

Court File No.: T-2166-18

**FEDERAL COURT**  
**PROPOSED CLASS PROCEEDING**

F I L E D	FEDERAL COURT COUR FÉDÉRALE	D É P O S É
12-JAN-2021		
Shaylee Martin		
OTT	26	

BETWEEN:

**BRIAN DAYSHANNON VARLEY AND SANDRA LUKOWICH**

Plaintiffs

and

**THE ATTORNEY GENERAL OF CANADA**

Defendant

**SECOND AMENDED STATEMENT OF CLAIM TO THE DEFENDANT**

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Courts Rules serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the Federal Court Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

Date: December 20, 2018 February 6, 2019

Issued by: Stan Shepherd  
(Registry Officer)

Address of local office: 180 Queen Street West, Suite 200, Toronto, ON M5V 3L6

**TO: The Attorney General of Canada**

The Exchange Tower  
3400-130 King Street West  
Toronto, ON M5X 1K6

## A. CLAIM

### 1. The Plaintiffs claims:

- (a) an order certifying this action as a class proceeding and appointing the Plaintiffs as Representative Plaintiffs for the Class;
- (b) a declaration that the Defendant breached its fiduciary duty to the Plaintiffs and the Class by reason of the events described herein;
- (c) a declaration that the Defendant breached its common law duty of care owed to the Plaintiffs and the Class by reason of the events described herein;
- (d) damages for breach of fiduciary duty and negligence in the amount that this Honourable Court deems appropriate;
- (e) punitive damages as this Honourable Court may find appropriate;
- (f) pre-judgment and post-judgment interest pursuant to the *Federal Courts Act*, R.S.C. 1985, c. F-7;
- (g) costs of the action on a substantial indemnity basis or in an amount that provides full indemnity;
- (h) the costs of notice and of administering the plan of distribution of the recovery in this action, plus applicable taxes, pursuant to Rule 334.38 of the *Federal Courts Rules*, S.O.R./98-106; and
- (i) such further and other relief as this Honourable Court deems just and appropriate in all the circumstances.

## B. OVERVIEW

2. The term "**Sixties Scoop**" refers to the Canadian practice, generally beginning in the 1960s and continuing until the early 1990s, of taking ("scooping up") children of Métis and Non-Status Indian families and placing them for adoption with non-Aboriginal parents.

3. As a result, these "scooped" children lost their identity as Aboriginal persons and suffered, *inter alia*, mentally, emotionally, spiritually, and physically. Aboriginal communities describe the Sixties Scoop as destructive to their culture.

4. This practice was largely dictated throughout Canada, although not exclusively, by bilateral agreements executed between Her Majesty the Queen in Right of Canada ("Canada" or the "Defendant") and the Provinces and/or Territories, under which, *inter alia*, Children's Aid Societies ("CAS"), or related agencies, scooped Aboriginal children from their homes for foster placement in, and/or adoption with, non-Aboriginal homes. In exchange, Canada reimbursed the Provinces and/or Territories for per diem costs of providing these services for Aboriginal children therein. The practice also occurred in the absence of bilateral agreements, contrary to Canada's duty owed to Métis and Non-Status Indian children.

5. By virtue of this practice in Canada, the Defendant (~~or "Canada"~~) breached its fiduciary duty and common law duty of care that it owed to the Plaintiffs and Class Members.

### C. THE PARTIES

~~6. The proposed Representative Plaintiff on behalf of the Class is Brian Day. He was born in Toronto, Ontario and now resides in Ottawa, Ontario. There are two proposed Representative Plaintiffs.~~

~~7. The first proposed Representative Plaintiff is Shannon Varley. Ms. Varley was born in Prince Albert, Saskatchewan and now resides in Merritt, British Columbia. Ms. Varley is Non-Status under the *Indian Act*.~~

~~6.8. The second proposed Representative Plaintiff is Sandra Lukowich. Ms. Lukowich was born in Prince Albert, Saskatchewan and now resides in Wainwright, Alberta. Ms. Lukowich is Métis.~~

7.9. The Defendant, the Attorney General of Canada, represents Her Majesty the Queen in Right of Canada.

8.10. The Defendant is vicariously liable for the acts and omissions of its employees, agents, and servants.

#### **D. THE CLASS**

9.11. The Proposed Class is composed of all Métis and Non-Status Indian persons in Canada, who were taken and placed in the care of non-Aboriginal foster or adoptive parents who did not raise the children in accordance with the Aboriginal person's customs, traditions, and practices.

