CITATION: Brown v. Canada (Attorney General), 2014 ONSC 1583
DIVISIONAL COURT FILE NO.: 523/13
DATE: 20140311

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: Marcia Brown and Robert Commanda, Plaintiffs

AND:

The Attorney General of Canada, Defendant

Proceedings under the *Class Proceedings Act, 1992,* S.O. 1992, c. 6

BEFORE: W. Matheson J.

COUNSEL: *Owen Young*, for the Plaintiffs

Morris Cooper and Jeffery Wilson, for the Defendant

HEARD: December 4, 2013

ENDORSEMENT

[1] The defendant moves for leave to appeal to the Divisional Court from the decision of Belobaba J. released September 27, 2013, which certified this action as a class action and dismissed the defendant's motion to strike out the amended statement of claim under Rule 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[2] This motion for leave to appeal arises in unusual circumstances. Due to its procedural history, the underlying motions were heard twice, by different Ontario Superior Court judges, based upon different versions of the statement of claim. Both judges certified the action (one conditionally) and dismissed the Rule 21 motion. However, they did so for different reasons. Those differences form part of the defendant's argument that leave to appeal should be granted, among other reasons.

[3] In brief, this claim is brought on behalf of Aboriginal children who were removed from their homes as children in need of protection, and adopted or placed into non-Aboriginal homes, in Ontario in the period from 1965 to 1984. It is alleged that, as a result of this course of conduct, these Aboriginal children lost their birth Aboriginal cultural identities and suffered mental and physical health problems. Ontario is not sued. The court orders under which various child protection steps were taken in Ontario are not being challenged, at least not directly. It is alleged, however, that the Federal Crown should have but did not prevent the harmful effects of Ontario's child welfare system, and should have but did not ensure maintaining an Aboriginal cultural identity for these children. Negligence and breach of fiduciary duty are alleged.

[4] Part of the factual matrix of this claim, if not also the legal matrix, is an agreement entered into between Canada and Ontario in 1965 called the Canada-Ontario Welfare Services Agreement (the "1965 Agreement"). It is the reason why the class period begins in that year. It is at least a funding agreement, under which Ontario agreed to extend its provincial welfare programs to "Indians with Reserve Status" and Canada agreed to reimburse Ontario for doing so. It is referred to in the amended statement of claim and therefore forms part of the pleading for the purposes of both Rule 21 and s. 5(1)(a) of the certification test under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, which requires that the claim disclose a cause of action.

[5] As set out in the preamble to the 1965 Agreement, it arose from a Federal-Provincial conference where it was determined that "in charting desirable long-range objectives and policies applicable to the Indian people, ... the principle 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 in other communities." The preamble to the 1965 Agreement recites its purpose:

> AND WHEREAS Canada and Ontario in working towards this objective desire to make available to the Indians in the Province the full range of provincial welfare programs...

[6] Under the 1965 Agreement, Ontario agreed, among other things, to provide services to Aboriginal children including for the protection of those children, under *The Child Welfare Act*, R.S.O. 1960, c. 53. The 1965 Agreement further provided that the Schedule listing the statutes covered by it could be amended from time to time.

[7] The end of class period arises from Ontario's passage of the 1984 *Child and Family Services Act,* S.O. 1984, c. 55, which incorporated protections regarding cultural identity into the legislation.

[8] Perell J. heard the first certification motion and parallel Rule 21 motion. His decision was released May 26, 2010 (the "Original Decision"). He found that entering into the 1965 Agreement was "the crucial allegation of wrongdoing" in the statement of claim: *Brown v. Canada (A.G.)*, 2010 ONSC 3095, 102 O.R. (3d) 493, at para. 10.

[9] A number of causes of action were advanced including breach of fiduciary duty and negligence. On the alleged fiduciary duty claim, Perell J. held that "based upon entering and implementing the [1965 Agreement]" the plaintiffs had "not disclosed a cause of action for breach of fiduciary duty": at para. 124. However, he also held that it was not plain and obvious that there was no viable cause of action in fiduciary duty: at paras. 124 and 148. With respect to negligence, he also found that the plaintiffs had no cause of action based upon the Federal Crown entering into the 1965 Agreement, but it was not plain and obvious that there was no viable cause of action in negligence on some other basis: at paras. 150-152.

