

IF YOU PAY THE PLAINTIFFS' CLAIM, and \$5,000.00 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the Plaintiffs' claim and \$400.00 for costs and have the costs assessed by the court.

Date February 9, 2009
(Fresh as Amended Statement of
Claim pursuant to the May 26,
2010 Order of the Honourable
Justice Perell.)

Issued by “ A. Vainukainen ”
Local registrar

Address of 393 University Avenue
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Toronto, Ontario
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TO: THE ATTORNEY GENERAL OF A CANADA
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CLAIM

1. The Plaintiffs claim:

(a) An Order certifying this proceeding as a Class Proceeding pursuant to the Class Proceedings Act and appointing them as Representative Plaintiffs;

(b) A Declaration that, by reason of the events described in this action, the Defendant did breach its fiduciary obligation and duty of care to the Class Members;

(c) Damages to include:

i. Non-pecuniary and general damages in the amount of \$50,000.00 for each Class Member;

ii. Pecuniary and special damages in the amount of \$25,000.00 for each Class Member; and

iii. Punitive, exemplary and aggravated damages in the amount of \$10,000.00 for each Class Member,

caused by the Defendant's breach of fiduciary duty and duty of care;

(d) Prejudgment and post judgment interest pursuant to s.128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43 (as am.);

(e) Substantial indemnity costs of this action;

(f) HST, as applicable, and

(g) Such further and other relief as this Honourable Court deems just.

Definitions

2. In this Claim:

- (a) "aboriginal" when used in reference to "aboriginal persons" or "aboriginal children" refers to Indian, or native or First Nations' persons;
- (b) "Agreement", "the Agreement" refers to "The Canada-Ontario Welfare Services Agreement", Treasury Board Minute Dated December 1, 1965, P.C. 1965-11/2135.
- (c) "Canada" refers to the Defendant, the Government of Canada, the federal Crown, ("the Crown") as represented by the Attorney General of Canada;
- (d) "child welfare services" refers to the provision of state services to children following removal from their indigenous or birth homes and includes wardship and adoption placements;
- (e) "Class" or "Class Members" refer to aboriginal persons in Ontario between December 1, 1965 and December 31, 1984 who 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;
- (f) "Class Period" refers to the period of time from December 1, 1965 to December 31, 1984 in which the "Sixties Scoop", as described below, is alleged to have occurred;
- (g) "constitutional obligation" refers to the obligation of Canada pursuant to section 91(24) of the *Constitution Act, 1867*;
- (h) "cognizable aboriginal interests" include:
 - i) An indigenous language;
 - ii) The exercise of a spiritual meaning of life and holistic view of the environment that is profoundly different than that of the European or the Eurocentric model and which enables a kinship with the environment, all animate and inanimate objects. In contrast to Eurocentric thought, aboriginal people believe and rear their children to respect that the totality of relationships between individuals govern the well-being of the universe, and that no one element exists in the absence of a relationship with all others;

- iii) The privilege and expectation of a sense of community, community rights, community inter-dependence that is different than that of the Eurocentric model, communalism in distinction to individualism as an expression of aboriginal identity in contrast to Eurocentric values;
- iv) The use of one's family name, the name passed on from generation to generation;
- v) The benefit and expectation of a large extended family or clan system, a collective of resources of great numbers and strengths where the ultimate panacea for a family under crisis is not the displacement of the child to another culture or stranger via crown wardship or property transfer *qua* adoption with one nuclear family replacing another; customary care being instead a communal responsibility for the care and rearing of the child within the extended family and clan;
- vi) Being raised by one's family and community and in one's indigenous culture;
- vii) Child rearing that is premised upon the child as the gift from the creator, and thus no child would be an orphan, or experience life in an orphanage, foster home or as a society or crown ward. There is no word for society ward or crown ward in any indigenous language of the members of the Class;
- viii) Child rearing that involves a series of rites of passage within childhood from early on, with the child involved in the routines and management of the community's chores and preservation, and enjoying a sense of freedom within the community uniquely different from that of the Eurocentric concept of childhood where

the child is excluded from adult activities and childhood is a period of containment and control;

- ix) The exercise of one's indigenous culture, traditions and customs; and,
- x) The respect for oral histories, respect for elders and the passing of beliefs from one generation to the next through such oral histories.

