Date: 20230518
Docket: CI 22-01-37801
CI 22-01-36804
(Winnipeg Centre)
Indexed as: Fontaine et al. v. The Government of Manitoba et al.
Cited as: 2023 MBKB 84

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

RE: CI 22-01-37801 CHIEF HEIDI COOK ON BEHALF OF MISIPAWISTIK CREE NATION AND ON BEHALF OF ALL THE MEMBERS OF MISIPAWISTIK CREE NATION; CHIEF SHELDON KENT ON BEHALF OF BLACK RIVER FIRST NATION AND ON BEHALF OF ALL THE MEMBERS OF BLACK RIVER FIRST NATION; CHIEF DAVID MONIAS ON BEHALF OF PIMICIKAMAK CREE NATION AND ON BEHALF OF ALL THE MEMBERS OF PIMICIKAMAK CREE NATION; ASSEMBLY OF MANITOBA CHIEFS BY ITS FIRST NATIONS FAMILY ADVOCATE, CORA MORGAN; AMBER LAPLANTE; ROBERTA GODIN; AND DYSIN SPENCE, plaintiffs, - and - THE GOVERNMENT OF MANITOBA AND THE ATTORNEY GENERAL OF CANADA, defendants	)	Re: CI 22-01-37801 Michael Rosenberg, Byron Williams Joëlle Pastora Sala Alana Robert Leah Strand Desiree Dorion for the plaintiffs Re: CI 22-01-36804 Shawn Scarcello, David Sterns, Stacey Soldier Melissa Serbin Angela Bespflug Mohsen Seddigh for the plaintiffs Jim Koch Bernice Bowley for the defendant, Government of Manitoba in both actions
Re: CI 22-01-36804 AMBER LYNN FONTAINE AND TRACY LYNN MCKENZIE plaintiffs, - and - ATTORNEY GENERAL OF CANADA AND THE GOVERNMENT OF MANITOBA, defendants.	)	Heather Thompson Stéphanie Dion for the defendant, Attorney General of Canada in both actions Judgment delivered: May 18, 2023

EDMOND J.

Introduction

[1] Two proposed class proceedings have been commenced and both actions address potential claims being advanced on behalf of Indigenous children who were under the age of 18 when they were apprehended by Governments or their agents and were placed in the care of other individuals, groups or foster parents. The Indigenous children were under the care of Child and Family Services ("CFS") or other agencies between 1992 and the present date and were not ordinarily resident on a reserve at the time of their apprehension. The defendants in the actions are the Government of Manitoba ("Manitoba") and the Attorney General of Canada ("Canada").

[2] The plaintiffs in both actions filed competing motions in which the parties propose class proceedings. Both motions seek an order granting carriage of the proposed class proceeding and a partial stay of the other proceeding. The defendants take no position regarding the carriage motions, although Canada filed an affidavit to clarify the evidence tendered by counsel for the plaintiffs in both actions.

[3] The proposed class proceedings in Manitoba are similar to other proceedings that have been commenced in the Federal Court and in other provinces across Canada. The proposed proceedings deal with claims that are commonly referred to as "Millennium Scoop" actions. As I will explain, deciding the carriage motions requires an understanding of the Millennium Scoop actions, the specific causes of action advanced by the parties, and determining which proceeding is in the best interests of the proposed classes.

Background

[4] Three proposed class action proceedings dealing with similar subject matter were commenced in Manitoba. Although initially the plaintiffs, Amber Lynn Fontaine ("Fontaine") and Tracy Lynn McKenzie ("McKenzie") advanced separate proceedings which were issued in August 2022; the law firms advancing the proposed class proceedings cooperated and agreed to advance the Fontaine and McKenzie actions as one class proceeding. On January 6, 2023, a Notice of Discontinuance of the McKenzie action was filed and a "fresh as amended statement of claim" was filed in the Fontaine action essentially amalgamating the two proceedings. For ease of reference, I will refer to the Fontaine and McKenzie action as the "Fontaine action".

[5] The Fontaine action alleges that the defendants' conduct in the operation, administration and management of CFS systems for Indigenous children, youth and families and its inequitable funding of those services was systemic and discriminatory, causing harm to the plaintiffs and other proposed class members. The plaintiffs allege that the defendants structured provincial child services in Manitoba in a manner that prioritizes removing Indigenous children from their families, rather than providing their families with supports to take care of their children. This aspect of the claim is defined in the claim as the "Removed Child Class" claims.

[6] The Fontaine action also alleges that the defendants underfunded services to Indigenous children such that they were unable to access essential health and social services. This aspect of the claim is defined as the "Essential Services Class" claims.

[7] The Fontaine action defines the classes of Indigenous individuals as follows (see fresh as amended statement of claim at para. 1):

> (h) (i) Indigenous individuals who were taken into out-of-home care:
> (a) During the Class Period,
> (b) While they were under the age of 18,
> (c) While they were not ordinarily resident on a Reserve,
> (d) By the Crown or any of its agents (the "Removed Child Class"),
> (e) Excluded from the Removed Child Class are the claims of individuals who meet the definition of the Removed Child Class in the Final Settlement Agreement dated June 30, 2022, in *Moushoom et al v Canada*, Federal Court File Nos. T-402-19 / T-141-20 / T-1120-21 ("*Moushoom*"), if approved by the Federal Court, to the extent that those claims are captured by *Moushoom*;
>
> (ii) Indigenous individuals in Manitoba who:
> (a) During the Class Period,
> (b) While they were under the age of 18,
> (c) Had a confirmed need for an essential service (inclusive of essential products),
> (d) Faced a delay, denial or service gap in the receipt of that essential service on grounds including but not limited to lack of funding or lack of jurisdiction, or a jurisdictional dispute with another level of government or governmental department (the "Essential Services Class"),
> (e) Excluded from the Essential Services Class are the claims of individuals who meet the definition of the Trout Child Class or the Jordan's Principle Class in the Final Settlement Agreement dated June 30, 2022 in *Moushoom*, if approved by the Federal Court, to the extent that those claims are captured by *Moushoom* against Canada only;
>
> (iii) The estates of members of the Removed Child Class and the Essential Services Class who passed away while in the care of the Crown or any of its agents (the "Estate Class");
>
> (iv) All parents and grandparents who were providing care to a member of the Removed Child Class or the Essential Services Class when that child was taken into out-of-home care or needed the essential service that was delayed, denied or faced a service gap (the "Family Class");
>
> (i) "Class Period" means the period of time between January 1, 1992 and the date of certification of this action as a class proceeding or such other date as the Court may deem appropriate.

[8] Legal counsel in the Fontaine action include: Gowling WLG, Canada LLP, Cochrane Saxberg LLP, Sotos LLP, Murphy Battista LLP and Miller Titerle Law Corporation (the "consortium").

[9] The consortium or member law firms of the consortium have commenced proceedings in a number of other provinces which contain similar allegations to those made in the Fontaine action. The proposed classes in the Fontaine action include First Nations people residing off reserve, as well as Inuit and Métis people.

[10] The action commenced by Amber Laplante as one of the representative plaintiffs ("Laplante action") is a proposed class proceeding on behalf of all First Nations people who were under the age of 18 when they were apprehended by Manitoba or Canada or their agents, were in CFS care between January 1, 1992 and present, and were not ordinarily resident on a reserve at the time of their apprehension (the "Laplante child class"). The Laplante action also asserts claims on behalf of parents and grandparents (the "Laplante family class"), as well as any First Nation in Manitoba that elects to opt-in and join the proceeding (the "First Nations class").

[11] Legal counsel representing the plaintiffs in the Laplante action include: the Public Interest Law Centre of Legal Aid Manitoba, McCarthy Tetrault LLP and Parkland Collaborative Legal Options (the "Laplante lawyers").

[12] The Fontaine action and the Laplante action advance similar but slightly different causes of action. The plaintiffs in the Fontaine action allege that the defendants breached their fiduciary and common law duties owed to the proposed class members and their conduct was contrary to the defendants' constitutional obligations and the honour of the Crown. Further, the plaintiffs allege that the defendants' conduct breached ss. 7 and 15

rights under the ***Charter of Rights and Freedoms*** ("***Charter***") and, as a result, Indigenous children and youth, and their caregiving parents and grandparents, suffered harm. The plaintiffs also seek declaratory relief.

[13] The Laplante action asserts that the defendants breached their fiduciary duties, duty of care and the honour of the Crown and violated ss. 2(a), 7 and 15 of the ***Charter*** and s. 36 of ***The Constitution Act***, 1982 as a result of their mismanagement of CFS for First Nations children and families. The plaintiffs allege that these failures threaten the viability of First Nations by dismantling families, communities, and nations by severing familial and kinship ties, and perpetrating prejudices towards First Nations people.

