

## CASE LAW UPDATE

*Hilary Book* \*

### *Brown v. Canada (Attorney General)*

(2010), 102 O.R. (3d) 493 (S.C.J.) (Released May 26, 2010)

#### **Class Actions – The Crown’s Duty to Aboriginal Children**

From 1965 to 1984, welfare authorities in Ontario removed many aboriginal children from their communities and placed them with non-aboriginal foster or adoptive parents in what is referred to as the “Sixties Scoop”. The Plaintiffs sought certification of a class action against the Federal Crown, which had entered into an agreement with Ontario to provide funding for Ontario to deliver provincial welfare programs to registered Indians with reserve status. The Plaintiffs alleged that the Federal Crown had wrongfully delegated its responsibility to aboriginal persons by entering into an agreement with Ontario that authorized a child welfare program that systematically eradicated the children’s aboriginal culture, society, language, customs, traditions and spirituality. The Plaintiffs adduced evidence that loss of cultural identity caused low self-esteem, depression, anxiety, suicide, substance abuse, violence and other difficulties for aboriginal individuals, as well as problems for aboriginal communities. The Crown sought to strike the claim for failing to disclose a reasonable cause of action.

Pursuant to the *Class Proceedings Act, 1992*, the court is required to 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.

With respect to whether the pleadings disclosed a cause of action, the proposed claim was based on five causes of action: (1) breach of the honour of the Crown; (2) the actionable wrong of identity genocide of children; (3) violation of aboriginal rights; (4) breach of fiduciary duty; and (5) negligence. The court found that there is no independent cause of action based on the honour of the Crown, and that the identity of genocide claim was not viable as a tort because: (i) various international covenants and conventions are not part of Ontario’s civil law; and, (ii) the Federal Crown’s execution of the Canada-Ontario Welfare Services Agreement is not an act or omission intended to destroy, in whole or in part, an identifiable group of persons. With respect to the claim of violation of aboriginal rights, the court found that being or identifying oneself as an aboriginal is not a right, but rather a legal status from which aboriginal rights arise. Thus, the first three causes of action disclosed no cause of action.

With respect to the claims of breach of fiduciary duty and negligence, the court found that the pleadings did not disclose a cause of action in relation to the Federal Crown's having entered into an agreement with Ontario for the provision of child welfare programs to aboriginal children, but that it was not plain and obvious that there was no breach of fiduciary duty or negligence when the Federal Crown allegedly did nothing to stop the Ontario system from operating in a way that was harmful to aboriginal children. The court thus struck out the claim as pleaded, but gave the Plaintiffs leave to amend the claim in respect of breach of fiduciary duty and negligence.

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