Brown v. Canada (Attorney General) 2013 ONSC 5637
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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Marcia Brown and Robert Commanda / Plaintiffs

AND:

The Attorney General of Canada / Defendant

Proceeding under the *Class Proceedings Act, 1992*

BEFORE: Justice Edward Belobaba

COUNSEL: *Jeffery Wilson* and *Morris Cooper* for the Plaintiffs

Owen Young, Paul Evraire and *Michael Bader* for the Defendant

HEARD: July 15 and 16, 2013

Re-Hearing of the 'Sixties' Scoop' Certification Motion

DECISION ON CERTIFICATION

Introduction

[1] The aboriginal communities in Ontario refer to it as the "Sixties' Scoop." For a time, and particularly for a nineteen-year period between 1965 and 1984, welfare authorities in Ontario removed many Indian and aboriginal children from their families and communities and placed them with foster or adoptive parents that were non-aboriginals. It is alleged that many of the "scooped" children lost their identity as aboriginal persons and suffered mentally and physically. The aboriginal communities describe the effects of the Sixties Scoop as horrendous, destructive, devastating, and tragic.

[2] Marcia Brown and Roberta Commanda are aboriginals of Ojibway ancestry, and they were scooped children. In this proposed class action, which was commenced on February 9, 2009, notably they do not sue the Ontario welfare authorities. They sue only

the Federal Crown. They accuse the Federal Crown of a systemic assimilation policy purposely designed to destroy First Nations families and communities. They bring their action on behalf of approximately 16,000 aboriginals who, they allege, were the victims of a deliberate program of "identity genocide of children" that occurred in Ontario between December 1, 1965 and December 31, 1984 ...

[3] This is how Justice Perell began his 2010 decision certifying the "Sixties' Scoop" lawsuit as a class action.[1] The time-period in question covers almost twenty years. It begins on December 1, 1965 when the Federal Crown signed an agreement with the province of Ontario known as the *Canada-Ontario Welfare Services Agreement* ("the 1965 Agreement") and ends on December 31, 1984, the day before the *Child and Family Services Act*[2] ("CFSA") was proclaimed in force, making aboriginality an important factor in child protection and placement practices.

[4] Under the 1965 Agreement, the Federal Crown entered into a funding agreement that allowed Ontario to extend the delivery of its existing child welfare (as well as other welfare services) to Indians living on reserves. The 1965 Agreement was limited in its scope to "Indians with reserve status". It did not apply to the Inuit or Metis peoples and some exceptions aside, it did not provide for the funding of welfare services to Indians or other aboriginal persons living in urban centres or in other places off-reserve.

[5] The welfare services were listed in a schedule and included "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 [provincial child welfare law.] One section of the 1965 Agreement provided that "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." As it turned out, no Indian Bands were consulted.

[6] At the hearing before Justice Perell, the plaintiffs made clear that it was the 1965 Agreement "that gave rise to these claims."[3] That is, it was the 1965 Agreement that allowed (or "unleashed", depending on one's perspective) a well-intentioned but profoundly uninformed child protection bureaucracy to "scoop" thousands of Indian children that were found to be in need of protection off Indian reserves and place them in non-aboriginal homes. (I will return to the significance of the 1965 Agreement when I consider the class definition).

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[1] *Brown v. Canada (Attorney General)*, 2010 ONSC 3095, 102 O.R. (3d) 493.

[2] S.O. 1984, c. 55. The CFSA took effect on January 1, 1985.

[3] *Brown v. Canada (Attorney General)*, *supra* note 1, at para. 41.

[7] The proposed class period ends at the end of 1984 when the CFSA was proclaimed in force. The CFSA did more that provide a legislative direction that aboriginality should be a factor to be considered in child protection and placement matters. The new law recognized 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[4]

and, in essence, mandated that, whenever possible, Indian or native children needing protection should be placed in an Indian or native setting – ideally, with a member of the extended family, or with the child's Band or native community[5], and when the child was being placed for adoption, the child's Band or native community had to be given thirty days written notice.[6]

[8] The CFSA provisions did not just list "aboriginality" as another factor for judicial consideration. They inscribed in law for the first time a legislative recognition that the aboriginal culture had a very different understanding of community, family and children in need of protection and that these differences had to be respected. With the enactment of the CFSA provisions, the chances of the Indian or native children being adopted-out to a non-aboriginal family and losing their culture and identity were reduced dramatically.

[9] Over the 19 years in question, however, before the CFSA took effect, on-reserve children deemed in need of protection were routinely placed in non-aboriginal homes and always with court approval. The judges that reviewed the crown ward-ship or adoption applications were undoubtedly acting in good faith and making decisions that they thought were in the best interests of the child. Some of the judges, on their own initiative, may even have weighed and considered the child's aboriginal culture in coming to their decisions. But none of them were statutorily required to preserve this culture and identity by placing the child *whenever possible* with an aboriginal family or Band. That was the unequivocal message of the CFSA enacted in 1984.

[10] And that is why the Federal Crown is wrong to argue that because all of the placements were pursuant to court orders and the courts acted in the best interests of the

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[4] CFSA, s. 1(f).

[5] CFSA, s. 57(2)(d).

[6] CFSA, s. 134(3).

children, that the so-called Sixties Scoop cannot now be questioned or challenged. Remember, the plaintiffs are not challenging the actual court decisions that allowed the aboriginal children to be placed in non-aboriginal homes. There is no collateral attack in this proposed class action on the judicial decisions. The plaintiffs are alleging that the Federal Crown had a duty or responsibility to protect and preserve the Indian children's culture and identity both when entering into the 1965 Agreement,[7] and after the children were placed in the non-aboriginal homes, and failed to do so. They seek damages for the harm that was caused not by the court orders but by the alleged breaches of fiduciary and common law duty on the part of the Federal Crown.

