

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**TONI GRANN, ROBERT MITCHELL, DALE GYSELINCK
and LORRAINE EVANS**

Plaintiffs

-and-

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO

Defendant

STATEMENT OF DEFENCE

1. The defendant, Her Majesty the Queen in right of the Province of Ontario (the "Crown"), admits the allegations contained in paragraph 23 of the Fresh as Amended Statement of Claim (the "Statement of Claim").
2. The Crown has no direct knowledge of the allegations made in paragraphs 9, 10, 11 (first sentence only), 12, 13, 14 (first sentence only), 15, 16, 17 (first sentence only), 18, 19, 20 (first sentence only), 24, 26, 27, 39 (first and second sentences only), 40 (first sentence only), 44, 46, 48, 49, 53, 55 (second sentence only), 57, 58 (first and second sentences only), 59 (first sentence only), 60 (first sentence only), 65, 66 (first sentence only), 67 (first sentence only), 68 (first sentence only) and 72 of the Statement of Claim.

3. The Crown denies all other allegations contained in the Statement of Claim to the extent not admitted herein, and specifically denies that the Plaintiffs or class members are entitled to any of the relief sought in the Statement of Claim. With respect to the allegations in paragraphs 37 to 72 of the Statement of Claim of specific abuse and harm which the Plaintiffs allege to have suffered, the Crown does not have specific knowledge of the events or harm alleged and, as such, for purposes of this action the Crown denies the truth of those allegations.

Overview

4. The Plaintiffs seek damages against the Crown on the basis that all Crown ward class members were victims of criminal abuse, neglect and tortious acts as children, and that the Crown owed and breached a duty to protect and preserve their legal rights and to assist them in pursuing compensation from the Criminal Injuries Compensation Board ("CICB"), or other civil damage claims against those who are alleged to have harmed them.

5. The Plaintiffs' assertion that all Crown wards have been victims of criminal abuse, neglect or tortious acts is not correct. Many children became Crown wards due to other factors that had nothing to do with the violent acts or other tortious acts of others for which compensation may be available.

6. Throughout the class period, Crown wards have been protected and cared for and by Children's Aid Societies ("CAS") pursuant to authority delegated to them by the Crown under the applicable child protection legislation in Ontario. The Crown retains a supervisory role over the CAS. However, the direct and primary responsibility for the protection and care of each Crown ward has at all material times rested with the applicable CAS, and not the Crown. In particular, since 1978 the CAS has had the express statutory authority to determine, at their discretion,

whether a proceeding to pursue compensation for a Crown ward in their care is in the best interests of the child and, if it determines that it is, the power to pursue compensation on behalf of the child.

7. The Crown pleads that the CAS properly exercised their discretion in considering whether pursuing compensation on behalf of any class members was appropriate and in the best interests of the child, and where the CAS determined that it was, the CAS did so.

8. The Crown denies that at any material time it owed a duty to pursue compensation from the CICB or through other proceedings on behalf of any class members who may have been harmed by violent crime, abuse or other tortious acts, or to assist them in pursuing compensation, and denies that it breached any duty of care that it may be found to have owed to any class members. To the extent any such duty existed, it was owed by the CAS, and not the Crown. The Crown further denies that it owed any class member a fiduciary duty as alleged or that it breached any such duty.

9. The Crown further denies that any class member has suffered any of the losses alleged or, in the alternative, that the Crown is liable for such losses. The Crown denies that the class members have lost any ability to seek compensation due to the expiry of limitation periods, and pleads that the class members have at all material times had, and continue to have, the ability to pursue any claims for compensation they may have before the CICB or the civil courts, and such rights have not been lost or prejudiced by any act or omission of the Crown.

Ontario's Child Protection Legislation

10. Throughout the class period, Ontario's child protection legislation defined the roles and responsibilities of the Crown and the CAS with regard to Crown wards.

11. Crown ward orders first became available in Ontario through the passage of the *Child Welfare Act, 1965*, S.O. 1965, c.14 which came into force in 1966. From 1966 to 1984, Ontario's child protection legislation defined the relationship of the Crown vis-à-vis its wards as that of a "legal guardian". Starting in 1984, the term "legal guardian" was replaced with "parent". Today, section 63 of the *Child and Family Services Act*, R.S.O. 1990, c. C.11 ("CFSA") continues to provide that when a child is made a Crown ward, "the Crown has the rights and responsibilities of a parent for the purpose of the child's care, custody and control".