#### **E. THE PLAINTIFF'S' EXPERIENCES**

12. The Plaintiff, Shannon Varley, was born in Prince Albert, Saskatchewan, on May 10, 1968. Ms. Varley is Non-Status under the *Indian Act*.

13. Ms. Varley's mother was Indigenous.

14. Ms. Varley was taken by her mother at birth by Saskatchewan child welfare workers.

15. Ms. Varley was adopted as a newborn through Saskatchewan's Adopt Indian Métis (AIM) Program. Her adoptive parents came to Prince Albert and selected her from a group of newborns who were up for adoption.

16. Ms. Varley's adoptive family raised her on a farm near Avonhurst, Saskatchewan.

17. Ms. Varley's adoptive family did not talk about her heritage.

18. Ms. Varley had no contact with child services workers or any other government representatives during the time I was living with my adoptive family.

19. Ms. Varley was not provided with any services that would enable her to be aware of and exercise her culture, traditions, and customs during the time she was living with her adoptive family.

20. Ms. Varley was not provided with any services that would enable her to be aware of and exercise her treaty rights during the time she was living with her adoptive family.

21. When she began living on her own as an adult, Ms. Varley was not provided with any information about her background by child services workers or any other government representatives.

22. As she grew older, Ms. Varley wasn't able to feel proud of her heritage. She feels that learning that she was taken away from her mother, and the adoption process as a whole, made her feel ashamed of who she was. As the mother of three children, she feels that she was not able to teach her children to be proud of who they are.

23. To this day, Ms. Varley feels disconnected from her family, community, culture.

24. The Plaintiff, Sandra Jacqueline Lukowich, was born in Prince Albert, Saskatchewan, on June 5, 1963.

25. Mr. Lukowich was born to a Métis mother.

26. Ms. Lukowich was taken from her mother by Saskatchewan child welfare workers on November 17, 1963.

27. Ms. Lukowich was adopted by a non-Indigenous family on October 5, 1965.

28. Ms. Lukowich's adoptive family knew about her heritage, but rarely mentioned it. Her adoptive family did not take any steps to enable her to be aware of and practice her culture, traditions, and customs.

29. While she was living with her adoptive family, Ms. Lukowich had no direct contact with child services workers or other government representatives.

30. Ms. Lukowich was not provided with any services that would enable her to be aware of and exercise her culture, traditions, and customs during the time she was living with her adoptive family.

31. Ms. Lukowich was not provided with any services that would enable her to be aware of and exercise her treaty rights during the time she was living with her adoptive family.

32. Ms. Lukowich became aware of her Métis heritage as a young adult.

33. Ms. Lukowich has not been able to reconnect with her community. Because she was taken from her community at such a young age, she feels that she does not know what or who she would be connecting to. She feels disconnected from her heritage.

~~10. The Plaintiff, Brian John Day, was born Brian John Granger Grant in Toronto, Ontario on February 24, 1974.~~

~~11. Mr. Day was born to a Métis family. His grandmother was an ancestor of the Drummond Island Voyageurs.~~

12. — ~~For the first four (4) years of his life, Mr. Day was raised in accordance with his family's Métis tradition. He spent time hunting and bullfrogging. He attended Métis Day in Burleigh Falls, Ontario. He attended pow wows and was exposed to French and other Indigenous languages and Métis traditions.~~

13. — ~~In 1978, Mr. Day was taken away from his family by Kawartha Haliburton Children's Aid Society.~~

14. — ~~Shortly thereafter, Mr. Day was placed with a non-Aboriginal family who owned a farm.~~

15. — ~~After this first family, Mr. Day was adopted. The family that adopted Mr. Day was the Day family.~~

