SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Marcia Brown / Representative Plaintiff

AND:

The Attorney General of Canada / Defendant

Proceeding under the *Class Proceedings Act, 1992*

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Jeffery Wilson, Morris Cooper* and *Jessica Braude* for the Plaintiff

Owen Young and Gail Sinclair for the Defendant

HEARD: August 23, December 1 and 2, 2016 and written submissions

The "Sixties Scoop"

SUMMARY JUDGMENT ON THE COMMON ISSUE

[1] After eight years of protracted procedural litigation,[1] the Sixties Scoop class action is before the court for a decision on the first stage of the merits. The representative plaintiff brings this motion for summary judgment asking that the certified common issue, which focuses on the liability of the federal government, be answered in favour of the class members. If the common issue is answered in favour of the class members, the class action will proceed to the damages stage. If the common issue is answered in favour of the federal government, the class action will be dismissed.

[1] *Brown v. Canada (Attorney General)* was certified as a class proceeding by Perell J. at 2010 ONSC 3095. Two appeals followed, first to the Divisional Court at 2011 ONSC 7712 and then to the Court of Appeal at 2013 ONCA 18. The Court of Appeal reversed the certification decision and directed that the matter be reheard by a different class action judge. I reheard the matter and again certified the action as a class proceeding at 2013 ONSC 5637. The defendant sought and was granted leave to appeal from my decision at 2014 ONSC 1583. The Divisional Court dismissed the appeal and affirmed the certification at 2014 ONSC 6967.

[2] Both sides agree that the common issue can be summarily decided. I do as well. For ease of reference I will refer to the defendant government as "Canada" or "the Federal Crown."

Background

[3] The background facts, as set out in the six previous decisions,[2] are by now well-known, not only to the parties but to many Canadians, and will not be repeated here. In any event, the factual background is not in dispute.

[4] The Sixties Scoop happened and great harm was done.

[5] There is no dispute about the fact that thousands of aboriginal children living on reserves in Ontario were apprehended and removed from their families by provincial child welfare authorities over the course of the class period – from 1965 to 1984 – and were placed in non-aboriginal foster homes or adopted by non-aboriginal parents.

[6] There is also no dispute about the fact that great harm was done. The "scooped"[3] children lost contact with their families. They lost their aboriginal language, culture and identity. Neither the children nor their foster or adoptive parents were given information about the children's aboriginal heritage or about the various educational and other benefits that they were entitled to receive. The removed children vanished "with scarcely a trace."[4] As a former Chief of the Chippewas Nawash put it: "[i]t was a tragedy. They just disappeared."[5]

[7] The impact on the removed aboriginal children has been described as "horrendous, destructive, devastating and tragic."[6] The uncontroverted evidence of the plaintiff's experts is that the loss of their aboriginal identity left the children fundamentally disoriented, with a reduced ability to lead healthy and fulfilling lives. The loss of aboriginal identity resulted in psychiatric disorders, substance abuse, unemployment, violence and numerous suicides.[7] Some researchers argue that the Sixties Scoop was even "more harmful than the residential schools":

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[2] *Ibid.*

[3] It was Patrick Johnson, the author of a 1983 research study on "Native Children and the Child Welfare System" that coined the name "Sixties Scoop." He took this phrase from the words of a British Columbia child-protection worker who noted that provincial social workers "would literally scoop children from reserves on the slightest pretext." See Chambers, *infra*, note 4, at 122.

[4] Fournier and Grey, *Stolen from our Embrace: The Abduction of First Nations Children and the Restoration of Aboriginal Communities* (1997) as cited in Chambers, *A Legal History of Adoption in Ontario*, (2016) at 120. I referred this recent publication of the Osgoode Society to counsel because one of the chapters was directly on point.

[5] Affidavit of former Chief Wilmer Nadjiwon (December 14, 2015) at para. 6.

[6] *Brown v. Canada (Attorney General)*, 2010 ONSC 3095 at para. 1.

> Residential schools incarcerated children for 10 months of the year, but at least the children stayed in an Aboriginal peer group; they always knew their First Nation of origin and who their parents were and they knew that eventually they would be going home. In the foster and adoptive system, Aboriginal children vanished with scarcely a trace, the vast majority of them placed until they were adults in non-Aboriginal homes where their cultural identity and legal Indian status, their knowledge of their own First Nation and even their birth names were erased, often forever.[8]

[8] One province, Manitoba, has issued a formal apology. On June 18, 2015, the premier of Manitoba apologized on behalf of the province for the "historical injustice" of the Sixties Scoop and "the practice of removing First Nation, Métis and Inuit children from their families and placing them for adoption in non-Indigenous homes, sometimes far from their home community, and for the losses of culture and identity to the children and their families and communities."[9]

[9] All of this, however, is background and is not determinative of the legal issue that is before the court. The court is not being asked to point fingers or lay blame. The court is not being asked to decide whether the Sixties Scoop was the result of a well-intentioned governmental initiative implemented in good faith and informed by the norms and values of the day, or was, as some maintain, state-sanctioned "culture/identity genocide"[10] that was driven by racial prejudice to "take the savage out of the Indian children."[11] This is a debate that is best left to historians and, perhaps, to truth and reconciliation commissions.