12. Further, since 1966, the Crown's rights and responsibilities have been delegated by statute to be exercised and performed by the CAS, who had care and custody of the Crown ward. The relevant legislative provisions are set out below:

1966 - Child Welfare Act, 1965, S.O. 1965, c.14

32. (1) *The Crown has and shall assume all the rights and responsibilities of a legal guardian* of its wards for the purpose of their care, custody and control, and the powers, **duties and obligations of the Crown** in respect of the wards of the Crown, other than those assigned to the Director by this Act, **may be exercised and discharged by the children's aid society having care of the ward** [emphasis added].

(2) The Director may direct that a Crown ward be moved to any other children's aid society or institution designated by the Director.

(3) Every child committed permanently to the care and custody of a children's aid society under The Child Welfare Act, or any predecessor thereof, and who is in the permanent care and custody of the society immediately before this Act comes into force is a ward of the Crown in the care of such society, subject otherwise to the terms of the order making the permanent commitment.

1978 - Child Welfare Act, 1978, S.O. 1978, c. 85

40. - (1) **The Crown has and shall assume all the rights and responsibilities of a legal guardian of each child who is made a ward of the Crown** for the purposes of the child's care, custody and control, and **the powers, duties and obligations of the Crown** in respect of the child

other than the powers, duties and obligations assigned to a Director by this Act **shall be exercised and discharged by the society having care of the child** [emphasis added].

(2) A Director may direct that a Crown ward be transferred to the care of any other society or institution designated by the Director.

1985 - Child and Family Services Act, 1984, S.O. 1984, c. 55

59. (1) **Where a child is made a Crown ward under paragraph 3 of subsection 53 (1), the Crown has the rights and responsibilities of a parent for the purposes of the child's care, custody and control and has the right to give or refuse consent to medical, treatment for the child where a parent's consent would otherwise be required, and the Crown's powers, duties and obligations in respect of the child, except those assigned to a Director by this Act or the regulations shall be exercised and performed by the society having care of the child.**

(2) Where a child is made a society ward under paragraph 2 of subsection 53(1), the society has the rights and responsibilities of a parent for the purpose of the child's care, custody and control.

1990 - Child and Family Services Act, R.S.O. 1990, c. C.11

63. (1) **Where a child is made a Crown ward under paragraph 3 of subsection 57 (1) or under subsection 65.2 (1), the Crown has the rights and responsibilities of a parent for the purpose of the child's care, custody and control and has the right to give or refuse consent to medical treatment for the child where a parent's consent would otherwise be required, and the Crown's powers, duties and obligations in respect of the child, except those assigned to a Director by this Act or the regulations, shall be exercised and performed by the society caring for the child.** R.S.O. 1990, c. C.11, s. 63 (1); 2006, c. 5, s. 20.

(2) Where a child is made a society ward under paragraph 2 of subsection 57(1), the society has the rights and responsibilities of a parent for the purpose of the child's care, custody and control.

13. Starting in 1978, the governing child protection legislation provided that the CAS with care and custody of a Crown ward had the discretion to institute and conduct proceedings on behalf of the Crown ward, when it was in the child's best interests to do so:

1978 - Child Welfare Act, 1978, S.O. 1978, c. 85

51. Where the Official Guardian, or in the case of a child in the care of a society under paragraph 2 or 3 of subsection 1 of section 30, the society, is of the opinion that a child has a cause of action against a person or persons or other right of recovery by reason of the infliction of abuse upon the child and that the institution of proceedings to recover damages or other compensation would be in the best interest of the child, the Official Guardian or the society, as the case may be may institute and conduct such proceedings on behalf of the child in respect of the abuse suffered by the child.