16. — ~~The Day family resided in Sudbury, Ontario. Mr. Day, then known as Brian John Granger Grant, had his last name changed to Day.~~

17. — ~~Mr. Day was told by his non-Aboriginal adopted family that he was not Métis or Indigenous. For years, he was told by this family that he was white and Scottish.~~

18. — ~~Mr. Day was not raised by this family in accordance with his Métis identity, culture, customs and background. He was not taught about his Métis heritage, culture, or language.~~

19. — ~~Mr. Day spent seven (7) years with the Day family.~~

20. — ~~When he was thirteen (13) years old, Mr. Day was removed from the Day family and placed in Sudbury Manitoulin Children's Aid Society, where he was placed in a group home.~~



21. — ~~Soon after, Mr. Day became a Crown ward. He stayed in a group home until the age of fifteen (15), and then went back to his adopted family. Shortly thereafter, he was placed again in a foster home. When he turned, sixteen (16), he was released.~~

22. — ~~At no time during this period was Mr. Day exposed to or taught about Métis heritage, culture, or language.~~

23. — ~~As a result of his adoption by a non-Aboriginal family, Mr. Day has lost his Métis cultural identity. He does not attend Métis events. He is not familiar with traditional Métis beliefs or traditions. He does not speak the French language.~~

24. — ~~Because of the Sixties Scoop, Mr. Day is emotionally, spiritually and culturally disconnected. He feels alienated, anxious, hopeless, sad, frustrated, and resentful. He feels broken and traumatized, confused and spiritually damaged. He feels as if he does not belong anywhere.~~

25. — ~~Mr. Day has largely lost contact and ties with his biological Métis family, community, language, and culture. He was deprived of his Métis identity, culture, customs and background. He was deprived of his family relationships.~~

26. — ~~Mr. Day's past life experiences have significantly impacted his present interpersonal relationships. He has difficulty opening up to others, including friends, adoptive parents, and his girlfriend. Having a fragmented sense of self has led him to develop relationships that can be best described as superficial in many instances. Feeling unlovable and having a confused identity has contributed to low self esteem, low self worth, and self loathing.~~

~~27. Mr. Day continues to struggle with his adoption and feels caught between two worlds. He feels difficulty engaging in the culture in which he was raised and difficulty engaging in the Métis culture into which he was born. He feels alone and stuck. He feels psychologically damaged and spiritually broken. He wants to heal and begin repairing his spirit so that he can move forward and live at peace.~~

**F. CANADA'S FIDUCIARY DUTY TO THE CLASS MEMBERS AND THE HONOUR OF THE CROWN**

28.34. The Defendant, Canada, has a fiduciary-beneficiary relationship with Métis and Non-Status Indian persons in Canada and is bound to act honourably in all of its dealings with them.

29.35. The Defendant has exclusive jurisdiction in respect of Aboriginal peoples, including Métis and Non-Status Indian persons, pursuant to, *inter alia*, section 91(24) of the *Constitution Act, 1867*, the common law, and court rulings of high and binding authority.

30.36. By virtue of its constitutional obligations, the Defendant has an ongoing obligation of consultation on matters relevant to Aboriginal interests, including the interests of Métis and Non-Status Indian persons. There is an express and implied undertaking by Canada to protect the best interests of Métis and Non-Status Indian persons at all times.

31.37. At all material times, the Defendant recognized and was aware that it had jurisdiction over and was responsible for the health and welfare of Métis and Non-Status Indian persons.

32.38. At all material times, the Defendant recognized and was aware that such Métis and Non-Status Indian persons were vulnerable to the acts and omissions of the Defendant.

33.39. At all material times, the Defendant had knowledge that the needs of Métis and Non-Status Indian persons -were not being met, and in particular, that through the acts and omissions of the Defendant, Métis and Non-Status Indians were at risk of being taken from their Aboriginal homes, and that those who were survivors of the Sixties Scoop faced the loss of their culture and identity.

34.40. The Defendant took no steps to protect or preserve the culture and identify of Métis and Non-Status Indian that were survivors of the Sixties Scoop.