(i) "cultural identity" includes the cognizable aboriginal interests, as defined above, and refers to the language, customs, traditions, and culture that an aboriginal child enjoys and necessarily exercises as a member of a family, extended family and aboriginal community;

(j) "Indian" has the same meaning as in the Indian Act, and "native" means a person who was a member of an aboriginal community but was not a member of an Indian band and was not a registered Indian under the Indian Act;

(k) "Indian Act" means the Indian Act, R.S.C. 1985, c.1-5

(l) "Ontario" refers to the Province and Government of Ontario;

Parties

3. The Plaintiffs, Marcia Brown and Robert Commanda, are aboriginal persons, and are proper Representative Plaintiffs on behalf of the Class. Both reside in Ontario. Both resided in Ontario at all relevant times. Both, as children, suffered the consequence of the Defendant's breach of fiduciary obligation and duty of care.

4. The proposed Class is made up of more than 16,000 aboriginal persons known within aboriginal communities and Bands in Ontario as those who, as children, experienced the "Sixties Scoop". During the Class Period they, as children, were placed in the care of non-aboriginal foster or adoptive parents who did not raise them in accordance with their aboriginal customs, traditions, and practices. This event, with its consequences, occurred because the Defendant breached a fiduciary duty and duty of care owed to the Class.

5. The Defendant, the Attorney General of Canada, represents the Crown.

Marcia Brown

6. The Plaintiff, Marcia Brown ("Brown"), was born on June 7, 1963 as Sally Susan Mathias, a member of the Temagami First Nation from the Beaverhouse Community, near Kirkland Lake.

7. When Brown was 4 or 5 years old, a children's aid society removed her and an older sister from their family. The family consisted of five other siblings and a mother and father, as well as extended maternal and paternal relatives, and an indigenous Indian community.

8. Thereafter, and until she was 17½ years old, Brown was denied any reasonable contact with her family, relatives and community. Brown was denied any reasonable opportunity to maintain any connection with the traditions, language, customs, heritage and culture of her family of birth. She lost the use of the only language she spoke before she was removed. She lost all contact with the other sister who was removed with her. Her name was changed when she was adopted at age 9 years. Her child rearing was as a non-native, non-Indian person with no reference at all to her identity as an Indian.

9. At the age of 17½ years, her adoptive mother put Brown on a plane. She was residing then in the U.S.A. Her adoptive parent caused her to be sent away to North Bay, Ontario.

10. At the event of being sent away, the only other personal items she had, besides the clothing she wore, were the clothes she had when years earlier she arrived at the non-Indian adoptive home.

11. Upon arrival in North Bay, Ontario, Brown had no identity as an Indian or native person. She had no legal papers that recognized her status as an Indian or native person. She had no capacity for integrating with the persons to whom she was returned; namely her Indian family, relatives and community.

12. In these circumstances, Brown found that she was unable to cope. She was an Indian but had no capacity to exercise an identity, let alone exercise membership of an Indian family and community and she formed an ambivalent, awkward and angry connection to mainstream non-native society. As a result, Brown floundered and struggled.

13. As a child, the authorities or persons in charge or care of her gave Brown no information as to her birth name, or information enabling her to make contact with her identity and her Indian family, extended family and community. When she turned 18, the Crown took no steps to provide her with any information or documentation that would enable her to have access to her adoption records or the adoption order, or any documentation that would enable her to exercise the benefits available to her under the *Indian Act*, R.S. C. c. I-5.

14. With the help of others, Brown searched for her records as an Indian person. She discovered that Sally Susan Mathias was dead, according to the Registrar-General in charge of such records. She was not prepared in any way for the process of re-claiming her status.