[10] The issue before this court is narrower and more focused. The question is whether Canada can be found liable in law for the class members' loss of aboriginal identity *after* they were placed in non-aboriginal foster and adoptive homes.

Common issue

[11] The certified common issue that is before the court for adjudication is this:

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[7] *Ibid.*, at para. 59. The loss of culture and identity is particularly devastating to an aboriginal person because Canada has had a "particularly destructive relationship with it First Nations." (Affidavit of psychiatrist Harvey Armstrong, May 28, 2009 at para. 10.)

[8] *Supra*, note 4. Also see *Brown v. Canada (Attorney General)*, 2013 ONSC 5637 at para. 12.

[9] Manitoba, Legislative Assembly, *Official Report of Debates (Hansard)*, 40th Parl., 4th Sess., No. 49(b) (18 June 2015), at p. 1993, Hon. Greg Selinger (Premier).

[10] *Brown v. Canada (Attorney General)*, 2013 ONSC 5637 at para. 11. Also see Chambers, *supra*, note 4, at 122 and 123.

[11] *Supra*, note 5.

> When the Federal Crown entered into the *Canada-Ontario Welfare Services Agreement* in December 1, 1965 and at any time thereafter up to December 31, 1984:
>
> (1) Did the Federal Crown have a fiduciary or common law duty of care to take reasonable steps to prevent on-reserve Indian children in Ontario who were placed in the care of non-aboriginal foster or adoptive parents from losing their aboriginal identity?
>
> (2) If so, did the Federal Crown breach such fiduciary or common law duty of care?[12]

[12] Three observations should be made. First, the *Canada-Ontario Welfare Services Agreement* entered into on December 1, 1965 ("the 1965 Agreement" or "the Agreement") is obviously at the core of the common issue. Second, the focus of the common issue is the action or inaction of Canada, not Ontario; and, three, the focus of attention is only on the time period after the aboriginal children had been placed in non-aboriginal foster or adoptive homes. The actual apprehension and removal of the children from the reserves by provincial child-care workers is not an issue that is before the court.

[13] Put simply, the common issue asks whether Canada had and breached any fiduciary or common law duties (when it entered into the 1965 Agreement or over the course of the class period) to take reasonable steps in the post-placement period to prevent the class members' loss of aboriginal identity.

Class definition

[14] The class is defined to include the estimated 16,000 aboriginal children who were removed from reserves in Ontario and placed in non-aboriginal foster homes or were adopted by non-aboriginal parents. The class period covers 19 years - from December 1, 1965 (when Canada entered into the 1965 Agreement) to December 31, 1984 (when Ontario amended its child welfare legislation to recognize for the first time that aboriginality should be a factor to be considered in child protection and placement matters.[13])

The 1965 agreement

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[12] The term "Indian" will be used throughout this judgment in its legal sense only. The court is aware of the derogatory meaning of this term outside of this context.

[13] *Child and Family Services Act*, S.O. 1984, c. 55. The CFSA took effect on January 1, 1985. Section 1(f) of the CFSA provides that "Indian and native people should be entitled to provide, whenever possible, their own child and family services, and that all services to Indian and native children and families should be provided in a manner that recognizes their culture, heritage and traditions and the concept of the extended family."

[15] The genesis of the 1965 Agreement can be found in the discussions that took place at the 1963 Federal-Provincial Conference. According to the preamble in the 1965 Agreement, the 1963 Conference "determined that the principal objective was the provision of provincial services and programs to Indians on the basis that needs in Indian Communities should be met according to standards applicable to other communities." The stated goal of the 1965 Agreement was to "make available to the Indians in the province the full range of provincial welfare programs."

[16] Under s. 2(1) of the 1965 Agreement, Ontario undertook to extend some 18 provincial welfare programs to "Indians with Reserve Status in the Province." The provincial programs in question, as listed in Schedules A and C to the Agreement, included blind and disabled person allowances, mothers' allowances, care of the aged and child welfare services, that is "services to children, including the protection and care of neglected children, the protection of children born out of wedlock and adoption services provided under the [Ontario] *Child Welfare Act*…"

[17] There is no doubt that Canada could have enacted its own child protection statute aimed only at Indian children on reserves[14] or, indeed, any of the other 17 provincial laws that formed part of the 1965 Agreement. But it chose not to do so. Ontario already had operating provincial programs in place. And even though the province could have extended these laws to the reserves as "laws of general application" under s. 88 of the *Indian Act*,[15] it was clearly not doing so. It made sense, therefore, for Canada to fund the provincial extension to the reserves of the 18 listed provincial laws as an exercise of its spending power. Canada's financial obligation under the 1965 Agreement was to reimburse the province for the per capita cost of the provincial programs that were so extended, in accordance with the formula that was set out in the Agreement.

[18] It is important to understand, however, that the 1965 Agreement was more than a federal spending agreement. It also reflected Canada's concern that the extension of the provincial laws would respect and accommodate the special culture and traditions of the First Nations peoples living on the reserves, including their children.