14. Since 1985, the governing child protection legislation has provided that the Children's Lawyer (formerly known as the "Official Guardian") with discretion to act as a litigation guardian for any child who has suffered abuse while maintaining that the CAS with care and custody of Crown wards has the discretion to institute and conduct proceedings on behalf of the Crown ward, when it was in the child's best interests to do so:

1985 - Child and Family Services Act, 1984, S.O. 1984, c. 55

77 (1) In this section, "to suffer abuse", when used in reference to a child, means to be a child in need of protection within the meaning of clause 37

(2) (a), (c), (e), (f) or (h).

(2) When the Official Guardian is of the opinion that a child has a case or Action or other claim because the child has suffered abuse, the Official Guardian may, if he or she considers it to be in the child's best interests, institute and conduct proceedings on the child's behalf for the recovery of damages or other compensation.

(3) Where a child is in a society's care and custody, subsection (2) also applies to the society with necessary modifications.

1990 - Child and Family Services Act, R.S.O. 1990, c. C.11

Recovery because of abuse

81. (1) In this section,

“to suffer abuse”, when used in reference to a child, means to be in need of protection within the meaning of clause 37 (2) (a), (c), (e), (f), (f.1) or (h).

Recovery on child’s behalf

(2) When the Children’s Lawyer is of the opinion that a child has a cause of action or other claim because the child has suffered abuse, the Children’s Lawyer may, if he or she considers it to be in the child’s best interests, institute and conduct proceedings on the child’s behalf for the recovery of damages or other compensation.

Idem: society

(3) Where a child is in a society’s care and custody, subsection (2) also applies to the society with necessary modifications.

15. By virtue of the foregoing statutory regime, throughout the class period the CAS have borne the direct responsibility for attending to the care and protection of Crown wards, and assumed the role of a parent vis-à-vis Crown wards under their care.

16. The CAS are not-for-profit corporations that exist independently of the Crown to promote the welfare and well-being of children in Ontario and to provide protection and care services to children. Each CAS carried out their protection and care mandate within a specified geographic territory. The CAS have never been agents of the Crown.

17. The functions of the CAS throughout the class period included:

- (a) investigating allegations or evidence that children who are under the age of sixteen years or are in the CAS’ care or under its supervision may be in need of protection;

- (b) protecting, where necessary, children who are under the age of sixteen years or are in the CAS' care or under its supervision;
- (c) providing guidance, counselling and other services to families for protecting children or for the prevention of circumstances requiring the protection of children;
- (d) providing care for children assigned or committed to their care;
- (e) supervising children assigned to its supervision;
- (f) placing children for adoption; and
- (g) performing any other duties given to them through legislation.

Crown Wards and Children's Aid Societies

18. Under Ontario's child protection legislation, the CAS have the exclusive responsibility to take the necessary steps to protect children in their territorial jurisdictions who may have been in need of protection, including apprehending these children where necessary and bringing protection applications to the court. The Crown plays no role in a CAS child protection investigation or a CAS case management decision involving a child who was or might have been in need of protection.

19. Throughout the class period the Courts have had the power on a protection application to make an order that the child be made a ward of the Crown. Crown ward orders are made when a court determines, based on evidence presented by the CAS and any other interested parties, that

the child can no longer live with his or her parent(s) and that a less intrusive option that is in the child's best interests is not available. The Crown ward orders direct that the child in need of protection will be placed in the care of the local CAS, not the Crown. Thereafter it is the CAS' responsibility to provide care and protection services for the Crown ward.

20. The Crown does not provide care or protection services for children subject to Crown ward orders.

21. Contrary to the plaintiffs' assertions, not all Crown wards are victims of criminal abuse or other tortious acts that result in their removal from the care of their families. Many children become Crown wards due to other circumstances, such as the parents' or legal guardian's unwillingness or inability to adequately care for the child, and situations in which there was a *risk* of physical or sexual abuse or other forms of abuse and neglect, and not because they were victims of abuse or other tortious acts.

22. The CAS with care of a Crown ward exercises all parental responsibilities in respect of that child, and must meet all statutory requirements for the care and protection of the child placed in its care. Whether or not a Crown ward had received compensation from the CICB or damages via a civil action had no bearing on the availability of therapy, counselling, support or other help provided to that Crown ward. Whether or not a particular Crown ward received such services was a function of many factors, including perceived need, the availability of services and the individual Crown ward's willingness to participate.