[14] In addition to seeking damages, the plaintiffs in the Laplante action also seek prospective and mandatory injunctive relief requiring the defendants to:

(a) end the unnecessary apprehension of First Nations children on the basis of poverty, racial bias, and cultural bias;

(b) fund the actual costs of preventative and reunification services;

(c) fund the actual costs of meeting the physical, mental, emotional, and spiritual needs of First Nations children in CFS;

(d) fund the actual costs of supporting First Nations persons aging out of CFS; and

(e) take immediate steps to comply with Jordan's Principle.

[15] Further, the plaintiffs in the Laplante action seek a permanent injunction requiring the defendants to fund the actual costs of capacity building for First Nations to address

the needs of First Nations children, and to support First Nations to develop their own laws relating to the well-being and caring of First Nations children based on their distinct traditions and needs.

[16] Both the Fontaine action and the Laplante action advance important causes of action on behalf of Indigenous children, families and First Nations in Manitoba. It is regrettable that the proposed class representatives and legal counsel are not able to reach an agreement on the manner in which the proposed class proceeding should be advanced in court. The Fontaine action and the Laplante action overlap in terms of their definition of proposed class members and the parties seek redress from the court to determine which proposed class action should proceed, which group of law firms should have carriage of the proceeding, and what partial stay of proceedings ought to be granted.

CFS Funding

[17] Before analyzing the numerous competing submissions advanced by the parties, some background is required regarding the CFS funding regimes in place in Manitoba. In general, two separate funding systems have applied to Indigenous children in Manitoba. First Nations children on-reserve have been funded by Canada. First Nations children living off-reserve, Métis and Inuit children who were apprehended are subject to provincial child welfare funding.

[18] In 1991, Canada introduced the Federal Crown First Nations Child and Family Services Programing ("FNCFS"), which funds Indigenous child welfare services on reserves. Since 1991, Canada gradually transferred responsibility for the child welfare services to Indigenous agencies, while continuing to provide funding and oversight.

[19] Child welfare services in Manitoba are somewhat unique. In 1999, Manitoba announced its plan to implement the Aboriginal Justice Inquiry recommendations. The process that followed implementation of the recommendations became known in Manitoba as devolution. The Manitoba Métis Federation ("MMF") on behalf of the Métis people, the Assembly of Manitoba Chiefs ("AMC") on behalf of Southern First Nations, Manitoba Keekatinowi Okimakanak ("MKO") on behalf of Northern First Nations and Manitoba negotiated and were involved in developing the devolved CFS system.

[20] Devolution recognizes the need for culturally appropriate care to be provided to First Nations and Métis 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 and to Indigenous CFS Agencies. Devolution was accomplished through amendments to ***The Child and Family Services Act***, C.C.S.M. c. C80 ("***CFS Act***"), the introduction of ***The Child and Family Services Authorities Act***, C.C.S.M. c. C90 and a variety of agreements between the parties.

[21] The parties included Manitoba, AMC, MMF and MKO. 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 Agency Mandates Regulation 184/2003. (See ***Flette et al. v. Government of Manitoba et al.***, 2022 MBQB 104, [2022] M.J. No. 444, at paras. 33-37)

[22] All Indigenous children and their families, whether First Nation, Métis or Inuit, who are a Manitoba funding responsibility, are subject to the same provincial laws, policies, standards, processes and funding guidelines.

[23] Canada has and continues to be responsible under the FNCFS program to fund all children ordinarily resident on-reserve at the time the child enters care and is eligible for treaty status. These children are not part of the classes defined in the Fontaine action or the Laplante action. They are covered by other class action proceedings. (See ***Moushoom v. Canada***, 2021 FC 1225, [2021] A.C.F. No 1995, Docket No. F.C. File No. T-402-19 ("Moushoom action"); ***Assembly of First Nations and Zacheus Joseph Trout v. The Attorney General of Canada***, 2022 FC 149, Docket T-1120-21 ("Trout action").

[24] As I mentioned, deciding the carriage motions requires an understanding of the Millennium Scoop class action proceedings that have been commenced across the country. I have attached as **Schedule "A"** to this decision a summary of the ongoing Millennium Scoop class actions which was attached to the affidavit of Lisa Parsons, affirmed February 27, 2023 (Exhibit "D"). I adopt the descriptions of the classes and definitions in Schedule "A" and, where necessary, I will refer to the related class action proceedings in this decision.

Millennium Scoop Class Action Proceedings

[25] Because some of the class action proceedings are inter-related, a short description of some of the class action proceedings is required.

[26] The consortium or some of its member law firms are part of the counsel team representing classes in several Millennium Scoop actions that have been certified against Canada. (Moushoom action, Trout action and the Stonechild action (***Stonechild v. Canada***, 2022 FC 914, [2022] F.C.J. No. 915))

[27] These inter-related class actions can be briefly summarized as follows:

a) Moushoom action and Trout action. Two law firms who are part of the consortium are class counsel in the Moushoom action and the Trout action. The Moushoom and Trout actions seek compensation from Canada for alleged systemic discrimination against First Nations children since 1991. The alleged discrimination includes:

i) Canada's FNCFS program is alleged to have denied proper funding to child welfare agencies responsible for the protection and well-being of on-reserve First Nations children. The alleged denial of proper funding contributed to epidemic numbers of First Nations children on reserves being removed from their homes and communities and placed into state care;

ii) Canada is alleged to have failed to provide non-discriminatory access to essential health and social services to First Nations children anywhere in Canada, on and off-reserve. These claims are sometimes called "Jordan's Principle", which is a legal principle that has its genesis from a claim of a First Nation child from Norway House Cree Nation, Manitoba, who was born with a serious medical condition. Due to his condition, Jordan spent the first two years of his life in a Winnipeg hospital while Canada and Manitoba argued about who was responsible for Jordan's specialized foster home care costs. Jordan passed away in 2005 at the age of five and was never placed in a specialized foster home. In honour of Jordan's memory, and to prevent similar discrimination regarding access to essential

> services to First Nations children, a child-first principle called Jordan's Principle was proposed. The House of Commons passed a resolution on December 12, 2007 recognizing Jordan's Principle. The Canadian Human Rights Tribunal ("CHRT") has found that Jordan's Principle binds Canada as a legal rule as of the date of the House of Commons' resolution (see ***First Nations Child and Family Caring Society of Canada v. Canada (Minister of Indigenous and Northern Affairs)***, 2019 CHRT 39, [2019] C.H.R.D. No. 39, at para. 250 (QL)). In essence, Jordan's Principle recognizes that children should not suffer denials, delays, and gaps in services provided by Governments that are essential to their health and life.

[28] The Moushoom action was certified by the Federal Court as a class action on November 26, 2021. The certified child classes include a "Removed Child Class" and a "Jordan's Class" as defined in that proceeding. A related family class of caregivers of the children was also certified by the Federal Court.

[29] The Trout action was certified by the Federal Court as a class action on February 11, 2022. The child class covering the period April 1, 1991 to December 11, 2007, is defined as follows:

> 2.(a) "Child class" means all First Nations individuals who were under the applicable provincial/territorial age of majority and who, during the Class Period, did not receive (whether by reason of a denial or a gap) an essential public service or product relating to a confirmed need, or whose receipt of said service or product was delayed, on grounds, including but not limited to, lack of funding or lack of jurisdiction, or as a result of a service gap or jurisdictional dispute with another government or governmental department.

[30] In the Trout action, the Federal Court also certified a related family class of the caregivers of those children.

[31] On December 31, 2021, an "Agreement in Principle" was reached to resolve the Moushoom action, the Trout action and a related overlapping 2019 compensation decision of the CHRT related to alleged discriminatory funding of on-reserve First Nations Child and Family Services and Jordan's Principle. A Settlement Agreement was signed on June 30, 2022, and is contingent on the CHRT's determination that the settlement satisfies its contingent orders. On October 24, 2022, the CHRT declined to approve the settlement agreement. According to Fontaine's counsel, discussions are ongoing between the Moushoom and Trout parties and the CHRT parties to arrive at a final agreement settling the proceedings. Any settlement must be approved by the Federal Court.

Stonechild action

[32] The Stonechild action was filed in Federal Court on June 10, 2020, by two law firms who are part of the consortium. The Stonechild action alleges that Canada failed to take reasonable steps to protect and preserve the Aboriginal identity of off-reserve Indigenous children and youth who were apprehended and brought into care. The claim alleges that Canada's conduct was systemic, lasted for decades and damaged the language, culture and heritage of Métis, Inuit and off-reserve First Nations children and youth in care.

[33] On June 17, 2022, the Federal Court certified the Stonechild action as a class proceeding and defined the primary class members as follows:

> All First Nations (Status and Non-Status Indians), Inuit and Métis persons who were removed from their homes in Canada between January 1, 1992 and December 31, 2019 and placed in the care of individuals who were not members

> of the Indigenous group, community or people to which they belong, excluding on-reserve class members in the *Moushoom* action.
>
> (See ***Stonechild v. Canada***, 2022 FC 913)

[34] The Stonechild action also certified a family class of off-reserve children. As a result, most, if not all, of the proposed members of the Removed Child Class and Laplante Child Class as well as the family classes in both the Fontaine and Laplante actions are already members of the Stonechild child class which is represented by law firms in the consortium.