[19] That is why section 2(2) was added.

Obligation to consult under section 2(2)

[20] Ontario's undertaking to extend the provincial welfare programs as set out in s. 2(1) was made "subject to (2)." Sub-section 2(2) of the Agreement said this:

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[14] Given its exclusive jurisdiction over "Indians and lands reserved for Indians" under s. 91(24) of the *Constitution Act, 1982.* Also see *Brown v. Canada (Attorney General)* 2014 ONSC 6967 (Div. Ct.) at para. 26.

[15] *Indian Act*, R.S.C. 1970, c. I-16, s. 88. And see *NIL/TU-O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, at paras. 34 and 35.

> No provincial welfare program shall be extended to any Indian Band in the Province unless that Band has been consulted by Canada or jointly by Canada and by Ontario and has signified its concurrence.

[21] It is obvious not only from the plain meaning of this provision but also from the circumstances surrounding the execution of the 1965 Agreement that the obligation to consult with Indian Bands and secure their concurrence was intended to be a key component of the Agreement. One only has to consider what was said in a background memorandum prepared by Canada for use at the 1963 Federal-Provincial Conference:

> The utmost care must be taken … to ensure that the Indians are not again presented with a fait accompli in the form of a blueprint for their future which they have had no part in developing and which they have been given no opportunity to influence. This means that the Federal Government should make crystal clear that before any final arrangements are made, the Indians must be fully consulted.

[22] Consider as well what was said by Mr. Tremblay, the federal Minister of Citizenship and Immigration, in October 1964 to the Federal-Provincial Conference, as summarized in the minutes of the meeting:

> *Consultation with Indians*. Mr. Tremblay, in introducing this topic, said that it is an extremely important one as the success of any federal-provincial effort to extend a provincial service will depend on the Indians accepting the proposal and participating in its development. From past experience, we believe acceptance and cooperation by the Indians will not be secured without adequate consultation with them.

[23] And, in a "circular" dated December 9, 1964, the Assistant Deputy Minister of the Indian Affairs Branch of the federal Department of Citizenship and Immigration advised his federal colleagues that he would view it as a "serious breach of faith with the Indian people if any provincial services were forced on a Band against its wishes":

> It is departmental policy … to encourage the extension of provincial services to reserves in those areas where Provinces are competent to provide services but under no circumstances must action be taken towards this end – that is to actually extend a service to a reserve – without the consent of the Indians concerned …
>
> If an agreement can be arrived at, the next step will be to explain it to each individual Band in the Province and to ascertain whether the Band wishes the provincial service extended to it. If it is unacceptable to any Band, no extension of that particular service will be made to that Band and the service provided by the Federal Government will continue.
>
> It is important that the Indians understand Federal policy in this regard and this circular may be helpful to you in your future discussions with

> them. *I would consider it to be a serious breach of faith with the Indian people if any provincial services were forced on a Band against its wishes.* (Emphasis added).

[24] In short, Canada was prepared to exercise its spending power to fund the extension of the provincial programs to reserves but only with the advice and consent of every affected Indian Band to every one of the 18 provincial programs that were being so extended. It is obvious from the record that the obligation to consult, as set out in s. 2(2) of the 1965 Agreement, was intended to include explanations, discussions and accommodations. It was meant to be a genuinely meaningful provision.

The obligation to consult applied to child welfare services

[25] Canada argues that the obligation to consult in section 2(2) of the 1965 Agreement did not apply to Ontario's extension of its child welfare services to the reserves because some level of child protection services had already been extended to some reserves *before* the 1965 Agreement.

[26] It is true that some provincial programs, such as blind and disabled person allowances, care of the aged, and some child welfare services had already been extended to some of the reserves in Ontario. For example, child welfare services were being provided to some reserves in the late 1950's under private agreements between certain Children's Aid Societies (CAS) and the federal government with the latter providing the funding.

[27] However, as Canada itself made clear at the 1963 Federal-Provincial Conference, the provincial services being provided were at best "piecemeal" and "rudimentary." The level of federal funding was "minimal."[16] The 1963 Federal-Provincial Conference was told that provincial services "needed to be increased several times over to bring them up to provincial standards." Canada explained that from its point of view, "it would be highly desirable to accelerate, enlarge and broaden the pace and scope [of these piecemeal arrangements] with the objective eventually of negotiating master agreements covering the whole field of welfare … on a province wide basis."

[28] Hence, the 1965 Agreement. The Agreement extended, amongst other things, the whole field of "services to children, including the protection and care of neglected children, the protection of children born out of wedlock and adoption services provided under the *Child Welfare Act*" to Indian reserves, on a province-wide and provincial

[16] Chambers, *supra*, note 4, at 118.

standards basis. The level of federal funding was now significant[17] as was the impact on the reserves.[18]

[29] If any of the provincial programs proved "unacceptable" to any Band, as was made clear in the federal memorandum of December 9, 1964 discussed above, then "no extension of that particular service will be made to that Band and the service provided by the Federal Government will continue." In other words, absent consultation and acceptance by the individual Band of the provincial child welfare regime, the pre-existing "piecemeal" and "rudimentary" service provided by the federal government (via private contractual agreements with certain CAS organizations in certain parts of the province) would continue.