The harm that was done

[11] On the evidence before me, the harm done was profound and included lasting psychological and emotional damage. According to Dr. Harvey Armstrong, who was the chairperson of the Canadian Psychiatric Association Section on Native Mental Health for many years and directed a University of Toronto program that provided mental health services to about 15,000 Cree and Ojibway people, the First Nations people of Ontario "experienced intentional and inadvertent culture/identity genocide."

[12] Dr. Armstrong's expert evidence was summarized by Justice Perell:

> - In the early part of the 20th century, Canada applied a policy of cultural extermination when officials seized thousands of native children from their homes on the reserve and committed them to residential schools that not only deprived them of the experience of living in an aboriginal family, but punished them for expressing their Indian customs, traditions and languages.
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> - In the 1960s, 70s and 80s, ill-informed child welfare workers in Ontario, who did not know enough about native communities and their resources to parent and protect the community's children, removed children and placed them with non-Indian caregivers with the same intention as of the residential school experience, albeit in the context of a replacement family rather than a residential school setting.

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[7] The plaintiffs allege in para. 28 of the Statement of Claim: "When the Agreement was made, it was not sufficient for Canada to provide funding only. Canada's duty of care to the Class required more than the application of funding." The particulars of this pleading, as they came out during the course of the hearing, included the suggestion that the Federal Crown should have insisted as a term or condition of the funding arrangement that the provincial child protection system continue to protect and preserve the apprehended child's Indian and native culture and identity by ensuring whenever possible that Indian and native children in need of protection were placed in aboriginal homes.

- This was a misguided policy based on the belief that the answer to the Indian problem was to assimilate the Indian children into mainstream culture.

- The effect of this policy was loss of culture, loss of language, loss of ability to parent as an aboriginal person, loss of identity, increased rate of psychopathology, confused identity formulation, psychiatric disorders, substance abuse, emotional isolation, violence, unemployment, feelings of betrayal, and extreme lack of emotional attachment. [8]

[13] Dr. Armstrong concluded his opinion with this comment:

> It is true that adolescence is a period of identity growth and confusion and thus arguably common to all persons. But nothing in my work with all persons compares with the experience of the Indian child who confronts the period identity with the discovery of a breach of trust and betrayal for himself and his people, as he experiences it.

[14] Mr. Kenn Richard, a director of Native Child and Family Services of Toronto added the following:

> In our work at Native Child and Family Service of Toronto, I know first-hand the experiences of the surviving children of the "Sixties Scoop". Typically, we met them (and we are still meeting them) anywhere from their adolescent years to adulthood and we work with them in counselling or therapy. We are providing necessary counselling or therapy because, when they found themselves confronting the fact of their Indian or native culture, they then experienced quite an alarming degree of frustration and anger with feelings of distance or non-belonging from both their indigenous family and their adoptive or permanent placement non-Indian or non-native family, and entered into a crisis over their identity.
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> The re-claiming of their identity as an Indian or native person becomes fundamental to our therapeutic work with these survivors and their capacity to achieve a sufficient sense of self-esteem in order to cope within society and make a constructive contribution to the community and live a good and non-combative life, in the sense of coming to terms with themselves and others whom they trusted ...
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> [A] dysfunction emerged when their indigenous identity became clear to them, as it must, and they were wholly ill-equipped to understand,

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[8] *Brown v. Canada (Attorney General)*, *supra* note 1, at para. 59.

> appreciate, connect, or identify with their Indian or native selves, and thus the identity crisis.

[15] The evidence tendered by the plaintiffs' other two experts was similar.

Justice Perell's decision

[16] Perell J. carefully reviewed all of the claims and issues in a detailed 39-page decision and concluded that the class action could be certified if the statement of claim was amended and the class definition and proposed common issues were revised. He said this:

> ... it is my conclusion that: (a) with amendments to their statement of claim; (b) with revisions to the proposed class definition and proposed common issues, and (c) subject to the preparation of an adequate litigation plan, Ms. Brown and Mr. Commanda will be able to satisfy all five criteria of the test for certification. Therefore, conditional upon Ms. Brown and Mr. Commanda revising their proposed class action in the manner described below and conditional upon the court approving the litigation plan for the revised class action, I grant their motion to certify the action as a class proceeding.[9]

[17] It was obvious from Justice Perell's reasons what he was deciding and what specific changes had to be made and, not surprisingly, the plaintiffs immediately filed a Fresh as Amended Statement of Claim following Perell J.'s directions to the letter. The Federal Crown, however, instead of appealing the certification decision on the merits, chose to focus on the conditionality of the certification order and took the position that Perell J.'s suggested changes were not obvious from his reasons, that the defendants could not know what the amended claim would look like and (despite three days of hearing where all of the issues were fully argued) that they were denied the right to respond to the amended claims of fiduciary duty and negligence.

[18] These submissions were accepted by the Divisional Court[10] who set aside the conditional certification order and directed that the matter be re-heard by another class actions judge. The Court of Appeal affirmed.[11]

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[9] *Brown v. Canada (Attorney General)*, *supra* note 1, at para. 9.

[10] 2011 ONSC 7712, 114 O.R. (3d) 352 (Div. Ct.).

[11] 2013 ONCA 18, (2013) 114 O.R. (3d) 355 (C.A.).

