Federal Court Cour fédérale

Date: 20220617

Docket: T-620-20

Citation: 2022 FC 914

CLASS PROCEEDING

BETWEEN:

CHEYENNE PAMA MUKOS STONECHILD, LORI-LYNN DAVID, AND STEVEN HICKS

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER

PHELAN J.

I. Introduction

[1] "At a time of truth and reconciliation, federal responsibility to Indigenous children should not be hidden behind provincial and territorial walls." This is the essential point of this litigation in the Federal Court.

[2] For reasons to follow, this Court grants certification of this single class action, thereby avoiding the necessity or prospect of thirteen provincial and territorial separate actions being pursued by one of Canada's most disadvantaged groups.

II. Nature of the Proceeding

[3] The present proceeding is a contested motion for certification of a class proceeding pursuant to Rule 334.16(1) of the *Federal Courts Rules*, SOR/98-106. The litigation seeks to hold Canada liable to off-reserve Indigenous children and families for Canada's failure to take reasonable steps to prevent injury and loss to those off-reserve Indigenous children of their identity, culture, heritage and language.

[4] The proposed class action questions and challenges Canada's role between January 1, 1992 and December 31, 2019, in allowing Indigenous children who were in state care to be placed in non-Indigenous homes and in the care of individuals who were not part of their Indigenous group, community or people [Primary Class Members]. This resulted in the loss of identity, culture, family and federal benefits. The claim also seeks relief for the parents and grandparents of Primary Class Members [Family Class].

[5] The claim is grounded in Canada's duty to protect apprehended Indigenous children and youth from harm - specifically the loss of their Aboriginal identity - as informed by the honour of the Crown, Canada's fiduciary obligations, Canada's common law duty of care and Canada's responsibility for all Indigenous peoples, whether status Indian, non-status, Métis or Inuit, and regardless of whether they reside on or off reserve land.

[6] The Plaintiffs assert that the Defendant Canada:

- unreasonably denied Indigenous peoples their inherent right to jurisdiction over child and family services;
- failed to take reasonable steps to preserve and protect the Aboriginal identity of Primary Class Members apprehended by child welfare agencies and placed in the care of individuals who were not members of their Indigenous community group or people; and
- failed to provide information about Primary Class Members' identity, Aboriginal and treaty rights and federal benefits to which Primary Class Members may have been entitled.

[7] The claim seeks declaratory relief, general and punitive damages as well as *Charter* damages and other relief.

[8] Importantly, the Defendant accepts that the Plaintiffs have a reasonable cause of action, a certifiable class and appropriate representative plaintiffs.

[9] The key issue from the Defendant's perspective is that the resolutions of the issues raised, "whether through litigation, or, more preferably, out of court settlement, requires the presence and participation of the provinces and territories". The Plaintiffs seek recovery only against the Federal Crown and only in this Court.

III. Background

A. *Action*

[10] The action has been generally described above. The time frame of January 1, 1992 to December 31, 2019 has been referred to as the "Millennium Scoop". This is to be distinguished

from what is known as the "Sixties Scoop" which was the topic of litigation in Ontario under *Brown v Canada (Attorney General)*, 2017 ONSC 251 [*Brown*] and in the Federal Court under *Riddle v Canada*, 2018 FC 641 [*Riddle*] with respect to the resulting national settlement. Both historic actions focused on loss of cultural identity, with *Brown* limited to on-reserve child apprehensions in the Province of Ontario and *Riddle* not distinguishing between on-reserve or off-reserve class members.

[11] Aside from alleging that the Defendant failed in its duty towards the Class Members, they also allege discriminatory practices which caused the Primary Class Members, their parents and grandparents to suffer loss from systemic negligence, breaches of sections 7 and 15 of the *Charter* and unjust enrichment.

[12] The Plaintiffs plead that the Defendant's duty to Indigenous children was not negated by the role of the provinces/territories in the provision of child welfare services and Canada never had the right to offload its legal obligations to Primary Class Members.

B. *Proposed Representative Plaintiffs*

[13] The proposed Representative Plaintiffs are Cheyenne Stonechild (originally in this litigation "Walters") and Steven Hicks – both for the Primary Class – and Lori-Lynn David for the Family Class.

[14] Ms. Stonechild was born in 1995 and her birth mother is a member of the Muscowpetung Saulteaux First Nation and a Sixties Scoop victim. When she was eight years old, she was moved

from her mother's care and, with the exception of one day when she was with an uncle, she was placed in a group home by the BC Ministry of Children and Family Development.

[15] By the time she turned 18, Ms. Stonechild had been placed in approximately 15 group homes in the Greater Vancouver area. Beyond the single day with her uncle, Ms. Stonechild was never placed in the care of anyone who identified as Indigenous nor was any attempt made to preserve her Cree identity, culture or language. She has suffered mentally and emotionally allegedly arising from the loss of her culture and identity. While never advised of her Indigenous rights, she has secured an Indian Status Card, become recognized by her Nation and learned about her Cree heritage. She states that she understands and is willing and able to fulfil her role and duties as a Representative Plaintiff.

