

FEDERAL COURT

PROPOSED CLASS PROCEEDING

B E T W E E N:

**XAVIER MOUSHOOM and JEREMY MEAWASIGE (BY HIS
LITIGATION GUARDIAN, MAURINA BEADLE)**

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

**THIRD SUPPLEMENTARY MOTION RECORD
(Motion for Certification)**

March 11, 2020

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FEDERAL COURT

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B E T W E E N:

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Court File No. T-402-19

FEDERAL COURT
PROPOSED CLASS PROCEEDING

BETWEEN:

XAVIER MOUSHOOM and JEREMY MEAWASIGE (BY HIS LITIGATION
 GUARDIAN, MAURINA BEADLE)

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

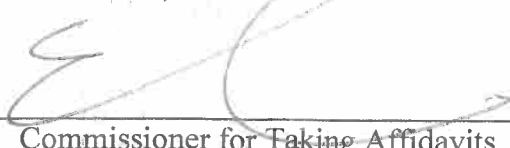
Defendant


AFFIDAVIT OF JOHN LOXLEY
(Sworn March 11, 2020)

I, **John Loxley**, of the City of Winnipeg, in the Province of Manitoba, SWEAR THAT:

1. I am Professor and Fellow of the Royal Society of Canada (FRSC) at the University of Manitoba. I was retained by Sotos LLP, Kugler Kandestin LLP and Miller Titerle + Company to provide expert evidence in this matter.
2. I previously prepared a report in this matter dated August 6, 2019. I have now prepared a further report. Attached as **Exhibit "A"** is a copy of my report.

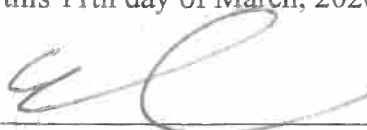
SWORN BEFORE ME at the City of
 Winnipeg, in the Province of Manitoba
 on March 11, 2020


 Commissioner for Taking Affidavits
(or as the case may be)


 JOHN LOXLEY

ELIZABETH J. CZYRNYJ
 Practising Barrister and Solicitor
 in the Province of Manitoba
 2500 - 360 Main Street
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This is Exhibit "A" to the Affidavit
of John Loxley sworn before me
this 11th day of March, 2020.



A Commissioner, etc.

ELIZABETH J. CZYRNYJ
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Moushoom et al v The Attorney General of Canada, Court File No. T-402-19

Prepared for Sotos LLP, Toronto, Ontario, Kugler Kandestin LLP, Montréal, Québec and
Miller Titerle & Co., Vancouver, BC.

Professor John Loxley, Department of Economics, University of Manitoba

March 11, 2020

1. This report supplements my previous report dated August 6, 2019 ('Initial Report') regarding the proposed class proceeding brought by Xavier Moushoom and Jeremy Meawasige (by his litigation guardian, Maurina Beadle) against the Attorney General of Canada ('Class Action').
2. I have read the affidavit of Jean-Pierre Morin ('Morin') sworn January 22, 2020 in this matter ('Morin Affidavit').
3. Exhibit B to the Morin Affidavit is a 2018 PowerPoint presentation providing an overview of the development of Indigenous child and family services. This document acknowledges the long-standing discriminatory features of the system and its gross underfunding. Slide 7 of that PowerPoint states that in the 1950s and 1960s, Indian Affairs officials broke the 'equal service' policy by 'refusing to provide adequate funds to pay for prevention services'. Slide 9 confirms that until the late 1970s 'complete federal funding was given only for maintenance (in-care) costs; operations (prevention) costs were calculated according to a per-capita formula, that was too low'. Slide 11 confirms that in 1995, DIANO stopped adjustments for inflation through Directive 20-1 and in 2000, DIANO and the AFN released a Joint Policy Review on Directive 20-1, which determined that Directive 20-1 'is not an appropriate funding formula for the varying agencies and services delivered in child welfare, and recommend a new policy be developed'. Slides 10-12 acknowledge that the federal funding system for child welfare throughout the period 1980 to 2007 was 'broken' and slide 12 documents some of the steps taken since 2007 to fix it. Morin's presentation supports the notion that underfunding and resulting discriminatory treatment of First Nation children was systemic, long standing, and across the board throughout Canada.

