Court File No. T-1542-12

CLASS ACTION

FEDERAL COURT

BETWEEN:

CHIEF SHANE GOTTFRIEDSON, on his own behalf and on behalf of all the members of the TK'EMLÚPS TE SECWÉPEMC INDIAN BAND and the TK'EMLÚPS TE SECWÉPEMC INDIAN BAND,

CHIEF GARRY FESCHUK, on his own behalf and on behalf of all the members of the SECHELT INDIAN BAND and the SECHELT INDIAN BAND,

VIOLET CATHERINE GOTTFRIEDSON, DOREEN LOUISE SEYMOUR, CHARLOTTE ANNE VICTORINE GILBERT, VICTOR FRASER, DIENA MARIE JULES, AMANDA DEANNE BIG SORREL HORSE, DARLENE MATILDA BULPIT, FREDERICK JOHNSON, ABIGAIL MARGARET AUGUST, SHELLY NADINE HOEHNE, DAPHNE PAUL, AARON JOE and RITA POULSEN

PLAINTIFFS

and

HER MAJESTY THE QUEEN

DEFENDANT

PLAINTIFFS' REPLY TO THE DEFENDANT'S STATEMENT OF DEFENCE

1. Except where explicitly admitted, the Plaintiffs admit none of the allegations contained in the Statement of Defence ("Defence"). The Plaintiffs repeat and rely on the facts as pleaded in the First Re-Amended Statement of Claim ("Statement of Claim").

2. The Plaintiffs admit the allegations in paragraphs 12 (first three sentences only), 17, 18, 19, 24, 25, 36 (the first three sentences only), 101, 103, 105, 174, and 175 (the first two sentences only) of the Defence.

History of Residential Schools

3. In reply to paragraph 42 of the Defence, in which the Defendant alleges that there were Residential Schools where Aboriginal languages were specifically encouraged, the Plaintiffs deny such schools existed and put the Defendant to the strict proof thereof, including identifying specifically which schools and time periods they rely upon, as well as the basis for such assertion.

4. In reply to paragraphs 65 and 82 of the Defence, the Plaintiff admits that the Tk'emlúps te Secwépemc Indian Band or its predecessor, and the Sechelt Indian Band were aware that the language of instruction at any school established by a religious organization at which the children would attend would be English, but the Plaintiffs deny that the Bands had knowledge that their children would be punished for speaking their own Aboriginal language or practising their culture.

5. In reply to paragraphs 96 and 98 of the Defence, the Plaintiffs deny that Day Scholars were only in attendance between about 1953/54 to 1962/63. Classes were held at SIRS until 1968/69.

Individual Issues Should be Addressed After Common Issues Trial

6. In reply to paragraphs 198 – 200 of the Defence, the Certification Order given by Mr. Justice Harrington on June 18, 2015, delineated the "Common Issues" for the trial of this class proceeding. The issue of the applicability of any limitation or equitable defence is not a common issue and is a matter that can only arise in assessing individual claims following the common issues trial.

Sections 39(1) and 39(2) of the *Federal Court Act* Are Not Applicable

7. In the alternative, in further reply to the Defendant's reliance on limitation periods, the Plaintiffs deny that any limitation period applies in these circumstances to limit the claims advanced, and they put the Defendant to the strict proof thereof. The advancement of a limitation period defence in the face of the Residential Schools Policy, aimed at the systematic destruction of cultures, languages, religions and ways of life – in addition to

the self-esteem – of the Aboriginal students who attended Residential Schools, all of whom are owed special duties by the Crown under the constitution and otherwise, is further evidence of the dishonour of the Crown and its failings in its obligations to its Aboriginal peoples.

8. In reply to the Defendant's reliance on s. 39(2) of the *Federal Court Act* at paragraph 198 of the Defence, the Plaintiffs say that s. 39(2):

a. has no application to the claims of the Plaintiffs in this action, including for the reasons set out below under (d);

b. is *ultra vires* and of no force or effect insofar as it is subordinate legislation that purports to limit or define a constitutional entitlement;

c. is unconstitutional and of no force or effect insofar as it purports to abrogate specific constitutional duties owed to the Plaintiffs under s. 91(24) of the *Constitution Act, 1867* and s.35 of the *Constitution Act, 1982,* by a statute of general application and is a violation of the honour of the Crown;

d. in the alternative, is of no effect or must be read down in relation to this action and these Plaintiffs by operation of the doctrine of special circumstances, if this action is otherwise found to be subject to s.39(2), where:

i. the Plaintiffs are members of a specific group, to wit, Aboriginal peoples, in relation to which the honour of the Crown is always at stake;

ii. the Plaintiffs are members of a disadvantaged group that remains unremedied and unreconciled;