23. CAS' employees work under the supervision of senior staff and under the direction of the CAS' boards of directors. They receive comprehensive training, and through their direct ongoing

contact with the children and their families, are best positioned to assess what is in each Crown ward's best interests.

24. Crown wardships typically terminate when a child is adopted or when the child turns 18 years old. However, as provided under the various versions of the *Child and Family Services Act* in force since 1965, the CAS are provided with authority to continue to provide some support and services to former Crown wards after they reach the age at which legal guardianship is no longer required.

The Crown's Role with Respect to Crown Wards

25. Throughout the class period, the role of the Crown in relation to Crown wards has been limited to providing oversight and guidance to the independent CAS given responsibility for the care of Crown wards pursuant to the child protection legislation and orders of Ontario courts placing Crown wards in their care.

26. As part of its supervisory duties, the Crown was required to perform Crown ward reviews. While the process and focus of Crown ward reviews changed over the class period, Crown ward reviews generally concerned whether each CAS was in compliance with its statutory obligations and standards and policy directives regarding the protection and care of Crown wards in their care.

27. With respect to paragraph 82 of the Statement of Claim, the Crown's role did not extend to interviewing Crown wards or reviewing specific information which would provide the Crown with particular knowledge of any allegations of criminal or tortious acts against any particular Crown ward. The responsibility for the care and protection of each Crown ward rested with the CAS.

Claims Before the Criminal Injuries Compensation Board and Civil Claims

28. The Criminal Injuries Compensation Board ("CICB") is a statutory board created in 1971 pursuant to the *Compensation for Victims of Crime Act*, R.S.O 1990, c. C.24. The CICB's mandate is to assess potential financial compensation available to victims of violent crime committed in Ontario.

29. In 1978, the *Child Welfare Act* was amended to give the CAS the authority and discretion to institute and conduct proceedings on behalf of a child in its care where the CAS was of the opinion that the child had a cause of action against a person or persons or other right of recovery by reason of the infliction of abuse upon the child, and the institution of proceedings to recover damages or other compensation would be in the best interests of the child. This authority included pursuing compensation from the CICB or through other proceedings on behalf of the Crown ward if the CAS determined, based upon its particular understanding of the circumstances and needs of the child, that such a claim would be appropriate and in the best interests of the child.

30. Over the course of the class period, the CAS in Ontario have properly exercised their discretion in deciding whether a Crown ward had a viable claim for compensation and whether pursuing a claim for compensation on behalf of Crown wards in their care was in their best interests. The CAS have applied to the CICB for compensation on behalf of thousands of children in their care.

No Breach of Duty of Care by the Crown

31. The Crown denies that it had any statutory or other duty to institute or conduct proceedings on behalf of Crown wards, or to protect their rights to do so, and in particular denies that the Crown at any material time owed the duties or was required to meet the standards of care alleged in paragraphs 83 and 85 of the Statement of Claim. The Crown denies that parents or other legal guardians owe a duty to their children to make claims for compensation to the CICB or to commence litigation on behalf of their children.

32. Further, for the majority of the class period, the CAS had the statutory authority and discretion to decide whether it would be appropriate to pursue compensation from the CICB or through other proceedings on behalf of a Crown ward, and where appropriate CAS would do so. Any decision on whether to seek compensation or civil damages on behalf of a Crown ward was made on the basis of the CAS case worker's consideration of what was in the best interests of the individual child, the case worker's training and experience in determining whether a particular case warranted pursuing a claim, whether there was sufficient information and documentation to support the claim and the policies or procedures established by the particular CAS. To the extent any such duty was owed, it was owed by the CAS, and not the Crown.

33. The Crown also denies that it owed a duty to the Plaintiffs or other class members to collect and preserve evidence for the purposes of pursuing a claim to the CICB or through other proceedings on behalf of Crown wards. As pleaded above, at all material times, the CAS had the statutory mandate to investigate allegations and incidents of harm to children. The Crown did not conduct, and had no duty to conduct, the investigations that gave rise to the placement of children in the care of the CAS as this was the responsibility of the CAS under the governing legislation. Available evidence and information pertaining to harm suffered by children preceding and during

their Crown wardships was collected by, and kept in the records of, the CAS in whose care the child was placed. To the extent any such duty was owed, it was owed by the CAS, and not the Crown.