The re-hearing before me

[19] I heard the plaintiff's motion for certification under the *Class Proceedings Act, 1992* ("CPA")[12] and the Federal Crown's motion under Rule 21 of the *Rules of Civil Procedure* to strike the pleadings on July 15 and 16, 2013. At the conclusion of the hearing I advised counsel that the plaintiffs' motion for certification would be granted (unconditionally) and the Federal Crown's motion to strike would be dismissed. Written reasons would follow in September.

[20] These are my reasons.[13]

[21] I will not repeat the factual background. It was set out in detail in Justice Perell's decision and was also summarized by the Court of Appeal. I will proceed directly with the legal analysis under the CPA.

[22] Generally speaking, I agree with the analysis of Justice Perell. I particularly agree that there are two possible causes of action, breach of fiduciary duty and negligence; that that the core common issue, as reworded by me below, will significantly advance the litigation; that a class action is by far the preferable procedure; and that Ms. Brown is a suitable representative plaintiff. I differ with Justice Perell in two respects, both of which stem from the fact that it was the 1965 Agreement, as the plaintiffs explained, that "gave rise to these claims." I have narrowed the class definition and re-worded the common issue to reflect this fact.

Analysis

[23] Under s. 5(1) of the CPA, the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[24] The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim. The question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be pursued as a class proceeding. Although s. 5(1) of the CPA, as just

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[12] S.O. 1992, c. 6.

[13] For the purpose of any appeals, I assured counsel at the conclusion of the hearing that the formal date of this decision would be the day these reasons were released (September 30, 2013) and not July 16, 2013 when the decision was announced.

noted, requires the plaintiff to satisfy five prerequisites, the bar for certification is actually quite low. The plaintiff only has to establish a plausible cause of action under the first prerequisite and "some basis in fact" for each of the remaining four prerequisites.[14]

[25] Indeed, the Supreme Court has made it clear that the CPA should be construed generously. An overly restrictive approach must be avoided in order to realize the benefits of the legislation as foreseen by its drafters, namely serving judicial economy, enhancing access to justice and encouraging behaviour modification by those who cause harm. The Court underlined the particular importance of keeping this principle of interpretation in mind at the certification stage.[15]

(1) Cause of action

[26] The first question is whether the plaintiffs have a cause of action. The test under s. 5(1)(a) of the CPA is the same as that under Rule 21, i.e. that the claim should be permitted to proceed unless it is "plain and obvious" that it cannot succeed.[16] That is, that the claim has no chance of success.[17] This is obviously a very low hurdle.

[27] The allegations of fact as pleaded in the statement of claim, which must be taken as true, can be summarized (in one very long sentence) as follows: The Federal Crown, having responsibility for the protection of Indian culture and identity, and knowing about the importance of this culture and identity to the Indian people, funded the expansion of Ontario child welfare services to on-reserve Indian children without consulting Indian Bands, and without taking any steps to ensure that the provincial child welfare authorities would preserve and protect, whenever possible, an apprehended child's aboriginal culture and identity; and then, after the child was placed in a non-aboriginal home, the Federal Crown failed to take reasonable steps to protect this culture, advise the child of his or her Indian status, and upon reaching the age of majority, the steps he or she could take to regain this status, or the federal benefits that he or she may be entitled to. These acts or omissions, say the plaintiffs, were acts of "fundamental disloyalty, betrayal and dishonesty to the plaintiffs and the class members."

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[14] For a summary of the oft-repeated principles and citations, see *Arora v. Whirlpool Canada*, 2012 ONSC 4642, 24 C.P.C. (7th) 68, at paras. 120 to 124.

[15] *Hollick v. City of Toronto*, 2001 SCC 68, [2001] 3 S.C.R. 158, at paras. 14-16 [*Hollick*].

[16] *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 [*Hunt v. Carey*].

[17] If there is a chance that the plaintiff might succeed, then the plaintiff should not be driven from the judgment seat: *Hunt v. Carey*, *ibid.*, at para. 36.

[28] The plaintiffs allege that the Federal Crown knew or should have known that the 1965 Agreement provided no protection for the cultural identity of vulnerable aboriginal children within Ontario's child welfare system. And yet it did nothing. Specifically, the plaintiffs allege that the Federal Crown:

- failed to consult with the Ontario Indian Bands in respect of the provision of funding for child welfare practices and policies to on-reserve Indian children that it knew were clearly in conflict with its duty to protect the cultural identity of on-reserve Indian children;

- did nothing to stop Ontario from providing child welfare services in consequence of which the class members lost their cultural identity;

- did nothing to ameliorate the harmful effects of Ontario's child welfare services;

- did nothing to assure that aboriginal children were made aware of their status as aboriginal children when they were placed in non-aboriginal homes;

- did nothing to assure that the aboriginal 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;

- did nothing to assure that aboriginal children were made aware of their status as aboriginal persons or the benefits available to them when they left their non-aboriginal homes or entered their age of majority;

- did nothing to assure that aboriginal children, when approaching their age of majority, or leaving their non-aboriginal homes, would be provided with services that could enable them to reclaim their cultural identity; and

- failed to ensure that aboriginal children had, at least, the protections in respect of their cultural identity as those which were subsequently implemented by Ontario in the 1984 CFSA.

[29] By failing to take any of these steps to protect the aboriginal cultural identity of the plaintiffs and the putative class members, the plaintiffs say that the Federal Crown was careless, reckless, willfully blind, or was deliberately accepting or promoting a policy of cultural assimilation. These omissions were acts of fundamental disloyalty, betrayal and dishonesty to the plaintiffs and the putative class members. In failing to act when it should have done so, say the plaintiffs, the Federal Crown breached its fiduciary and common law duties of care.

