February 23, 2017

The Sixties Scoop & the Duty to Consult: A New Frontier in Aboriginal Litigation?

By: *Brown v Canada (Attorney General)*, 2017 ONSC 251 (CanLII)

Case Commented On: Elysa Hogg and Alex Darling

*Note on terminology: "Indian" is used to describe a person defined as such under the *Indian Act*, and is not intended to carry any derogatory connotations.

Introduction

From 1965- 1984 governments across Canada removed tens of thousands of Indian children from their families on reserve and placed them with non-Indian adoptive families or in foster homes and group homes. As a result, many of these children lost touch with both their families and their First Nations identities, with devastating consequences including emotional scarring, substance abuse, and heightened rates of suicide and incarceration. This dark period in Canada's history is commonly known as the "Sixties Scoop".

Brown v Attorney General (Canada) 2017 ONSC 251 (CanLII) (*Brown*) is a decision regarding a class action lawsuit by nearly 16,000 individuals in Ontario who were negatively affected by the Ontario Government's child welfare policies during the Sixties Scoop. Specifically, the claimants focus on the period between 1965 when Ontario extended its child welfare services to reserves and 1984, when Ontario amended its child welfare legislation to recognize that "aboriginality" should be a factor considered in child protection and placement (at para 14).

The Court held that Canada breached its common-law duty of care by failing to take reasonable steps to prevent removed children from losing their indigenous heritage (at para 85), but declined to find that the Crown breached any fiduciary duty.

This post will aim to provide the following:

1. Background information on the period commonly referred to as the "Sixties Scoop";
2. A brief look at the procedural history of *Brown*, as well as an analysis of the decision; and
3. Thoughts on how this ruling, and its implications on tort law and Aboriginal rights, may fit into the federal government's promises to Canada's indigenous peoples, and how it may affect Sixties Scoop claimants across the country, including Alberta.

Background – the Sixties Scoop

In 1965 Canada and Ontario entered into the *Canada-Ontario Welfare Services Agreement*, (the "1965 Agreement" or the "Agreement") which extended provincial child welfare schemes to

Indians living on reserve. Section 2 of the Agreement required that each Indian band be consulted and agree to this extension. None were ever consulted, and none ever consented.

Almost immediately, Indian children were adopted out to non-indigenous parents or foster homes. The overrepresentation of indigenous children in the child welfare system accelerated in the 1960s when indigenous children were seized and taken from their homes for reasons that are now believed to stem from the social workers' lack of understanding of indigenous culture or history. An excellent example of such practices is provided here:

> For example, when social workers entered the homes of families subsisting on a traditional Aboriginal diet of dried game, fish, and berries, and didn't see fridges or cupboards stocked in typical Euro-Canadian fashion, they assumed that the adults in the home were not providing for their children. Additionally, upon seeing the social problems reserve communities faced, such as poverty, unemployment, and addiction, some social workers felt a duty to protect the local children. In many cases, Aboriginal parents who were living in poverty but otherwise providing caring homes had their children taken from them with little or no warning and absolutely no consent.

Throughout the Sixties Scoop, social workers often told adoptive or foster parents to deny any link to the child's indigenous culture, which the *Brown* claimants argue resulted in denial of the children's true ancestry and the related federal entitlements it allowed for. It was not until 1980 that the Federal Government began providing this important information to removed indigenous children, and not until 1984 that their "aboriginality" was recognized as a factor to be taken into consideration when deciding if they were to be adopted, and to whom.

The human cost of the Sixties Scoop adoptions was immense. For example, Chief Marcia Brown Martel, the representative plaintiff in *Brown*, was removed from her family home at the Beaverhouse First Nation at age 9 and placed in a series of foster homes where she suffered a variety of abuses. In at least one home, she was told to wash off her "dirty brown colour". After her adoptive parents divorced she was essentially abandoned. She eventually returned to Beaverhouse First Nation, where she is now chief.

Despite the countless stories similar to Chief Martel's, the claimants in *Brown* are not seeking redress for any physical or sexual abuse specifically, but rather damages that spring from the loss of their First Nations identity.

Procedural History

Brown was decided by way of Summary Judgement Application, after the claimants persevered through nearly 9 years of procedural hurdles.

Brown v Canada (Attorney General) was certified as a class proceeding in 2010 (2010 ONSC 3095 (CanLII)). Two appeals by the Crown followed, first to the Divisional Court (2011 ONSC 7712 (CanLII)), and then to the Court of Appeal (2013 ONCA 18 (CanLII)). The Court of Appeal reversed the original certification decision and directed that the matter be reheard by a different class action judge. The matter was reheard and again the action was certified as a class proceeding (2013 ONSC 5637 (CanLII)).

The defendant sought and was granted leave to appeal from this decision (2014 ONSC 1583 (CanLII)). The Divisional Court dismissed the appeal and affirmed the certification (2014 ONSC

6967 (CanLII)) (*Brown* at footnote 1, para 1) The decision was made from a summary judgment application on the certified common issue.

Case Analysis

The Issue

The agreed issue for determination is *Brown* was whether "Canada had 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" (at para 10).

The class claimed that the Indian Bands were not consulted, and the impact on the removed aboriginal children was described as "horrendous, destructive, devastating and tragic" (at para 7). Differentiating this harm from that of the residential school system, one researcher stated:

> 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. (at para 7)

As the class brought proceedings against the Federal Crown, the actions of the Ontario Welfare System were not at issue. The Court focused its attention on two ways in which the Federal Crown may have breached its fiduciary and/or common law duty to the claimants:

1. Failure to consult Indian bands about the extension of Ontario child welfare services to their reserves as required by the 1965 Agreement; and
2. Failure to otherwise ensure that Indian children removed from their reserves had a reasonable opportunity to stay connected to their First Nations heritage.

