples can be described as fiduciary in nature, not all aspects of that relationship are governed by fiduciary obligations (at para. 48). As stated in ***Wewaykum Indian Band v. Canada***, 2002 SCC 79 at para. 81, [2002] 4 SCR 245, the fiduciary duty "does not exist at large but in relation to specific Indian interests".

2. There are two ways that a fiduciary duty can arise in the aboriginal context:

(a) Where the Crown administers lands or property in which Aboriginal peoples have an interest, such a duty may arise if there is
(i) a specific or cognizable Aboriginal interest, and
(ii) a Crown undertaking of discretionary control over that interest (at para. 51).
The interest must be a communal Aboriginal interest in land that is integral to the nature of the community and their relationship to the land (at para. 53). It must be predicated on historic use and occupation, and cannot be established by treaty or by legislation (at para. 58).

(b) A more general fiduciary duty may arise (at para. 60), if there is:
(i) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary, coupled with a duty of loyalty that would involve subordinating the interests of all others in favour of the beneficiary (at para. 61),
(ii) a defined person or class of persons vulnerable to a fiduciary's control; and
(iii) a legal or substantial practical interest of the beneficiary that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

3. Where a fiduciary duty exists, the scope and content of that duty will vary depending on the circumstances (at para. 49).

[249] Manitoba submits that: (a) the Aboriginal interest described by AMC is not one recognized as an individual interest; (b) the CSA Benefit is created by statute and the organizations that are disputing the steps taken by Manitoba are creatures of Provincial legislation; (c) there is no basis upon which a fiduciary duty can arise from the circumstances of this case in the Crown-Aboriginal context; (d) a fiduciary duty is not owed and the honour of the Crown does not apply in the context of legislative actions.

[250] Finally, Manitoba acknowledges that a fiduciary duty may arise from an undertaking if certain conditions are met. While no one would dispute that Manitoba has a duty to act in the best interests of children in care, Manitoba submits that the

undertaking to act in the alleged beneficiary's interests is typically lacking where what is at issue is the exercise of government power or discretion. Otherwise, fiduciary obligations would arise in most government day-to-day functions. Clearly, governments must make decisions that are in the best interests of society as a whole and they have an obligation to make difficult decisions regarding the allocation of limited resources. (See ***Alberta v. Elder Advocates of Alberta Society***, 2011 SCC 24, [2011] 2 S.C.R. 261 at paras. 37 and 44)

[251] Based on my review of the evidence and the authorities referenced by the parties, the following are my findings respecting the alleged breach of fiduciary duty issue:

a) a fiduciary relationship exists between Manitoba and First Nations communities;

b) such a relationship does not mean that a fiduciary duty arises in the context of funding child welfare and protection in Manitoba;

c) children in care are vulnerable and Manitoba has a duty to act in the best interests of children in care;

d) the process of devolution devolved the power and responsibility of delivering child welfare services to the CFS Authorities and CFS Agencies. CFS Agencies are the direct service providers under the legislative framework and Manitoba funds the CFS Authorities and CFS Agencies in accordance with the ***CFS Act*** and agreements reached between the parties;

e) the two ways a fiduciary duty can arise in the Aboriginal context are summarized above in para. 248 (See ***Nunavut Tunngavik Inc.*** at para. 32 and ***Manitoba Metis Federation Inc. supra.***);

f) the specific Aboriginal interest alleged by AMC is not based upon an historic use or occupation by Aboriginal peoples and cannot be established by treaty or legislation;

g) I agree that a general fiduciary duty may exist on the facts of this case because Manitoba as the fiduciary, undertook to act in the best interests of children in care who are vulnerable to Manitoba's control and children in care stand to be adversely impacted by Manitoba exercise of discretion or control respecting the use of the CSA Benefits;

h) However, as pointed out in ***Elder Advocates of Alberta Society***, "… an undertaking to act in the alleged beneficiary's interest will typically be lacking where what is at issue is the exercise of a government power or discretion." (para. 42) Governments frequently must make decisions on the allocation of limited financial resources and it is difficult to see how a claim based on a breach of fiduciary duty arises in the circumstances of this case. Otherwise, all decisions made regarding the use of resources for the public good may be challenged by a vulnerable person who may be adversely affected by the decision. In my view, the challenge to such discretionary decisions by government is generally made at the ballet box, not by applications or actions before the courts. Imposing a fiduciary duty on Manitoba in these circumstances is inherently at odds with its duty to act in the best interests of society as a whole;

i) Governments wear many hats and represent many interests including Aboriginal peoples' interests. Those interests may be conflicting. Difficult

decisions on funding affect both Aboriginal and non-Aboriginal peoples and children in care and I am not satisfied on the facts of this case that this is one of the limited or special circumstances where a fiduciary duty arises; and

j) AMC opposes the funding model adopted by Manitoba and I am not satisfied the claim equates to a cognizable interest that gives rise to a fiduciary duty in the circumstances. The allegations by AMC are really claims dealing with ***Charter*** breaches and the constitutionality of Manitoba's CSA Policy during the funding period and s. 231 of ***BITSA***, not properly grounded on a breach of fiduciary duty.

