Class action for off-reserve Indigenous children separated from families can proceed: Federal Court

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Research Pod

Case(s):

First Nations Child and Family Caring Society of Canada v. Canada (Minister of Indian Affairs and Northern Development), [2016] C.H.R.D. No. 2

The Federal Court has certified a significant class action by off-reserve Indigenous people removed from their families in the so-called Millennium Scoop.

In *Stonechild v. Canada* 2022, FC 914, released June 17 and written by Justice Michael Phelan, the court determined that one class action would be better than multiple actions across the country.

This was the right decision as "requiring the plaintiffs to bring a multitude of provincial and territorial actions to have their legal rights determined could result in the cases becoming 'political footballs,'" said plaintiffs' lawyer Angela Bespflug of Murphy Battista LLP in an e-mail to *The Lawyer's Daily*.

Angela Bespflug, Murphy Battista LLP

"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]," the court stated.

This resulted in a loss of identity, culture, family and federal benefits, the court observed.

The plaintiffs were taken from their families as children and had been adopted by non-Indigenous families or grown up in multiple group homes until adulthood.

In December, Canada reached an agreement in principle to pay $40 billion to on-reserve children and their families who had been affected by discriminatory child-welfare funding practices.

Canada is opposing the current class action concerning off-reserve children. Those affected include status and non-status Indians, Inuit and Métis youngsters and their families who were not living on reserves.

According to the Federal Court's decision, "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. …

"Importantly, the Defendant accepts that the Plaintiffs have a reasonable cause of action, a certifiable class and appropriate representative plaintiffs," the court said.

The key issue from the defendant's perspective, the court noted, "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.'"

Canada did not challenge any of the evidence brought before the court detailing the plaintiffs' past experience of being removed from their families; it simply argued that "it is the provinces and territories who operate" these child welfare systems.

"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," Justice Phelan wrote.

The plaintiffs argued that "Canada has the responsibility to protect and preserve the Aboriginal identity of the Primary Class Members."

They cited *First Nations Child and Family Caring Society of Canada v. Canada (Minister of Indian Affairs and Northern Development)*, [2016] C.H.R.D. No. 2, which, they said, showed "Canada, as the sole respondent, could not evade constitutional responsibility by the mere fact that it had delegated responsibility to provincial agencies."

"It is fundamentally wrong that Canada has agreed to compensate on-reserve children while leaving off-reserve children out in the cold," stated Bespflug.

The Defendant argued that a "proceeding in a superior court could allow for provincial/territorial involvement."

While the court agreed this point was 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."

"I conclude that a single proceeding would be particularly important to matters of judicial economy and access to justice," Justice Phelan wrote.

Counsel for the defendant were not immediately available for comment.

Canada was represented by Catharine Moore, Travis Henderson and Stéphanie Dion of Justice Canada.

Cheyenne Pama Mukos Stonechild, Lori-lynn David and Steven Hicks were represented by Angela Bespflug and Janelle O'Connor of Murphy Battista LLP, as well as Maxime Faille, Aaron Christoff and Keith Brown of Gowling WLG International Limited.

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