34. In the alternative, if the Crown did owe a duty of care to Crown wards with respect to the protection of legal rights and pursuit of claims for compensation from the CICB or through other proceedings, which is not admitted but rather is expressly denied, the Crown met such duty. Over the decades, the practice, approach and legislative framework pertaining to the enforcement of the legal rights of minors and seeking recovery from the CICB has evolved. As a result, the standard of care applicable to the enforcement of legal rights of children has evolved over time. If the Crown owed a duty to the Plaintiffs and class members in relation to the protection and pursuit of claims for compensation to the CICB or through other proceedings, which is not admitted but is expressly denied, the Crown, her employees, agents and servants met or exceeded the applicable standard of care.

35. At all material times, the Crown had policies and procedures in place to lend guidance and to assist the CAS in determining whether a claim for compensation would be appropriate and, if so, in pursuing the claim before the CICB or through other proceedings. From at least 1978 when CAS were provided with the statutory discretion to make claims to the CICB on behalf of children in their care, the Crown has provided information and direction to CAS about the availability of compensation from the CICB and information and guidance to CAS. However, the decision as to whether such claims were appropriate has rested with CAS, and not the Crown.

No Breach of Fiduciary Duty

36. The Crown denies that it owed a fiduciary duty to the class members as alleged in paragraphs 91 to 95 of the Statement of Claim or that it deliberately or negligently engaged in any of the wrongful conduct alleged in paragraph 96 of the Statement of Claim.

37. To the extent the Crown may be found to have owed a fiduciary duty to the class members, which is not admitted and is expressly denied, the Crown denies that such duty extended to assuming the responsibility to pursue compensation for the class members or to take particular steps to protect their ability to do so.

38. Further, the Crown denies that the class members relied on, or reasonably relied on, the Crown to their detriment as alleged in paragraph 95 of the Statement of Claim, particularly having regard to the fact they were aware that ongoing and direct care was being provided to them by the CAS under its express delegated authority, and not the Crown.

39. The Crown denies that it at any time put its own interests ahead of those of the Crown wards to their detriment as alleged.

Crown Wards Continue to have the Ability to Seek Compensation

40. The Crown further denies that the ability of the class members to make claims for compensation to the CICB or through other proceedings have been prejudiced by any act or omission of the Crown.

41. The Crown denies that any potential claims of class members to the CICB for compensation in respect of harm suffered as children are statute-barred. Crown wards who have not yet made a

claim for compensation to the CICB in respect of physical or sexual abuse that they may have suffered as children can still apply to the CICB for compensation. Under the *Compensation for Victims of Crime Act*, RSO 1990, c. C. 24, applications to the CICB resulting from a crime of sexual violence or violence that occurred within a relationship of intimacy or dependency may be made at any time and are not to be barred by the operation of a limitation period, except in specific circumstances. Furthermore, the CICB has the discretion to waive, and often does waive, any limitation periods that may otherwise apply to a claim before it.

42. The Crown further denies that the rights of the Plaintiffs or other class members to make civil claims to recover damages sustained as a result of torts committed prior to or during their time as Crown wards have been prejudiced by any act or omission of the Crown. In particular, the Crown denies that that any such claims are statute-barred. Under the *Limitations Act, 2002*, S.O. 2002, c. 24, Schedule B, as amended ("*Limitations Act*"), there is no limitation period in respect of a proceeding based on a sexual assault or any other misconduct of a sexual nature if, at the time of the misconduct, the person with the claim was a minor. The *Limitations Act* further provides that there is no limitation period in respect of a proceeding based on assault if, at the time of the assault, the person with the claim was a minor.

43. The Crown further denies that the Plaintiffs or other class members' ability to put forward evidence necessary to advance a claim before the CICB or a civil claim has been prejudiced by an act or omission of the Crown. Any evidence and information required for the Plaintiffs and class members to advance a claim to recover damages in respect of torts committed against them prior to or during their time as Crown wards, including, but not limited to, their CAS file, is in the power, possession or control of the class members.

