Court File No. T-2166-18

FEDERAL COURT

CLASS PROCEEDING

BETWEEN

SHANNON VARLEY AND SANDRA LUKOWICH

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

STATEMENT OF DEFENCE

OVERVIEW

1. Canada is committed to reconciliation with Indigenous peoples. Canada acknowledges that historical wrongs have been committed against Indigenous peoples in the provision and administration of child and family services. Canada has taken a range of measures to address these wrongs, including a settlement to address Canada's role in the Sixties Scoop. Through the Sixties Scoop national settlement, Canada provided compensation to eligible Sixties Scoop survivors being those defined as "Indian" under the *Indian Act* and Inuit who were removed from their homes and placed in the care of non-Indigenous foster or adoptive parents. The settlement also included the creation of a Foundation to serve for the benefit of every Sixties Scoop survivor, including Métis and non-status Indians.

2. Through the federal spending power, Canada provides general funding to provinces and territories for use in the delivery of social programs for all children ordinarily resident off-reserve, which includes Métis and non-status Indians. This

provides provinces and territories with the capacity to extend regulated and supported child and family services to Métis and non-status Indians. It is wholly within the discretion of the provinces and territories to determine the allocation of such funding.

3. There were no bilateral funding agreements with respect to child and family services for Métis and non-status Indians with Canada during the class period, and Canada has no statutory or other duty with respect to the delivery of child and family services to Métis and non-status Indians. The circumstances set out in this Claim do not give rise to any duties in law on the part of Canada to the Plaintiffs or to the class. The action should therefore be dismissed.

SPECIFIC RESPONSES TO THE CLAIM

4. Canada responds to each of the paragraphs of the Amended Statement of Claim ("**Claim**") as follows:
    a) Canada admits the assertions in paragraphs 6, 7 (first sentence), 8 (first sentence), 10 and 64.
    b) Canada has no knowledge of the assertions in paragraphs 3, 7 (second and third sentences), 8 (second and third sentences), 12-33 and 48.
    c) Canada denies the assertions in paragraphs 2, 4-5, 9, 34-47, 49-60 and 62.
    d) Apart from the facts that Canada has expressly admitted above, Canada denies any other facts contained in the Claim.

CANADA

5. In response to paragraph 9, Canada says that His Majesty the King in Right of Canada is the proper defendant for proceedings against the federal Crown, pursuant to subsection 23(1) of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 and the Schedule to section 48 of the *Federal Courts Act,* RSC 1985, c F-7. His

Majesty the King in Right of Canada is represented by the Attorney General of Canada pursuant to section 5 of the *Department of Justice Act*, RSC 1985, c J-2.

6. In response to paragraph 10, Canada says that Canada's vicarious liability is governed by s. 3 of the *Crown Liability and Proceedings Act*.

THE CLASS

7. In response to paragraph 11, Canada says that the certified class is defined as:

> All Indigenous persons, as referred to by the Supreme Court of Canada in *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, at para. 6, excluding Indian persons (as defined in the *Indian Act*) and Inuit persons, who were removed from their homes in Canada between January 1, 1951 and December 31, 1991 and who were placed in the care of non-Indigenous foster or adoptive parents.

THE DEVELOPMENT OF CHILD AND FAMILY SERVICES LEGISLATION AND POLICY IN CANADA

8. The Plaintiffs framed this Claim as being brought with respect to "Métis and Non-Status Indian persons". "Non-Status Indians" commonly refers to people who identify themselves as Indians but who are not entitled to registration on the Indian Register pursuant to the *Indian Act*.

9. Canada was not – during the class period or otherwise – in control of, or responsible for, the delivery of child and family services programs for children residing off-reserve. Each province and territory is responsible for, and has its own legislation that governs the delivery of child and family services to those requiring them within that province or territory.

10. During the class period, Canada did not provide any direct funding for the provision of off-reserve child and family services to Métis and non-status children.

11. In response to paragraphs 4, 45-47, 49, 55, 57 of the Claim, Canada says that where Canada entered into bilateral funding agreements with the provinces, territories, Children Aid Societies, or related agencies, these agreements were for the purpose

of extending existing provincial and territorial child welfare services to persons registered under the *Indian Act.* These agreements did not extend to non-status and Métis children.

12. While Canada does provide general funding to provinces and territories for use in the delivery of social programs, including, among other programs, child and family services, the allocation of such funding is at the discretion of the provinces and territories. More specifically:

    a) in the 1950s and 1960s, health and social transfers were either provided as cash grants or were cost-shared to encourage the establishment of national social programs and ensure comparable quality across the provinces;

    b) commencing in 1966, pursuant to Part I of the Canada Assistance Plan, Canada began cost sharing by paying 50% of funding to provinces and territories for eligible social programs. These eligible social programs included child welfare services;

    c) subsequently in 1977, the Established Programs Financing was introduced and replaced cost-sharing programs for health and post-secondary education; and,

    d) in 1995, the Canada Assistance Plan and the Established Programs Financing were combined into a block transfer arrangement called the Canada Health and Social Transfer, which was split into the Canada Health Transfer and the Canada Social Transfer in 2004. The allocation of these funds between programs is entirely in the discretion of the provinces and territories. Canada does not have knowledge of the provinces' and territories' contribution, or of the methods used by the provinces and territories to determine how the funding received through the transfer payments is allocated.