Robert Commanda

15. Robert Commanda ("Commanda") was born Bruce Edward Robert Joseph Commanda on March 28, 1959 in Haileybury, Ontario.

16. A children's aid society removed him and three brothers from their home in or about 1961, when he was two years old.

17.. Commanda was not adopted. He lived in foster homes in Ontario throughout his childhood. The child rearing to which he was exposed was by non-native non-Indian persons with no reference ever made to his native or Indian culture or identity.

18. Commanda was denied any reasonable opportunity to maintain contact with his Indian family, relatives and community. Commanda was denied any reasonable opportunity to maintain any connection with the traditions, language, customs, heritage and culture of his family of birth

family and community. Commanda entered adulthood with no knowledge of what it meant to be an Indian.

19. In none of the places where he lived was Commanda offered any opportunity to know of or maintain his cultural identity. No one caring for him showed him pictures or related to him any information about his Indian family, extended family and community.

20. At all relevant times during his childhood, Commanda was not registered as a member of his paternal or maternal Indian families and Bands, although there was a large extended maternal family located at the Dokis Reserve in Monetteville, Ontario and a similarly large extended paternal family located at the Garden Village Reserve in Sturgeon Falls, Ontario, and although the numbers of his family and his extended family exceeded 3,000 persons and both side of his parents' families continued to practice their culture and to speak their native language.

21. At the age of 18 years, and upon contact in Toronto with the Native Friendship Centre, he first learned of information that enabled him to begin the process of securing his identity as an Indian person. He also learned then of his entitlement to benefits as an Indian. No one had prepared him for the process of Indian status and benefits. At this time, he finally obtained his birth certificate. No one had provided it to him before.

22. In these circumstances, Commanda was unable to successfully re-integrate into the Indian community.

23. In these circumstances, Commanda experienced anger and ambivalence about the mainstream community that had led him to his predicament. He experienced distance and awkwardness with the Indian community with whom he had no or little connection in respect of traditions, language, customs, heritage and culture. He could not settle into ordinary relationships with Indian and non-Indian persons. He experienced depression and suicidal ideation.

Negligence — Canada owes a duty of care

24. Canada has a duty of care to its vulnerable aboriginal children by virtue of:
- (a) its constitutional obligations;
 - (b) jurisprudence of high and binding authority;
 - (c) its special relationship with aboriginal persons referred to in jurisprudence as a “duty of honour”;
 - (d) the incorporation into common law of the traditions and customs of aboriginal societies, giving them legal force as part of the Canadian legal system, and as incorporated into the *Constitution Act, 1982*.
 - (e) the existence of an Indian Act as a statutory acknowledgment of Canada’s duty of care to aboriginal people; and
 - (f) the formal acknowledgement of responsibility by Canada and apology for past policies of assimilation of vulnerable aboriginal children which caused harm.

Negligence — Canada breached its duty to vulnerable aboriginal children

25. The Plaintiffs state that cultural identity is a fundamental element in respect of which Canada owes vulnerable aboriginal children a duty of care.

26. In Ontario, between December 1, 1965 and December 31, 1984, Canada breached its duty of care by omitting or failing to take reasonable steps to prevent the Plaintiffs and the Class Members from losing their cultural identity.

27. The Plaintiffs state that their personal circumstances as described above are representative of the Class.

28. When the Agreement was made, it was not sufficient for Canada to provide funding only. Canada’s duty of care to the Class required more than the application of funding. The

constitutional duty owed by Canada to vulnerable aboriginal children requires reasonable steps for the protection and exercise of aboriginal cultural identity. Canada took no reasonable steps in fulfilment of its duty of care.