[30] Canada's submission that the obligation to consult in section 2(2) of the 1965 Agreement did not apply to child welfare services does not succeed. The language in section 2(2) is clear and unambiguous and there is nothing in the discussion papers or other documents surrounding the formation of the 1965 Agreement that suggests in any way that the obligation to consult set out in section 2(2) was not intended to apply to the extension of provincial child welfare services.[19]

[31] Indeed, it strains credulity to think that Canada would repeatedly emphasize the importance of genuine consultation and how it would be "a serious breach of faith" if *any* of the provincial programs were "forced on a Band against its wishes", all the while intending that child welfare services, probably the most intrusive of the provincial programs, could be extended to the reserve without any consultation whatsoever.

[32] In sum, the 1965 Agreement was a watershed event that extended some 18 provincial welfare programs, including child welfare services, on a province-wide and provincial standards basis to Indians on the reserves. The obligation to consult as set out in section 2(2) applied plainly and unambiguously to every provincial welfare program, including child welfare services. There was no carve-out for child protection services.

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[17] Between 1965 and 1966 Reserve Status Indian (RSI) child-in-care costs "jumped over ten times." And by 1972, the RSI costs were "40 times higher than their costs in 1957. See Expert Report of Dr. Joyce Timson (Affidavit of November 7, 2016) at 19 and 22.

[18] *Ibid.*, at 1: "After 1965" aboriginal children were taken into care "in disproportionate numbers."

[19] Canada referred to federal memoranda that post-dated the 1965 Agreement to suggest that the obligation to consult under s. 2(2) did not apply to the extension of child welfare services because some of these services were already being provided (in the late 1950's) on some reserves by certain CAS under contracts with the federal government. In my view, this submission fails for the reasons already noted. It also fails because evidence of subsequent conduct or "evidence of the behavior of the parties *after* the execution of the contract" is not part of the factual matrix or surrounding circumstances at the date of the agreement and "should be admitted only if the contract remains ambiguous after considering its text and factual matrix" (emphasis added): *Shewchuk v Blackmont Capital Inc.*, 2016 ONCA 912 at paras. 41 and 46. Here, as I have already found, there is no such ambiguity in the meaning of s. 2(2) of the 1965 Agreement.

[33] For the balance of my analysis, I will focus on the obligation to consult as it related to the extension of the provincial child welfare regime to the reserves.

No Indian bands were ever consulted

[34] The plaintiff says no Indian Bands were ever consulted and the full reach of the provincial child welfare regime was extended to all of the reserves without any consultation and concurrence on the part of any Indian Band.

[35] The plaintiff is right.

[36] On the record before me, I find that no Indian Bands were ever consulted before provincial child welfare services were extended to the reserves and no Bands ever provided their "signified concurrence" following such consultations. The evidence supporting the plaintiff on this point is, frankly, insurmountable. In any event, Canada offered no evidence to suggest otherwise.

Canada breached the 1965 Agreement

[37] I find that by failing to consult the Indian Bands, Canada breached section 2(2) of the 1965 Agreement. This finding may seem self-evident but it requires some explanation.

[38] Under section 2(1) of the Agreement, Ontario undertook to extend the listed provincial welfare programs to Indians on reserves but did so "subject to (2)" which required consultation by Canada. One could argue that it was Ontario that breached sections 2(1) and (2) of the Agreement because it proceeded to extend the named provincial programs to the reserves even though Canada had not consulted any Indian Band. The plaintiff, however, filed this class action against Canada, not Ontario.

[39] The question therefore is whether Canada breached section 2(2) of the Agreement. Strictly speaking, there is nothing in section 2(2) which explicitly obliges Canada to actually undertake the consultations referred to therein. However, the undertaking to do so can be implied from the language and context of this provision. The law is clear that a contractual term can be implied if it is a contractual term that must have been intended by the parties and is necessary or obvious in light of the particular circumstances of the agreement.[20] The law is also clear that "where the approval of a third party is necessary in order to enable a contract to proceed, it may be implied that the party in a position to seek that approval must make reasonable efforts to do so."[21]

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[20] McCamus, *The Law of Contracts*, (2nd ed.) at 779-81.

[21] *Ibid.*, at 783-84.

[40] I therefore have no difficulty concluding that under section 2(2) of the 1965 Agreement, Canada undertook to consult with the Indian Bands, that it failed to do so and thus breached this provision of the Agreement.

If the Indian Bands had been consulted

[41] Canada argues that even if it had consulted with the Indian bands, as it was obliged to do under section 2(2), there is no evidence that any of the Indian bands would have provided any ideas or advice that could have prevented the Indian children who had been removed and placed in non-aboriginal foster or adoptive homes from losing their aboriginal identity. Counsel for Canada put it this way: "[W]ould life have been different had they been consulted?"