[16] Mr. Hicks is Métis, born in 1995. When six months old, he and his sister were removed from their home and placed with a non-Métis family. He was adopted when he was seven but returned to the child welfare system when he was 11. For the next 18.5 years, Mr. Hicks was placed in numerous foster homes, none of them being Métis. In addition to experiencing mental and emotional difficulties, he was never made aware that he was Métis until he was 19 nor provided with information on his status, culture or federal entitlements.

[17] Mr. Hicks has begun to reconnect with his Métis community, identity and culture. Like Ms. Stonechild, he understands and accepts his role and duties as a Representative Plaintiff, and has reviewed the litigation plan and the Fee Agreement.

[18] Ms. David is an Indigenous woman who alleges that she has suffered intergenerational trauma due to being separated from her birth mother during the Sixties Scoop and adopted by non-Indigenous parents. As a result, she lost all connection with her birth mother and her culture. Following three of her children being apprehended in 1993 and 1997 (she has not seen her eldest son since 1996), Ms. David experienced depression, alcohol abuse, suicidal thoughts and homelessness.

[19] Since 2006, Ms. David has been “turning her life around”. She attributes her loss of Indigenous identity and her children’s cultural loss to Canada’s failure to take steps to help preserve and protect their identities. She too is aware of and accepts her duties and role and understands the litigation plan and legal costs.

[20] Although the parties are in agreement that the proposed Representative Plaintiffs are appropriate, the Court must reach its own conclusion as discussed later.

The point Canada emphasizes is that each of these Representative Plaintiffs had their lives, cultures and identities harmed by officials of British Columbia, not of Canada.

[21] Canada has argued that these Plaintiffs should not be allowed to cut off the Class’ claim for liability at the federal government level; that such a limitation harms other Class Members’ rights and interests.

[22] However, in my view, those who find the case too limited are free to opt out. More particularly, the case does not bind the provincial/territorial governments nor restrict claims against them in their courts.

Importantly, there is nothing to suggest that the Representative Plaintiffs are not aware of the limitations or informed of the risks. In their judgment the single class action in the national court is the preferred way to proceed. It is not for this Court at this stage or for Canada at any stage to deny them the right to make that decision.

C. *Trauma/Harm*

[23] The Plaintiffs, in advancing their arguable cause of action argument, filed two expert reports.

[24] The first was from Dr. Amy Bombay of the Department of Psychiatry and School of Nursing at Dalhousie University. Her opinion related to the significant psychological and emotional impacts which occur when an Indigenous child is separated from his/her group, community or people. She further opined on the negative health and social impacts caused by cultural suppression or loss faced by those affected by residential schools and child welfare systems.

[25] The second expert was Professor Nico Trocmé of the School of Social Work at McGill University. He concluded that First Nations children and families were significantly more likely to be investigated by child welfare authorities than non-Indigenous children and families by significant degrees of difference. He further opined on the significant overrepresentation of

Indigenous children in care and the majority of such children being placed in non-Indigenous homes.

[26] The Defendant does not challenge this evidence but points to the fact that it is the provinces and territories who operate these child welfare systems.

[27] The Plaintiffs point to the federal entitlements and benefits available to off-reserve Indigenous people and the failure to inform Indigenous children, removed from their families, of these entitlements which are lost or to which access is not given. It is the Plaintiffs' position at the basis of this claim that Canada had a constitutional obligation to off-reserve Indigenous people and Canada's policy of leaving funding of social services for off-reserve Indigenous people to the provinces and territories amounts to a violation.

IV. Issues

[28] The parties agree that the overarching issue is whether this action should be certified as a class proceeding pursuant to Rule 334.16. That issue in this context underscores:

a) whether the proposed common questions are appropriate in these circumstances; and

b) whether a single class proceeding in this Court is the preferable proceeding.

[29] Rule 334.16(1) sets out a mandatory obligation on the Court to certify a proceeding as a class action if the action meets certain conditions. Subsection (2) sets out a non-exhaustive list of matters which the Court must have considered:

334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if

(a) the pleadings disclose a reasonable cause of action;

(b) there is an identifiable class of two or more persons;

(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;

(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and

(e) there is a representative plaintiff or applicant who

(i) would fairly and adequately represent the interests of the class,

(ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,

(iii) does not have, on the common questions of law

334.16 (1) Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :

a) les actes de procédure révèlent une cause d’action valable;

b) il existe un groupe identifiable formé d’au moins deux personnes;

c) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu’un membre;

d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;

e) il existe un représentant demandeur qui :

(i) représenterait de façon équitable et adéquate les intérêts du groupe,

(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l’instance au nom du groupe et tenir les membres du groupe informés de son déroulement,

(iii) n’a pas de conflit d’intérêts avec d’autres

or fact, an interest that is in conflict with the interests of other class members, and

membres du groupe en ce qui concerne les points de droit ou de fait communs,

(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l’avocat inscrit au dossier.