Fiduciary or Common Law Duty of Care?

The Court examined the ways in which a fiduciary duty could be established and determined that a duty could not be established on the evidence (at paras 65-69). While Canada's fiduciary relationship with aboriginal peoples was not in dispute, the Court held that a fiduciary *duty* only arises when the fiduciary engages in a degree of discretionary control over a discrete interest of the beneficiary. The concept of "aboriginal identity" was held to be too vague to constitute a interest for the purposes of fiduciary law.

However, the Court did find that a common law duty of care existed due to the obligation created by section 2(2). This resulted in a "common law duty of care and provides a basis in tort for the class members' claims." (at para 72) Canada undertook the obligation to consult in order to benefit Indian Bands (and by extension, Indians living on the reserves, including children). Even though the Indian Bands were not parties to the Agreement, a tort duty could be imposed on Canada as a contracting party in these circumstances (at para 73). In conclusion, the Court found that a common law duty existed that required the Federal Government to take steps to prevent the loss of aboriginal identity for the children placed in non-aboriginal homes (at para 83).

Failure to Consult

The motive behind the 1965 Agreement was discussed at length in the decision. The main aim of the Agreement was to "make available to the Indians in the province the full range of provincial welfare programs." (at para 15) Under Section 2(1) of the 1965 Agreement, Ontario undertook to extend some 18 provincial welfare programs to "Indians with Reserve Status in the Province." (at para 16) This extension of welfare programs was subject to Section 2(2) which stated 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." (at para 20) The class argued that the 1965 Agreement's explicit statement that the Bands had to be consulted before welfare services were applied to them was indicative of a duty to consult that was not fulfilled.

Canada argued that the Agreement did not create an obligation to consult, as it had already provided some level of child protection services to reserves prior to the 1965 Agreement (at para 25). The Court acknowledged this, but then noted that the central difference in this Agreement was that the Province would be offering the "whole field" of child welfare services (at para 28). Further, the Court stated that 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 (at para 30).

Finding that the duty to consult existed, that the Bands had not been consulted (at para 35), the Court determined that Canada had breached the obligation set out in the Agreement (at para 37).

The Court went on to determine that on the evidence, had the Indian Bands been consulted, it was far less likely that the removed children would have suffered a complete loss of their aboriginal identity (at para 49). 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 (at para 54).

Failure to Ensure a Connection to First Nations Heritage

The Federal Government did not, in any way, facilitate aboriginal children in understanding their ancestry until 1980, when the department of Indian and Northern Affairs published a detailed information booklet titled *Adoption and the Indian Child* that was "meant to encourage adoptive parents to inform their adopted children of their heritage and rights." (at para 59) Until then, the only way that a removed aboriginal child could learn about their aboriginal identity or the various federal benefits they were entitled to was if the non-aboriginal foster or adoptive parents knew and shared this information with them, or if the child or his non-aboriginal parents made the effort to obtain this information by writing to the Federal Government (at para 58).

Implications for Other Sixties Scoop Cases

The Sixties Scoop affected indigenous children across Canada. For example, Adam North Peigan was removed from his family home on the Piikani First Nation (northeast of Pincher Creek) by Alberta Social Services as an infant. He spent 18 years shuffling between foster homes before social workers decided to "reintegrate" him into his community by sending him back to the reserve.

Minister of Indigenous and Northern Affairs Carolyn Bennett has stated that the government has no plans to appeal the decision, and the case will now move towards the damages assessment stage. The Claimants are asking for a total of $1.3 billion, $85,000 each for the harm caused. This decision will likely have a ripple effect in Sixties Scoop cases across Canada, but each province's unique agreement with the federal government made a national class action suit on this issue impossible. At present, Sixties Scoop class actions have been instituted including in Manitoba, Saskatchewan, Alberta and British Columbia.

Tort of Failure to Consult?

More broadly, *Brown* may have the effect of making it easier for First Nations to obtain damages from Canada based on failure to consult, especially in cases like *Brown* in which the duty to consult is codified in an agreement or statute. However, as developed by the Supreme Court in cases such as *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII) (*Haida Nation*), the duty to consult arises from the "honour of the Crown" in its dealings with Aboriginal peoples.

Notably, *Haida Nation* states that the honour of the Crown is engaged even in situations, such as *Brown*, where the aboriginal interest in question is not specific enough to engage a fiduciary duty. As many unproven law claims and traditional hunting or fishing rights do not enjoy formal protection aside from a duty to consult (and perhaps accommodate), perhaps the most far reaching implication of the *Brown* decision then may be the creation of a precedent for claiming specific damages for failure to consult.

Conclusion

As noted in another post, Justin Trudeau's Liberal government has made a number of promises to Canada's indigenous populations since taking power in November. Ahead of the release of the decision in *Brown*, Minister Carolyn Bennett added yet another commitment to that list when she announced that the government will launch negotiations towards a national resolution to the Sixties Scoop litigation.

The favourable ruling in *Brown* should place aboriginal groups in a strong bargaining position with regard to any negotiations, and more broadly should add some much needed "teeth" to the Crown's duty to consult.

This post may be cited as: Elysa Hogg & Alex Darling "The Sixties Scoop & the Duty to Consult: A New Frontier in Aboriginal Litigation?" (23 February, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/02/Blog_EH_AD_SixtiesScoop.pdf
To subscribe to ABlawg by email or RSS feed, please go to **http://ablawg.ca**
Follow us on Twitter **@ABlawg**