[42] This is an odd and, frankly, insulting submission. Canada appears to be saying that even if the extension of child welfare services to their reserves had been fully explained to the Indian Bands and if each Band had been genuinely consulted about their concerns in this regard, that no meaningful advice or ideas would have been forthcoming.

[43] In the documentation produced by Canada over the course of the class period, there are numerous memoranda and letters from both federal and First Nations representatives setting out in some detail the kinds of things that could have been done to prevent the loss of aboriginal identity post-placement. For example: educating non-aboriginal foster and adoptive parents about the relevant cultural differences and providing them with information about the aboriginal child's entitlement to various federal benefits and payments.

[44] Direct evidence from Indian Band representatives as to what they would have said or advised had they been consulted in 1965 was presented, but in broad brush. Wilmer Nadjiwon, former Chief of the Chippewas Nawash, filed an affidavit that stated if his Indian Band had been consulted he would have "done whatever [he] could" to assist the removed Indian child "to re-connect with his or her family or learn about their First Nations identity." I required more specificity.

[45] I therefore directed a mini-trial under Rule 20.04(2.2) for the purposes of clarification[22] and ordered that the representative plaintiff present oral evidence on the following issue:

> If Canada had consulted with Indian Bands (as per s. 2(2) of the 1965 Agreement) what ideas or advice would have been provided that could

[22] *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, at para. 51: "...concerns about credibility or *clarification of the evidence* can be addressed by calling oral evidence on the [summary judgment] motion itself." (emphasis added). I am satisfied that my proposed use of a mini-trial to clarify the evidence in question falls squarely within the Supreme Court's decision in *Hryniak* and within the letter and spirit of Rule 20.04(2.2). See my decision as the summary judgment judge in *Combined Air v. Flesch*, 2010 ONSC 1729 at para. 38, confirmed on appeal, *sub. nom. Hryniak v. Mauldin.*

> have prevented the Indian children who had been removed and placed in non-Aboriginal foster or adoptive homes from losing their Aboriginal identity?

[46] The plaintiff filed two brief affidavits for the mini-trial: one from Wilmer Nadjiwon who had been the Chief of the Chippewas Nawash from 1964 to 1978 and the other from Howard Jones who had been a Band Councillor on the same reserve over some 15 years beginning in 1965. Upon receiving the affidavits, Canada advised that it would not cross-examine and that the two affidavits could stand as the oral testimony. As a result, it was agreed that there was no need for the formal mini-trial.

[47] The uncontroverted evidence of Mr. Nadjiwon and Mr. Jones was that if they had been consulted they would have suggested that some contact be maintained with the removed children during the post-placement period so that they would know that they were loved and "could always come home"; and that the "white care-givers" be provided with information about the removed child's Indian Band, culture and traditions and the various federal educational and financial benefits that were available to the Indian children.

[48] There is no reason to believe that similar ideas would not have been provided by other Indian Bands had they been consulted and Canada has not adduced any evidence to the contrary.

[49] If these ideas and suggestions had been implemented as part of the extension of the provincial child welfare regime – that is, if the foster or adoptive parents had been provided with information about the aboriginal child's heritage and the federal benefits and payments that were available when the child became of age, and if the foster or adoptive parents had shared this information with the aboriginal child that was under their care,[23] it follows in my view that it would have been far less likely that the children of the Sixties Scoop would have suffered a complete loss of their aboriginal identity.

[50] Canada says things were different back then. Canada argues that in 1965 and in the years immediately following, it was not foreseeable, given the state of social science knowledge at the time, that trans-racial adoptions or placements in non-aboriginal foster homes would have caused the great harm that resulted.

[51] Canada's submission misses the point.

[52] The issue is not what was known in the 1960's about the harm of trans-racial adoption or the risk of abuse in the foster home. The issue is what was known in the 1960's about the existential importance to the First Nations peoples of protecting and preserving their distinctive cultures and traditions, including their concept of the extended

[23] One does not know how many of the foster and adoptive parents, having received this information, would have shared the information with the aboriginal child that had been placed in their home. Probably most, but this is an issue that will have to be determined on evidence that will be presented at the damages stage.

family. There can be no doubt that this was well understood by Canada at the time. For example, focusing on adoption alone, Canada knew or should have known that the adoption of aboriginal children by non-aboriginal parents constituted "a serious intrusion into the Indian family relationship" that could "obliterate the [Indian] family and… destroy [Indian] status."[24]

[53] Recall as well that the Indian Affairs Branch was of the view that "it would be a serious breach of faith with the Indian people if any provincial services were forced on a Band against its wishes." Indeed, as I have already noted, it was this very understanding, namely the importance to the First Nations peoples of protecting and preserving their distinctive cultures and traditions, that best explains why section 2(2) and the obligation to consult was added to the 1965 Agreement in the first place.

[54] In sum, information about the aboriginal child's heritage and his or her entitlement to various federal benefits was in and of itself important to both the Indian Band and the removed aboriginal children - not only to ensure that the latter knew about their aboriginal roots and "could always come home" but also about the fact that they could apply for the various federal entitlements, including a free university education, and other financial benefits once they reached the age of majority.