35.41. Moreover, the Defendant's fiduciary duty is compounded by the fact that the Class Members were vulnerable Métis and Non-Status Indian children when taken from their Aboriginal homes, and accordingly, the Defendant assumed further responsibility for the supply of all the necessities of life to Class Members, *in loco parentis*, during the Class Period.

36.42. The Defendant had a special responsibility to Métis and Non-Status Indian persons during the class period, including on the basis of *parens patriae*.

37.43. Canada's constitutional obligations, in conjunction with the *Indian Act* and related legislation and policies, Canada's recognition of its jurisdiction over the health and welfare of Métis and Non-Status Indian persons, the doctrine of *parens patriae*, the common law, and the honour of the Crown, bestow a discretionary control requiring Canada to take steps to monitor, influence, safeguard, secure, and otherwise protect the vital interests of vulnerable Métis and Non-Status Indian children, and in particular, their cultural identity, which is fundamental to the security, welfare and survival of Métis and Non-Status Indian persons, as well as to safeguard the benefits derived from their rightful status as Aboriginals.

38.44. As a result of these obligations, the Defendant had enhanced duties and obligations to Métis and Non-Status Indian persons.

39.45. The Defendant's fiduciary duty and to act honourably in respect of Métis and Non-Status Indian persons in Canada ~~is~~ are non-delegable in nature in light of the *sui generis* relationship between Canada and its Aboriginal peoples. It continued notwithstanding any bilateral agreements between Canada and the Provinces and/or Territories.

### **G. CANADA'S COMMON LAW DUTY OF CARE TO THE CLASS MEMBERS**

40.46. The Defendant owes a duty of care to all Class Members. By virtue of, *inter alia*, the various bilateral agreements between Canada and the Provinces and/or Territories, Canada created, planned, established, operated, financed, supervised, controlled and/or regulated the provision of child welfare services throughout Canada to the Métis and Non-Status Indian child Class Members.

41.47. Canada knew or ought to have known of the impropriety of policies in respect of Métis and Non-Status Indian children under the various bilateral agreements between Canada and the Provinces and/or Territories, and the negligent operation of such policies, including the failure to ensure that the child welfare programs were administered appropriately to Métis and Non-Status Indian children, such as by adoption and/or permanent foster care in non-Aboriginal homes, failing which might foreseeably cause harms to the Class Members. This is especially so given that the persons affected were, by nature, vulnerable children.

42.48. The Defendant's duties to the class also arose by virtue of the circumstances identified in paragraphs 29-39.

43.49. Proximity between the Defendant and the Class Members is supplemented further by the acknowledged fiduciary duty in existence between them in respect of specific interests. Moreover, Canada assumed an obligation towards Métis and Non-Status Indian peoples regarding the provision of child welfare programs to them by virtue of the various bilateral agreements between Canada and the Provinces and/or Territories.

44.50. A duty of care is not eliminated just because the person who has the duty is engaged in what is intended to be an affirmative or beneficial act to the receiver.

## **H. CANADA BREACHED ITS DUTIES TO THE CLASS MEMBERS**

45.51. During the Class Period, the Defendant breached its fiduciary duty, honour of the Crown, constitutional, and/or common law duty of care by the following acts or omissions, including but not limited to:

- (a) Canada illegitimately delegated its non-delegable duties in respect of the vulnerable child Class Members;
- (b) Canada failed to ensure that an appropriate child welfare program for Métis and Non-Status Indian children was delivered in the Provinces and Territories when Canada proceeded to illegitimately delegate its obligations to the child Class Members;
- (c) Canada failed to properly monitor and properly oversee the provision of funding it made to the Provinces and/or Territories with respect to the child welfare programs for Métis and Non-Status Indian children, knowing that their operation was in conflict with its fiduciary duty and common law duty of care;
- (d) Canada failed to intervene and prevent the provision of child welfare services in consequence of which the Class Members were deprived of their Métis and Non-Status Indian culture and identity;
- (e) Canada failed to ameliorate the harmful effects of the child welfare services on Métis and Non-Status Indian persons in the Provinces and/or Territories for which it provided funding;

