CITATION: Brown v. Attorney General of Canada 2014 ONSC 6967
DIVISIONAL COURT FILE NO.: 523/13
DATE: 20141202

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

SACHS, NORDHEMER & POMERANCE JJ.

BETWEEN:	)	
	)	
MARCIA BROWN and ROBERT COMMANDA	)	*J. Wilson, M. Cooper & J. Gagne*, for the respondents
	)	
Respondents (Plaintiffs)	)	
	)	
– and –	)	
	)	
THE ATTORNEY GENERAL OF CANADA	)	*O. Young, P. Evraire, Q.C. & M. Bader, Q.C.* for the appellant
	)	
Appellant (Defendant)	)	
	)	
	)	**HEARD at Toronto:** November 13, 2014

NORDHEIMER J.:

[1] This is an appeal, with leave, from the decision of Belobaba J. certifying this proceeding as a class action pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

Background

[2] This action has already had a significant procedural history, as I shall explain. The claim itself involves the period between 1965 and 1984, when welfare authorities in Ontario removed many Indian and aboriginal children from their families and communities and placed them with foster or adoptive parents that were non-aboriginals. It is alleged that many of these children lost their identity as aboriginal persons, and their connection to their aboriginal culture, that

ultimately led to them suffering emotional, psychological and spiritual harm. More specifically, it is alleged that these children were deprived of their culture, customs, traditions, language and spirituality. This led them to experience loss of self-esteem, identity crisis and trauma in trying to re-claim their lost culture and traditions.

[3] The respondents, Marcia Brown and Robert Commanda, are aboriginal persons from Ontario.[1] They were two of these displaced children. In this proposed class action, they sue only Canada, as represented by the Attorney General of Canada, (and who I shall hereafter refer to as "Canada") and not Ontario. In essence, the respondents accuse Canada of failing to ensure that the Ontario child welfare system, which Canada arranged to extend to aboriginal children in Ontario, would protect them generally, and in particular, would ensure the maintenance of their identities as aboriginal persons. The respondents bring their action on behalf of approximately 16,000 aboriginals who, they allege, were the victims of this policy in Ontario between December 1, 1965 and December 31, 1984.

[4] The reason that the claim involves Canada, and not Ontario, is the fact that in the early part of 1966, Canada and Ontario entered into the Canada-Ontario Welfare Services Agreement ("the 1965 Agreement") by which Canada agreed to pay Ontario for the per capita cost of extending certain Provincial welfare programs to "Indians in the Province" as I shall describe in more detail later. The effective date of the 1965 Agreement was December 1, 1965.

[5] The respondents allege that, during the years between December 1, 1965 and December 31, 1984 (when new child welfare legislation came into force in Ontario), Canada wrongfully delegated its exclusive responsibility as guardian, trustee, protector, and fiduciary of aboriginal persons by entering into an agreement with Ontario that authorized a child welfare program that systemically eradicated the aboriginal culture, society, language, customs, traditions, and spirituality of these children.

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[1] Only Marcia Brown was appointed as a representative plaintiff. The certification judge found that Robert Commanda could not be a representative plaintiff because he was neither a registered Indian nor entitled to be registered. He also did not have reserve status. Mr. Commanda was, consequently, not representative of the claims of the class members.

[6] The respondents allege that they personally suffered from Ontario's child protection program in that they experienced psychological problems associated with a loss of culture, self-esteem, and identity. They seek a declaration that Canada breached its fiduciary obligation and duty of care to the class members and, as a consequence of those breaches, claim general damages of $50,000 for each class member; special damages of $25,000 for each class member and punitive, exemplary and aggravated damages of $10,000 for each class member.

[7] Returning to the procedural history of this action, in April 2010, the respondents sought certification of the proceeding as a class action. At the same time, Canada sought, pursuant to Rule 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to strike out the statement of claim as disclosing no reasonable cause of action. On May 26, 2010, Perell J. "conditionally" certified this proceeding as a class action provided that the respondents delivered an amended statement of claim. In his reasons, Perell J. found that some of the claims that had been advanced by the respondents were unsustainable as pleaded and, consequently, he struck them out. In particular, he found that the 1965 Agreement could not form the basis of a fiduciary duty, and thus an allegation of breach, but allowed that such an action could be maintained, if differently pleaded. He reached the same conclusion regarding the claim in negligence that the respondents had advanced. In the end result, Perell J. certified the proceeding as a class action "[c]onditional upon Ms. Brown and Mr. Commanda delivering a properly pleaded fresh as amended statement of claim", in accordance with his reasons.