(2) All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether

(2) Pour décider si le recours collectif est le meilleur moyen de régler les points de droit ou de fait communs de façon juste et efficace, tous les facteurs pertinents sont pris en compte, notamment les suivants :

(a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;

a) la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres;

(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;

b) la proportion de membres du groupe qui ont un intérêt légitime à poursuivre des instances séparées;

(c) the class proceeding would involve claims that are or have been the subject of any other proceeding;

c) le fait que le recours collectif porte ou non sur des réclamations qui ont fait ou qui font l’objet d’autres instances;

(d) other means of resolving the claims are less practical or less efficient; and

d) l’aspect pratique ou l’efficacité moindres des autres moyens de régler les réclamations;

(e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.	**e)** les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d’autres mesures de redressement.

Note: Subsection (3) is not relevant at this stage of the proceedings.

A. *Certification Principles*

[30] The Plaintiffs argue that they have satisfied the “low threshold” for certification as Rule 334.16 is procedural in nature and meant to be interpreted broadly, liberally and purposively to achieve the foundational policy objectives of class action proceedings – access to justice, judicial economy and behaviour modification: see *Canada v John Doe*, 2016 FCA 191 at para 25. In this regard, the Court is generally in agreement with the Plaintiffs.

[31] The Defendant takes the position that at least with respect to judicial economy, the proposed certified action would be a false economy because there are not the proper common questions or at least insufficient commonality across the class; that this action is not the preferable way of proceeding and the matter of behaviour modification has been addressed under *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 [Act].

[32] In *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at paras 99-100, the Supreme Court confirmed that the class representative must show some basis in fact for each of the certification requirements other than that the pleadings disclose a cause of action. The certification stage is not meant to be a test of the merits of the case. The question at the

certification stage is whether there is some basis in fact which establishes each of the individual certification requirements.

[33] It is not necessary to seek a resolution to each challenge or to each issue which may or might arise in the course of litigation – either procedural or substantive. If that were the case, class action law in this country would be barren for lack of precedents because such resolution would be either premature or impossibly speculative. The overall question is not whether the action will succeed but whether the action can work as a class action.

B. *Reasonable Cause of Action (Rule 334.16(1)(a))*

[34] The action concerns the loss of Primary Class Members' Aboriginal identity after they were apprehended and placed in the care of individuals who were not members of their Indigenous community, group or people. There is nothing in the Defendant's material that suggests that these circumstances did not in fact happen.

[35] The Plaintiffs plead that the federal Crown had a duty constitutionally to protect and preserve the Aboriginal identity of apprehended Indigenous children and youth. They further plead that Canada failed in its duty from which the Class suffered loss and damage.

[36] Critical to the claim is the argument that Canada's duty was not negated because child welfare was otherwise a matter within provincial legislative competence. The analogy of a "political football" being who were "Indians" for whom Canada was responsible was alluded to both at the trial and ultimate appeal in the *Daniels* case (*Daniels v Canada (Indian Affairs and*

Northern Development), 2016 SCC 12). Jurisdictional arguments are discussed later, both in the context of common questions and preferability.

[37] At this stage of the analysis the Defendant has properly acknowledged that the pleadings disclose a reasonable cause of action. The test is whether it is "plain and obvious" that the claim is doomed to failure (*Varley v Canada (Attorney General)*, 2021 FC 589 at para 6 [*Varley*]). It is not.

[38] Given the pleadings, the Amended Notice of Motion and the arguments made, I am satisfied that the Plaintiffs have met this condition for certification.

C. *Identifiable class of two or more persons (Rule 334.16(1)(b))*

[39] The Defendant accepts, as do I, that the proposed Primary Class and Family Class meet this condition. The classes are objective and not overly broad. They are also similar to the classes in *Moushoom v Canada (Attorney General)*, 2021 FC 1225 [*Moushoom*].

D. *Common questions of law or fact (Rule 334.16(1)(c))*

(1) Jurisdictional Issues

[40] It is on this requirement and that of a class action as the preferable manner of proceeding for which the parties have the most disagreement. The Plaintiffs have filed an amended list of proposed common questions. The amended questions are largely the same as originally filed but

add in questions related to Canada’s delegation of its off-reserve Indigenous child welfare duties to the provinces and territories and whether this amounted to systemic negligence.

[41] The Defendant challenges the matters of common question and preferability, while accepting the existence of a reasonable cause of action. The Defendant argues that the questions are only theoretically common and would in reality require overwhelming individual assessments based on the jurisdictional issues which may be involved. The Defendant says that the involvement of the provinces and territories takes this claim outside of a workable common issues claim.