29. More specifically, during the Class Period:

particulars

a) Canada did nothing to stop Ontario from providing child welfare services in consequence of which Canada knew or ought to have known would result in the Class Members losing their cultural identity;

b) Canada did nothing to ameliorate the harmful effects of Ontario's child welfare services;

c) Canada did nothing to assure that vulnerable aboriginal children were made aware of their status as aboriginal children when they were placed in non-aboriginal homes;

d) Canada did nothing to assure that the aboriginal children would be provided with services that could enable them to be aware of and exercise their culture, traditions, customs and identity during the period of their placement in non-aboriginal homes;

e) Canada did nothing to assure that aboriginal children were made aware of their status as aboriginal persons when they left their non-aboriginal homes or entered their age of majority;

f) Canada did nothing to assure that aboriginal children, when approaching their age of majority, or leaving their non-aboriginal homes, would be provided with services that could enable them to reclaim their cultural identity; and

g) Canada failed to ensure that vulnerable aboriginal children had, at least, the protections in respect of their cultural identity as those which were subsequently implemented by Ontario in the 1984 provincial *Child and Family Services Act*, S.O. 1984, c. 55.

30. By failing to take any such steps, Canada turned a blind eye to the Class who it knew, or reasonably should have known would thereby individually and collectively lose their cultural identity, and suffer the psychological and other harm described herein.

Negligence — Causation

31. Canada's conduct, as pleaded herein, caused damages to the Plaintiffs and the Class, as particularized below, which harm and damages were foreseeable.

32. The provision of funding through the Agreement did not absolve Canada from the duty to take reasonable steps to prevent vulnerable aboriginal children from losing their aboriginal cultural identity as a by-product of Ontario child welfare policies.

33. Canada cannot rely upon a delegation of authority to Ontario when Canada failed to take any reasonable steps to monitor and safeguard the protection of the vulnerable aboriginal child's cultural identity.

Negligence — Damages

34. The Plaintiffs state that they and members of the Class suffered damages by reason of the loss of their cultural identity. The Plaintiffs rely upon the description of damages set out below at paragraphs 52-55.

Fiduciary Duty

Canada has a fiduciary relationship with vulnerable aboriginal children

35. The Plaintiffs state that Canada stands in a fiduciary relationship to its aboriginal peoples.

36. Canada has exclusive jurisdiction in respect of aboriginal persons pursuant to section 91(24) of the *Constitution Act, 1867*, section 35(1) of the *Constitution Act, 1982*, the common law, and court rulings of high and binding authority.

The fiduciary duties arising from the fiduciary relationship

37. By virtue of its constitutional obligation, Canada's duty of honour in the treatment of aboriginal persons, including an ongoing obligation of consultation on matters relevant to aboriginal interests, and well-accepted jurisprudence of high and binding authority, there is an expressed and implied undertaking by Canada to protect the interests of vulnerable aboriginal children.

38. Canada's constitutional obligation, the Indian Act, and the common law, including the duty of honour, bestow a discretionary control requiring Canada to take steps to monitor, influence, safeguard, secure, and otherwise protect the vital interests of vulnerable aboriginal children, and, in particular, their cultural identity.

39. The nature and importance of the aboriginal cultural identity is fundamental to the security, welfare and survival of aboriginal persons.

40. Aboriginal cultural identity is entrenched within the Constitution Act, 1867 and the Constitution Act, 1982, and is at the core of being an "Indian" under Canadian law.

Canada's Breach of its Fiduciary Duties

41. During the Class Period, Canada had a fiduciary duty to the Plaintiffs and the Class when they were removed from their homes and placed in non-aboriginal homes.

42. Canada's fiduciary duty continued by virtue of its constitutional obligation notwithstanding the Agreement and Ontario's responsibility for providing child welfare services.

43. Cultural identity is critical to the healthy development of vulnerable aboriginal children which, as a fiduciary, Canada must take into account and take reasonable steps to protect.

44. Canada breached its fiduciary duty to the Plaintiffs and the Class by failing to take reasonable steps to protect the cultural identity of the Plaintiffs and the Class Members and, therefore, failed to prevent the Plaintiffs and the Class Members from losing their cultural identity.