4. Paragraph 30 of the Morin Affidavit underscores the funding inadequacies built into the two principal funding methods, Directive 20-1 and the EPFA, inadequacies that persisted until the move to re-imbursement of actual expenditures was introduced in 2018.

5. Morin's portrayal of the third large funding system, the Ontario 1965 Welfare Agreement, is over simplistic and flawed. Reimbursement of child welfare spending is much less than 93% as the federal government does not cover all the services provided by Ontario; it is only 63% of total child welfare spending, and reimbursement of prevention spending is only 70.6% (Ministry of Children and Youth Services, (MCYS) Ontario, 2017, Background – Indian Welfare Agreement (1965): Background Briefing. May. p11).

6. Morin also states that 'there is no overall cap of expenditures under the 1965 Agreement'. This calls for qualification. The funding envelope for child welfare in Ontario has been static over the past six years, and is not adjusted for inflation. The additional cost of servicing Indigenous people in terms of remoteness and level of need is not recognized directly by the model; there is inadequate provision for capital spending as federal cost sharing for infrastructure expired in 1975; there is little specific provision for prevention activities and in 2007 the federal government cut funding for Band Representatives. Each of these, in their own way, constitute a 'cap' on the expenditures of First Nation child welfare in Ontario.

7. Morin does not address the conclusion in my Initial Report that the problems with the 1965 Agreement would have affected First Nation children and families consistently across Ontario and

are not dissimilar to the problems inherent in both the Directive 20-1 and the EPFA elsewhere in the country. The Canadian Human Rights Tribunal ('CHRT') stated: 'AANDC's design, management and control of the FNCFS Program, along with its corresponding funding formulas and the other related provincial/territorial agreements have resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserves' (2016 CHRT 2, January 26, 2016, para. 458, p.161). I agree with this conclusion.

8. Paragraph 5 of the Morin Affidavit states that Morin has read all of the CHRT decisions in this matter since 2016 and is familiar with Canada's efforts to comply with those decisions, some of which are documented as appendices (C and D). He does not, however, accurately summarize any of these documents or outline the nature of Canada's non-compliance with CHRT orders. By failing to specify the several ways in which Canada was non-compliant, the Morin Affidavit is insufficient and misleading.

9. Paragraphs 44 to 50 of the Morin Affidavit outline funding agreements with provinces to provide child and family services. There is nothing in those paragraphs that was not in the CHRT ruling (2016 CHRT 2 at pages 76-87) or in my Initial Affidavit. These arrangements, including the 1965 Ontario Agreement, did not in any way undermine the central critique of the system that it was underfunded and discriminatory across Canada.

10. Morin states that the federal government has no role in defining culturally appropriate needs for a community (Morin Affidavit at paras 44 and 46). This ignores the fact that defining those needs was constrained by a lack of federal funding. This lack of funding was partially

remedied in 2018 by the granting of \$75,000 to each community to help them define culturally appropriate needs (INAC's Response to the Canadian Human Rights Tribunal Order of September 14, 2016).

11. Morin makes a point of stressing the tripartite nature of the EPFA; yet had it been a genuine tripartite arrangement, the federal government would not have ended the funding arrangements that supported the prevention activities of West Region Child and Family Services in Manitoba, upon which model the EPFA was based.

12. It was the *Wen:De* reports of the Assembly of First Nations and the First Nations Child and Family Caring Society of Canada that led to the introduction of the EPFA. Morin suggests at paragraph 57 of the Morin Affidavit that the federal budget of 2016 fully funded the recommendations of *Wen:De* in terms of prevention activities. What is not acknowledged in the Morin Affidavit is that the *Wen:De* exercise did not cover Ontario so the costs of applying the recommendations across the country would have been more than the \$34.7 million quoted.

Conclusion

13. There is nothing in the Morin Affidavit that directly addresses the issues underlying the Class Action. The Morin Affidavit confirms the essential characteristics of federal child welfare funding underlying the lawsuit, namely that the system was grossly underfunded and discriminatory against First Nation children on reserve, and that this underfunding was consistent across Canada.

Court File No. T-402-19

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