[55] Much of this information was finally provided by the federal government in 1980.

The federal booklet

[56] Until the publication of the federal informational booklet in or around 1980, Canada had little to no interaction with the removed children or their foster or adoptive parents in the post-placement period. The evidence indicates that on occasion the Indian Affairs Branch of the federal Department of Northern Affairs and National Resources would receive a letter of inquiry from the adoptive parent of a removed aboriginal child. Here is how the registrar of the Indian Affairs Branch responded on January 7, 1966 to one such letter:

> … [*Names redacted*] are registered as Indians. They have no band number, however, as Indian children who are adopted by non-Indians are removed from their natural parents' band number and registered in a special index so that the facts of their adoption may be kept confidential. This index also enables us to identify them as Indians in future if they are informed of their Indian status and make inquiries as to their funds, enfranchisement, or other relevant matters. Whether or not they are informed of their Indian status is left to their adoptive parents.
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> It is now the policy of the Branch to administer the funds of children adopted by non-Indians and keep them available for the children until

[24] As Laskin C.J.C. noted in *Natural Parents v. British Columbia (Superintendant of Child Welfare)* [1976] 2 S.C.R. 751 at 756-57.

> they become of age. The funds are held in trust in savings accounts and paid out to the children on application at any time after twenty-one years of age.

[57] Three points are made clear in this response: (i) the Indian Affairs Branch maintained a special registry of adopted Indian children that would allow them to be identified as Indians in the future but only "if they are informed of their Indian status and make inquiries as to their [entitlements]"; (ii) the Indian Affairs Branch was not providing any such information to the adoptive parents ("whether or not [the children] are informed of their Indian status is left to their adoptive parents"); and (iii) the Indian Affairs Branch was holding the monies that were payable to the adopted children in trust accounts, to be released when they turned 21 and made the required "application".

[58] In short, the only way that an apprehended aboriginal child would ever learn about his or her aboriginal identity or the various federal entitlements was if he or she had the good fortune to be placed in a home where the non-aboriginal foster or adoptive parents themselves knew and shared this information with the aboriginal child or if the child or his non-aboriginal parents made the effort to obtain this information by writing to the federal government. Canada, however, took no steps to provide any of this information on its own – at least not until 1980.

[59] In or around 1980, the federal department of Indian and Northern Affairs published a detailed informational booklet titled *Adoption and the Indian Child* that was "meant to encourage adoptive parents to inform their adopted Indian children of their heritage and rights."[25] The booklet provided information about the adopted child's aboriginal heritage and status, the various federal benefits and entitlements that were available, including band payments and treaty annuities. It also explained that the Department was placing these monies into trust accounts and that the child could apply to have these amounts paid out once he or she reached the age of majority. The informational booklet was published in response to "concerns expressed by First Nations individuals and groups that adoptions of Indian children by non-Indian parents would result in the children not learning of their heritage as registered Indians"[26]

[60] Canada's evidence is that the booklets were provided to the province so that CAS workers could distribute them to non-aboriginal adoptive parents. The plaintiff, however, says there is no evidence that any CAS workers ever received these booklets and certainly no evidence that they were ever distributed to the adoptive parents. In any event, the evidence is clear that Canada took no steps to provide such information until this booklet was published in 1980, some fifteen years after the 1965 Agreement – and then only directed to adoptive parents, not foster parents.

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[25] As explained by one of Canada's non-expert witnesses with Indigenous and Northern Affairs Canada, (Affidavit of Eric Guimond, August 15, 2016) at para. 7.

[26] *Ibid.*

[61] What would have happened if Canada had honoured its obligation to consult the Indian Bands under s. 2(2) of the 1965 Agreement? In all likelihood, as the evidence filed for the mini-trial shows, the Indian Bands would have expressed the same concerns (in 1966) that years later prompted Canada to publish *Adoption and the Indian Child.* If Canada had honoured its obligation to consult the Indian Bands under s. 2(2) of the 1965 Agreement, the information about the child's aboriginal identity and culture and the available federal benefits would have been provided years sooner and would probably have been provided, via the CAS, to both foster and adoptive parents and not just the latter.

Returning to the common issue

[62] Let me sum up what I have found thus far. I have found that Canada was obliged under section 2(2) of the 1965 Agreement to consult with each Indian Band before any provincial welfare program, including child welfare services, was extended to the reserve in question. I have found that no such consultations ever took place. I have also found that if the Indian Bands had been consulted they would have suggested, amongst other things, that information about the apprehended child's aboriginal heritage and the availability of federal benefits be provided to the foster or adoptive parents. This booklet alone, assuming that the foster and adoptive parents would have shared this information with the aboriginal child in their care,[27] would probably have prevented the loss of the apprehended child's aboriginal identity.

[63] That is, Canada failed to take reasonable steps to prevent the loss of aboriginal identity in the post-placement period by failing, *at a minimum*, to provide to both foster and adoptive parents (via the CAS) the kind of information that was finally provided in 1980 and thereafter.