[30] I will now turn to these alleged duties of care. I will first discuss the fiduciary duty claim and then the negligence claim.

(i) Fiduciary duty

[31] Justice Perell concluded the breach of fiduciary duty claim cleared the s. 5(1)(a) hurdle. In his view, it was not plain and obvious that there was no viable cause of action for breach of fiduciary duty against the Federal Crown based on what it did or did not do as aboriginal children were being placed in non-aboriginal homes. He put it this way:

> [A]ssuming that the Federal Crown did have a fiduciary relationship with the aboriginal children and assuming that the child welfare system in Ontario robbed these children of their communities, culture, support, and identity, in my opinion, it is not plain and obvious that there was no breach of fiduciary duty by the Federal Government when it allegedly did nothing to stop the Ontario system from operating in this way or when it allegedly did nothing to ameliorate any harmful effects of the child welfare scheme or when it did nothing to assure that Indian children were made aware of their status as Indians when they were placed in non-aboriginal homes.[18]

[32] I agree with Justice Perell for the following reasons. I begin with the reminder that the "cause of action" hurdle under s. 5(1)(a) of the CPA is a low hurdle: the defendant must show that the impugned cause of action plainly and obviously has no chance of success and is doomed to fail. When one is dealing with the law of fiduciary duty or aboriginal claims, two "very dynamic"[19] areas of law that are rapidly "evolving,"[20] the hurdle becomes even lower and the defendant has "a particularly heavy burden in seeking to strike a pleading."[21]

[33] As Justice Hugessen noted in the *Shubenacadia Indian Band* decision:[22]

> The Statement of Claim is to be read generously and with an open mind and it is only in the very clearest of cases that the Court should strike out the Statement of Claim. This, in my view, is especially the case in this field, that is the field of aboriginal law, which in recent years in Canada

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[18] *Brown v. Canada (Attorney General)*, *supra* note 1, at para. 134.

[19] *Bonaparte v. Canada (Attorney General)* (2003), 64 O.R. (3d) 1 (C.A.), at para. 32 [*Bonaparte*].

[20] *Davis v. Canada (Attorney General)*, 2004 NLSCTD 153, 240 Nfld. & P.E.I.R. 21, at para. 11.

[21] *Ibid.*

[22] *Shubenacadia Indian Band v. Canada (Minister of Fisheries and Oceans)*, 2001 FCT 181, 104 A.C.W.S. (3d) 62 (F.C.T.D.), at para. 5.

> has been in a state of rapid evolution and change. Claims which might have been considered outlandish or outrageous only a few years ago are now being accepted.
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> If there is in a pleading a glimmer of a cause of action, even though vaguely or imperfectly stated, it should, in my view, be allowed to go forward.[23]

[34] This does not mean, of course, that any claim for breach of fiduciary duty arising out of the relationship between the Federal Crown and the aboriginal peoples must necessarily survive the pleading stage. What it does mean, according to the Court of Appeal is that "more claims of this nature may be, as of yet, unprecedented but nonetheless tenable at law within the meaning of Rule 21."[24]

[35] Turning then to the viability of a breach of fiduciary duty claim against the Federal Crown on the facts as pleaded herein, I agree with the Federal Crown that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties do not typically give rise to a fiduciary relationship.[25] However, it is important to note that the existence of a public law duty does not exclude the possibility that the Crown undertook, in the discharge of that public law duty, obligations "in the nature of a private law duty" towards aboriginal peoples.[26] I will return to this point shortly.

[36] I also agree with the Federal Crown that even though it stands in a fiduciary relationship with Canada's aboriginal peoples,[27] a fiduciary relationship alone does not impose a generalized fiduciary duty. Not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation.[28]

[37] I accept the Federal Crown's submission that fiduciary duty may arise in one of two ways:

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[23] *Ibid.*, at para. 6.

[24] *Bonaparte*, *supra* note 19, at para. 33.

[25] *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 96 [*Wewaykum*]; *Gladstone v. Canada (Attorney General)*, 2005 SCC 21, [2005] 1 S.C.R. 325 at para. 27.

[26] *Wewaykum*, *ibid.*, at para. 74.

[27] It is now well settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada: *Guerin v. The Queen*, [1984] 2 S.C.R. 335 [*Guerin*]; *Bonaparte*, *supra* note 19, at para. 26, citing *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 at p. 183.

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

> (i) First, and unique to the aboriginal context, a duty may arise as a result of the Crown's assumption of discretionary control over specific aboriginal interests. Typically, this first category has been limited to interests in land, specifically a communal aboriginal interest in land that is integral to the nature of the aboriginal community and their relationship to the land; and
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> (ii) Second, 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.

[38] In my view it is at least arguable, given the evolving state of the law, that both of these categories apply on the facts as pleaded herein. I will deal first with the "assumption of discretionary control over specific aboriginal interests" category.

The first category

[39] I begin with the pronouncement of the Supreme Court that over the decades, the Federal Crown has assumed a "high degree of discretionary control [...] over the lives of aboriginal peoples"[29] and that the fiduciary duty, where it exists, is called into existence "to facilitate supervision of the high degree of discretionary control."[30]

[40] The Supreme Court has also made clear that in the area of aboriginal law, the fiduciary duty imposed on the Federal Crown does not exist at large but in relation to specific Indian interests.[31] It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.[32]

[41] The only interest that has been recognized "to date" as imposing a private law fiduciary duty or "in the nature of" a private law fiduciary duty is Indian lands:

> Fiduciary protection accorded to Crown dealings with aboriginal interests in land (including reserve creation) has not *to date* been recognized by

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[29] *Wewaykum*, *supra* note 25, at para. 79.