[42] The Defendant raises what they describe as “jurisdictional issues”; however, it does not assert that this Court does not have jurisdiction over a claim against Canada alone. The Defendant’s position is that the Plaintiffs should also be suing the provinces.

[43] In the course of dealing with this so-called jurisdictional issue, the Defendant refused to answer questions about Canada’s delegation of its responsibilities to the provinces. The questioning was in writing; the Defendant objected on the basis that it was not proper cross-examination and was too broad.

[44] The parties have engaged in procedural skirmishes over who had the obligation to force an answer and what should be done in the face of the Defendant’s refusal to answer.

[45] In my view, this procedural issue should not distract the Court from the real issue of whether the Plaintiffs' limitation of its claim to only Canada deprives the Plaintiffs of the opportunity to pursue its claim in one court with national jurisdiction as opposed to being bogged down in multiple jurisdiction litigation. The Defendant's failure to respond to questions related to jurisdiction and delegation detracts from the force of its submissions that the role of the provinces somehow makes the Plaintiffs' claim impossible or impractical to pursue in this Court.

[46] Moreover, the commonality of the questions is enhanced by the fact that there is a single defendant. The Plaintiffs have deliberately limited the scope of their claim to the federal government as they are entitled to do. As stated in *Daniels v Canada*, 2013 FC 6 at para 66:

> It is an accepted right that a plaintiff may frame the action (subject to various rules of pleading) as it wishes. It is not for the Defendants to tell the Plaintiffs what their case is or should be.

[47] It is the Plaintiffs' position that Canada has the responsibility to protect and preserve the Aboriginal identity of the Primary Class Members. The Plaintiffs are prepared to take the risk that it has only one defendant and that relief may be limited by that factor. That is the Plaintiffs' choice and their right.

[48] The Plaintiffs rely on the principle that Canada cannot delegate these responsibilities. As the Canadian Human Rights Tribunal held in *First Nations Child and Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2, and upheld in this Court (*Canada (Attorney General) v First Nations Child and Family Caring Society of Canada*, 2021 FC 969), Canada, as the sole respondent, could not

evade constitutional responsibility by the mere fact that it had delegated responsibility to provincial agencies.

[49] The ultimate question in this litigation is whether Canada complied with its constitutional obligations under s 91(24) to "Indians" which could not be delegated to provincial bodies or discharged by provincial legislation. That issue is common to all the Class Members and is the foundational question throughout – did Canada have the obligations to preserve and protect and did it fulfil those obligations?

[50] In limiting its claim to the federal government, the Plaintiffs have judicial support from this Court in *Campeau v Canada*, 2021 FC 1449 [*Campeau*], where Justice Southcott held that where a plaintiff elects to limit its claim to the several liability of Canada in regard to matters within Canada's authority and responsibility, the Court has no basis for staying an action even in the face of Canada's expressed intention to bring a claim for contribution and indemnity against a party over which the Federal Court has no jurisdiction.

[51] In this present case, both parties accept that if judgment is against Canada for its own liability, the matter of a potential third party proceeding is irrelevant.

[52] While the Court, at this stage of the litigation, need not answer these issues – it is sufficient if they are fairly arguable, the Plaintiffs argue that the question of Canada's obligation to preserve and protect has been acknowledged by Canada by its passage of the Act**.**

[53] The legislation arguably establishes what is and what should have been the duty and the standard of care which the Defendant should have had in place during the period of time covered by this class action. It addresses, at least in part, the Defendant's argument that there is a lack of commonality because each province had its own system, duties and standards.

(2) The Common Questions

[54] The following are the Amended Common Questions:

a) Did the defendant owe a duty of care to the class and, if so, what was the scope of that duty?

b) If the answer to (a) is yes, was the defendant entitled to delegate its duty or aspects of that duty to the provinces and territories and their child welfare agencies?

c) If the answer to (b) is no or if aspects of the defendant's duty were not delegable, what was the standard of care owed by the defendant to the class?

d) Did the defendant's conduct, acts, and omissions fall below the applicable standard of care?

e) If the answer to (d) is yes, can causation of any damages incurred by class members be determined as a common question?

f) Where loss of culture and identity has occurred and was materially caused by the class' engagement with the child welfare system – including loss of identity and/or loss of rights and entitlements arising from Indigeneity – is Canada *ipso facto* liable (or was Canada legally capable of off-loading that liability onto the provinces and territories)?

g) Where loss of culture and identity has occurred and was materially caused by the class' engagement with the child welfare system (and Canada was not legally capable of off-loading that liability onto the provinces and territories), can the Court make an aggregate assessment of damages suffered by all or some class members and, if so, in what amount?

h) Did the defendant breach class members' right to life, liberty, and security of the person in a manner contrary to the interests of fundamental justice under section 7 of the *Canadian Charter of Rights and Freedoms*?

i) Did the defendant breach the right of class members to equal protection and equal benefit of the law without discrimination based on race, religion, colour, or national or ethnic origin under section 15 of the *Canadian Charter of Rights and Freedoms*?