[64] Was Canada legally obliged to provide such information? The plaintiff says yes and makes two submissions, one based on fiduciary law and the second based on the common law. For the reasons that follow, I find that Canada's liability cannot be established under fiduciary law but can be established under the common law. I will explain each of these findings in turn.

Fiduciary duty of care

[65] The law of fiduciary duty as it applies in the aboriginal context is not in dispute. Although the Federal Crown stands in a fiduciary relationship with Canada's aboriginal peoples,[28] a fiduciary relationship alone does not necessarily give rise to a fiduciary

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[27] *Supra*, note 23.

[28] *Guerin v. The Queen*, [1984] 2 S.C.R. 335 and *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159.

duty.[29] In the aboriginal context, a fiduciary duty may be imposed on the Federal Crown in one of two ways.

[66] First, a duty may arise as a result of the Crown's assumption of discretionary control over a specific aboriginal interest. The interest must be a communal aboriginal interest in land that is integral to the nature of the aboriginal community and their relationship to the land and must be predicated on historic use and occupation. [30]

[67] Second, in cases other than ones involving lands of historic use or occupation, a fiduciary duty may arise if three elements are present: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary; (2) a defined person or class of persons vulnerable to a fiduciary's control; and (3) a legal or substantial practical interest of the beneficiary that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.[31] The degree of discretionary control must be "equivalent or analogous to direct administration of that interest."[32]

[68] In my view, a fiduciary duty under the first category cannot be established in this case. The aboriginal interest in question is not an interest in land and the action herein is not being advanced as a communal claim but as a class action seeking individualized redress.

[69] The attempt to establish a fiduciary duty under the second category also does not succeed on the evidence herein. Even if I were to agree with the plaintiff that the first two elements are satisfied – that the obligation to consult was an undertaking to act in the Indian Band's best interests and there existed a vulnerable group, namely children in need or protection – I would still have difficulty with the third element.

[70] I cannot find on the evidence before me that when Canada undertook the obligation to consult under s. 2(2) of the 1965 Agreement that it assumed such a degree of discretionary control over the protection and preservation of aboriginal identity that it amounted to a "direct administration of that interest." There is no doubt that the obligation to consult was breached and this resulted in great harm but the degree of discretionary control that is required before a fiduciary duty can be imposed is not present on the evidence before the court.

[71] Fiduciary duty has meaning as a legal term and should not be used "as a conclusion to justify a result."[33] I therefore find on the applicable law that a fiduciary duty of care has not been established.

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[29] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 647.

[30] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] 1 S.C.R. 623 at para. 53.

[31] *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, at para. 36; *Manitoba Metis*, *ibid*, at para. 50.

[32] *Elder Advocates of Alberta Society*, *ibid*, at para. 53.

Common law duty of care

[72] A duty of care at common law, however, has been established. In my view, section 2(2) and the obligation to consult creates a common law duty of care and provides a basis in tort for the class members' claims.

[73] The common law duty of care arises out of the fact that the 1965 Agreement is analogous to a third-party beneficiary agreement. Canada undertook the obligation to consult in order to benefit Indian Bands (and by extension, Indians living on the reserves, including children). The Indian Bands are not parties to the Agreement. But a tort duty can be imposed on Canada as a contracting party in these circumstances. As a leading contracts scholar explains:

> There are…cases in which the tort duty owed to the third party appears to arise directly from the breach of contract. In recent English cases, for example, solicitors have been held liable to prospective beneficiaries for their failure to draw up a will or execute it properly. Such failures would constitute breach of contractual duties owed to their clients that could not be enforced in a contract claim by the prospective beneficiaries because of the third-party beneficiary rule. Their claim in tort, which avoids the third-party beneficiary rule, appears to flow directly from the initial breach of contract.[34]

[74] Similarly here, the plaintiff's claim in tort (the existence and breach of a common law duty of care) flows directly from the fact that at the time of entering the 1965 Agreement, Canada assumed and breached the obligation to consult with the third-party Indian Bands. If the circumstances of a solicitor drafting a will for the benefit of a third party beneficiary is "sufficient to create a special relationship to which the law attaches a duty of care"[35], the same should follow even more where there is not only a unique and pre-existing "special relationship" based on both history and law but a clear obligation to consult the beneficiaries about matters of existential importance.

[75] I pause here to acknowledge that strictly speaking the third-party beneficiaries under the 1965 Agreement were the Indian Bands not the apprehended children – that is, not the class members. It is certainly open to Canada to take the position that the breach of the Agreement and the duty of care that flowed from this breach applied only to the Indian Bands and not to the removed Indian children. I remain confident, however, that such a formalistic argument, fully acceptable in the commercial context, will not be

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[33] *Lac Minerals, supra*, note 29, at 652.

[34] McCamus, *The Law of Contracts* (2nd ed.) at 315. And see Waddams, *The Law of Contracts*, (5th ed.) at 198 and *Whittingham v. Crease & Co.*, [1978] B.C.J. No. 1229; *Ross v Caunters*, [1980] 1 Ch. 297; and *White v. Jones*, [1995] 2 A.C. 207.