[30] *Ibid.*

[31] *Wewaykum*, *supra* note 25, at para. 81.

[32] *Ibid.*, at para. 83.

> this Court in relation to Indian interests other than land outside the framework of s. 35(1) of the *Constitution Act, 1982*.[33] (Emphasis added.)
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> The Indians' interest in land is an independent legal interest. *It is not a creation of either the legislative or executive branches of government.* The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty.[34] (Emphasis added.)

[42] But Indian and native, indeed aboriginal, culture and identity is also "not a creation of either the legislative or executive branches of government." As noted by the Supreme Court in *Alberta v. Elder Advocates*,[35] the interest affected must be a specific private law interest to which the person has a pre-existing distinct and complete legal entitlement:

> Examples of sufficient interests include property rights, interests akin to property rights, and *the type of fundamental human or personal interest that is implicated when the state assumes guardianship of a child* or incompetent person.[36] (Emphasis added.)

[43] In *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, the Supreme Court adopted "the accepted view" that the aboriginal peoples (and one must assume that this includes their children) "are, in effect, *wards of the state*, whose care and welfare are a political trust of the highest obligation."[37]

[44] Given these dicta and noting again that the law in this area is "rapidly evolving," it is at least arguable that a fiduciary duty arose on the facts herein for these reasons: (i) the Federal Crown exercised or assumed discretionary control over a specific aboriginal interest (i.e. culture and identity) by entering into the 1965 Agreement; (ii) without taking any steps to protect the culture and identity of the on-reserve children; (iii) who under federal common law were "wards of the state whose care and welfare are a political trust of the highest obligation"; and (iv) who were potentially being exposed to a provincial

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[33] *Ibid.*, at para. 81.

[34] *Guerin, supra* note 27, at p. 385, cited in *Wewaykum*, supra note 25, at para. 76.

[35] *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261 [*Elder*].

[36] *Ibid.*, at para. 51.

[37] *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211, at 219 [*St. Ann's Island*], cited in *Wewaykum, supra* note 25, at para. 73. Emphasis added.

child welfare regime that could place them in non-aboriginal homes. Remember, as Justice Hugessen noted, all the plaintiffs have to show on the facts herein is "a glimmer of a cause of action, even though vaguely or imperfectly stated."[38]

[45] Also, if the Federal Crown's duty toward aboriginal peoples in respect of lands held in trust for them has been recognized "on a collective basis,"[39] is it not at least arguable that the same can be said about the Crown's duty toward aboriginal people with respect to their culture and identity?

[46] In my view, given the judicial admonition about new causes of action in the rapidly evolving area of aboriginal law, and given the case law just cited, it is not plain and obvious and beyond any doubt that the fiduciary duty alleged herein does not fall within the first category, namely the Crown's assumption of discretionary control over specific aboriginal interests. There is more than the glimmer of a cause of action.

The second category

[47] I would say the same thing about the second category. Recall the three elements in the second category:

> 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.

[48] In my view, each of the three elements are, at least arguably, present herein. First, the execution of the 1965 Agreement was (arguably) an undertaking by the Federal Crown, pursuant to the federal government's spending power, to fund the expansion of the provincial welfare system, including its child protection component, to on-reserve families. This was being done, one must assume, with the latter's best interests in mind. Second, there was (arguably) a defined person or class of persons (on-reserve Indian children) that were thus made vulnerable to the provincial child welfare system. This development depended on federal funding and thus (arguably) stemmed from the fiduciary's initial exercise of discretion or control. Third, there was (arguably) a legal or substantial practical interest of the beneficiary (i.e. the Indian child's aboriginal culture and identity) that stood to be adversely affected by the alleged fiduciary's exercise of

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[38] *Supra,* note 22, at para. 6.

[39] *Elder*, supra note 35, at para. 50.

discretion or control. As it turned out, the interests of the beneficiary were profoundly affected by the alleged failure on the part of the Federal Crown to consult with the Indian Bands and, at least, to try to negotiate a cultural protection clause as a term or condition of the federal funding.

[49] What about evidence of disloyalty? The case law is clear that misconduct alone by a fiduciary does not necessarily constitute a breach of a fiduciary duty. There must be some disloyalty or a wrong "that is a betrayal of the trust component of the relationship."[40]

[50] The aboriginal peoples have been described by the Supreme Court as a "specific class of persons to whom the government owes an exclusive duty of loyalty."[41] The Supreme Court has also noted that the relationship between the federal government and aboriginals is "trust-like, rather than adversarial" and that "contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship."[42] And, recall again what was said in the *St. Ann's Island* case: that the aboriginal people are "wards of the state whose care and welfare are a political trust of the highest obligation."[43]

[51] Can it not therefore be said that there is at least a glimmer of actionability in the allegation that the Federal Crown should have done more when it entered into the 1965 Agreement and in failing to do so, breached its trust with the on-reserve Indian families and thus acted disloyally? I therefore cannot agree with the Federal Crown that it is plain and obvious that no fiduciary duty arose under the second category discussed above.

[52] In sum, given the judicial admonition that the field of aboriginal law is rapidly evolving and the case law discussed above, I cannot in good conscience conclude that it is plain and obvious that the breach of fiduciary duty allegation under either the first or second categories has no chance of success. In my view, as I have already noted, there is more than a glimmer of a cause of action based on fiduciary duty under both categories as set out above.

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[40] *Varcoe v. Sterling* (1992), 7 O.R. (3d) 204, at para. 72 (Gen. Div.).

[41] *Elder*, *supra* note 35, at para. 49.