j) If the answer to common question (h) or (i) is yes, were the defendant's actions saved by section 1 of the *Canadian Charter of Rights and Freedoms* and, if so, to what extent and for what time period?

k) If the answer to common question (h) or (i) is yes, and the answer to common question (j) is no, do those breaches make damages an appropriate and just remedy under section 24 of the *Canadian Charter of Rights and Freedoms* for all or some of the class?

l) If the answer to common question (k) is yes, can the Court make an aggregate assessment of damages owed to some or all class members under section 24 of the *Canadian Charter of Rights and Freedoms* and, if so, in what amount?

m) Was the defendant unjustly enriched by class members' loss of rights and entitlements arising from Indigeneity?

n) If the answer to common question (m) is yes, can the Court make an aggregate assessment of the restitution that should be paid to class members or some of them on account of the defendant's wrongful gains and, if so, what amount of restitution should be paid to class members?

o) Does the defendant's conduct justify an award of punitive damages?

p) If the answer to common question (o) is yes, what amount of punitive damages should be awarded against the defendant?

[55] The Defendant did not object to the Plaintiffs submitting the Amended Common Questions which include the questions concerning the delegation to the provinces. It does object to questions (f) and (g).

[56] The Defendant's position is that the Plaintiffs' claim of systemic negligence is focused on Canada's failure to pass earlier legislation similar to the Act which came into effect on January 1, 2020. It says that the scope of any duty owed by Canada could not be assessed without simultaneous consideration of provincial/territorial duties of care and any breaches

thereof. It lists a number of questions provinces and territories would be required to answer on the topic.

[57] The Defendant argues that the same rationale applies to the *Charter* claims and the unjust enrichment claims.

[58] The Defendant takes some comfort in the *Caring Society* findings that Canada discriminated against on-reserve Indigenous children by not providing them with comparable services to those provided off-reserve in similar circumstances.

[59] Without addressing the merits or the validity of the Defendant's position as a defence, it is not clear to me that a comparison between disadvantaged people's treatment exonerates Canada from its duty to preserve and protect all Indigenous people.

[60] The Defendant emphasizes that the individual nature of the claim will make causation and damages on a systemic basis difficult and that the Plaintiffs have not indicated how that would be done. It levels the same type of criticism in respect of the claim for unjust enrichment.

[61] Both parties included in their common question submissions elements of jurisdictional issues at play and which are also addressed in the "preferability" analysis which follows. The Defendant expresses concern about the use of Rules 233 and 238 (production by a non-party/examination of a non-party) in regards to provinces/territories. This concern, addressed

later, was considered in *Campeau* at para 33 in respect of parties holding joint and several liability:

> It is not necessary for the Court to delve into the evidence surrounding Murphy Battista's responses to the Defendant's past efforts to explore the Ransomware Attack. The Defendant has advanced no arguments as to why the processes to compel evidence from a non-party under the Rules would be ineffective in providing the Defendant or the Court with the evidentiary foundation necessary to apportion liability between the Defendant and Murphy Battista (for purposes of limiting any liability imposed on the Defendant in this proceeding to its several liability). In *Gottfriedson* at paragraph 27, Justice Harrington noted that the Court may apportion fault against a person who is a non-party to a proceeding and endorsed the statement in *Taylor* that undertaking such apportionment without adding parties will mean fewer parties at trial, a shorter trial, and reduced costs. Justice Harrington also noted the availability of Rules 233 and 238 to order non-party production of documents and examination for discovery (at para 30).

[62] Justice Stratas in *Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 72 [*Wenham*], outlined the Court's task at this stage of the certification process:

> Further, the task under this part of the certification determination is not to determine the common issues, especially not without a full record and full legal submissions on the issue, but rather to assess whether the resolution of the issue is necessary to the resolution of each class member's claim. Specifically, the test is as follows:
>
>> The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a

> substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significant [*sic*] of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.

> (*Western Canadian Shopping Centres*, above at para. 39; see also *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3 at paras. 41 and 44-46.)

[63] Justice Gleason, in *Canada v Greenwood*, 2021 FCA 186 [*Greenwood*], in addressing cases such as this one dealing with systemic negligence claims, confirmed such cases are appropriate for certification:

> [182] Issues related to the scope of a duty of care, breach and punitive damages have frequently been certified as common issues in systemic negligence claims as the respondent rightly notes: see, i.e., *Rumley*; *Cloud v. Canada (Attorney General)*, 2004 CarswellOnt 5026, [2004] O.J. No. 4924 (CA); *Gay et al. v. Regional Health Authority 7 and Dr. Menon*, 2014 NBCA 10; *Ross v. Canada (Attorney General)*, 2018 SKCA 12; and *Francis v. Ontario*, 2021 ONCA 197, to name only a few cases where such determinations were reached or upheld by various appellate courts. The Federal Court has also frequently certified class actions for systemic negligence: see, i.e., *Merlo*; *Tiller*; *Ross*, *Paradis Honey Ltd. v. Canada*, 2017 FC 199, [2018] 1 F.C.R. 275; *McLean v. Canada (Attorney General)*, 2018 FC 642; and *Nasogaluak v. Canada (Attorney General)*, 2021 FC 656.