- (f) Canada failed to ensure that Métis and Non-Status Indian children were made aware of their status as Métis and Non-Status Indian persons when they were placed in non-Aboriginal homes;
- (g) Canada failed to ensure that the Métis and Non-Status Indian children would be provided with services that could enable them to be aware of and exercise their culture, traditions, customs and identity during the period of their placement in non-Aboriginal homes;
- (h) Canada failed to ensure that Métis and Non-Status Indian children would be provided with services that could enable them to be aware of and exercise their treaty and other related rights and benefits as Métis and Non-Status Indian persons during the period of their placement in non-Aboriginal homes;
- (i) Canada failed to ensure that Métis and Non-Status Indian children were made aware of their status as Métis and Non-Status Indian persons and treaty and other related rights and benefits available to them when they left their non-Aboriginal homes or entered their age of majority, failing which the Class Members could not reclaim, or had difficulty reclaiming, their status and concordant benefits;
- (j) Canada failed to ensure the healthy development, childhood, and family and community life of the vulnerable Class Members;
- (k) Canada failed to consult with Indian Bands, Aboriginal communities, and other necessary Aboriginal stakeholders, in respect of the provision of funding for child welfare practices and policies to Métis and Non-Status Indian children that it knew were in conflict with its duty to protect the cultural identity and treaty and other related status and rights of Aboriginal persons; and
- (l) Canada was careless, reckless, wilfully blind, or deliberately accepting of, or was actively promoting, a policy of cultural assimilation.

46.52. At all relevant times, Canada had sole jurisdiction, discretion, authority and an obligation to intervene. It did not. Instead, Canada failed to take any steps to prevent Class Members from being “scooped”, failed to protect vulnerable Métis and Non-Status Indian children, and provided funding to the Provinces and Territories to ensure that the applicable child welfare legislation would extend to Métis and Non-Status Indian children. As Canada knew, the various bilateral agreements between Canada and the Provinces and/or Territories did not provide protection for the cultural identity and treaty and other related status and rights of vulnerable Métis and Non-Status Indian children within the child welfare system in Canada.

~~47.53.~~ The actions and omissions of Canada, as described herein, were acts of fundamental disloyalty, betrayal and dishonesty to the Plaintiffs and the Class Members.

~~48.54.~~ Canada turned a blind eye to the Class Members, when it knew, or reasonably ought to have known, that the Class Members would thereby individually and collectively lose their cultural identity, lose their protected treaty and other related status and related monetary and non-monetary benefits, and would suffer other harms described herein.

~~49.55.~~ The provision of funding through the various bilateral agreements between Canada and the Provinces and/or Territories did not absolve Canada from the duty to take reasonable steps to prevent vulnerable Métis and Non-Status Indian children from, *inter alia*, losing their cultural identity and treaty and other benefits, as a by-product of the child welfare policies implemented in Canada.

## **I. DAMAGES SUFFERED BY CLASS MEMBERS**

~~50.56.~~ As a consequence of the negligence and breach of fiduciary duty by the Defendant and its agents for whom the Defendant is vicariously liable, the Class Members, including the Plaintiffs, suffered injury and damages, including but not limited to:

- (a) mental, emotional, and spiritual abuse and suffering;
- (b) physical abuse and suffering;
- (c) sexual abuse and suffering;
- (d) deprivation of Aboriginal culture, customs, traditions, language, and spirituality;
- (e) deprivation of Aboriginal identity;
- (f) deprivation monetary and non-monetary benefits for Aboriginal persons;

- (g) deprivation of reserve or related land on which to reside and join an Aboriginal community;
- (h) forced cultural assimilation;
- (i) deprivation of family and familial relations;
- (j) deprivation of a healthy development and childhood;
- (k) deprivation of one's ability to pass one's culture and identity on to one's children;
- (l) loss of self-esteem and self-worth;
- (m) social dysfunctionality and alienation from family, spouses and children;
- (n) impaired capacity for employment and to earn income;
- (o) the need for psychological, psychiatric and medical treatment as a result of the above; and
- (p) pain and suffering.