[42] *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at para. 59.

[43] *Supra,* note 37.

(ii) Negligence

[53] Justice Perell found that the claim in negligence also cleared the s. 5(1)(a) / Rule 21 hurdle. Referring back to his breach of fiduciary duty analysis, he said this:

> More or less for the reasons already expressed above, it is not plain and obvious that there is no cause of action in negligence. The negligence claim would be based on what Canada knew or ought to have known and what it did or did not do after Ontario welfare authorities began placing aboriginal children in non-aboriginal homes.[44]

[54] I agree with Justice Perell for the following reasons. I begin by noting that because the alleged duty of care (to preserve and protect aboriginal culture and identity) does not fall within an established category of negligence, the two-stage *Anns-Cooper* analysis is required.[45] Stage One involves an examination of foreseeability and proximity, including policy considerations relevant to the relationship between the parties; and Stage Two requires a consideration of residual policy considerations of a broader nature to determine if they negative any *prima facie* imposition of a duty of care.[46]

Stage One

[55] First, foreseeability and proximity. As the Supreme Court explained in *Imperial Tobacco*:

> Proximity and foreseeability are two aspects of one inquiry - the inquiry into whether the facts disclose a relationship that gives rise to a *prima facie* duty of care at common law. Foreseeability is the touchstone of negligence law. However, not every foreseeable outcome will attract a commensurate duty of care. Foreseeability must be grounded in a relationship of sufficient closeness, or proximity, to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other.[47]

[56] Stopping here, can it be seriously argued that the relationship between the Federal Crown and the aboriginal peoples of Canada is *not* grounded in sufficient closeness or

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[44] *Brown v. Canada (Attorney General)*, *supra* note 1, at para. 152.

[45] *Anns v. Merton London Borough Council*, [1978] A.C. 728; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R 537 [Cooper].

[46] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 39-66 [*Imperial Tobacco*]; *Taylor v. Canada (Attorney General)*, 2012 ONCA 479, 111 O.R. (3d) 161 (C.A.), at paras. 70-74 [*Taylor*].

[47] *Imperial Tobacco*, *ibid.*, at para. 41.

proximity to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other? Having just completed the fiduciary relationship / fiduciary duty analysis, how could I or any judge conclude that any such proximity argument has no chance of success and plainly and obviously is doomed to fail? In my view, there is more than a glimmer of a cause of action in negligence. Let me explain.

[57] First, the foreseeability of the alleged psychological and emotional injuries is explicitly pleaded and supported with relevant and material evidence in the plaintiffs' narrative. The real question under the Stage One analysis is proximity.

[58] In determining proximity, one of the factors to consider is the nature of the overall relationship existing between the plaintiff and the defendant.[48] The concept of proximity describes a relationship between a plaintiff and a defendant that is sufficiently close and direct to render it fair and reasonable to require that the defendant, in the conduct of its affairs, be mindful of the plaintiff's legitimate interests.[49]

[59] This factor is not concerned with how intimate the plaintiff and defendant were, or with their physical proximity, so much as with whether the actions of the alleged wrongdoer have a close or direct effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed.[50] The court must evaluate the closeness of the relationship between the plaintiff and the defendant and determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.[51]

[60] Here, as I have already noted, there is a fiduciary relationship between the Federal Crown and the aboriginal people "whose care and welfare are *a political trust* of the highest obligation."[52] The 1965 Agreement also (arguably) created proximity with the intended targets - the on-reserve children that were potentially in need of protection. Is it not at least arguable that it would be just and fair having regard to this unique and important historical relationship and the intended impact of the 1965 Agreement to impose a duty of care upon the Federal Crown?

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[48] *Cooper*, *supra* note 45, at paras. 34-35.

[49] *Taylor*, *supra* note 46, at para. 66 and *Cooper*, *supra* note 5, at paras. 32-36.

[50] *Taylor*, *supra* note 46 at para. 68.

[51] *Cooper*, *supra* note 45, at para. 34.

[52] *St. Ann's Island*, *supra* note 37. Emphasis added.

[61] I therefore find, under Stage One of the analysis, that there is at least an arguable *prima facie* duty of care that cannot plainly and obviously be described as having no chance of success.

Stage Two

[62] I will now turn to the Stage Two analysis. Has the Federal Crown established a residual policy consideration of a broader nature that would negative the *prima facie* duty of care? Or, to put it more accurately, a residual policy consideration of a broader nature that would plainly and obviously negative the *prima facie* duty of care established under Stage One?

[63] The Federal Crown makes two "residual policy" arguments: one, that imposing on Canada a duty to the plaintiffs flowing from the 1965 Agreement would result in an unwarranted and constitutionally improper interference by Canada in provincial child welfare jurisdiction as well as an inappropriate interference with the judiciary's role in authorizing the Crown ward-ships or adoptions; and two, that Canada was required to abide by the terms of court orders that sanctioned the adoption or the placement of the plaintiffs.

[64] In my view, neither policy submission succeeds. The Federal Crown could have taken a number of steps which would not have amounted to constitutional interference or resulted in the violation of any court orders. For example, the Federal Crown could have (i) consulted with the Indian bands (as it was obliged to do under the terms of the 1965 Agreement); (ii) negotiated an aboriginal cultural protection provision; or (iii) followed up the child placements, whether Crown ward-ships or adoptions, by providing the displaced children and their new non-aboriginal families with information about the child's Indian status, his or her future options and the availability of federal benefits upon reaching the age of majority.