Other provincial Superior Court proceedings

[35] The consortium is advancing Millennium Scoop class action proceedings against Canada and the Provincial Governments in British Columbia, Alberta, Saskatchewan, Ontario and Quebec which are similar to the Fontaine action.

[36] All of the actions in other provinces are being prosecuted by the consortium which is comprised of the law firms who agreed to advance the claims in a coordinated fashion across the country.

[37] I propose to outline the relevant factors to be considered to decide the carriage motions and then review the factors in the context of the competing motions.

The Law - The carriage test

[38] The parties agree, as do I, that the legal test to determine carriage is not in dispute and the governing authority in Manitoba is the Court of Appeal's decision in ***Thompson v. Manitoba (Minister of Justice)***, 2017 MBCA 71, [2017] M.J. No. 209 (QL). The Court of Appeal made it clear that the main question is "what resolution is in the best interests of all putative class members while at the same time fair to the defendants"

(see para. 24). The Court of Appeal endorsed six main factors to apply on a carriage motion (para. 24):

i) the nature and scope of the causes of action advanced;

ii) the theories advanced by counsel;

iii) the state of each class action, including preparation;

iv) the number, size and extent of involvement of the proposed representative plaintiffs;

v) the relative priority of commencing the class action (i.e. filing date); and

vi) the resources and experience of counsel.

[39] The Court of Appeal emphasized that the court may also consider the factors listed in Ontario cases, including:

> **27** Courts in Ontario have considered additional factors deemed relevant to the circumstances: funding, the definition of class membership, the definition of class period, joinder of defendants, the plaintiff and defendant correlation, the prospect of certification, the prospect of success against the defendants and the inter-relationship of class actions in more than one jurisdiction. ...

[40] Interestingly, counsel in both the Fontaine action and the Laplante action submit that a review of the relevant factors favours their proceeding. The only exception is their submissions respecting factor v) the relative priority of commencing the class proceeding. Counsel in the Laplante action acknowledge that the Fontaine and McKenzie actions were filed prior to the Laplante action. However, they submit that priority of filing should be afforded minimal weight where the gap in timing does not materially impact the progress of the claim, or where the late-filed claim has progressed faster, which they submit applies in this case.

[41] My review of the authorities satisfies me that the priority of commencing the class action or the actual filing date is not a key-determining factor. Ultimately, the role of the court is to determine which proposed class action proceeding is in the best interests of the putative class and offers the most focused and efficient approach to the proposed proceeding. (See ***Thompson*** at paras. 44-45) I propose to review the key factors I considered to decide the competing motions.

Factors to apply on a carriage motion

i) and ii) The nature and scope of the causes of actions advanced and the theories advanced by counsel

[42] Both proposed class proceedings advance Removed Child claims on behalf of children who were not living on a reserve during the Class Period. Although the Laplante causes of action are arguably broader than the causes of action advanced in the Fontaine action, the class definitions are narrower in the Laplante action when compared to the Fontaine action.

[43] The plaintiffs in the Fontaine action stress that the Laplante child class is narrower than the Removed Child Class in the Fontaine action in three ways:

a) The Laplante action restricts the proposed class to First Nations children. It specifically does not include Métis and Inuit children. The Fontaine action includes Indigenous individuals and therefore includes First Nations children as well as Métis and Inuit children. The Fontaine plaintiffs submit that Métis and Inuit children were subjected to the same CFS system and suffered similar harms and therefore ought to be included in the Removed Child Class claims;

b) The Laplante Child class excludes First Nations children removed from their homes and placed with extended family; and

c) The Laplante proposed action does not advance an Essential Services Claim on behalf of Indigenous children.

[44] The Laplante action includes an opt-in claim by First Nations in Manitoba. The Fontaine action does not include claims advanced by First Nations. However, legal counsel in the Fontaine action represent several First Nations in a separate, opt-in action in the Federal Court representing First Nations across Canada. (***Fisher River First Nation et al. v. Canada***, Docket No. F.C. File No. T-213-23) The Fontaine plaintiffs submit that the separation of the claims is deliberate and is preferable.

[45] The Fontaine plaintiffs also submit that children and First Nations suffer distinct harms and children and families should be dealt with separately and the children and families should have control over the class action proceeding, not First Nation Councils or the AMC. They submit First Nations exclusively control the ***Fisher River First Nation*** claim.

[46] The Laplante action advances claims on behalf of children by First Nations and the AMC. The Fontaine plaintiffs submit that the litigation plan advanced by the Laplante plaintiffs "runs the risk of subordinating the interests of the children to those of the organizations".

[47] Further, the Fontaine plaintiffs submit that the Laplante action does not represent all First Nations in Manitoba. The record filed includes affidavits from the Chiefs of three First Nations who oppose having the claims of children and the claims of First Nations in the same action.

[48] The Fontaine plaintiffs advance the position that their approach is preferable and that it ensures that children's claims are front and center.

[49] The parties agree that the Fontaine proposed Removed Child class is broader than the Laplante proposed child class. The Laplante action deliberately does not include claims on behalf of Métis and Inuit children. The plaintiffs in the Laplante action submit that the claims on behalf of Métis and Inuit children are weaker than those of First Nations children and therefore the causes of action on behalf of different Indigenous groups should not be advanced together.

[50] Finally, the Fontaine plaintiffs submit that both efficiency and practicality favour proceeding with the Fontaine action. All off-reserve First Nations children will remain members of a certified class action proceeding in ***Stonechild***, and will be represented by the consortium. The Fontaine plaintiffs submit that if the court grants the relief sought by them, the entire class of survivors will be covered by Fontaine and proceed as one. On the other hand, if the Laplante action proceeds, they submit that many First Nations survivors will be covered by Fontaine for their Essential Services Class claims and all of them will continue to be members of the ***Stonechild*** class action proceeding and continue to be represented by law firms who are part of the consortium.

[51] The Fontaine plaintiffs submit that they seek compensation for more claims by Indigenous children as part of a single class action proceeding, rather than splitting claims. Further, members of the Fontaine counsel team have already negotiated a settlement for on-reserve claims of First Nations survivors in the Moushoom action (subject to further negotiation and Federal Court approval).

[52] The Laplante plaintiffs submit that the causes of action asserted by them are preferable because they better reflect the needs of First Nations people and they maximize the proposed classes' chance of success on the merits. The Laplante plaintiffs emphasize the following:

a) The Laplante action advances a claim based on alleged breaches of s. 2(a) of the ***Charter*** based on an alleged breach of the right to freedom of religion including ancestral laws, teachings, and traditional ceremonies, which the Laplante plaintiffs allege is grounded in the defendants' ongoing efforts to assimilate First Nations people by severing children from their culture, spirituality and First Nations. The Fontaine action does not advance a claim for alleged breaches of s. 2(a) of the ***Charter*** and the Laplante plaintiffs submit that this is perhaps because the Fontaine action takes a "pan-Indigenous approach". The Laplante plaintiffs submit, therefore, that the Fontaine action omits an important aspect of harm experienced by First Nations people and First Nations.

b) Both the Laplante action and the Fontaine action advance a cause of action based on alleged breaches of s. 15 of the ***Charter***. The Laplante plaintiffs say that they are better positioned to succeed in this claim. The Laplante plaintiffs submit that First Nations children are grossly overrepresented in the CFS system, both on and off reserve. They submit that the Fontaine action will experience challenges in proving disproportionate impacts for Métis and Inuit children and families. They point to the lack of evidence that Métis or Inuit persons suffered disproportionate impacts to support a

s. 15 claim in the "pan-Indigenous" Fontaine action. The Laplante plaintiffs say the empirical evidence supports a strong s. 15 claim for First Nations people, but not for other Indigenous groups. The Laplante plaintiffs submit that the evidence in the Laplante action asserts a strong s. 15 claim on behalf of First Nations people, which is not possible to replicate for Métis or Inuit people. They submit that the more diffuse s. 15 claim in the Fontaine action is weaker, thus diluting the claims of First Nations people.

c) The Laplante plaintiffs acknowledge that both proposed class proceedings allege breaches of s. 7 of the ***Charter***. However, the plaintiffs in the Laplante action assert what they submit is "a more nuanced s. 7 claim that highlights Class members' unique vulnerability while in CFS and increases the prospect of success on the merits" (Brief of the Moving Party, document no. 30, p. 51).

d) The Laplante action advances collective claims by First Nations which are not advanced in the Fontaine action. The Laplante plaintiffs submit that the absence of First Nation plaintiffs narrows the claims available to all class members. The Laplante plaintiffs submit that the Fontaine action focuses on individuals relegating the First Nations to separate and what they submit are duplicative Federal Court proceedings. The Laplante plaintiffs submit that the ***United Nations Declaration on the Rights of Indigenous Peoples Act***, S.C. 2021 c. 14, is an important Act to assist in defining and considering the rights of First Nations and their members. They submit that collective rights "coexist" and are "not mutually exclusive in nature." The

Laplante plaintiffs submit that it is in the best interests of the class as a whole to advance collective claims with individual claims.

e) The Laplante plaintiffs seek injunctive relief to deal with what they refer to as "systemic relief in order to prevent history from repeating itself." The Laplante plaintiffs submit that the Fontaine action seeks declarations of ***Charter*** breaches and breaches of the defendants' duties, but does not compel the defendants to correct or change the alleged misconduct. The Laplante plaintiffs submit therefore that their approach is to be preferred. Regarding the relief being sought, Chief Monias explains at paras. 81 and 82 of his affidavit:

> 81. ... The members of our proposed class need compensation ... But money is not enough. I hope this proposed class action will reset the relationship with Manitoba and Canada and create a future without unnecessary apprehensions.
>
> 82. I also want to eliminate the biases, discrimination, and racism that are baked into CFS ... This is an opportunity to learn from the tragedies of our past and present to create the future that our children deserve.