[8] Canada sought leave to appeal the decision of Perell J. On February 22, 2011, Swinton J. granted leave. In the interim, the respondents had amended their statement of claim in accordance with the suggestions that Perell J. had made in his reasons. On December 28, 2011, the Divisional Court allowed the appeal. The court found that there was no basis to conditionally certify a class action since, among other things, it would preclude Canada from challenging any amended statement of claim that might be delivered. Consequently, the court struck out the

"existing" statement of claim but with leave to amend.[2] The court also ordered that any certification motion that followed was to be heard before a different judge.

[9] The respondents appealed to the Court of Appeal from the decision of the Divisional Court. On January 17, 2013, the Court of Appeal dismissed their appeal. The Court of Appeal essentially agreed with the Divisional Court's reasoning that one could not conditionally certify a class action because it would restrict the right of a defendant to challenge the sufficiency of any amended statement of claim. As Rosenberg J.A. said, at para. 52:

> As both Swinton J. and the Divisional Court noted, it is not self-evident that there are viable causes of action. The plain and obvious test sets a low threshold, but it will still be necessary for a court to determine whether the causes of action suggested by the case management judge can pass that test. The [Attorney General of Canada] is entitled to an opportunity to show that the causes of action are not viable.

[10] The respondents sought certification for the second time in July 2013. The certification motion was heard by Belobaba J. Canada again brought a motion, under Rule 21, to strike out the statement of claim as still not disclosing a reasonable cause of action. On September 27, 2013, Belobaba J. certified the proceeding as a class action. He dismissed Canada's Rule 21 motion.

[11] Canada sought leave to appeal the decision of Belobaba J. On March 11, 2014, Matheson J. granted leave. This is how the matter arrives before the Divisional Court for the second time.

[12] Central to the issues raised by all of these proceedings is whether the respondents have advanced a proper claim for breach of fiduciary duty and/or for negligence arising out of the actions that were taken by Canada, both in entering into the 1965 Agreement and thereafter. Before this court, no other issues are raised respecting the certification of this proceeding as a class action. It is only the issue whether a proper cause of action is pleaded that is in dispute. Consequently, it is really the dismissal of the Rule 21 motion that is at the heart of this appeal. The propriety of the certification order is, of course, nonetheless engaged because s. 5(1)(a) of

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[2] I am assuming that the Divisional Court's reference to the "existing" statement of claim was intended as a reference to the first statement of claim, and not the amended statement of claim that was prepared subsequent to the decision of Perell J.

the *Class Proceedings Act, 1992*, requires that the statement of claim disclose a cause of action as a prerequisite to certification.

Analysis

[13] I believe that it is worthwhile to start my analysis with a review of the basic principles that apply to a motion under Rule 21. Those principles are well-established. They are:

(a) the statement of claim should not be struck out unless it is "plain and obvious" that the claim discloses no reasonable cause of action: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959;

(b) the allegations in the statement of claim are to be taken as being true or capable of being proven unless they are patently ridiculous or incapable of proof: *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.);

(c) the statement of claim is to be read generously with due allowance for drafting deficiencies: *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441;

(d) the court should not, at this stage of the proceedings, dispose of matters of law that are not fully settled in the jurisprudence: *Hunt v. Carey Canada Inc.*

[14] These principles must be applied, however, in the context of the case that is before us. Aboriginal claims are ones that are particularly undeveloped and fluid. This point was made in *Bonaparte v. Canada (Attorney General)*, [2003] 2 C.N.L.R. 43 (Ont. C.A.) where the court said, at para. 32:

> Further, as Binnie J.'s review of the law in *Wewaykum Indian Band* reveals, fiduciary law in Canada, particularly in respect of the Crown's relationship with Aboriginal peoples, is a very dynamic area of Canadian law. The nature and extent of the particular obligations that may arise out of this relationship are matters that remain largely unsettled in the jurisprudence.

[15] The court should, therefore, approach with considerable caution any invitation to strike out, at this preliminary stage, a claim such as this one.

A. Fiduciary duty

[16] I begin with the asserted claim for breach of fiduciary duty. I do so because the fiduciary duty claim appears to be the more significant and broader claim of the two. It is also clear, as will become apparent later, that the determination of the survival of the fiduciary duty claim will, for all intents and purposes, preordain the result respecting the claim in negligence.