[35] *White v. Jones, ibid*,. at 276.

advanced in the First Nations context where notions of good faith, political trust and honourable conduct are meant to be taken seriously,[36] and where Canada's breach of the 1965 Agreement was so flagrant.

[76] If I am wrong in my conclusion that the common law duty of care as alleged herein can be established under existing law as just described, and instead is better understood as a novel claim, I now turn to the analysis that applies when dealing with a novel claim.

[77] The applicable legal approach is the "two stage" analysis known as the *Anns-Cooper* test.[37] The first stage question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. If this is established, a *prima facie* duty of care arises and the analysis proceeds to the second stage, which asks whether there are any residual policy reasons why this *prima facie* duty of care should not be recognized.[38]

[78] In my view, under the first stage of the analysis, a *prima facie* duty of care is established. It is beyond dispute that there is a special and long-standing historical and constitutional relationship between Canada and aboriginal peoples that has evolved into a unique and important fiduciary relationship.

[79] It is also beyond dispute that given such close and trust-like proximity it was foreseeable that a failure on Canada's part to take reasonable care might cause loss or harm to aboriginal peoples, including their children. As the Supreme Court noted in *Cooper v. Hobart*, by looking at the "expectations" and "interests involved" the court can evaluate "the closeness of the relationship between the plaintiff and the defendant" and can "determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant."[39]

[80] Even in the absence of section 2(2) and the obligation to consult, Canadian law, during the time period in question, "accepted" that Canada's care and welfare of the aboriginal peoples was a "political trust of the highest obligation."[40] And there can be no

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[36] As the Supreme Court noted in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1108: "[t]he relationship between the Government and aboriginals is trust-like rather than adversarial" and in *Manitoba Métis*, *supra*, note 30, at para. 77: "… an honourable interpretation of an obligation cannot be a legalistic one that divorces the words from their purpose."

[37] The analysis set out by the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) was refined and applied by the Supreme Court of Canada in *Cooper v. Hobart*, 2001 SCC 79.

[38] *Knight v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45 at para. 39.

[39] *Cooper*, *supra*, note 37, at para. 34.

[40] In *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211 at 219, the Supreme Court described the aboriginal peoples as "wards of the state, whose care and welfare are a political trust of the highest obligation." The language used was paternalistic and condescending, but according to the Supreme Court it was the

doubt that the aboriginal peoples' concern to protect and preserve their aboriginal identity was and remains an interest of the highest importance. As the Divisional Court put it: "[i]t is difficult to see a specific interest that could be of more importance to aboriginal peoples than each person's connection to their aboriginal heritage."[41]

[81] The content of the 1965 Agreement and Canada's clear obligation to consult and secure the signified concurrence of the affected Indian Band before the child welfare regime was extended to that reserve reinforces the conclusion that the proximity criterion is easily satisfied on the evidence herein and that it is indeed just and fair to impose a duty of care upon the defendant. All the more so when the focus of the extended child welfare regime was a highly vulnerable group, namely children in need of protection. I therefore find that a *prima facie* duty of care has been established.

[82] I can now turn to the second stage of the *Anns-Cooper* analysis. In my view, Canada has not advanced any credible policy consideration that would negate the common law duty of care. Canada says that imposing a duty on the federal government to provide essential information about aboriginal identity and federal financial benefits to the non-aboriginal foster and adoptive parents would "penalize Canada for having used its spending power to ensure that Ontario had the capacity to provide Indian children on reserves in need of protection with that very protection." In my view, this submission does not succeed. Imposing a duty of care to provide said information would not have "penalized" anybody. All that would have happened in this case is that Canada would have provided the much-needed information in and around 1965 and not fifteen years later.

[83] I therefore find that a common law duty to take steps to prevent aboriginal children who were placed in the care of non-aboriginal foster or adoptive parents from losing their aboriginal identity has been established.

Answering the common issue

[84] In my view, the common issue must be answered as follows.

[85] For the reasons set out above, when Canada entered into the 1965 Agreement and over the years of the class period, Canada had a common law duty of care to take reasonable steps to prevent on-reserve Indian children in Ontario, who had been placed in the care of non-aboriginal foster or adoptive parents, from losing their aboriginal identity. Canada breached this common law duty of care.

Disposition

"accepted view" in the 1950's – a view that at the very least acknowledged the historic partnership between the Federal Crown and the First Nations and the importance of respecting the latter's way of life.

[41] *Brown v. Canada (Attorney General)*, 2014 ONSC 6967 at para. 30.

[86] The common issue is answered in favour of the plaintiff. Canada is liable in law for breaching a common law duty of care to the class members. This is not an issue that requires a trial.

[87] The class action now moves forward to the damages assessment stage. Counsel should schedule a case conference to discuss next steps.

[88] The plaintiff is entitled to the costs of this summary judgment motion. These costs are likely to be substantial. If the parties cannot agree on the costs I would be pleased to receive brief written submissions from the plaintiff within fourteen days and from the defendant within fourteen days thereafter. A brief reply from the plaintiff may follow.

[89] Order to go accordingly.

Justice Edward P. Belobaba

Date: February 14, 2017