#### **J. PUNITIVE AND EXEMPLARY DAMAGES**

~~51:57.~~ The Plaintiffs pleads that Canada, including its senior officers, directors, bureaucrats, ministers and executives, had specific and complete knowledge of the widespread mental, emotional, and physical abuse, or potential therefore, perpetrated upon Class Members that occurred during the Class Period. Despite this knowledge, Canada entered into the various bilateral agreements between Canada and the Provinces and/or Territories and proceeded to operate thereunder in an irresponsible and indifferent fashion and permitted the perpetration of grievous harm to the Class Members.

~~52:58.~~ The high-handed and callous conduct of Canada warrants the condemnation of this Honourable Court. Canada conducted its affairs with wanton and callous disregard for the Class Members' interests, safety and well-being. Canada breached its fiduciary duties, honour of the Crown, and common law duties of care owed to the Class Members.



~~53.59.~~ Over a lengthy period, the Plaintiffs and Class Members were treated in a manner that could only result in aggravated and increased, *inter alia*, mental, emotional, spiritual, and physical suffering for a vulnerable population. The effects of Canada's actions have violated the Class Members' rights and have irreparably altered the paths of their lives.

~~54.60.~~ Full particulars respecting Class composition and the effects of the Sixties Scoop on the Class Members are within Canada's knowledge, control and possession.

~~55.61.~~ The Plaintiffs pleads and relies upon the:

- (a) *Federal Courts Rules*, S.O.R./98-106;
- (b) *Federal Courts Act*, R.S.C., 1985, c. F-7;
- (c) *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.); and
- (d) Common law.

~~56.62.~~ Where the actions of Canada and its employees, agents and servants took place in Québec, they constitute:

- (a) fault giving rise to the extra-contractual liability of the Defendant, its employees, servants and agents to the Plaintiffs and Class pursuant to the *Civil Code of Québec*, S.Q. 1991, c. 64, Art. 1457; and
- (b) fault giving rise to the extra-contractual liability of the Defendant in accordance with the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, s. 3, and the *Interpretation Act*, R.S.C. 1985, c. 1-16, s. 8.1; thereby
- (c) giving rise to the liability of the Defendant to pay damages, including punitive damages to the Plaintiffs and Class members pursuant to the *Civil Code of Québec*, Arts. 1611-1621.

~~57.63.~~ The Plaintiffs pleads and relies on the tolling provisions of the class proceedings statutes in Canada, including:

- (a) *Class Proceedings Act*, S.A. 2003, c. C-16.5, s. 40;
- (b) *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 39;

- (c) *The Class Proceedings Act*, C.C.S.M. c. c.130, s. 39;
- (d) *Class Actions Act*, S.N.L. 2001,c. C-18.1, s. 39;
- (e) *Class Proceedings Act*, R.S.N.B. 2011, c. 125, s. 41;
- (f) *Class Proceedings Acts*, S.N.S. 2007, c. 28, s. 42;
- (g) *Class Proceedings Act, 1992*, S.O. 1992 c. 6, s. 28; and
- (h) *The Class Actions Act*, S.S. 2001, c. C-12.01, s. 43.

58.64. The Sixties Scoop Settlement Agreement and the Sixties Scoop Settlement Agreement implementation order specifically preserved all claims against Canada on behalf of Métis and Non-Status Indian persons.

59.65. The Plaintiffs proposes that this action be tried at Toronto, Ontario.

**DATED** at Toronto, Ontario, this 20<sup>th</sup> day of December, 2018.

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**FEDERAL COURT**

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**PROPOSED CLASS PROCEEDING**

**BRIAN DAYSHANNON VARLEY AND SANDRA LUKOWICH**

Plaintiffs

- and -

**ATTORNEY GENERAL OF CANADA**

Defendant

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**SECOND AMENDED STATEMENT OF CLAIM**

(Filed this 20<sup>th</sup> day of December, 2018)

(Amended February 6, 2019)

(Amended January 12, 2021)

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