[17] An appropriate starting point for the challenge to the fiduciary duty claim is the Supreme Court of Canada's decision in *Alberta v. Elder Advocates of Alberta Society*, [2011] 2 S.C.R. 261. This was also a proposed class action and it also involved a challenge to the causes of action asserted that included a claim for breach of fiduciary duty involving, in that case, the Province of Alberta. In the course of her reasons, McLachlin C.J.C. set out three elements that would identify the existence of a fiduciary duty in situations that were not covered by an existing category in which fiduciary duties have been recognized. I note that the parties are agreed that the claim being advanced here does not fall into any previously recognized category of fiduciary duty. It is acknowledged to be a "novel" claim.

[18] The three elements identified by McLachlin C.J.C. are (paras. 30-34):

> (i) the evidence must show that the alleged fiduciary gave an undertaking of responsibility to act in the best interests of a beneficiary;
>
> (ii) the duty must be owed to a defined person or class of persons who must be vulnerable to the fiduciary in the sense that the fiduciary has a discretionary power over them;
>
> (iii) to establish a fiduciary duty, the claimant must show that the alleged fiduciary's power may affect the legal or substantial practical interests of the beneficiary.

[19] The decision in *Alberta* then went on to consider how fiduciary duties can arise in the government context. McLachlin, C.J.C. noted that governments will owe fiduciary duties "only in limited and special circumstances". This was due to the fact that public law duties will not typically give rise to a fiduciary relationship because of the necessary exercise of discretion that accompanies public law duties. In this respect, however, it is again important to remember that this is an aboriginal claim. The relationship between Canada and its aboriginal peoples is

distinct. On that point, I note that it is conceded in this case that Canada stands in a fiduciary relationship to aboriginal peoples.[3] The issue is whether that fiduciary relationship gives rise, in turn, to a fiduciary duty.

[20] The decision in *Alberta* makes reference to the issue of fiduciary duties as they relate to aboriginal peoples. In particular, the decision refers to the Supreme Court's earlier decision in *Guerin v. The Queen*, [1984] 2 S.C.R. 335 and observes that, in *Guerin*, the court had noted:

> … that the fiduciary duty owed to the Aboriginal peoples of Canada is unique and grounded in analogy to private law …

[21] That point made, McLachlin C.J.C. went on to distinguish the fiduciary duty as it relates to aboriginal peoples from other types of fiduciary relationships. In essence, McLachlin C.J.C. sets up this particular form of fiduciary duty as a category unto itself arising from the "unique and historic nature of Crown-Aboriginal relations". She said, at para. 38:

> Noting the unique nature of the fiduciary duty owed by the Crown in the Aboriginal context, courts have suggested that this duty must be distinguished from other relationships: [citation omitted]

[22] The existence of fiduciary duties between the Crown and aboriginal peoples was, more recently, directly addressed in *Manitoba Metis Federation Inc. v. Canada (Attorney General),* [2013] 1 S.C.R. 623. This was a land claim case but it raised the issue of whether a fiduciary duty had arisen in the context of that case. In considering when a fiduciary duty can arise, McLachlin C.J.C. and Karakatsanis J. said, at para. 49:

> In the Aboriginal context, a fiduciary duty may arise as a result of the "Crown [assuming] discretionary control over specific Aboriginal interests": *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 18. The focus is on the particular interest that is the subject matter of the dispute: *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 83. The content of the Crown's fiduciary duty towards Aboriginal peoples varies with the nature and importance of the interest sought to be protected: *Wewaykum*, at para. 86.

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[3] That concession would appear to be unavoidable given various decisions by the Supreme Court of Canada on this issue including *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1108.

[23] With those principles in mind, I have concluded that the asserted claim of a fiduciary duty in this case is sufficiently made out on the facts as pleaded that it cannot be said that it is plain and obvious that the claim does not raise a reasonable cause of action. I reach that conclusion for the following reasons.

[24] Returning to the three elements set out in *Alberta*, it is at least arguable that Canada had a responsibility to act in the best interests of the members of the class. Each member of the proposed class was, at the relevant time, a child who was in need of protection. No issue is taken with that latter fact nor is any challenge raised to the court orders that removed these children from their aboriginal homes and placed them in non-aboriginal homes. In my view, the 1965 Agreement can be argued to be evidence of the obligation that Canada considered that it had to the aboriginal peoples generally and these children in particular. The preamble to the 1965 Agreement states that:

> ... the principal 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;

That conclusion is also consistent with the "high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples": *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245 at para. 79.