[65] In my view, there would have been nothing unconstitutional about the Federal Crown consulting with the Indian bands, or negotiating cultural protection as a condition precedent before the funding would flow, or taking the various steps suggested after the Indian child was placed in a non-aboriginal home.[53] Nor would any of these actions have been in violation of any court orders (indeed, no specific examples have been suggested). The plaintiffs prevail on the Stage Two analysis.

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[53] It is not disputed that the provincial welfare system, as a law of general application, could constitutionally apply to families or children living on reserves. But the province was not extending its welfare services to the reserves, perhaps thinking that this was a federal responsibility. The 1965 Agreement as a funding agreement could easily have included a term or condition that would have obliged the provincial authorities to learn about the Indian and native culture and their unique understanding of families and parenting and to act accordingly. The addition of this obligation as a condition of federal funding, in my view, would not have raised any constitutional concerns.

[66] In sum, it is not plain and obvious that the survivors of the Sixties' Scoop cannot establish a relationship of sufficient proximity that makes it fair and just to impose a private law duty of care on the Federal Crown on the facts of this case. The plaintiffs and class members may or may not prevail in the action overall. The defendant may show at trial, for example, that the applicable standard of care in the 1960's was not breached either in entering into the 1965 Agreement without "doing more" as pleaded by the plaintiffs, or in the acts or omissions impugned thereafter. But for now the breach of fiduciary duty and negligence actions must be allowed to proceed. The courtroom door should not be closed to Ms. Brown and the other members of the class at this stage of the proceedings.

[67] The plaintiffs have cleared the s. 5(1)(a) and Rule 21 hurdle.

(2) Identifiable class

[68] Section 5(1)(b) of the CPA requires that there be an identifiable class of two or more persons that would be represented by the representative plaintiff. Class definition is important because it describes the persons entitled to relief, those who will be bound by the decision and those who are entitled to notice of certification.[54] Class membership must be determinable by stated, objective criteria.[55] And, there must be a rational relationship between the class and the common issues.[56]

[69] Based on Justice Perell's analysis, the plaintiffs revised their class definition to read as follows:

> Aboriginal persons in Ontario between December 1, 1965 and December 31, 1984 who were 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.

[70] In my view, this class definition is too broad. According to the plaintiffs, it was the 1965 Agreement "that gave rise to these claims."[57] However, as already noted, the 1965 Agreement funded the expansion of the provincial welfare services to "Indians with reserve status." That is, with some minor exceptions, only to Indian families and children

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[54] *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Gen. Div.), at para. 10.

[55] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534.

[56] *Pearson v. Inco Ltd.*, (2006), 78 O.R. (3d) 641 (C.A.), at para. 57 [*Pearson*], rev'g (2004), 44 C.P.C. (5th) 276 (Div. Ct.), which had aff'd (2002), 33 C.P.C. (5th) 264 (S.C.J.), leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 1. at para. 57.

[57] *Brown v. Canada (Attorney General)*, *supra* note 1, at para. 41.

living on reserves. Also, recall that both causes of action, fiduciary duty and negligence, as discussed above, depend in part on the significance of and their connection to the 1965 Agreement.

[71] It therefore makes sense to revise the class definition so that it can more rationally accord with the causes of action and the common issues. The class definition should be revised to read as follows:

> Indian children who were taken from their homes on reserves in Ontario between December 1, 1965 and December 31, 1984 and were 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.[58]

[72] I am satisfied that this is the class definition that should be certified.

(3) Common issues

[73] Section 5(1)(c) of the CPA requires that the claims of class members raise common issues of fact or law that will move the litigation forward. For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim.[59] The fundamental aspect of a common issue is that the resolution of the common issue will avoid duplication of fact-finding or legal analysis.[60]

[74] Justice Perell concluded that the core common issue should be this:

> In Ontario, between December 1, 1965 and December 31, 1984, when an aboriginal child was placed in the care of non-aboriginal foster or adoptive parents who did not raise the child in accordance with the child's aboriginal customs, traditions, and practices, did the federal Crown have and breach a fiduciary or common law duty of care to take

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[58] In describing the human parameters of both the class definition and the common issue discussed below, it is my intention to mirror the parameters set out in the 1965 Agreement. I recognize that strictly speaking (given the minor exceptions noted in this Agreement) the reach of the Agreement may be slightly broader than Indian children actually living on the reserves. If these slightly broader nuances are important to class counsel and potential class members, please let me know and I will revise the class definition and the common issue accordingly.

[59] *Hollick, supra* note 15, at para. 18; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 55, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g, (2003), 65 O.R. (3d) 492 (Div. Ct.).

[60] *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 39.

> reasonable steps to prevent the aboriginal child from losing his or her aboriginal identity?[61]

[75] Here again, and for the reasons just stated, I believe that the common issue must be revised to reflect the significance of the 1965 Agreement. My revision reads as follows:

> 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?

[76] I am satisfied that this is the common issue that should be certified.

(4) Preferable procedure

[77] Section 5(1)(d) of the CPA requires that a class proceeding be the "preferable procedure for the resolution of the common issues." The analysis must consider whether a class proceeding is a "fair, efficient and manageable method of advancing the claim" as a whole.[62] Preferability is to be broadly construed and is meant to capture two ideas: (i) whether the class proceeding would be a fair, efficient and manageable method of advancing the claim; and (ii) whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation or any other means of resolving the dispute.

[78] The Federal Crown argues that a test case would be preferable to a class proceeding. I do not understand this submission. The same amount of time and effort would be required in litigating the common issue whether as a "test case" or a class proceeding. But the advantage to both sides of the latter is that the parties would come away with a judicial decision that is binding on the entire 16,000-person class, not just the test case litigant.