45. More specifically, during the Class Period:

Particulars

- a) Canada did nothing to stop Ontario from providing child welfare services in consequence of which the Class Members lost their cultural identity;
- b) Canada did nothing to ameliorate the harmful effects of Ontario's child welfare services;
- c) Canada did nothing to assure that aboriginal children were made aware of their status as aboriginal children when they were placed in non-aboriginal homes;

- d) Canada did nothing to assure that the aboriginal children would be provided with services that could enable them to be aware of and exercise their culture, traditions, customs and identity during the period of their placement in non-aboriginal homes;
- e) Canada did nothing to assure that aboriginal children were made aware of their status as aboriginal persons or the benefits available to them when they left their non-aboriginal homes or entered their age of majority;
- f) Canada did nothing to assure that aboriginal children, when approaching their age of majority, or leaving their non-aboriginal homes, would be provided with services that could enable them to reclaim their cultural identity; and
- g) Canada failed to ensure that vulnerable aboriginal children had, at least, the protections in respect of their cultural identity as those which were subsequently implemented by Ontario in the 1984 provincial *Child and Family Services Act*, S.O. 1984, c. 55.

46. At all relevant times, Canada had authority and an obligation to intervene. It did not. Instead, Canada merely provided funding to Ontario to ensure that the province's child welfare legislation would extend to on-reserve Indian children. As Canada knew, the Agreement did not provide protection for the cultural identity of vulnerable aboriginal children within Ontario's child welfare system.

47. As Canada knew, adoption and permanent foster care in non-aboriginal homes were events in apparent and actual conflict with the protection of aboriginal cultural identity.

48. Canada failed to consult with the Ontario Indian Bands in respect of the provision of funding for child welfare practices and policies to on-reserve Indian children that it knew were clearly in conflict with its duty to protect the cultural identity of on-reserve Indian children.

49. By failing to take any such steps to protect the aboriginal cultural identity of the Plaintiffs and the Class, Canada, in breach of its fiduciary duty, was careless, reckless, wilfully blind, or deliberately accepting or promoting a policy of cultural assimilation.

50. Canada knew or reasonably should have known that vulnerable aboriginal children, in these circumstances, would assimilate with the culture of their non-aboriginal caregivers.

51. The actions and omissions of Canada, as described herein, were acts of fundamental disloyalty, betrayal and dishonesty to the Plaintiffs and the Class Members.

Fiduciary duty— Damages

52. As a result of Canada's actions and omissions, the Plaintiffs and the Class were subject to emotional, psychological and spiritual suffering by reason of the unnecessary and destructive loss of an aboriginal cultural identity. They were left fundamentally disoriented, with a reduced ability to lead healthy, functional and fulfilling lives, and their ability to pass on to succeeding generations the spiritual, cultural and behavioural bases of their peoples was significantly compromised.

53. The Plaintiffs and the Class became unwilling participants in what is now known in the aboriginal community as the "Sixties Scoop". This description refers to the survivors of the Class Period that were robbed of their culture, customs, traditions, language and spirituality, in consequence of which they experienced loss of self-esteem, identity crisis, trauma in trying to re-claim the culture, traditions and spirituality that comprises the identity, and they became socially dysfunctional, requiring therapy and counselling.

54. The Plaintiffs plead that they and the Class members experienced, and continue to experience the impact of the Sixties Scoop as Canada's attempt to intentionally implement a cultural assimilation and loss of their aboriginal identity. The Plaintiffs seek punitive, aggravated and exemplary damages by reason of Canada's egregious conduct in violating the fundamental rights of children.

55. Special damages include the costs for rehabilitative and therapeutic services responsive to the harm experienced by the Class. For some of the Class Members, special damages includes the loss to the enjoyment of a parcel of Band land where a house can be built, which is the entitlement of every Band member. The loss of enjoyment is the result of the experience described above, the effect of which led some of the Class Members to be so distanced or estranged from their culture that they would not reasonably choose to live within the Band, or

exercise their statutory rights under the Indian Act. Particulars of the claim for special damages will be provided prior to trial.

56. The Plaintiffs plead and rely upon the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

Place of Trial

57. The Plaintiffs propose that this action be heard in Toronto, Ontario.

Date: February 9, 2009

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Court File No. CV-09-00372025-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding Commenced at Toronto

FRESH AS AMENDED
STATEMENT OF CLAIM

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