[25] In making that observation, I am aware that the mere fact that the argument can be made, does not mean that it will be successful. However, that is not the point on a motion under Rule 21. As I earlier noted, it is only necessary to conclude that the allegations are capable of proof. The merits are up to a trial judge to determine.

[26] Returning to the elements identified in *Alberta*, it is clear that there is a defined class of persons who were vulnerable to the discretionary authority that Canada held over them. All of the persons covered by the 1965 Agreement were "Indians with Reserve Status". Canada had a discretionary power over those persons as such. It is acknowledged by Canada that it could have set up its own child welfare system to deal with these persons. Instead, it chose to delegate that responsibility to Ontario, which was already providing such services to all other residents of the

Province. While that approach undoubtedly made good sense from a practical and efficiency point of view, Canada cannot avoid its responsibilities as a fiduciary by delegating its discretionary authority to another.

[27] Like any other fiduciary, if Canada does so delegate, it remains responsible for ensuring that its delegate carries out those fiduciary responsibilities in a proper manner: *Reference re Broome v. Prince Edward Island*, [2010] 1 S.C.R. 360 at para. 54. The allegation here, among others, is that Canada failed to do so. The finding that a fiduciary duty arises and that Canada's actions in negotiating and signing the 1965 Agreement might be a breach of that duty is consistent with the *sui generis* relationship between Canada and its aboriginal peoples. It also reflects the risk, commented on in *Wewaykum*, where Binnie J. said, at para. 80:

> ... but the degree of economic, social and proprietary control and discretion asserted by the Crown also left aboriginal populations vulnerable to the risks of government misconduct or ineptitude.

It is, of course, the respondents' claim that the 1965 Agreement reflects government misconduct or ineptitude.

[28] Finally, I do not take Canada to quarrel with the fact that its actions could affect the legal or substantial practical interests of the beneficiaries, i.e., the members of the class. In any event, it would be hard to see how it could be suggested that removing a child from his/her family and placing the child in the care of others could do anything other than affect the child's most basic interests.

[29] I conclude, therefore, that each of the three elements set out in *Alberta* for the creation of a fiduciary duty are, at least arguably, met in this case. That is sufficient to get the respondents over the relatively low threshold for defeating a motion under Rule 21.

[30] In reaching that conclusion, I am mindful of the fact that a fiduciary duty does not arise between the Crown and aboriginal peoples with respect to all aspects of the relationship between the two. As was clearly stated in *Wewaykum*, the fiduciary duty arises only in relation to specific aboriginal interests. Cases, such as *Guerin,* have imposed a fiduciary duty in respect of aboriginal lands because of the central role that land played in aboriginal economies and culture.

Here, we are not dealing with just one aspect of that culture. Rather, we are dealing with a person's connection to that culture as a whole. It is difficult to see a specific interest that could be of more importance to aboriginal peoples than each person's essential connection to their aboriginal heritage. In addition, on this point, the importance of aboriginal rights cannot be disputed. They are specifically "recognized and affirmed" by s. 35(1) of the *Constitution Act, 1982* and a long line of authorities.

B. Negligence

[31] The respondents also assert a claim in negligence. Canada complains that the motion judge did not undertake a proper *Anns/Cooper* analysis of the negligence claim. I do not agree. Not only did the motion judge expressly refer to the *Anns/Cooper* test, he clearly applied it in reaching his decision.

[32] The components of the *Anns/Cooper* test are set out in *R. v. Imperial Tobacco Canada Ltd.,* [2011] 3 S.C.R. 45 where McLachlin C.J.C. said, at para. 39:

> At the first stage of this test, the question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. If this is established, a *prima facie* duty of care arises and the analysis proceeds to the second stage, which asks whether there are policy reasons why this *prima facie* duty of care should not be recognized: [citation omitted]

[33] The motion judge found that there was a sufficient relationship of proximity demonstrated between Canada and the respondents. As may be apparent from my analysis of the fiduciary duty claim, I reach the same conclusion. Canada acknowledges that there is a fiduciary relationship between Canada and aboriginal peoples. As I have explained above, Canada assumed an obligation towards aboriginal peoples regarding the provision of Provincial welfare programs to them. Canada chose to fulfill that obligation by entering into the 1965 Agreement with Ontario. It is certainly arguable that, by taking those steps, Canada demonstrated a sufficient relationship of proximity to the members of the proposed class. It is equally arguable that, in doing so, Canada ought to have recognized that the failure to take reasonable care, to ensure that the welfare programs were administered properly, might foreseeably cause harm to

the members of the class. This is especially so given that the persons affected, in this particular instance and by this particular welfare program, were children.