[10] The fiduciary duty and negligence claims were struck out with leave to amend. The other proposed causes of action were struck out without leave to amend. The result, on the cause of action question, was summarized as follows at para. 10:

> I would not have certified the class action in its current form, which makes the Federal Crown's signing a welfare services agreement with the province of Ontario the crucial allegation of wrongdoing. The practical effect of my conclusions is that I grant the Federal Crown's motion to strike out the current statement of claim but I grant leave to [the plaintiffs] to amend their pleading in a way, which is described below, that would support a class proceeding. If they do not amend their proposed class action, then I dismiss their motion for certification and I grant the Federal Crown's motion to dismiss the action.

[11] A "conditional certification" process was employed, granting the motion for certification provided that the plaintiffs took certain steps, including amending their statement of claim. The plaintiffs then amended their statement of claim, presumably with the objective of conforming to the Original Decision and therefore achieving certification. The amended statement of claim no longer pleads the 1965 Agreement as a basis for the alleged duties. However, the defendant challenged the conditional certification process itself and the Court of Appeal ultimately overturned it on January 17, 2013: *Brown v. Canada (A.G.)*, 2013 ONCA 18, 114 O.R. (3d) 355.

[12] The Court of Appeal held that there must be a new hearing based upon the amended statement of claim. The new certification motion and related Rule 21 motion was then heard by Belobaba J., and his decision was released September 27, 2013 (the "Current Decision"): *Brown v. Canada (A.G.)*, 2013 ONSC 5637, 2013 CarswellOnt 13591.

[13] The defendant seeks leave to appeal under subrule 62.02(4)(b), which provides as follows:

> (4) Leave to appeal shall not be granted unless,
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> ...
>
> (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

[14] The focus of the oral argument was s. 5(1)(a) of the certification test, which requires that the amended statement of claim disclose a cause of action, and the parallel Rule 21 test. Both s. 5(1)(a) and Rule 21 require that to succeed, the defendant must show that it is plain and obvious that the pleaded claim does not disclose a cause of action. The causes of action that the plaintiffs seek to advance in the amended statement of claim are negligence and breach of fiduciary duty.

Matters of sufficient importance?

[15] I am satisfied that the second branch of the leave test is met with respect to the cause of action issue. The question of whether the pleading discloses these causes of action will have

significant ramifications for the important relationship between the Federal Crown and the Aboriginal peoples. These are serious claims being made against the Federal Crown regarding historical events, over a lengthy period of time, with important consequences. The proposed appeal on the cause of action test involves matters of sufficient importance for the granting of leave.

[16] Some other issues of alleged importance were raised in the defendant's factum, which were more focused on class action process. Those issues were not the focus of the defendant's oral argument, for good reason in my view. They are not matters of such importance that leave would be granted.

Good reason to doubt correctness?

[17] It therefore remains to consider whether or not there is good reason to doubt the correctness of the decision that the amended statement of claim discloses a cause of action. On this motion, the defendant need not show that the Current Decision is wrong or even probably wrong. The defendant must only show that its correctness is open to serious doubt or debate: *Brownhall v. Canada (Ministry of National Defence)* (2006), 80 O.R. (3d) 91 (S.C.), at paras. 26-30.

[18] There are two aspects of the Current Decision that give rise, in my view, to serious doubt or debate. Both relate to the role of the 1965 Agreement. The first issue is an inconsistency between the basis for the Current Decision and the amended statement of claim itself. The Current Decision relies upon the 1965 Agreement in finding an arguable fiduciary duty and a duty of care. But that agreement is not pleaded as the basis for either duty. The second issue is the differing legal treatment of the 1965 Agreement by the two judges who heard the above motions in this action. The judges differed in certain respects, "which stemmed from the fact that it was the 1965 Agreement ... that 'gave rise to these claims'": *Brown v. Canada (A.G.)*, 2013 ONSC 6887, 2013 CarswellOnt 15475, at para. 2.