[64] As the Plaintiffs' claim includes allegations of systemic negligence, *Rumley v British Columbia*, 2001 SCC 69 [*Rumley*], is particularly instructive. It involved issues of abuse of residential school children who were deaf or blind. The claim was based on systemic negligence

which, at para 30, was defined as "the failure to have in place management and operations procedures that would reasonably have prevented the abuse".

[65] In respect of the issue of commonality versus individuality, the argument in *Rumley*, as also made here, was that ultimately the action would break down into individual proceedings because the action depended on the application of the standard of care. At para 30, the Court rejected this dominance of individual assessments, on the basis that the plaintiff was entitled to restrict the grounds of negligence to systemic negligence to facilitate a class proceeding.

> 30 I cannot agree, however, that such are the circumstances here. As Mackenzie J.A. noted, the respondents' argument is based on an allegation of "systemic" negligence – "the failure to have in place management and operations procedures that would reasonably have prevented the abuse" (pp. 8-9). The respondents assert, for example, that JHS did not have policies in place to deal with abuse, and that JHS acted negligently by placing all residential students in one dormitory in 1978. These are actions (or omissions) whose reasonability can be determined without reference to the circumstances of any individual class member. It is true that the respondents' election to limit their allegations to systemic negligence may make the individual component of the proceedings more difficult; clearly it would be easier for any given complainant to show causation if the established breach were that JHS had failed to address her own complaint of abuse (an individualized breach) than it would be if, for example, the established breach were that JHS had as a general matter failed to respond adequately to some complaints (a "systemic" breach). As Mackenzie J.A. wrote, however, the respondents "are entitled to restrict the grounds of negligence they wish to advance to make the case more amenable to class proceedings if they choose to do so" (p. 9).

[66] The Defendant suggests that Canada's lack of a system to address the needs of Indigenous children and youth taken from their Indigenous families is a policy decision by the federal government; presumably as such is less susceptible to court challenge. However, this

assertion is a matter of a defence, if Canada chooses to advance it, and would, because it was a general policy, suggest that there is a <u>broad</u> common issue of its application of the policy.

[67] In assessing the common questions with a purposive approach, both the original and Amended Common Questions can be distilled to four main issues:

1. Canada's alleged systemic negligence, its delegation to provinces and territories and the Court's ability to make an aggregate assessment of damages.
2. Canada's alleged breaches of s 7 and 15 of the *Charter* and the entitlement to s 24 *Charter* damages.
3. Canada's alleged unjust enrichment by avoiding the cost of a proper system to protect and preserve as well as the Court's ability to assess and make a restitution order.
4. Canada's liability for punitive damages.

[68] The Court is not convinced that the issues are only theoretically common. Individual provincial/territorial welfare practices would need to be considered, whether the claim is in this Court or in several courts.

[69] The specific questions posed by the Plaintiffs are not inimitable and may be amended at a later date if appropriate. However, they must be common and flow from the pleadings as they do.

[70] It would be naïve to suggest that dealing with aspects of provincial issues inherent in the common questions would be simple but it should be able to be done as discussed in paragraphs 79 and following of these Reasons.

[71] The Amended Common Questions contain rhetoric which is unnecessary and may not ultimately be helpful in resolving the core of the dispute.

[72] In addressing the Defendant's objection to some of the new questions, the Court agrees that questions (f) and (g) are more augmentory of questions (b)-(d) which more directly address the issue of delegation.

[73] Therefore, the common questions to be certified are:

Systemic negligence questions

a) Did the Defendant owe a duty of care to the class and, if so, what was the scope of that duty?

b) If the answer to (a) is yes, was the Defendant entitled to delegate its duty or aspects of that duty to the provinces and territories and their child welfare agencies?

c) If the answer to (b) is no or if aspects of the Defendant's duty were not delegable, what was the standard of care owed by the Defendant to the class?

d) Did the Defendant's conduct, acts, and omissions fall below the applicable standard of care?

e) If the answer to (d) is yes, can causation of any damages incurred by class members be determined as a common question?

f) In the answer to common questions (a), (d) and (e) is yes, can the Court make an aggregate assessment of damages suffered by all or some class members and, if so, in what amount?

