1. **The Court and the Parties always contemplated that class identification, causation, damages and quantum of damages would have to be determined individually.**

- In determining whether the preferable procedure criteria was met, Justice Perell said:

> [185] 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.
>
> [186] 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.

Justice Belobaba set out this same quote in the 2013 certification decision (as did the OCA), saying "I agree with Justice Perell's analysis."

- No common issue was certified or attempted with respect to aggregate damages
  - three common issues relating to damages were attempted but not certified by Justice Perell:

> [173] Ms. Brown and Mr. Commanda propose as common issues the following questions:
> …
> 5. If the answer is affirmative in respect of the questions noted above, what are the damages, if any, associated with any such breach or actionable wrong, limited as they must be to that pleaded in the February 9, 2009 Statement of Claim?
> 6. If the answer is affirmative in respect of the questions noted above, is the Defendant's conduct such as to attract punitive, exemplary or aggravated damages?
> 7. If so, what amount of punitive, exemplary or aggravated damages is appropriate?
> …
> [175] In any event, I would not have certified questions 5, 6 and 7 because, in my opinion, in the circumstances of this case, they are not common issues and they could only be answered as an aspect of individual issue trials.

  - No common issues relating to damages were attempted before Justice Belobaba

2. **The summary judgement decision <u>does not</u> establish liabili**ty – the claim is pleaded in negligence and while duty of care and breach have been established on behalf of the class, causation in fact and damages still need to be proven individually.

3. **Causation cannot be established on a class-wide basis.**

- The class is defined as:

> 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.

- differences within class negate class-wide causation finding; for example:

    - foster care (connection to biological family retained) or adoption (biological tie severed)
    - chronological – short-term or long-term foster care
    - adoption as infant or as older child
    - family with one aboriginal parent

4. **An aggregate assessment of damages is not possible.**

- Section 24(1) not met as causation cannot be established on a class-wide basis
- Evidence is insufficient to establish entitlement to aggregate damages:
    - no theory as to how aggregate damages could be assessed – no model, no opinion
    - Expert evidence contains no opinion, just calculations
        - housing allowance – $400 x 12=$4800
        - relative earning gaps, even accepting the quantification of the gap, no opinion as to how much is owed to the class
    - No evidence of actual class size
        - taking affidavits at face value, evidence relates to removal from reserve and not to other elements of the class definition:
            - placed in the care of non-aboriginal foster or adoptive parents
            - not raised in accordance with the aboriginal person's customs, traditions and practices
- booklet:

  One does not know how many of the foster and adoptive parents, having received this information, would have shared the information with the aboriginal child that had been placed in their home. Probably most, but this is an issue that will have to be determined on evidence that will be presented at the damages stage. (fn#23 to Feb 14, 2017 decision)

- Some pivotal factual assumptions are incorrect:
    - post-secondary education – no individual entitlement to fully coverage - bands have always had a role in determining support, and component parts and amounts of the financial support have changed over time – tuition, housing allowance, child care, etc. non-insured health benefits – have changed over time; these expenses for children in foster care were covered by provincial Children's Aid Societies

  Treaty annuities and per capita payments – factually individual, do not logically flow with respect to fostered children; adopted children (can be claimed on age of majority). INAC pays once contacted.