Brown V. Canada (Attorney General), 2017 ONSC 251, Ontario Superior Court of Justice (Belobaba J.), 14 February 2017

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The Ontario Superior Court of Justice held that Canada was liable for the loss or harm suffered by approximately 16,000 Aboriginal children apprehended and removed from their homes in Ontario during the so-called "Sixties Scoop". Canada breached its common law duty of care to take reasonable steps to prevent on-reserve Indian children in Ontario from losing their Aboriginal identity after being placed in the care of non-Aboriginal foster or adoptive parents. This class action will now move to the damages assessment stage.

The plaintiffs commenced this action in 2009 naming only the federal Crown as a defendant. The basis of the claim is that the removal of Aboriginal children from their families by Ontario welfare authorities was a "systematic assimilation policy", and led to "identity genocide". The proposed class members were Aboriginal children who were placed in non-Aboriginal foster homes, or adopted by non-Aboriginal children, between 1965 and 1984. The applicable timeframe was based upon the signing of the Canada-Ontario Welfare Services Agreement on December 1, 1965 and the coming into force of the provincial Child and Family Services Act in 1984. The 1965 Agreement related to Ontario assuming the responsibility for the provision of provincial services and programs to Indians, with funds provided by Canada.

Mr. Justice Belobaba held: "The Sixties Scoop happened and great harm was done". Approximately 16,000 Aboriginal children living on reserve in Ontario were apprehended and removed from their families by provincial child welfare authorities. The children lost contact with their families; they lost their language, culture and identity. The loss of Aboriginal identity left the children fundamentally disoriented, and resulted in psychiatric disorders, substance abuse, unemployment, violence, and suicides.

The issue for adjudication 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. The certified common issue before the Court was:

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?

The Court reviewed the circumstances of the 1965 Agreement between Canada and Ontario. The stated goal was to "make available to the Indians in the province the full range of provincial welfare programs". Canada could have enacted its own legislation aimed at Indian children on reserves, but chose to fund the extension of various provincial programs through the federal spending power. Belobaba J. noted:

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.

The Court emphasized the importance of subsection 2(2) of the 1965 Agreement. This provision stated:

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.

Belobaba J. concluded that the obligation to consult with Indian Bands and secure their concurrence was "intended to be a key component of the Agreement". He cited statements of the federal government at the time of the 1965 Agreement about the need to secure the consent of the affected Indian bands, and not forcing a provincial program on a Band against its wishes. The "advice and consent" of each affected Indian Band was required before Canada could exercise its spending power.

The Court rejected a preliminary argument of Canada that section 2(2) did not apply to Ontario's extension of child welfare services because some level of child protection services had already been extended to reserves before 1965. Belobaba J. held that such an argument is inconsistent with the clear and unambiguous language of s. 2(2), and it would incredulous that such a provision would not apply to the most intrusive of the provincial programs. There was no carve-out for child protection services.

The Court found that Canada breached the 1965 Agreement. There was no evidence that any Indian Bands were ever consulted in accordance with section 2(2) of the 1965 Agreement, or that any Indian Band "signified its concurrence" to the extension of the provincial child welfare regime. It can be implied by the language of the 1965 Agreement that Canada was obliged to consult with each Indian Band before any provincial welfare program was extended to the reserve in question, and it failed to do so.

The Court considered submissions that nothing would have been different even if Indian Bands had been consulted. Belobaba J. considered this submission "odd and, frankly, insulting". There was evidence that Bands would have taken steps to assist the removed child to re-connect with his or her family or learn about their Aboriginal identity. Indian Bands would have suggested that some contact be maintained, and that the

foster/adoptive parents be provided with information about the child's Band, culture and traditions. Belobaba J. held:

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, 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.

The Court reviewed a booklet prepared by Canada in 1980 that provided some of this information. Prior to that time, Canada had little or no interaction with the removed children or their foster/adoptive parents. The only way that an apprehended child could learn about his or her Aboriginal identity 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 his non-aboriginal parents made the effort to obtain this information by writing to the federal government". The 1980 booklet was aimed at adoptive parents, but there was no evidence that it was distributed. Belobaba J. stated:

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 [the 1980 booklet]. 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.

The Court found that 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 the kind of information that was finally provided in the 1980 booklet.

Canada owed a common law duty of care to the class members. Although Indian Bands (and the class members) were not parties to the 1965 Agreement, a tort duty can be imposed on the contracting party Canada due to its breach of the agreement. Canada assumed and breached the obligation to consult with Indian Bands. Belobaba J. found that this situation was analogous to other legal situations, such as the "disappointed beneficiary" situation in estates law whereby a solicitor owes a duty of care to the persons who were supposed to be beneficiaries of a will, even though the only contractual relationship is with the client. The Court held:

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", 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.

The Court held, in the alternative, that a common law duty of care arose based upon the *Anns-Cooper* test. A prima facie duty of care exists due to the relationship of proximity between Canada and the class members. It is "beyond dispute" that there is a special and long-standing historical and constitutional relationship between Canada and Aboriginal peoples and, 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. Even in absence of section 2(2) of the 1965 Agreement, it was accepted at the time that Canada's care of welfare of Aboriginal peoples was a "political trust of the highest obligation". The terms of the 1965 Agreement reinforced the conclusion that the proximity stage of the Anns-Cooper test is satisfied. The Court also found no policy considerations that would negate this common law duty of care. Imposing a duty on Canada to provide essential information about matters such as Aboriginal identity would not have "penalized" Canada.

Belobaba J. held that Canada's liability could not be based upon the law of fiduciary duty, or the fiduciary relationship between the Crown and Aboriginal peoples. In this case, it could not be said that Canada had assumed discretionary control over the protection and preservation of Aboriginal identity that amounted to a "direct administration of that interest".

The Court therefore answered the common issue as follows:

... 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.

Due to this finding of liability, the class action now moves to the damages assessment stage. The Court awarded costs of this summary judgment motion to the plaintiff.

By

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