Charter questions

g) Did the Defendant breach the class members' right to life, liberty, and security of the person in a manner contrary to the interests of fundamental justice under section 7 of the *Canadian Charter of Rights and Freedoms*?

h) Did the Defendant breach the right of class members to equal protection and equal benefit of the law without discrimination based on race, religion, colour, or national or ethnic origin under section 15 of the *Canadian Charter of Rights and Freedoms*?

i) If the answer to common question (g) or (h) is yes, were the Defendant's actions saved by section 1 of the *Canadian Charter of Rights and Freedoms* and, if so, to what extent and for what time period?

j) If the answer to common question (g) or (h) is yes, and the answer to common question (i) is no, do those breaches make damages an appropriate and just remedy under section 24 of the *Canadian Charter of Rights and Freedoms* for all or some of the class?

k) If the answer to common question (j) is yes, can the Court make an aggregate assessment of damages owed to some or all class members under section 24 of the *Canadian Charter of Rights and Freedoms* and, if so, in what amount?

Unjust enrichment questions

l) Was the Defendant unjustly enriched by class members' loss of rights and entitlements arising from Indigeneity?

m) If the answer to common question (l) is yes, can the Court make an aggregate assessment of the restitution that should be paid to class members or some of them on account of the Defendant's wrongful gains and, if so, what amount of restitution should be paid to class members?

Punitive damages questions

n) Does the Defendant's conduct justify an award of punitive damages?

o) If the answer to common question (n) is yes, what amount of punitive damages should be awarded against the Defendant?

E. *Preferability*

[74] The question is whether the single class proceeding in this Court is the preferable proceeding. The issue of preferability usually contrasts a class proceeding to some other proceeding such as a single plaintiff or representation action. This motion adds an additional layer of complexity by raising the issue of whether the class proceeding in this Court, as opposed to other and multiple courts, is to be the preferred process.

[75] In *Wenham*, Justice Stratas outlined the test for preferability procedure under Rule 334.16(1)(d):

> [77] The test, from *Hollick* at paras. 27-31, is well-summarized in Mr. Wenham's memorandum as follows:
>
> > (a) the preferability requirement has two concepts at its core:
> >
> > > (i) first, whether the class proceeding would be a fair, efficient and manageable method of advancing the claim; and
> > >
> > > (ii) second, whether the class proceeding would be preferable to other reasonably available means of resolving the claims of class members;
> >
> > (b) this determination requires an examination of the common issues in their context, taking into account the importance of the common issues in relation to the claim as a whole; and
> >
> > (c) the preferability requirement can be met even where there are substantial individual issues; the common issues need not predominate over individual issues.
>
> [78] The preferability of a class proceeding must be "conducted through the lens of the three principal goals of class action, namely judicial economy, behaviour modification and access to justice": *Fischer* at para. 22.

[76] In these Reasons, this Court referred to paragraph 30 of *Rumley* in respect to a plaintiff's right to restrict its claim to negligence as here. The case importantly confirms that a class action where systemic wrong is alleged is preferred even though there are aspects of individual assessments.

[77] The Court of Appeal in *Greenwood* confirmed that the type of case advanced here is frequently certified as a class action:

> [181] Moreover, as this Court recently noted at paragraph 77 of *Brake*:
>
> > [...] the result of the determination of the common issues need not be the same for all class members. In particular,
> >
> > (a) for a question to be common, success for one member of the class does not necessarily have to lead to success for all the members;
> >
> > (b) a common question can exist even if the answer given to the question might vary from one member of the class to another, and a common question may require nuanced and varied answers based on the circumstances of individual members;
> >
> > (c) the requirement of commonality does not mean that the answer for all members of the class needs to be the same or even that the answer must benefit them to the same extent as long as the questions do not give rise to a conflict of interest among the members; for example, the success of one member must not result in failure for another.
> >
> > (See *Vivendi* at paras. 44-46; *Rumley* at para. 36; *Hodge v. Neinstein*, 2017 ONCA 494, 136 O.R. (3d) 81 at para. 114.)
>
> [182] Issues related to the scope of a duty of care, breach and punitive damages have frequently been certified as common issues in systemic negligence claims as the respondent rightly notes: see, i.e., *Rumley*; *Cloud v. Canada (Attorney General)*, 2004 CarswellOnt 5026, [2004] O.J. No. 4924 (CA); *Gay et al. v. Regional Health Authority 7 and Dr. Menon*, 2014 NBCA 10; *Ross v. Canada (Attorney General)*, 2018 SKCA 12; and *Francis v. Ontario*, 2021 ONCA 197, to name only a few cases where such determinations were reached or upheld by various appellate courts. The Federal Court has also frequently certified class actions for systemic negligence: see, i.e., *Merlo*; *Tiller*; *Ross*, *Paradis Honey Ltd. v. Canada*, 2017 FC 199, [2018] 1 F.C.R. 275; *McLean v. Canada (Attorney General)*, 2018 FC 642; and *Nasogaluak v. Canada (Attorney General)*, 2021 FC 656.

[78] The Plaintiffs have addressed the non-exhaustive factors laid out in Rule 334.16(2). I conclude that a single proceeding would be particularly important to matters of judicial economy and access to justice.