Discussion on first factor

[53] The plaintiffs in both proceedings advance different theories underlying the causes of action in the two competing claims and each plaintiff group urged me to accept their approach as preferred. Having reviewed the applicable authorities, I note that the analysis that should be undertaken when a court is asked to choose between proceedings must be undertaken on a qualitative rather than a quantitative basis. The purpose of a carriage motion is not to parse the proposed actions finely or overly analyze them for purposes of comparison, but rather to scrutinize each for any glaring deficiencies. (See

Setterington v. Merck Frosst Canada Ltd., [2006] O.J. No. 376, 2006 CarswellOnt 506 (Ont. Sup. Ct. J.); ***Simmonds v. Armtec Infrastructure Inc.***, 2012 ONSC 44, [2012] O.J. No. 277; ***Locking v. Armtec Infrastructure Inc.***, 2013 ONSC 331, [2013] O.J. No. 531; ***Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.***, 2000 O.J. No. 4594, [2000] O.T.C. 877 (Ont. Sup. Ct. J.); and ***Thompson***)

[54] As pointed out by the Ontario divisional court in ***Locking***, some carriage motions are incapable of being resolved by merely considering whether claims have "glaring deficiencies" or can be said to be "frivolous". Sometimes it is necessary for the motion judge to conduct a more detailed and nuanced analysis, because there is no other way to properly distinguish between the actions and choose the proceeding that is in the best interests of the class.

[55] In this case, counsel advanced strong submissions as to why the causes of action advanced in their proposed class proceedings were in the best interests of the classes. In my view, the proposed causes of action do not contain "glaring deficiencies" or can be said to be "frivolous". In assessing the nature and scope of the causes of actions advanced and the theories advanced by legal counsel, I am satisfied that the approach taken in the Fontaine action is in the best interests of the putative class members for a number of reasons which I will outline below. That is not to say that the causes of action or theories advanced in the Laplante action are necessarily deficient or frivolous.

[56] In making the decision, it is important to keep in mind the overriding principle to be applied in carriage motions. It is to determine the best interests of the putative class members having regard to the objectives of a class action proceeding while at the same time is fair to the defendants.

[57] In my view, the approach advanced in the Fontaine action is in the best interests of the putative class members for the following reasons:

a) The Fontaine action is broader than the Laplante action as it advances claims on behalf of all Indigenous people impacted by the CFS system, not just First Nations children. The class members in the Fontaine action include First Nations, Métis and Inuit people.

b) The Laplante plaintiffs advance a strong argument that their cause of action is more focused and is for and on behalf of First Nations persons living off-reserve. The Laplante plaintiffs submit that there is evidence that First Nations children are grossly overrepresented in the CFS system, both on and off-reserve and that First Nations children are in a stronger position to advance a s. 15 ***Charter*** claim. I agree that the evidence filed thus far establishes the s. 15 claim may be stronger for First Nations children than it may be for Métis or Inuit children. However, First Nations, Métis and Inuit children are all subject to the same CFS system and evidence may be forthcoming that Métis and/or Inuit persons also suffered disproportionate impacts as a result of the CFS system. In my view, it is preferable to advance the claims of all impacted Indigenous children in one action.

c) The Laplante plaintiffs also submit that the lack of evidence respecting Métis or Inuit people will dilute the s. 15 claim being advanced on behalf of First Nations children. I disagree with that submission. All persons impacted by the CFS system will have to prove the alleged disproportionate impact suffered and if the claims advanced on behalf of First Nations children are

stronger than the claims advanced on behalf of Métis and Inuit children, those claims may be successful and the other claims may not. However, if the proceeding is certified, it simply makes more sense from an efficiency and cost standpoint to advance claims on behalf of all Indigenous children that may have been impacted, not just one group of the children. If I accept the position advanced on behalf of the Laplante plaintiffs, it arguably means that separate claims may have to be advanced on behalf of Métis and/or Inuit persons thus increasing the number of different claims being advanced on behalf of different groups of children. In my view, that approach should be discouraged.

d) The Fontaine action advances claims on behalf of an Essential Services Class for Indigenous people that are not covered by the Moushoom action and the Trout action. The Laplante plaintiffs did not advance an Essential Services Class claim and submit that such a claim should be advanced separate and apart from the child removal claims. Both sides have raised compelling submissions and I am not persuaded that it is necessarily an advantage or a disadvantage to advance the different causes of action in one proceeding or multiple proceedings. The more significant point I considered is that the Fontaine claim is similar to the claims advanced in other provinces and the Essential Services Class claim is being advanced in numerous claims across the country. Including the Essential Services Class ensures that all potential class members are covered that are not part of the Moushoom action and the Trout action and the potential settlement that

has been negotiated and may be finalized in the near future. Again, in my view, one proceeding in Manitoba consistent with other proceedings in other jurisdictions as opposed to multiple proceedings is preferred.

e) The Laplante action excludes First Nations children removed from their homes and placed with extended family. This is submitted to be consistent with the theory of the Millennium Scoop actions of removing First Nations children and placing them with non-Indigenous foster parents resulting in a loss of culture, language, heritage and identity of Indigenous people. I agree with the Laplante plaintiffs that their approach is more consistent with what has been referred to as the Millennium Scoop cause of action. However, First Nations children removed from their homes and placed with extended families may also have been impacted or affected by the CFS system and therefore may have a claim. The Fontaine action and definition of the Removed Child Class includes children removed from their homes and placed with extended family. Put another way, the Fontaine action class definition does not include a First Nation family qualifier. While I am not necessarily convinced that the approach taken in the Laplante action is a disadvantage or a deficiency, it is a factor I considered in assessing the causes of action advanced in the two competing actions. The broader approach adopted in the Fontaine action would avoid confusion for First Nations families and ensure all impacted children and families will be able to advance a claim by the same group of lawyers.

f) Finally, I agree that from both a cost efficiency and practicality standpoint, the cause of action advanced by the Fontaine plaintiffs is preferred. All off-reserve First Nations children remain members of the Stonechild action and will be represented by law firms that are part of the consortium. The Essential Services Class claims are being advanced by the consortium. It is important to keep in mind that Fontaine counsel have already negotiated a potential settlement for on-reserve claims of First Nations survivors in the Moushoom action. Advancing the same causes of action in other actions across Canada on behalf of off-reserve children and being represented by the same or similar counsel team is, in my view, in the best interests of the putative class.