iii. the Plaintiffs are members of a distinct class, to wit, "Indians" within the meaning of s.91(24) of the *Constitution Act, 1867* and Aboriginal peoples under s. 35 of the *Constitution Act, 1982,* who are recognized as having distinct legal status within the Canadian constitution and in Canadian law;

iv. the Defendant is in breach of the honour of the Crown in attempting to rely on such a limitation defence for breach of its specific constitutional duties owed to Aboriginal peoples, and these Plaintiffs in particular, when the violation of those duties undermined the Plaintiffs distinct identity as Aboriginal peoples;

v. the Defendant is also in breach of the honour of the Crown by selectively relying upon limitations with one band or group when it has not relied upon those same limitations relative to another band or group for the same causes of action, as demonstrated in the inclusion of Day Scholars in the *Cloud* settlement and with other residential scholars who received the Common Experience Payment (CEP);

vi. the Defendant fails to uphold the honour of the Crown by undermining the goal of reconciliation through its differential treatment of Survivors, often members of the same family, depending on whether they stayed overnight in a Residential School or went home each night after being subjected to the same Residential School policy;

vii. there is no prejudice to Canada given the historical context in which these claims arose, in terms of what Canada has known throughout the operation of the Residential Schools, as well as the guaranteed ongoing preservation of the documents of Canada under the Indian Residential Schools Settlement Agreement (the "Agreement") and the legal limitations placed upon members of the Classes by Canada for decades during the Class Period; and

viii. additional policy rationales do not apply in this case.

9. In further reply to paragraph 199 of the Defence, the Defendant specifically pleads and relies upon the *Federal Court Act*, s. 39(1). The Plaintiffs say that s. 39(1):

a. has no application to the claims of the Plaintiffs in this action, including for the reasons set out below under (d);

b. is *ultra vires* and of no force or effect insofar as it is subordinate legislation that purports to limit or define a constitutional entitlement;

c. is unconstitutional and of no force or effect insofar as the Federal government has unlawfully delegated to the Provincial government the ability to legislatively limit constitutional obligations and duties owed specifically to the Plaintiffs as "Indians" under s.91(24) of the *Constitution Act, 1867* and under s. 35 of the *Constitution Act, 1982*;

d. is a breach of the honour of the Crown generally and, in particular:

i. the honour of the Crown is breached when the Defendant limits its own specific constitutional duties owed to Indians, and these Plaintiffs in particular, when the violation of those duties goes directly to undermine the Plaintiffs very identity as Indians under s. 91(24) of the *Constitution Act, 1867* and s. 35 of the *Constitution Act 1982*;

ii. the Defendant further breaches its duty to uphold the honour of the Crown by selectively and unequally relying upon provincial limitations that apply arbitrarily, differently and unfairly to Aboriginal peoples claiming under the same causes of action against Canada based solely upon the province in which the action is brought or where the Residential School is located or both; and

iii. the Defendant further breaches the honour of the Crown by relying upon limitations with one band or group when it has not relied upon those same limitations relative to another band or group for the same cause of action(s), as demonstrated in the inclusion of Day Scholars in the *Cloud* settlement and with other residential scholars who received the CEP.

Discoverability of the Cause of Action

10. Further, and in the alternative, if this Court finds that s. 39(2) of the *Federal Courts Act* applies, then the applicable limitation period for this action has not expired, based upon the discoverability of the cause of action. The discovery was not possible until Canada's acknowledgment of the Residential Schools Policy on or about June 11, 2008 when the Prime Minister acknowledged that there was a Residential Schools Policy in his apology (the "Apology").

11. Further, and in the alternative, although individual Plaintiffs may have been aware that they lost their language and culture as a result of their attendance at a Residential School they could not have known that this was part of a nation-wide Policy devised and implemented by the Canadian Government until properly acknowledged by Canada.

12. Further, Canada acknowledged its responsibility for the Residential Schools Policy in the Minister of Indian Affair's 1998 Statement of Reconciliation.

13. Further, the availability of compensation for loss of language and culture suffered in the Residential Schools was first known when the nine Courts across Canada approved the Agreement on December 15, 2006. This proceeding was commenced less than six years after the Court confirmation of the Agreement.

14. In further response to the limitations defence, any applicable limitation period has been tolled by the filing of class proceedings that included members of the Classes as putative class members in those proceedings, including in the *Fontaine v. Canada* class proceeding filed in the Ontario Superior Court in 2004.

15. Further, and in any event, Plaintiffs also claim declaratory relief which is not barred by any limitation period.

Equitable Fraud

16. Further, in reply to the Defendant's reliance upon alleged limitation periods, the Plaintiffs state that such reliance is contrary to the Defendant's continued denial of the existence of the Residential Schools Policy. The Defendant cannot assert both that the Plaintiffs ought to have known that by way of a nation-wide Residential Schools Policy, it was seeking to eradicate the language and culture of all Aboriginal children attending Residential Schools, while at the same time denying the existence of this Policy.