Accordingly, the claim based on breach of fiduciary duty is dismissed.

Issue (h) - If the answer to issues (a) to (d), (f) and (g), in whole or in part, is yes, and the answer to issue (e) is no, what is the appropriate remedy?

[252] The parties agreed that pecuniary remedies are not common issues and therefore were not within the scope of the consolidated hearing. The moving parties submit that declarations are the appropriate remedy in this case.

[253] Relying upon s. 52(1) of the ***Constitution***, the moving parties submit that any law that is inconsistent with the provisions of the ***Constitution*** is, to the extent of the inconsistency, of no force or affect. Therefore, the moving parties submit that because s. 231 of ***BITSA*** is inconsistent with the provisions of the ***Constitution*** and in violation of the ***Charter***, it must be declared invalid and inoperable. Further, the moving parties submit that a partial invalidation of ***BITSA*** through severance, reading down, reading in and constitutional exemptions are not appropriate remedies in this case.

[254] The moving parties submit that the operative or deeming provisions of s. 231 (ss. 231(1) to (7) of ***BITSA***) operate together with the "barring provisions" (ss. 231(8) to (15)) which expressly relate to the deeming provisions. All of s. 231 must be declared invalid and of no force or effect.

[255] Manitoba submits that the remedy should be properly tailored to the findings of the court. Manitoba's primary position is that s. 231 of ***BITSA*** is not invalid and that there should be a declaration of validity of s. 231 in its entirety.

[256] Given my finding that s. 231 of ***BITSA*** is unconstitutional because it frustrates and undermines the purpose of the ***CSA Act*** and is in breach of s. 15(1) of the ***Charter***, I am satisfied it is appropriate to grant a declaration that s. 231 is of no force or effect and is invalid. Section 52(1) of the ***Constitution*** states that any law that is inconsistent with the provisions of the ***Constitution*** is, to the extent of the inconsistency, of no force or effect. Since I have found that s. 231 of ***BITSA*** is unconstitutional, it has no force or effect.

[257] I agree with the moving parties that reading down, reading in and constitutional exemptions are not appropriate in this case. Section 231 of ***BITSA*** made the CSA Policy legal during the funding period. The barring provisions extinguish or take away a right to a cause of action as a result of Manitoba implementing the CSA Policy. Since I have found that the CSA Policy and the enactment of s. 231 of ***BITSA*** are unconstitutional, s. 231 must be declared invalid.

[258] Effective April 1, 2019, Manitoba implemented a new policy of permitting the CFS Agencies to retain the CSA Benefits and use them in accordance with the ***CSA Act***. Section 231 of ***BITSA*** addresses the CSA Policy during the funding period up to March

31, 2019. It does not operate in the future and therefore a declaration of invalidity does not cause any uncertainty in the state of the law.

[259] I also agree that if ss. 231(1) to 231(7) are inoperative, the incidental barring provisions, ss. 231(8) to 231(15) should also be declared invalid. In my view, the operational and deeming provisions and the barring provisions are so inextricably bound up with each other that they cannot independently survive (see ***Schachter v. Canada***, [1992] 2 S.C.R. 679 (S.C.C.) at p. 697).

[260] Accordingly, the appropriate remedy in this case is a declaration that s. 231 of ***BITSA*** is of no force or effect and is therefore invalid.

Conclusion

[261] The answers to the issues raised in this proceeding are as follows:

a) The CSA Policy implemented by Manitoba during the funding period and enacting s. 231 of ***BITSA*** was not in violation of Manitoba's constitutional jurisdiction having regard to ss. 91 and 92 of the ***Constitution***;

b) The paramountcy doctrine applies and s. 231 of ***BITSA*** is operationally incompatible with the clear provisions of the ***CSA Act***;

c) Section 231 of ***BITSA*** does not infringe on the core or inherent jurisdiction of superior courts under s. 96 of the ***Constitution***;

d) The CSA Policy implemented by Manitoba during the funding period and enacting s. 231 of ***BITSA*** infringes s. 15(1) but did not infringe s. 12 of the ***Charter***;

e) The *prima facie* breach of s. 15(1) of the ***Charter*** cannot be justified under s. 1 of the ***Charter***. Therefore, it is a violation of s. 15(1) by Manitoba to

preclude children in care from receiving the CSA Benefits and then enacting s. 231 of ***BITSA*** to make the CSA Policy law in Manitoba;

f) AMC's claim based on a breach of the honour of the Crown, including any fiduciary duty owed by the Crown is dismissed; and

g) The appropriate remedy in the circumstances of this case is a declaration that s. 231 of ***BITSA*** is of no force or effect and is therefore invalid.

[262] If the parties are unable to agree on costs, they may be spoken to.

_____ J.