[58] I considered other factors in assessing the competing motions which, in my view, did not necessarily tip the scales in favour of either the Fontaine action or the Laplante action. The factors considered include:

a) The Laplante action seeks prospective and mandatory injunctive relief which I detailed at para. 14 above. The Laplante plaintiffs submit it is an advantage to address systemic relief and "prevent history from repeating itself". While such a goal is laudable, I have reservations about whether the form of injunctive relief sought can be successfully advanced and ordered in the proposed class action proceeding. (See ***The Proceedings Against the Crown Act***, C.C.S.M. c. P140 s. 14 and the ***Crown Liability and Proceedings Act*** R.S.C. 1985 c. C-50, s. 22.) In contrast, the Fontaine plaintiffs seek declaratory relief about the impugned conduct of

the defendants. Without deciding the issue in this case, there is authority for granting declaratory relief in actions involving First Nations and Métis claims. (See ***Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada***, 2021 FC 969, [2021] F.C.J. No. 104), at paras. 299-301 and the ***Manitoba Métis Federation Inc. v. Canada (Attorney General)***, 2013 SCC 14, [2013] 1 S.C.R. 623) A strong argument will undoubtedly be made by the defendants that the court cannot grant injunctive relief against the Crown. That said, novel arguments advanced under the umbrella of ***Charter*** damages should not be finely parsed, dismissed or discouraged at this juncture. Therefore, this difference between the causes of action advanced was not necessarily considered to be an advantage or disadvantage for one action over the other. None of the parties would disagree that steps ought to be taken to prevent history from repeating itself. The real question is how to achieve that objective. The consortium has established a consultative council to advance the views of First Nations and other stakeholders into the long-term reform efforts which they submit are consistent with the reconciliation principles of the Truth and Reconciliation Commission, chaired by the Honourable Murray Sinclair. I cannot say at this point whether the consultative council can or will achieve the objective of long-term reform. In any event, I agree that such an objective may be best left for consultation, negotiation and agreement between governing bodies, including First Nations, AMC, MMF, MKO, Keewatin Tribal Council,

Federation of Sovereign Indigenous Nations, Treaty 8 First Nations of Alberta, representative plaintiffs in the proceedings across Canada and representatives of Manitoba, other provinces and Canada.

b) The Laplante plaintiffs submitted that its approach should be preferred as it includes an alleged breach of the plaintiffs' right to freedom of conscience and religion under s. 2(a) of the ***Charter*** and breach of s. 36 of the ***Constitution Act***, 1982. The Fontaine action does not advance a claim for these alleged breaches. While I do not necessarily consider this to be a glaring deficiency in the Fontaine action, it is a factor I considered in assessing what is in the best interests of the class. The Fontaine plaintiffs submit that neither of these two causes of action have been successfully advanced in similar litigation and including them risks adding unnecessary time, complexity and cost to the proceeding. The claims that have been raised in similar actions include causes of action in negligence, breach of fiduciary duty and violations of ss. 7 and 15 of the ***Charter***. Both the Laplante action and the Fontaine action advance those causes of action. I do not agree that adding causes of action will necessarily add unnecessary time and costs. They may, however, add to the complexity. As I already mentioned, novel causes of action should not necessarily be discouraged but, in my view, adding these additional causes of action do not add significantly to the potential claims such that it tips the scales in favour of either the Fontaine action or the Laplante action.

c) I considered the submission advanced by the Laplante plaintiffs that its collective claims are advanced by First Nations and the Fontaine action does not advance claims by First Nations or the AMC. I am not certain whether the claims of the First Nations should necessarily be joined with the claims advanced on behalf of the children affected by the CFS system. I am not making any determination as to whether the First Nations claims must be tied to claims advanced on behalf of Indigenous children. I considered the fact that an action has already been commenced on behalf of First Nations in a Federal Court proceeding. Without ruling on the issue at this time, I am not convinced that the rights of children and First Nations are mutually exclusive or not. It does make sense to advance all claims in one proceeding. I am also not sure that I accept the submissions advanced by the Fontaine plaintiffs that the Fontaine action ensures the children's claim should be front and center and not the claims of First Nations and/or the AMC. I agree that the children have separate claims and those claims should not necessarily be controlled by First Nations, the AMC or others. Overall, I did not consider this difference in the causes of action advanced between the two proceedings as determinative. The claims advanced by the AMC and the First Nations in the Laplante action will not be stayed and I will address the form of stay granted in the conclusion of this decision.

iii) **The state of each class action, including preparation**

[59] The plaintiffs in both actions and their legal counsel have already undertaken a significant amount of work, time and effort to proceed with the proposed class proceedings. The plaintiffs in the Fontaine action filed numerous affidavits, including:

- Affidavit of Amber Lynn Fontaine, affirmed January 5, 2023
- Affidavit of Cheyenne Stonechild, affirmed January 6, 2023
- Affidavit of Tracy Lynn McKenzie, affirmed January 6, 2023
- Affidavit of Trudy Lavallee, affirmed January 6, 2023
- Affidavit of Gregory Besant, affirmed January 9, 2023
- Affidavit of Harold (Sonny) Cochrane, K.C., affirmed January 9, 2023
- Affidavit of Amber Lynn Fontaine, affirmed January 26, 2023
- Affidavit of Chief Hubert Watt, affirmed January 27, 2023
- Affidavit of Chief Jennifer Bone, affirmed January 27, 2023
- Affidavit of Chief Michael Yellowback, affirmed January 27, 2023
- Affidavit of Tracy Lynn McKenzie, affirmed January 27, 2023
- Affidavit of Harold (Sonny) Cochrane, K.C., affirmed January 30, 2023

[60] The affidavits filed by the Fontaine plaintiffs outline the numerous steps that have been taken by the representative plaintiffs and the consortium, as well as in the other class action proceedings that have been commenced across the country. As explained in the affidavit of Harold (Sonny) Cochrane, K.C., affirmed January 9, 2023, legal counsel realized that "infighting, and carriage disputes were not in the best interests of the vulnerable classes" (p. 5, para. 10). The counsel teams, therefore, decided to put the interests of class members first and to work together collectively and cooperatively to

advance this litigation and related litigation in an efficient and effective manner. Mr. Cochrane states:

> 11. Counsel recognized that the claim in this jurisdiction, as in others, would require: (a) significant resources; (b) significant experience and expertise relating not only to class actions, b0ut also to Indigenous law, public law, and Indigenous child and family services law; (c) the unique perspective and skills of Indigenous legal counsel; and (d) a deep understanding of how Indigenous child and family services operate in practice in Manitoba and other jurisdictions (which vary greatly in practice), and the underlying endemic problems that currently bedevil that system and have led to the gross overrepresentation of Indigenous children – including off-reserve Indigenous children – in state care. Counsel further recognized that there would be very significant synergies to be gained from collaboration across the certified Federal Court class actions (*Stonechild* and *Moushoom*) and claims being pursued in various provincial superior courts.
>
> 12. We therefore assembled a counsel team from across Canada that can prosecute these actions in various provinces as well as on the federal level. This team is able to leverage its members' specific expertise, including knowledge and familiarity with the various child and family services regimes, and the several years of experience its members have had in litigating closely related Indigenous child welfare actions, while creating a unified platform to advance all of the claims more effectively. This is particularly relevant given that Canada has been named as a defendant in every action. Accordingly, on or around October 12, 2022, the law firms of Murphy Battista, Gowling, Cochrane Saxberg, Sotos, and Miller Titerle agreed to collaborate and act as co-counsel in advancing the present claim, the *Stonechild* claim, and other claims in provincial superior courts, including British Columbia, Saskatchewan and Ontario. Counsel are also working with Quebec counsel, Kugler Kandestin LLP, ... to advance a parallel proceeding in Quebec.

[61] Mr. Cochrane and the other deponents describe in detail the outreach and communication with putative class members, the related and overlapping class proceedings, the CHRT and long-term reform being sought as well as the experience of class counsel.

[62] Similarly, the plaintiffs in the Laplante action have filed extensive evidence from counsel and the representative plaintiffs. The evidence filed in the Laplante action includes:

- Affidavit of Cora Morgan, affirmed November 24, 2022

- Affidavit of Elder Florence Paynter, affirmed November 24, 2022
- Affidavit of Chief Heidi Cook, affirmed November 28, 2022
- Affidavit of Amber Laplante, affirmed November 28, 2022
- Affidavit of Dysin Spence, sworn November 28, 2022
- Affidavit of Chief David Monias, affirmed November 30, 2022
- Affidavit of Byron Williams, sworn December 2, 2022
- Affidavit of Chief Sheldon Kent, affirmed December 2, 2022
- Affidavit of Jennifer Kasper, sworn December 2, 2022
- Affidavit of Roberta Godin, affirmed December 5, 2022
- Affidavit of Taralee Beardy, affirmed January 16, 2023
- Affidavit of Grand Chief Catherine Ann Merrick, affirmed January 17, 2023
- Affidavit of Byron Williams, sworn January 18, 2023
- Affidavit of Lisa Parsons, affirmed February 27, 2023

[63] The plaintiffs in the Laplante action submit that they are further advanced than the Fontaine action and are ready to proceed to summary judgment on a fixed timetable. The Laplante lawyers have prepared a litigation plan and have retained experts that will be required to prove their case. The affidavits and the brief filed in the Laplante action outline a litigation plan they submit will allow the Laplante action to proceed efficiently and effectively to conclusion.

[64] Based on their previous experience, the Laplante lawyers submit that they can credibly bring the Laplante action to a favourable judgment or settlement in less than two years.

[65] The Laplante plaintiffs submit that the Fontaine litigation plan is uncertain and less focused. That said, legal counsel representing the plaintiffs in both proceedings submit that their plan is superior and in the best interests of the putative class members.