[34] Canada says that proximity cannot be established because the respondents "do not plead that federal actors had any direct, supervisory or other operational role in the design or delivery of the child welfare programs delivered to Indians on reserves in Ontario".[4] I do not accept that the plaintiffs need to plead that fact in order to establish an arguable case on proximity. As I have already said, it is not the fact that Canada negligently designed or negligently delivered the child welfare program that is in issue in this case. Rather, the allegation is that Canada failed to ensure that Ontario delivered an appropriate child welfare program when Canada delegated its obligations, in this regard, to Ontario through the 1965 Agreement. That allegation, among others, is specifically pleaded.[5]

[35] Canada also complains that the respondents have not pleaded that they relied on any "expectations, representations, communications or other interactions of a 'close and direct' nature with Canada's officials following their apprehension or removal from their parental homes". With respect, it is not reasonable to expect children to have that degree of awareness. Indeed, if such an allegation had been made, I suspect that Canada would have argued that it was one that was "patently ridiculous". The respondents, as children, were entitled to rely on the basic premise that any authority dealing with them would do so with due consideration for their best interests. In this case, the respondents plead that Canada did not ensure that that was done.

[36] In terms of the second stage of the Anns/Cooper test, Canada submits that the motion judge did not:

> ...address the significant concern that, to impose a private law duty of care or fiduciary duty in this case, would effectively penalize Canada for having used its spending power to ensure that Ontario had the capacity to provide Indian children in need of protection with that very protection.[6]

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[4] Appellant's factum, para. 67
[5] Statement of claim, para. 29
[6] Appellant's factum, para. 70

[37] The fact is, as the motion judge found, there was nothing that prevented Canada from ensuring, as part of the 1965 Agreement, that Ontario would carry out its welfare programs in an appropriate way. The fact that Canada was trying to do something positive for these children does not remove the need for Canada to undertake its good work free of negligence. In other words, a duty of care is not eliminated just because the person who has the duty is engaged in what is intended to be an affirmative or beneficial act.

[38] No other policy reasons are advanced for why Canada should not be subject to a duty of care in carrying out its responsibilities to aboriginal peoples regarding their ability to access appropriate welfare programs. Certainly, it is difficult to see any policy reason that would negate that duty in the situation where children are directly affected. I note, in passing on this point, that the argument that was advanced before the motion judge that Canada could not impose conditions on Ontario as part of the 1965 Agreement, because it would involve a constitutionally improper interference with Provincial jurisdiction, was not advanced here.

[39] Before concluding, I make four other observations. The first observation is that I accept that the amended statement of claim may not plead these two causes of action flawlessly. However, the causes of action are sufficiently pleaded to permit Canada to understand the nature of the claims and to be able to respond to them. Much time and effort has already been spent in this case over the adequacy of the statement of claim and I do not believe that it serves the interests of any of the parties to engage, any further, in the exercise of trying to create the perfect pleading. If Canada requires any particulars regarding the allegations in the amended statement of claim in order to plead to it, then Canada can utilize its rights under the *Rules of Civil Procedure* to seek those particulars.

[40] I would add, on that point, the caution, recently expressed by the Supreme Court of Canada, regarding the problems that are inherent in crafting a pleading in a case such as this. In *Tsilhqot'in Nation v. British Columbia*, [2014] S.C.J. No. 44, McLachlin C.J.C. said, at para. 23:

> Third, cases such as this require an approach that results in decisions based on the best evidence that emerges, not what a lawyer may have envisaged when drafting the initial claim. What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader

> society. A technical approach to pleadings would serve neither goal. It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter. Only thus can the project of reconciliation this Court spoke of in *Delgamuukw* be achieved. [emphasis added]

[41] The second observation is that I recognize that my reasoning in this matter may differ, in some respects, from that employed by the motion judge. I mention this because a central facet of Canada's submissions was its criticism of the motion judge's reasoning. In particular, Canada criticized the motion judge for engaging in reasoning regarding the effect of the 1965 Agreement, and its role in this claim, which was said to be directly contrary to the reasoning used by the first motion judge. On this appeal, however, it must be remembered that the issue is not whether the motion judge reached his decision for the right reasons. The issue is whether the decision is correct.