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[61] *Brown v. Canada (Attorney General)*, *supra* note 1, at para. 12.

[62] *Pearson*, *supra* note 56, at para. 67.

[79] This is not a situation where there are many other actions waiting to proceed and where a test case would either open or close this potential pipeline of cases. Here, there are no other actions. There may even be a question as to how many of the class members would actually proceed to individual damage trials if the common issue is decided in their favour. But there is no question that a class action to determine the core common issue would significantly advance the litigation. At this point, only a class proceeding can sensibly "test" the viability of the fiduciary duty and negligence claims.

[80] I agree with Justice Perell's analysis:

> In a sense, the litigation of Ms. Brown's and Mr. Commanda's story will be the test case for determining whether the Federal Crown committed a civil harm. If Ms. Brown or Mr. Commanda successfully prove or fail to prove that the Federal Crown owed them respectively a fiduciary or common law duty, then a precedent will be established and other class members will be bound by that result. If Ms. Brown and Mr. Commanda are successful then other class members, if they are inclined to do so, can come forward in individual issues trials to prove class identification, causation, damages, and quantum of damages.
>
> It remains to be seen how many members of the class, said to be 16,000 persons, would proceed to individual issues trials because each class member will have an individual history and story to tell about the consequences of their placement in non-aboriginal homes. That said, in my opinion, the common issues trial and any individual issues trial will be manageable and provide access to justice, and they are the preferable and perhaps the *only* procedure for resolving the claims of those allegedly injured by the Sixties Scoop.[63]

[81] In short, there is at least some basis in fact for concluding that a class action is the "preferable procedure for the resolution of the common issues." The preferability criterion in s. 5(1)(d) has been satisfied.

(5) Representative plaintiff

[82] Finally, under s. 5(1)(e) of the CPA, the court must be satisfied that there is a representative plaintiff who (i) would fairly and adequately represent the interests of the class, (ii) has produced a workable litigation plan and (iii) does not have a conflict of interest with any of the other class members.

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[63] *Brown v. Canada (Attorney General)*, *supra* note 1, at paras. 185-86.

[83] The proposed representative need not be 'typical' of the class, but must be 'adequate' in the sense that he or she will vigorously prosecute the claim.[64] The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented.[65]

[84] The Federal Crown concedes that the plaintiff Marcia Brown was "probably" entitled to be a registered Indian at the time of her initial apprehension by child welfare authorities in 1967 or 1968. The difficulty, given the revised class definition, is with the co-plaintiff. Robert Commanda was neither a registered Indian nor entitled to be registered pursuant to the *Indian Act* at any time during the proposed class period. He did not have reserve status. Also, his interactions with the provincial child welfare system occurred before the 1965 Agreement was entered into. Therefore, he does not have a claim that is a genuine representation of the claims of the members of the class to be represented.[66]

[85] I am prepared to appoint Marcia Brown as the representative plaintiff. I am satisfied that she would fairly and adequately represent the class. Although this now leaves Ms. Brown as the sole representative plaintiff, I am satisfied on the evidence before me that there are more than two members in the revised class, indeed thousands more.

[86] As for the litigation plan, I am satisfied that the plaintiff has produced a revised plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceedings. And, I find that the representative plaintiff does not have an interest in conflict with the interests of the other class members.

[87] In short, the five required prerequisites set out in s. 5(1) of the CPA have been satisfied.

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[64] *Campbell v. Flexwatt* (1997), 98 B.C.A.C. 22 (C.A.), at paras. 45, 75-76, leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 13.

[65] *Drady v. Canada (Minister of Health)*, 159 A.C.W.S. (3d) 177 (S.C.J.) at paras. 36-45; *Attis v. Canada (Minister of Health)*, 29 C.P.C. (5th) 242 (S.C.J.) at para. 40, aff'd (2003), 127 A.C.W.S. (3d) 450 (C.A.).

[66] *Ibid.* I note that Mr. Commanda later become entitled to Indian registration because of the amendments made to the *Indian Act* in 1985.

Conclusion

[88] The action is certified as a class proceeding. I agree in general with the reasons of my colleague, Justice Perell. I have, however, made two changes: the class definition has been narrowed and the common issue has been reworded to better reflect the significance of the 1965 Agreement and for improved readability.

Disposition

[89] The plaintiffs' motion for certification is granted. The class definition and proposed common issue are revised as set out above. Marcia Brown is appointed representative plaintiff.

[90] The Federal Crown's Rule 21 motion to strike is dismissed.

[91] The Federal Crown's motion, in the alternative, to strike certain paragraphs from the Fresh as Amended Statement of Claim on the basis that they are conclusions of law, constitute argument or lack material facts is also dismissed. In my view, some of the impugned paragraphs come close to the line and possibly could be struck on the grounds just stated, but on balance, I will let them stand because they add to the overall narrative and nothing of importance turns on their presence or absence.

[92] The Notice of Certification to the Class shall be given pursuant to the revised Litigation Plan of Proceeding attached to the Notice of Motion. Class members who elect to opt out of the class proceeding must do so within 60 days of the date of the Notice of Certification. The Federal Crown shall be responsible for all costs associated with giving Notice of this action to the class.

[93] Counsel are directed to prepare an order in the form contemplated by s. 8 of the CPA. If any questions arise in this regard, please let me know.

[94] The representative plaintiff is entitled to her costs. If costs cannot be resolved by the parties, I will be pleased to receive brief written submissions within 14 days from Ms. Brown and within 10 days thereafter from the Federal Crown.

[95] I am obliged to counsel for their assistance.

Belobaba J.

Date: September 27, 2013