Discussion on this factor

[66] A significant amount of evidence has been filed in both proceedings, including reference to numerous experts that will be involved in expressing opinions regarding the claims being advanced and the impact suffered by the class members. At this stage, it is difficult to assess which class action proceeding has the superior litigation plan. While it appears that the Laplante plaintiffs have prepared a detailed litigation plan and retained certain experts, the evidence establishes that the same experts and other experts have been retained by the consortium in the Millennium Scoop actions that have been commenced across the country. Clearly, there is no property in expert witnesses and experienced counsel representing the Fontaine plaintiffs and the Laplante plaintiffs are in a position to engage the appropriate experts to proceed with the proposed class action proceedings.

[67] Having assessed all of the evidence, I am not satisfied that the state of preparation tips the scales one way or the other. Both counsel teams have prepared litigation plans and are well positioned to advance the proposed class proceedings. I am mindful of the fact that statements of defence have not yet been filed, the positions of the defendants are not yet known and certification hearings have not been scheduled. At this stage, the litigation plans are drafts only and it is premature to assess whether the proposed timelines can be met.

[68] In any event, I consider this a neutral factor in determining who should have carriage of the class proceedings. Both groups of counsel have extensive experience in prosecuting class action proceedings and neither is arguably superior or in a significantly better state of preparation.

iv) The number, size and extent of involvement of the proposed representative plaintiffs

[69] I do not intend to review in any detail the extensive evidence filed or the positions of the parties regarding this factor. Suffice to say that the representative plaintiffs in both the Fontaine action and the Laplante action have had extensive involvement in the proceedings thus far. The affidavits filed outline their background and extent of their involvement in the proposed class action proceedings. I have no hesitation in finding that the proposed representative plaintiffs in both actions are suitable and would fairly and adequately represent the interests of the proposed class members in both of these proceedings.

[70] The Laplante action has more representative plaintiffs than the Fontaine action. While the number is not a determinative factor, I agree that the Laplante representative plaintiffs have a wide variety of backgrounds and perspectives and their backgrounds include experience in navigating and reforming the CFS system. The Laplante action includes Manitoba's First Nations Family Advocate, Cora Morgan, on behalf of the AMC as a representative plaintiff. It is not disputed that the AMC and the office of the First Nations Family Advocate have a long history of advocating for First Nations children and families.

[71] I also agree that Chief Cook, Chief Monias and Chief Kent have extensive experience with CFS portfolios and agencies and I have no doubt that they understand the potential harms suffered by First Nations when children are removed from their homes.

[72] The Fontaine representative plaintiffs, Amber Fontaine and Tracy McKenzie, both provide affidavits detailing their background and experience with the CFS system in Manitoba. They both emphasize that the claims advanced are about Indigenous children and families involved with the child welfare system and that the survivors should not be overshadowed by government entities that do not share their childhood experiences. I have no hesitation in finding that they are both suitable representative plaintiffs who will advance the interests of all class members.

[73] Ideally, with cooperation and agreement, the two competing class action proceedings could potentially be amalgamated and advanced as one claim. Since no agreement has been reached, the court is left in the unenviable position of choosing which group should have carriage of the class action proceeding and which representative plaintiffs are more suitable. It is important to keep in mind that the parties are only seeking a partial stay of their respective proceedings. It is only to the extent that the proposed claims overlap that the parties are seeking a stay.

[74] The Fontaine plaintiffs are not seeking a stay respecting the claims advanced by the First Nations and the AMC. Therefore, to a certain extent the representative plaintiffs in the Laplante action will still play a role because, as I outline in the conclusion of my decision, I will only grant a partial stay of the Laplante action.

[75] Having reviewed all of the evidence relevant to this factor, it is my view that this is a neutral factor in determining who should have carriage of the proposed class action proceedings.

vi) **The resources and experience of counsel**

[76] Both the consortium and the Laplante lawyers have the knowledge, expertise, experience and resources to advance the proposed class action proceedings. All of the authorities emphasize that carriage motions are not "beauty contests" where the opposing legal counsel groups advance positions submitting they are superior to the other group. Both legal counsel groups have vast experience in prosecuting class action proceedings and I am satisfied, after having reviewed all of the material filed, that this is a neutral factor.

[77] I did not find the allegations of conflict of interest, criticism regarding the manner in which the Millennium Scoop class action proceedings have been prosecuted and allegations of inefficiency and potential for high legal fees were of assistance to decide the carriage motions. I will provide one observation regarding the issue of legal fees. The legal teams are retained by representative plaintiffs and the class members to provide legal services required to prosecute the class action proceedings in a cost effective and efficient manner pursuant to contingency fee agreements. The overriding principle is that all legal fees are subject to court approval and must be fair and reasonable. Therefore, regardless of the resources used and the number of lawyers involved, the legal fees to be paid out of any settlement or judgment, if either is achieved, are subject to review based on what is determined to be fair and reasonable in the circumstances.

The inter-relationship of class actions in more than one jurisdiction

[78] Earlier, I referenced and summarized the numerous class action proceedings that have been commenced in the Federal Court and in provinces across the country. The consortium or member firms of the consortium act as counsel in the Stonechild action, the Moushoom action and the Trout action. As well, the consortium acts in the class action proceedings that have been commenced in Ontario, British Columbia, Alberta, Saskatchewan and are collaborating with lawyers in Quebec. The parallel Millennium Scoop class actions in other provinces advance causes of action that are similar to the Fontaine action.

[79] The Laplante proposed class is covered by the certified class in the Stonechild action. The Stonechild action is being prosecuted by two law firms that are part of the consortium and the claims advanced will have to be coordinated with the Fontaine action.

[80] In assessing this factor, I considered the following statement made by Cheyenne Stonechild in her affidavit affirmed January 6, 2023 at para. 30:

> As an Indigenous survivor of the child welfare system, I would not want to have my interests and fate in this critical fight to be in the hands of two separate and competing groups of lawyers. There's no place for competition in any of these class actions, which are and should be about the survivors. From my own history, which is one that in my experience is shared by many other survivors, establishing and maintaining a relationship of trust and confidence with others is not easy. This of course includes lawyers, with whom the establishment and maintenance of a relationship of trust and confidence is crucial to success. For many of us, given our stories in this life, trust is finite, and it is precious. It is not something we hand over easily or readily. And trust is never [to] be treated as something we hand over without vigilance. From everything we have lived through while in the system, we should not be asked to act nor feel differently. We should not have to develop and maintain and be ever-vigilant in regard to two sets of lawyers representing us in two separate but clearly interconnected and interrelated actions. And yet that is what is what is being proposed for survivors should the *Stonechild* class members be represented by a different set of counsel in Manitoba.

[81] I accept that this is a legitimate concern and agree that it is in the best interests of the putative class to be represented by the same group of lawyers and to coordinate the various class action proceedings that have been commenced across Canada.

[82] The Laplante plaintiffs submit that the Fontaine action and Stonechild action advance claims for the same damages respecting the same injuries. They disagree that the Fontaine action was commenced to complement the Stonechild action.

[83] The Federal Court proceedings can only be pursued against Canada, while the provincial superior courts have jurisdiction in connection with claims against their respective provincial governments and Canada.

[84] I agree that there appears to be an overlap between the Manitoba resident Stonechild class and the Fontaine Removed Child Class. By the same token, there is an overlap between the Stonechild Manitoba resident class and the proposed Laplante child class.

[85] The overlap between provincial claims and claims advanced in the Federal Court will have to be assessed at a certification hearing and will not be resolved in deciding the competing carriage motions.

[86] The Laplante plaintiffs submit that "[i]f the Laplante action is awarded carriage, following certification, the Laplante plaintiffs will, if necessary, move to stay the Stonechild action to the extent of the overlap" (at para. 76 of the reply brief of the Laplante plaintiffs).

[87] While I agree that the issue of overlap will have to be assessed and determined, I am concerned that further motions to stay class action proceedings which have already

been certified adds to the cost and expense incurred by the parties and may delay the prosecution of the class action proceedings.

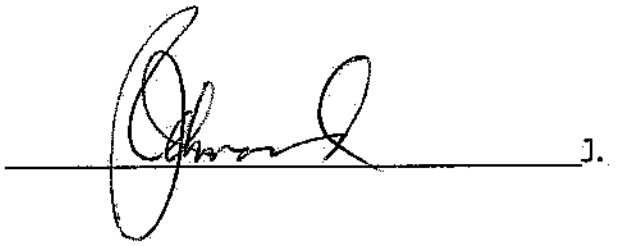
[88] Considering the submissions advanced in support of the competing motions on this issue, I am satisfied this factor favours granting carriage to the Fontaine plaintiffs represented by the consortium. In my view, granting carriage to the consortium and proceeding with the Fontaine action best ensures the classes are represented by the same counsel group in a coordinated fashion in multiple jurisdictions and in my view, doing so is in the best interests of the putative class members.