Further Defence to Allegations of Negligence and Breach of Fiduciary and Statutory Duties

44. The Crown, her employees, agents and servants acted at all times in the best interests of Crown wards.

45. The Crown denies any breach of duty it may have owed in law.

46. The Crown pleads that it cannot be held liable at law in respect of decisions made which are the result of policy considerations. No duty of care is owed to the Plaintiffs or other class members for policy or planning functions of the Crown that involve allocation of resources and policy choices.

47. If the legal rights of the Plaintiffs or class members relating to torts or criminal acts committed against them prior to or during their time as Crown wards have been prejudiced, which is not admitted but is strictly denied, the Crown specifically denies that such prejudice resulted from any failure on the part of the Crown to meet applicable standards of care or meet any other applicable duty.

48. The Plaintiffs cannot assert a claim for breach of statutory duty. Such a claim is not recognized at law.

49. The claims brought by the Plaintiffs as against the Crown for failure to protect and enforce their legal rights are statute-barred by virtue of the *Limitations Act* and predecessor legislation, as applicable.

50. The Crown denies that the Plaintiffs and other class members have suffered any loss or damage as alleged.

51. In the alternative, if class members have suffered damages, such loss or damages were the result of acts and/or admissions not within the power or control of the Crown.

52. Further, any such damages were caused by matters arising subsequent to the termination of the Crown wardship of class members and were unrelated to any conduct of the Crown.

53. If class members suffered any loss or damages as alleged or otherwise, which is not admitted but denied, such alleged loss and damages are excessive and too remote to be recoverable at law, and the Plaintiffs are put to the strict proof thereof.

54. If class members suffered any loss or damages as alleged or otherwise, which is not admitted but denied, the class members have failed to mitigate their damages unless they have fully pursued a claim or claims for compensation to the CICB or commenced civil actions in relation to tortious or criminal acts committed against them in the time preceding or during their time as Crown wards.

55. The Crown specifically denies that aggregate damages are available to the class. The experience of each child leading up to and during their time as Crown wards was unique. To the extent that any class members have suffered any losses or damages as alleged, which is not admitted but is expressly denied, the extent of such damages can only be determined on an individual basis, taking into accounts considerations including, but not limited to:

- (a) the basis on which the child became a Crown ward and, in particular, whether it the individual became a Crown ward due to a tortious or criminal act;
- (b) whether the individual Crown ward was the victim of a tortious or criminal act during his or her time as a Crown ward;
- (c) the extent of recoverable losses, damages or compensation available to the Crown ward as a result of any criminal or tortious act committed against the individual prior to or during their time as a Crown ward;
- (d) whether the Crown was made aware of a tortious act or criminal act suffered by the Crown ward during the individual's time as a Crown ward;
- (e) whether steps were taken during or upon termination of the individual's time as a Crown ward to consider and/or pursue any claim for compensation or damages on behalf of the individual Crown ward;
- (f) steps taken by subsequent legal guardians of former Crown wards including, but not limited to, adoptive parents of former Crown wards in protecting and pursuing the legal rights of their children;
- (g) the extent to which any damages or losses sustained by individual class members have been mitigated through civil actions or claims made to the CICB in respect of to the legal rights alleged to have been prejudiced;

- (h) the extent to which any damages or losses of individual class members were mitigated through the provision of care, counselling and other services provided to class members during their time as Crown wards; and
- (i) whether pursuing a claim was in the best interests of the child.

56. The Crown states that nothing in its conduct warrants the awarding of punitive or exemplary damages.

57. The Crown pleads and relies on the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P. 27, *Limitations Act, 2002*, S.O. 2002, c. 24, Schedule B, as amended, the *Child and Family Services Act*, R.S.O. 1990, c. C.11 and associated Regulations enacted thereunder, the *Child Welfare Act*, S.O. 1965, c. 14, as amended, and the *Compensation for Victims of Crime Act*, RSO 1990, c. C. 24.

58. The Crown requests that this action be dismissed with costs payable to the Crown.

DATE: September 7, 2017

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TONI GRANN et al.
Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO
Defendant

ONTARIO

SUPERIOR COURT OF JUSTICE
Proceeding Commenced at TORONTO

STATEMENT OF DEFENCE

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