13. With respect to paragraphs 39-40 of the Claim, Canada did not have control over the placement of children when they were apprehended by provincial or territorial child and family services. Canada did not have any knowledge of, or involvement in, apprehensions or placements by provincial or territorial authorities.

14. With respect to paragraph 43 of the Claim, during the class period, Canada did not have a role in the supervision, administration, coordination, or other responsibilities relating to the provision of child and family services to children off-reserve in Canada.

SIXTIES SCOOP SETTLEMENT AGREEMENT

15. The Sixties Scoop refers to the period between 1951 and 1991, when Indigenous children were taken into care and placed with non-Indigenous parents where they were not raised in accordance with their cultural traditions nor taught their traditional language.

16. On November 30, 2017, Canada executed a historic settlement agreement with respect to Sixties Scoop survivors who met the definition of “Indian” under the *Indian Act*, and Inuit. The Sixties Scoop Settlement Agreement included 23 related class actions in multiple Canadian jurisdictions, including the Federal Court.

17. Pursuant to the Settlement Agreement, the National Sixties Scoop Healing Foundation of Canada was established, to serve for the benefit of every survivor of the Sixties Scoop, including Métis and non-status Indians. The mission of the independent organization is to accompany survivors and their descendants along their healing journey by supporting cultural reclamation and reunification, holistic wellness services, advocacy, commemoration, and educational initiatives. The Settlement Agreement provides that, with Canada having met its funding obligation, it has no ongoing role in the Foundation.

CONSTITUTIONAL STRUCTURE

18. In response to paragraph 35 of the Claim, Canada agrees that it has exclusive jurisdiction in respect of Aboriginal peoples, including Métis and Non-Status "Indian, and lands reserved for the Indians" pursuant to section 91(24) of the *Constitution Act, 1867*, the common law, and court rulings of high and binding authority.

19. In response to the first sentence of paragraph 36 of the Claim, Canada asserts that the Defendant has a duty to consult that is engaged in relation to specific Crown conduct and applies only where the legal test is met.

20. Canada acknowledges that the Parliament of Canada has legislative jurisdiction under section 91(24) of the *Constitution Act, 1867* with respect to "Indians, and Lands reserved for the Indians". Canada acknowledges that this legislative jurisdiction includes the jurisdiction to legislate with respect to class members, and in particular Métis persons.

21. Provinces, however, have legislative jurisdiction under section 92(13) of the *Constitution Act, 1867* with respect to the welfare, protection and care of all children in the province. Provincial and territorial child and family services statutes are laws of general application. At all material times, the provinces, and not Canada, exercised this jurisdiction through provincial entities acting pursuant to their respective child and family services legislation. Pursuant to s. 88 of the *Indian Act,* at all material times laws of general application in force in the province were applicable to the Plaintiffs and class members.

22. While provinces exercise constitutional powers in their own right, the territories exercise powers delegated under the authority of the Parliament of Canada. Federal statutes have established a legislative assembly and executive council for each territory and province-like powers are increasingly being transferred to territorial governments by Canada. This process, known as "devolution", provides greater

local decision-making and accountability. Each territory in Canada has passed legislation with respect to child and family services.

23. In response to paragraphs 42 and 43 of the Claim, Canada did not and was not required to stand in *loco parentis* to the Plaintiffs. The Crown's *parens patriae* is a power of judicial discretion, which covers the power to act in the best interests of a child on a case-by-case basis. The judicial branch of government is separate from the Defendant, with separate constitutional powers and responsibilities.

CANADA'S CONSTITUTIONAL OBLIGATIONS AND THE HONOUR OF THE CROWN

24. Canada recognizes that the honour of the Crown is always at stake in all its interactions with Indigenous peoples. However, the honour of the Crown finds its application in concrete practices. The honour of the Crown is not a stand-alone cause of action. Rather, it speaks to how obligations that attract it must be fulfilled. What specifically constitutes honourable conduct will vary with the circumstances of each case. In the circumstances of this case, there were no underlying specific federal executive or legislative actions to which the honour of the Crown could attach. The honour of the Crown, while guiding the federal Crown in its conduct with Indigenous peoples, does not give rise to any specific duties here. Canada therefore denies that it breached the honour of the Crown, or any duties arising from the honour of the Crown, or failed to comply with any legal or constitutional obligations, as stated in the Claim.

25. Canada's use of the federal spending power to contribute to the capacity of provincial and territorial child and family services to deliver services to Indigenous children is not a delegation of its constitutional authority under s. 91(21) of the *Constitution Act, 1867.*

26. Canada denies the existence of any statutory duties owed to the Plaintiffs or class in the circumstances described in the Claim. Canada did not have responsibility over the child and family services at issue, nor could it exercise any control over

the decisions and actions of the provincial or territorial governments during the class period. To the extent that the Plaintiffs may assert that any funding agreements between the provinces and territories and Canada resulted in such control or liability, Canada denies that there is any basis for this in fact or law in the circumstances of this case.