Conclusion

[89] Taking into account all of the relevant factors, it is my view that it is in the best interests of the putative class to grant carriage of the proposed class action proceeding to the consortium in the Fontaine action. The Laplante action is stayed to the extent that it duplicates or overlaps with the Fontaine action. The Laplante action advancing a collective claim by and on behalf of First Nations and the AMC is not stayed. I am not making any determination as to whether the Laplante action overlaps with the Federal Court proceeding of ***Fisher River First Nation***, as that issue was not referenced in the notices of motion and was not before me for decision. If the parties cannot agree on the precise terms of the partial stay of proceedings granted, I will hear further submissions at a scheduled hearing.

[90] I also order that no other proposed class action proceedings may be commenced in Manitoba respecting the same or similar claims advanced in the Fontaine action without leave of the court.

[91] No order of costs is made to any of the parties on the competing motions. As pointed out in the ***Thompson*** decision, ss. 37(1) and 37(2), ***The Class Proceedings Act***, C.C.S.M. c. C130, govern costs in a class proceeding and make it clear that costs should not be awarded on carriage motions absent vexatious, frivolous or abusive conduct, an improper purpose or exceptional circumstances, none of which, in my view, were demonstrated in this case.



J.

Schedule "A"

Ongoing Millennium Scoop class actions against Canada – Feb 24, 2023

	Case Name	Jurisdiction	Class Counsel	Date Issued (YYYY-MM-DD)	Status of Litigation	Class Definition	Class Period	Members status (removed child)
STONECHILD	***Cheyenne Pama Mukos Stonechild, Lori-Lynn David and Steven Hicks v. His Majesty the King*** (T-620-20/A-137-22) (previously known as *"Walters"*)	Federal Court	Murphy Battista LLP Gowling WLG	2020-06-10	Certified (2022 FC 913; 2022 FC 914), on appeal (A-137-22) Appeal timelines suspended until March 1, 2023.	**Primary Class:** All First Nations (Status and Non-Status Indian), Inuit and Métis persons who were removed from their homes in Canada between January 1, 1992 and December 31, 2019 and placed in the care of individuals who were not members of the Indigenous group, community or people to which they belong, excluding on-reserve class members in the Federal Court action styled as *Moushoom and Meawasige (by his litigation guardian, Beadle) v The Attorney General of Canada* with court file number T-402-19. **Family Class:** The parents and grandparents of Primary Class Members.	January 1, 1992 to December 31, 2019	- Indians - Inuit - Métis - Non-status Indians
MOUSHOOM / AFN / TROUT	***Xavier Moushoom and al. and Assembly of First Nations and al. v The Attorney General of Canada*** (T-402-19/T-141-20) ***Assembly of First Nations and Zacheus Joseph Trout v The Attorney General of Canada*** (T-1120-21)	Federal Court	Sotos LLP Kugler Kandestin Miller Titerle + co Nahwegahbow, Corbiere Fasken Dumoulin Martineau	Moushoom: 2019-03-04 (consolidated Statement of claim filed 2021-07-21) Trout: 2021-07-16	Moushoom was certified (2021 FC 1225) Trout was certified (2022 FC 149) Final Settlement Agreement signed on June 30, 2022 and is contingent on the Canadian Human Rights Tribunal's determination that the Final Settlement Agreement satisfies its compensation orders *The Assembly of First Nations and Zacheus Joseph Trout (Plaintiffs of the *Trout* class action (T-	**Moushoom Removed Child Class**: All First Nations individuals who: (i) Were under the applicable provincial/territorial age of majority at any time during the Class Period; and (ii) Were taken into out-of-home care during the Class Period while they, or at least one of their parents, were ordinarily resident on a Reserve. **Moushoom Jordan's Class:** First Nations individuals who were under the applicable provincial/territorial age of majority and who during the Class Period were denied a service or product, or whose receipt of a service or product was delayed or disrupted, on grounds, including but not limited to, lack of funding or lack of jurisdiction, or as a result of a jurisdictional dispute with another government or governmental department. **Moushoom Family Class:** All persons who are the brother, sister, mother, father, grandmother or grandfather of a member of the Removed Child Class and/or Jordan's Principle Class. **Trout Child Class:** All First Nations individuals who were under the applicable provincial/territorial age of majority and who, during the Class Period [April 1, 1991 – December 11, 2007], did not receive (whether by reason of a denial or a gap) an essential public service or product relating to a confirmed need, or whose receipt of	Moushoom: April 1, 1991 to certification order [Nov. 26, 2021] Trout: April 1, 1991 to December 11, 2007	For Moushoom Removed Child Class (ordinary residence on a reserve is a condition): - Indian status pursuant to the *Indian Act* (or entitled to be registered) - Band members. For Moushoom Jordan's Class and Trout Child Class: - Indian status pursuant to the *Indian Act* (or entitled to be registered) - Band members;

Ongoing Millennium Scoop class actions against Canada – Feb 24, 2023

					1120-21)) are also parties to the Final Settlement Agreement The Canadian Human Rights Tribunal declined to approve the settlement agreement on October 24, 2022 Canada and the Assembly of First Nations filed for judicial review of the Canadian Human Rights Tribunal's October 24 decision (Court file No. T-2438-22/T-2448-22). A case management conference is scheduled on March 3, 2023 to discuss next steps.	said service or product was delayed, on grounds, including but not limited to, lack of funding or lack of jurisdiction, or as a result of a service gap or jurisdictional dispute with another government or governmental department. **Trout Family Class:** all persons who are brother, sister, mother, father, grandmother or grandfather of a member of the Child Class.		- Individuals recognized as citizens or members of their respective First Nations whether under agreement, treaties or First Nations' customs, traditions and laws
FISHER RIVER	***Fisher River Cree Nation et al. v AGC*** (T-213-23)	Federal Court	Cochrane Saxberg LLP Sotos LLP Miller Titerle & Co. Muphy Battista LLP Gowling WLG (Canada) LLP	2023-01-31	Statement of claim issued January 31, 2023.	**Class:** the plaintiffs and every other First Nation that is later added as a plaintiff, or opts into this proceeding in the manner and within the time period approved by the Court, collectively.	April 1, 1991 to certification	- First Nations (named and opt-ins)

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NEAL/SMITH	*Neal and Smith v. AGC and HMTK in Right of the Province of British Columbia* (S-224088)	British Columbia	Muphy Battista LLP Gowling WLG Miller Titerle Law Corpporation Sotos LLP Cochrane Saxberg LLP	2022-05-19	Neal Statement of Claim (S-224088) issued on May 19, 2022 Smith Statement of Claim (S-225194) issued on June 24, 2022 Consolidated statement of claim filing is pending	**Removed Child Class:** all status Indians residing off-reserve and all non-status Indians, Inuit, and Métis persons (irrespective of residency on- or off-reserve) who were taken into care in British Columbia. **Essential Services Class:** Indigenous individuals in British Columbia who, during the Class Period and while they were under the age of 18: (i) had a need for an essential service (inclusive of essential products); and (ii) faced a delay, denial, or service gap in the receipt of that essential service on grounds including but not limited to lack of funding or lack of jurisdiction, or a jurisdictional dispute with another government, level of government, or another governmental department. Excluded from the Essential Services Class, but only with respect to Canada, are: (i) the claims of individuals who meet the definition of the Jordan's Class as certified by the Federal Court in *Moushoom*; and (ii) the claims of individuals who meet the definition of the Child Class certified by the Federal Court in *Trout et al v Canada*, 2022 FC 149 (Federal Court File No., T-1120-21) ("***Trout***"); but in every case only to the extent that those claims are captured by *Moushoom* or *Trout*. **Family Class:** he parents, grandparents and caregivers of members of the Removed Child Class and Essential Services Class.	January 1, 1992 to the date of certification	- Indians residing off-reserve - Inuit - Métis - Non-status Indians
YELLOWKNEE	*Yellowknee v HMTK in right of Alberta and AGC* (2301 01977)	Alberta	Muphy Battista LLP Gowling WLG Miller Titerle Law Corpporation Sotos LLP Cochrane Saxberg LLP	2023-02-13	Statement of Claim issued on February 13, 2023	**Removed Child Class:** First Nations individuals not ordinarily resident on a reserve, and Inuit and Metis individuals whether or not resident on a reserve, who: (1) Were taken into out-of-home state care in Alberta, (2) During the Class Period, (3) While they were under the age of 18, and (4) Do not meet the definition of the Removed Child Class certified by the Federal Court of Canada in Moushoom v Canada, 2021 FC 1225 (Federal Court File Nos, T-402-19 and T-141-20) ("Moushoom"), only to the extent that such claims are captured by Moushoom. **Essential Services Class:** Indigenous individuals who: (1) Had a confirmed need for an essential service (inclusive of essential products), (2) Faced a delay, denial, or service gap in the receipt of that essential service during the Class Period on grounds including but not limited to lack of funding, lack of jurisdiction, or a jurisdictional dispute with another government, another level of government, or another government department, (3) While they were	January 1, 1992 to the date of certification	- Indians residing off-reserve - Inuit - Métis - Non-status Indians