[79] The Defendant has not established that a class action in this matter is not manageable nor has it established that it cannot defend its position or that a class proceeding in this single court with national coverage is not the preferred proceeding.

[80] This case, like other class actions, underscores the difficulties with class actions against the Crown due to constitutional limitations. These Plaintiffs cannot solve this class action conundrum nor should they have to await its resolution.

[81] Class actions covering persons and actions outside the specific borders of the pertinent borders raise problems as well as shown in *Option Consommateurs c Nippon Yusen Kabushiki Kaisha (NYK)*, 2022 QCCS 1338.

[82] The Defendant has raised concerns that in defending this action, it may be constrained in securing evidence from the provinces in support of its defence. However, this Court in *Tippett v Canada*, 2020 FC 714, issued production orders under Rule 233 against the Province of British Columbia (a non party to the class action). The same principled approach would presumably apply in respect to other non party provinces and territories in this class proceeding. At this stage, it cannot be said that Canada cannot adequately defend this proposed class proceeding.

[83] The Defendant has not satisfied me, nor have they advanced a case, that there is a better proceeding which can address the Plaintiffs' claim.

[84] The Defendant argues that a proceeding in a superior court could allow for provincial/territorial involvement. While this is doubtless true, the Defendant has not addressed how this could be done for a national class. The prospect that each class would only involve members from the particular province/territory invites thirteen legal actions across the country, a prospect which is truly daunting - particularly for the Plaintiffs.

[85] Such multiple litigation involving issues related to Indigenous children and youth invites making the cases "political footballs" as between Canada and the provinces/territories. The prospect offends that which was identified and to be avoided under Jordan's Principle.

[86] The suggestion made included having a provincial superior court in one province be the principal court; however, the Defendant has not shown how other provinces would or could attorn to the jurisdiction of another province in respect of the laws and actions of the first province.

[87] Although one must be cautious in drawing too much from class actions where consent to certification was part of the certification process, Canada had been prepared to accept class proceedings in this Court in many such actions. It did so in *Moushoom* where the remedy sought was similar to that asked for here. The key difference is that in the present action, the focus is on

off-reserve child welfare funding and actions while *Moushoom* dealt with on-reserve funding plus aspects of a Jordan's Principle class.

[88] The lengthy and multi-jurisdictional nature of the Sixties Scoop litigation is a cautionary tale and much simpler, one involving one court rather than a multi-jurisdictional Stonechild proceeding. Only after eight years of Ontario litigation did the national settlement materialize in *Riddle*.

[89] In both *Moushoom* and *Varley*, Canada accepted its role as a single defendant. In terms of fairness based on the pleadings in this Stonechild proceeding, Canada is in a better position to deal with provincial witnesses (to the extent necessary) than these Plaintiffs.

[90] In respect to access to jurisdiction, a single proceeding is a simpler process than multi-jurisdictional claims. Given the nature of the class, and the likelihood of them individually or in groups being able to carry an action, a class proceeding is evidently more effective and efficient. It may well be the only way this type of litigation could proceed.

[91] With regard to judicial economy, again a single national jurisdiction proceeding is more efficient. Canada says there is limited judicial economy as this proceeding is incomplete because of the absence of provinces and territories. Given this Court's conclusion on the matter of a common question and the right of the Plaintiffs to pick their target of liability, a class action in this Court offers sufficient, if not greater judicial economy, than other proceedings.

[92] In terms of behaviour modification, while Canada says that this factor has been addressed by the new Act, a class proceeding is more likely than not to help ensure that the legislation is acted upon, funded and administered as it should. The class proceeding is likely to keep Canada on course – "steady and true".

[93] Canada has repeatedly said it seeks reconciliation and resolution. Despite the lengthy period over which the offending acts occurred, that has not happened and there was no suggestion that it was likely or that a vehicle for resolution existed. The words of the former Chief Justice in *Rumley* suggest that a class action may be useful in mitigating harm and even creating a vehicle for resolution.

> 39 The final factor is "whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means": s. 4(2)(e). On this point it is necessary to emphasize the particular vulnerability of the plaintiffs in this case. The individual class members are deaf or blind or both. Litigation is always a difficult process but I am convinced that it will be extraordinarily so for the class members here. Allowing the suit to proceed as a class action may go some way toward mitigating the difficulties that will be faced by the class members. I am in full agreement, therefore, with Mackenzie J.A.'s conclusion that "[t]he communications barriers faced by the students both at the time of the assaults alleged and currently in the litigation process favour a common process to explain the significance of those barriers and to elicit relevant evidence." As he wrote, "[a] group action should assist in marshalling the expertise required to assist individual students in communicating their testimony effectively" (p. 9).

V. Conclusion

[94] For all these reasons, this action will be certified as a class proceeding on the terms of the Certification Order.

"Michael L. Phelan"
Judge

Ottawa, Ontario
June 17, 2022

FEDERAL COURT

SOLICITORS OF RECORD

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