17. The Defendant's deliberate concealment of the Residential Schools Policy, which has continued through Canada's failures to provide full and proper disclosure to the Truth and Reconciliation Commission under the terms of the Agreement, amounts to equitable fraud preventing the application of any limitation period.

Releases

18. In full answer to the reliance by the Defendant on the deemed releases and the Schedule P Releases, such defences are individual in nature and can only be addressed on full facts relating to the individual claims following the common issues trial.

19. Furthermore, the Plaintiffs state that the notices issued under the Agreement were not intended to cover Day Scholars and, by reason of Canada's insistence on the exclusion of

Day Scholars, the members of the Classes in this proceeding were told that the Agreement did not apply to them. Consequently, it is improper and unfair to impose deemed releases on the Class members based upon a notice plan that was not intended for them and which asserted that it did not include them.

20. In the alternative and in reply to Canada's allegations at paragraph 11 that the claims of Charlotte Anne Victorine Gilbert be dismissed on the basis of a deemed release as a result of receiving the CEP, the Plaintiffs plead that there is no release that is applicable with respect to the claims of the Plaintiff, Charlotte Gilbert, or for other Class members, for any period for which they were a Day Scholar because time spent as a Day Scholar is specifically excluded from compensation through the CEP. Any release, deemed or otherwise, which applies to Charlotte Gilbert or any other Class member is only applicable for their time as a resident and for sexual abuse and serious physical abuse that they suffered at a Residential School and not for damages suffered as a Day Scholar.

21. In the further alternative, the Plaintiffs plead that any releases that may apply to some or all of the Plaintiffs claims ought to be interpreted to ensure that Canada treats all similarly situated Aboriginal people consistently and equitably. In this case, that means that Day Scholars should be treated like day scholars who attended the Mohawk Institute, who were eligible to receive the CEP under the Agreement.

22. Furthermore, the releases should not be interpreted and applied to limit the recovery of those who were both Day Scholars and residents, who have not been fully compensated for their Residential School losses. For example, an individual such as Charlotte Anne Victorine Gilbert, who spent a few weeks as a Resident and most of her time as a Day Scholar, would lose access to compensation for the majority of the time spent at Residential School.

23. In response to Canada's allegations at paragraphs 16 and 17 of the Statement of Defence, that the claims of the Descendant Class Representative Plaintiffs be dismissed on the basis of their membership in the Agreement family class, the Plaintiffs plead that the Agreement release relates to damages resulting from residence at a Residential School only, and not from attendance as a Day Scholar. Furthermore, any benefit to Family Class

members under the Agreement was to descendants of Residential School students and not Day Scholars. As such, the deemed release does not apply to the Descendant Class.

Contribution by the Plaintiff Bands

24. Canada pleads that the Representative Plaintiff Bands sought the education of their children and therefore contributed to the loss of language and culture. While the Representative Plaintiff Bands admit they wanted educational opportunities for their children, they did not seek to have their language and culture stripped from their children and their societies, but rather sought to enhance their children's opportunities. Further, the Representative Plaintiff Bands were not the creators, nor the implementers, nor overseers of the Residential Schools Policy and had no knowledge of Canada's intention to undertake a program of cultural and linguistic assimilation through the Residential Schools Policy.

Shared Liability with the Churches

25. In reply to paragraphs 34-42 of the Statement of Defence, the Plaintiffs state that this lawsuit is in response to Canada's creation of a Residential Schools Policy and Canada's role in overseeing its implementation, and that the allegations relating to the Churches are irrelevant. The Churches did not create the Residential Schools Policy.

26. Canada has been found to have effectively controlled the school budgets at the Residential Schools and therefore to have effectively controlled the quality of education and care provided to the children at the Residential Schools. The Plaintiffs rely on the principle of *res judicata* with respect to this issue.

Losses of Language and Culture

27. The Defendant alleges at paragraph 120 that the loss of language and culture was a result of a "myriad of historical, personal, societal, and community circumstances" and not a result of any acts or omissions of Canada. The Plaintiffs state that the Residential Schools Policy was designed and carried out with the purpose of assimilating Canada's Aboriginal peoples, regardless of what other circumstances might have existed. The

Plaintiffs state that no such circumstances exist which would relieve Canada of the legal burden of its decision to assimilate Canada's Aboriginal people through expungement of their languages and culture. The Plaintiffs further deny the impact of any such alleged circumstances, and put the Defendant to the strict proof of any and all of said circumstances.

Aboriginal Rights

28. In reply to Paragraphs 147 and 148 of the Defence, the pleading by the Defendant that specifically denies that the Plaintiffs' Aboriginal language and cultures are pre-contact practices should be struck as scandalous, frivolous and vexatious with costs in any event of the cause.

Respectfully submitted this 27th day of November, 2015.

Karenna Williams on behalf of
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