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						under the age of 18, and (4) Do not meet the definition of the Jordan's Class certified by the Federal Court in Moushoom and the claims of individuals who meet the definition of the Child Class certified by the Federal Court in Trout v Canada, 2022 FC 149 (Federal Court File No. T-1120-21) ("Trout"), only to the extent that those claims are captured by Moushoom or Trout. **Family Class**: the caregiving parents or grandparents of all members of the Removed Child Class or the Essential Services Class.		
GENAILLE	***Genaille v AGC and HMTQ in right of the province of Saskatchewan*** (QBG-SA-00760-2022)	Saskatchewan	Gowlings WLG Murphy Battista LLP	2022-08-03	Statement of Claim issued on August 3, 2022	**Underfunding Class**: All status Indians residing off-reserve and all non-status Indians, Inuit, and Métis persons (irrespective of residency on- or off-reserve) who were taken into care in Saskatchewan. **Essential Services Class**: All status Indians residing off-reserve and all non-status Indians, Inuit, and Métis persons (irrespective of residency on- or off-reserve) who were denied a public service or product, or whose receipt of a public service or product was delayed or disrupted, in Saskatchewan, on grounds including but not limited to: lack of funding or lack of jurisdiction, or a jurisdictional dispute with another level or government or governmental department, except as recognized under 2020 CHRT 20. **Family Class**: The parents, grandparents, and caregivers of members of the Underfunding Class and Essential Services Class.	January 1, 1992 to the date of certification	- Indians residing off-reserve - Inuit - Métis - Non-status Indians
FONTAINE/MCKENZIE	***Fontaine and McKenzie v AGC and The Government of Manitoba*** (CI22-01-36804)	Manitoba	Gowlings WLG Murphy Battista LLP Miller Titerle Law Corporation Sotos LLP Cochrane Saxberg LLP	2022-08-19	Fontaine Statement of claim (CI22-01-36804) issued on August 19, 2022 McKenzie Statement of claim (CI22-01-37019) issued on August 26, 2022 Fresh as amended Statement of Claim (consolidating	**Removed Child Class**:(i) Indigenous individuals who were taken into out-of-home care: (a) During the Class Period, (b) While they were under the age of 18, (c) While they were not ordinarily resident on a Reserve, (d) By the Crown or any of its agents, (e) Excluded from the Removed Child Class are the claims of individuals who meet the definition of the Removed Child Class in the Final Settlement Agreement dated June 30, 2022 in *Moushoom et al v Canada*, Federal Court File Nos. T-402-19/T-141-20/T-1120-21 ("*Moushoom*"), if approved by the Federal Court, to the extent that those claims are captured by *Moushoom*. **Essential Services Class**: Indigenous individuals in Manitoba who: (a) During the Class Period, (b) While they were under the age of 18, (c) Had a confirmed need for an essential service (inclusive of essential products), (d) Faced a delay, denial or service gap in the	January 1, 1992 to the date of certification	- First Nations residing off-reserve - Inuit - Métis

					Fontaine and McKenzie claims) filed January 6, 2023 Carriage of Fontaine/McKenzie and Misipawistik set for March 1, 2023	receipt of that essential service on grounds including but not limited to lack of funding or lack of jurisdiction, or a jurisdictional dispute with another level of government or governmental department; (e) Excluded from the Essential Services Class are the claims of individuals who meet the definition of the Trout Child Class or the Jordan's Principle Class in the Final Settlement Agreement dated June 30, 2022 in *Moushoom*, if approved by the Federal Court, to the extent that those claims are captured by *Moushoom* against Canada only. **Estate class**: The estates of members of the Removed Child Class and the Essential Services Class who passed away while in the care of the Crown or any of its agents. **Family class**: All parents and grandparents who were providing care to a member of the Removed Child Class or the Essential Services Class when that child was taken into out-of-home care or needed the essential service that was delayed, denied or faced a service gap.		
MISIPAWISTIK	*Misipawistik Cree Nation and al. v. Government of Manitoba and AGC* (CI22-01-37801)	Manitoba	McCarthy Tétrault LLP	2022-10-06	Statement of Claim issued on October 6, 2022 Carriage of Fontaine/McKenzie and Misipawistik set for March 1, 2023	**Child Class:** All First Nations persons who: (i) were under the age of 18 when they were apprehended by the Defendants or their agents; (ii) were in CFS in Manitoba during the class period; and (iii) were not, at the time of their apprehension, ordinary resident on a reserve. **Family Class:** all parents and grandparents of persons referenced in the Child Class. **First Nations Class:** Black River First Nation, Pimicikamak Cree Nation, Misipawistik Cree Nation and any other First Nation located in Manitoba that elects to join this action within a period of time to be prescribed by this Honourable Court.	January 1, 1992 to the date of certification	- Indians residing off-reserve - Non-status Indians residing off-reserve - Named and opt-in First Nations
MCWATCH	***McWatch and Angnetsiak v. HMTK in Right of Ontario and AGC*** (CV-22-00691039-00CP)	Ontario	Gowlings WLG Murphy Battista LLP Miller Titerle Law Corporation Sotos LLP Cochrane Saxberg LLP	2022-11-30	Statement of Claim issued on November 30, 2022	**Removed Child Class:** First Nations not ordinarily resident on-Reserve, Inuit, Métis individuals in Ontario who were taken into out-of-home care: (1) during the Class Period; and (2) while they were under the age of 18; (3) excluded from the Removed Child Class are the claims of individuals who meet the definition of the Removed Child Class certified by the Federal Court of Canada in *Moushoom et al v Canada*, 2021 FC 1225 (Federal Court File Nos. T-402-19/T-141-20) ("*Moushoom*").	January 1, 1992 to the date of certification	- First Nations residing off-reserve - Inuit - Métis

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						Essential Services Class: Indigenous individuals in Ontario who: (1) during the Class Period; (2) while they were under the age of 18; (3) had a confirmed need for an essential service (inclusive of essential products); and (4) faced a delay, denial, or service gap in the receipt of that essential service on grounds including but not limited to lack of funding or lack of jurisdiction; or a jurisdictional dispute with another government, level of government, or another governmental department; (5) excluded from the Essential Services Class, only with respect to Canada, are the claims of individuals who meet the definition of the Jordan's Class certified by the Federal Court in *Moushoom* and the claims of individuals who meet the definition of the Child Class certified by the Federal Court in *Trout et al v Canada*, 2022 FC 149 (Federal Court File No., T-1120-21) ("***Trout***"), to the extent that those claims are captured by *Moushoom* or *Trout*. **Family Class:** the caregiving parents or caregiving grandparents of all members of the Removed Child Class or the Essential Services Class.		
TOOKALOOK	***Tookalook and James v Attorney General of Quebec and Attorney General of Canada*** (500-06-001177-225)	Quebec	Kugler Kandestin LLP Coupal Chauvelot Sotos LLP	2021-02-21	Application for authorization to institute a class action filed on February 21, 2022 Amended Application for authorization filed on September 1, 2022 Authorization (certification) hearing set for September 25-26, 2023	**Nunavik Child Class:** All Inuit persons ordinarily resident in Nunavik and registered or entitled to be registered as a beneficiary under The James Bay and Northern Québec Agreement ("**JBNQA**") or registered with an Inuit land claim organization who between November 11, 1975 and the date of authorization of this action: 1) were under the age of 18; and 2) were reported to, or otherwise brought to the attention of, the Directors of Youth Protection in Nunavik (*recevoir le signalement*), including, but not limited to, all persons taken in charge, apprehended and placed in care, whether through a voluntary agreement, by court order or otherwise. **Essential Services Class:** All Inuit persons ordinarily resident in Nunavik and registered or entitled to be registered as a beneficiary under the JBNQA or registered with an Inuit land claim organization who between November 11, 1975 and the date of authorization of this action: 1) were under the age of 18; and 2) needed an essential service but did not receive such service or whose receipt of the service was delayed by either respondent or	Nunavik child Class: November 11, 1975 to the date of authorization Québec Child Class: January 1, 1992 to the date of authorization	Nunavik Child Class: - Inuit Québec Child Class: - First Nations (not residing on reserve) - Inuit - Métis

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						their departments or agents, on grounds including, but not limited to, lack of jurisdiction or a gap in services. **Nunavik Family Class:** All parents and grandparents who were providing care to a member of the Nunavik Child Class and the Essential Services Class (…). **Québec Child Class:** All Indigenous persons in Québec who: 1) Were taken into out-of-home care between January 1, 1992 and the date of the authorization of this action; 2) While they were under the age of 18, 3) While they were not ordinarily resident on a Reserve, 4) By Her Majesty the Queen in right of Canada (the "Federal Crown") or Her Majesty in right of Québec (the "Provincial Crown"), or any of their agents, and 5) Are not members of the Nunavik Child Class. **Québec Family Class** : All parents and grandparents who were providing care to a member of the Québec Child Class when that child was taken into out-of-home care.		