[19] Both issues are important to the decision that the amended statement of claim disclosed a cause of action in fiduciary duty and negligence.

[20] The amended statement of claim sets out the alleged bases for these duties, not including the 1965 Agreement (see the amended statement of claim, at paras. 24 and 37-38). That agreement is pleaded as part of the allegations of breach of these duties.

[21] On the question of whether the amended statement of claim discloses a cause of action in fiduciary duty, the Supreme Court of Canada has made it clear that "the fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests": *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 81.

[22] The Supreme Court has also recently articulated the proper approach to the question of where a new fiduciary duty may be found in the Aboriginal context, in *Manitoba Métis Federation Inc. v. Canada (A.G.)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at paras. 49-51. Fiduciary obligations may arise in two ways:

1) a fiduciary duty may arise if there is a specific and cognizable Aboriginal interest and a Crown undertaking of discretionary control over that interest; and

2) a fiduciary duty may also arise from an undertaking if the following conditions are met: (1) an undertaking by the alleged fiduciary to act in the best interest of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); 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.

[23] In either case, there must be an undertaking of discretionary control. In the Current Decision, this requirement was satisfied by the Federal Crown entering into the 1965 Agreement, holding that "it is at least arguable that a fiduciary duty arose" on the basis that "the Federal Crown exercised or assumed discretionary control over a specific Aboriginal interest (i.e. culture and identity) by entering into the 1965 Agreement": at para. 44; see also para. 48. This is not pleaded (see the amended statement of claim, at paras. 37 and 38). And it appears from the history of this action that it was omitted deliberately, because the Original Decision held that entering into the 1965 Agreement could not found a fiduciary duty claim.

[24] Similarly, in the Current Decision at para. 60, the duty of care analysis was founded on the 1965 Agreement:

> 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?

[25] Again, the 1965 Agreement is not pleaded in support of the alleged duty of care (see the amended statement of claim, at para. 24), presumably because the Original Decision found it could not support a negligence claim.

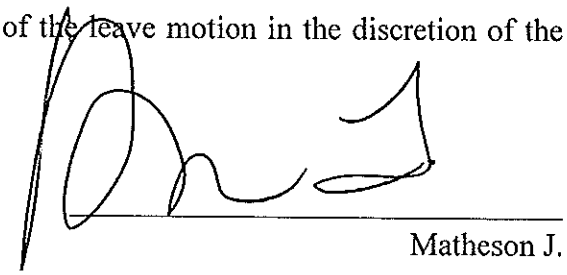
[26] Plaintiffs' counsel emphasized the very low threshold that must be met for a claim to disclose a cause of action. I agree that it is a very low threshold. I have also taken into account the note of caution that it is especially low for Aboriginal law: *Shubenacadie Indian Band v. Canada (A.G.)*, 2001 FCT 181, 2001 CarswellNat 443, at paras. 5-6.

[27] This principle is tempered, as least regarding fiduciary duty, by the Supreme Court of Canada decision in *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261. In that case, the court held that "claims against the government that fail to satisfy the legal requirements of a fiduciary duty should not be allowed to proceed in the speculative hope that they may ultimately succeed": at para. 54. They should be tested at the pleadings stage, as for any cause of action: at para. 54.

[28] This is not a case where the alleged role of the 1965 Agreement is unclear on the pleadings. It does not form part of the allegations made in support of the alleged duties. Perell J. determined that the 1965 Agreement could not fill that role. He did so after an extensive consideration of a substantial body of case law about the circumstances in which a fiduciary duty will be found, especially with respect to government and Aboriginal interests. That analysis is not fully addressed in the Current Decision, given that the 1965 Agreement had been removed as a foundation for the alleged duties.

[29] I conclude that, because of the inconsistency between the Current Decision and the allegations in the amended statement of claim and the inconsistency between the two judges regarding the legal significance of the 1965 Agreement, the second requirement for leave is met.

[30] I therefore grant leave to appeal, with costs of the leave motion in the discretion of the panel hearing the appeal.



Matheson J.

Date: March 11, 2014