NO LIABILITY ON THE PART OF CANADA

No breach of fiduciary duty

27. Canada denies the existence or breach of a fiduciary duty or obligation owed to the Plaintiffs or to the class, in the circumstances of this case.

28. Canada acknowledges that the relationship between the federal Crown and the Indigenous peoples of Canada is fiduciary in nature. However, not every aspect of the relationship gives rise to a fiduciary duty. The facts as alleged do not give rise to a fiduciary duty owed by the Crown to the Plaintiffs or the class pursuant to either the *sui generis* or the *ad hoc* fiduciary duty tests. No specific fiduciary duty is triggered or exists in respect of the circumstances pleaded by the Plaintiffs.

29. In the alternative, if a fiduciary duty arose, which is denied, it was not breached. Canada, by providing funding to the provinces and territories, for their allocation toward child welfare services, including to Indigenous children and their families, did not put its own interests ahead of those of Indigenous children, in any way that was a betrayal of trust or loyalty. Further, at no time did Canada act in its own self-interest or against the protected interests of the Plaintiffs or the class. Nor has Canada taken advantage of relationships of trust with the Plaintiffs or the Class for its own benefit.

No Negligence

30. Canada pleads and relies on s. 3(b)(i) of the *Crown Liability and Proceedings Act*, RSC 1985 c C-50, as amended. Under this provision, the Crown in right of Canada

is only vicariously liable in negligence. The Crown will only be liable in negligence where a federal Crown servant was negligent.

31. In response to paragraphs 46-50, while Canada acknowledges the legislative jurisdiction grounded in s. 91(24) of the *Constitution Act, 1867*, and the specific duties established in the *Indian Act* with respect to Indigenous people, this does not in itself create a duty of care. The Plaintiffs have not provided facts or particulars which would support such a duty, and none exist.

32. Canada denies that it owed a common law duty of care to the Plaintiffs or the class in respect of the interests or losses for which compensation is claimed in this action.

33. Further, considering the provinces' and territories' exercise of jurisdiction and control relating to the provision of child and family services for children living off-reserve, Canada denies sufficient proximity with the classes to create a duty of care. No individual Crown officers or servants have, or had, any direct supervisory or other operational role in the design or delivery of child and family services provided to the Plaintiffs and class, or in the disposition of their cases.

34. To the extent that harm is alleged to have arisen from the formulation and implementation of policy, these are core policy decisions for which Canada is immune from tort liability. As the claim against Canada is predicated directly on policy decisions with respect to funding, and in particular the decision to not directly fund or direct the provision of specific services for the class, a claim in negligence is not available to the Plaintiffs.

35. In the alternative, if Canada did owe the Plaintiffs and class members any duty of care, which is denied, Canada did not breach any such duty, nor did Canada's actions cause any of the damage alleged.

Damages Claimed

36. In response to paragraphs 56-60, to the extent the Plaintiffs or class suffered damages, losses or injuries as set out in this Claim, these were not caused by any acts or omissions of Canada, and Canada is not liable for the damages, losses, or injuries. Rather, such damages were caused by factors unrelated to the Crown's conduct, including events prior and subsequent to their apprehension by provincial and territorial Children's Aid Societies involved and their subsequent placement in foster care and/or adoption.

37. In the alternative, to the extent Canada is liable for any portion of the Plaintiffs or class members' damages, losses or injuries, damages should be apportioned according to its several liability, reflecting its obligations with respect to the funding and administration of child and family services.

38. To the extent that the Plaintiffs have suffered damages, losses or injuries as set out in this Claim, they must be assessed taking into account the impacts of the National Sixties Scoop Foundation which accompanies survivors, including Métis and non-status, and their descendants along their healing journey by supporting cultural reclamation and reunification, holistic wellness services, advocacy, commemoration, and educational initiatives.

39. In the circumstances, an assessment of aggregate damages is not appropriate given the highly individual experiences of the Plaintiffs and class members. The circumstances of each individual apprehension and placement into care are highly individualized and depend on a variety of factors and considerations, including the reason for apprehension, family status of the child, geographic location, and applicable legislative schemes.

40. Canada denies the claim for damages in negligence and breach of fiduciary duty, and states that the circumstances, if proven, would not give rise to liability for special, punitive, or exemplary damages.

Limitations and Laches

41. The Plaintiffs' and class members' claims are out of time and statute-barred pursuant to s. 32 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, the *Crown Liability Act*, S.C. 1952-53, c. 30, s. 39(2) of the *Federal Courts Act*, RSC 1985, c F-7, and all provincial limitations statutes as applicable. Canada also relies upon the equitable doctrines of laches and acquiescence.

RELIEF

42. For these reasons, the Claim should be dismissed.

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