[42] The third observation follows on the second. Much was made of an alleged conflict between the two motion judges' reasons regarding the 1965 Agreement. Indeed, it is this alleged conflict that appears to have been central to the decision of Matheson J. to grant leave to appeal. As I have already said, any conflict between those reasons is not particularly relevant to my conclusion that the amended statement of claim discloses reasonable causes of action. The first motion judge found that the 1965 Agreement could not form the basis for a claim for breach of fiduciary duty. That conclusion does not preclude reliance on the 1965 Agreement to prove the material fact that there was a breach of that fiduciary duty or a breach of the duty of care. In other words, while I agree with the first motion judge that the 1965 Agreement could not, by itself, be relied on for the creation of the fiduciary duty, the 1965 Agreement is still very much a relevant fact to the allegation that Canada failed to honour its fiduciary duty or failed to fulfill its duty of care. In my view, that is the way in which the 1965 Agreement is used in the amended statement of claim, and that use does not offend the reasons of the first motion judge.

[43] The fourth observation involves what happened after the hearing. Five days after the hearing concluded, counsel for the respondents wrote to the court to draw to our attention the decision in *Anderson v. Canada (Attorney General),* [2011] N.J. No. 445 (C.A.) and to make brief submissions regarding its relevance. In light of this development, we permitted the appellant to file brief written submissions, which the appellant did. I make two comments on

this situation. One is that it runs afoul of the point that Borins J. made in *Walker Estate v. York Finch General Hospital*, [1998] O.J. No. 2271 (Gen. Div.) where he spoke about the "practice" that had developed of counsel corresponding with the court after a hearing has been completed. In complaining about that practice and urging that it be stopped, Borins J. encapsulates the very problem regarding that practice into which this court was placed. He said, at para. 34:

> The practice of communicating directly with a motions judge, or a trial judge, after a hearing has been concluded, puts the judge in a difficult position. The judge feels that it might be unfair to the party to ignore the communication, with the result that the judge re-opens the hearing, or takes the additional material into consideration. In my view, a judge need not consider uninvited communications sent directly to him or her after the conclusion of the hearing. Indeed, I do not believe that I would be criticized if I ignored the materials sent to me by counsel in this case.

I note in this regard that this was not a "late breaking" decision to which counsel could not have referred during the course of the argument.

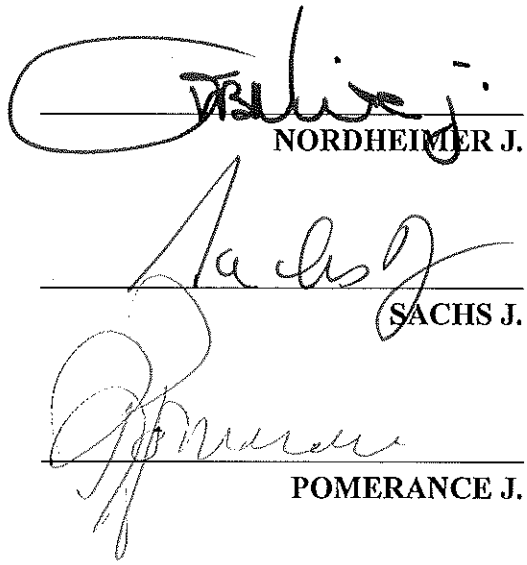
[44] Nonetheless, we have considered the decision. Having done so, I do not find that it adds much to the analysis already undertaken in terms of the proper principles to be applied. It does, however, represent an example where another court has permitted, what might be referred to as a "novel" claim, to proceed in circumstances that have some similarity to the circumstances here. It does serve to reinforce the conclusion, that I have already reached, that aboriginal claims are ones that are particularly undeveloped and fluid and, consequently, greater latitude should be accorded to them in terms of the "plain and obvious" test.

Conclusion

[45] The appeal is dismissed.

[46] If the parties cannot agree, they may file written submissions on the costs of the appeal. The respondents shall file their submissions within thirty days of the date of the release of these

reasons and the appellant shall file its submissions within fifteen days thereafter. The submissions of each party shall not exceed ten pages in length. No reply submissions shall be filed without leave of the court.



NORDHEIMER J.

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MARCIA BROWN and ROBERT COMMANDA

Respondent

– and –

THE ATTORNEY GENERAL OF CANADA

Appellant

REASONS FOR JUDGMENT

NORDHEIMER J.

Date of Release: DEC 0 2 2014