Federal Court  Cour fédérale

Date: 20210610

Docket: T-2166-18

Citation: 2021 FC 589

CLASS PROCEEDING

BETWEEN:

SHANNON VARLEY AND SANDRA LUKOWICH

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR ORDER

PHELAN J.

I. Summary

[1] These are the reasons for the Court's issuance of an oral order on June 7, 2021, confirming that a formal order to be dated and effective from June 7, 2021, will issue certifying this matter as a class action. The formal order is awaiting translation and some minor amendments of dates and other technical matters.

II. Background

[2] The Plaintiffs made a motion, on consent, to certify the action as a class action pursuant to Rule 334.16 of the *Federal Courts Rules*, SOR/98-106. The Rule is mandatory and sets out that a judge "shall" certify a proceeding as a class proceeding if various conditions are met.

[3] Importantly, the proposed class action is to embrace those indigenous persons who were not included in the 60's Scoop class action and settlement (see *Riddle v Canada*, 2018 FC 641/*Brown v Canada*, 2018 ONSC 3429 [*Brown*] [60's Scoop]).

III. Consent

[4] The Defendant Canada's consent is significant to the Court. As Justice Barnes said in *Buote Estate v Canada*, 2014 FC 773, such consent reduces the necessity for a rigorous approach, although similar comments appear in instances of consent certification and settlement. It does not relieve the Court of the duty to ensure that the requirements of the Rule are met.

[5] Given the results of the 60's Scoop cases, it would be difficult to see Canada taking a strongly antagonistic approach to the current case without very good cause.

IV. Disclosure of Cause of Action

[6] As to this element of the certification analysis, the test is a low one. At its simplest, the question for the Court is whether it is plain and obvious that the claim is doomed to failure

(*Wenham v Canada*, 2018 FCA 199 [*Wenham*]). Even without Canada's consent, this requirement is satisfied. Aside from pleading a duty of care, the fiduciary duty is said to arise from the fiduciary relationship with Canada – the federal Crown.

[7] The Statement of Claim pleads all the necessary elements sufficient for purposes of this motion.

V. Identifiable Class of Persons

[8] The class definition proposed was similar to that in *Brown* but wider and objectively circumscribed.

[9] While the class embraces non-status Indian [NSI] and Métis and was referred to in the carriage motion, the definition of those groups is best dealt with in relation to the term "all Indigenous Persons …". To avoid any doubt as to the meaning and members of the class, the term "all Indigenous People" will refer back to that term as referenced in *Daniels v Canada*, 2016 SCC 12.

VI. Common Questions of Law and Fact

[10] As to common facts, there will have to be a showing that Canada failed to take any steps to prevent a class member from being scooped – a fact base common to all.

[11] As to the common issues, they are:

a) Did Canada have a fiduciary duty to take reasonable steps to prevent all Indigenous persons, excluding Indian (as defined in the *Indian Act*) and Inuit persons, who were placed in the care of non-Indigenous foster or adoptive parents from losing their Indigenous identities?

b) If the answer to a) is yes, did Canada breach this duty?

c) Did Canada owe a common law duty of care to take reasonable steps to prevent all Indigenous persons, excluding Indian (as defined in the *Indian Act*) and Inuit persons, who were placed in the care of non-Indigenous foster or adoptive parents from losing their Indigenous identities?

d) If the answer to c) is yes, did Canada breach this duty?

e) If the answer to either b) or d) is yes, can the Court make an aggregate assessment of some or all of the damages suffered by the Class as part of the common issues trial?

f) If the answer to either b) or d) is yes, is an award of punitive damages warranted?

g) If the answer to f) is yes, what amount of punitive damages ought to be awarded?

[12] These issues are common ingredients of the claims of class members. They are questions similar in nature to those certified in *Cloud v Canada (Attorney General)*, [2004] OJ No 4924 (CA); *Brown v Canada (Attorney General)*, 2010 ONSC 3095; and *Anderson v Canada (Attorney General)*, 2016 NLTD(G) 167.

[13] The Federal Court of Appeal has commented on this commonality question requirement in *Wenham* as follows:

- A question that ought to be approached purposively;
- Class members need not be identically situated vis-à-vis the defendant;

- Common issues need not predominate over other issues; and
- The claims must share a material and substantial common ingredient.

On the basis of the pleading, the common question element is satisfied.

VII. Preferred Procedure

[14] This case meets the preferability requirement mandated by the Supreme Court in *Hollick v Toronto (City of)*, 2001 SCC 68 at paras 28-30.

[15] A class action of this type has been shown through the 60's Scoop decision to be fair, efficient and manageable. It has also been seen to be preferable to other reasonably available means.

[16] This is particularly true in respect of a federal court class action where a single court has national scope to deal with a national issue. Any individual issues can be accommodated within the class action context as has been shown to date in related cases.

VIII. Representative Plaintiffs – Adequate Representation

[17] The proposed representative plaintiffs represent Métis and NSI experience. While a representative plaintiff need not be typical of the class, in this case having representative plaintiffs from both indigenous groups auger well for meaningful representation of both groups.

IX. Overlapping Actions

[18] There are a number of overlapping claims filed in provincial superior courts. To date, none of those claims have been certified despite the fact that some are several years old and no steps have been initiated by proposed class counsel in those cases (the Merchant Law Group).

[19] Give the nature of the claim in this case, there is a presumption in favour of a national class. There are no aspects which are unique or specific to one or more provinces.

[20] Experience from the 60's Scoop cases and the Indian Day School decision (*McLean v Canada*, 2019 FC 1076) confirm the uniquely suitable nature of a federal class proceeding.

[21] The Court has considered the CBA Class Action Protocol. This case suits a federal court class proceeding.

X. Conclusion

[22] This case should be certified as a class proceeding. An order to that effect will issue. A more complete formal order with Notices is awaiting finalization and translation and will issue in the near future.

"Michael L. Phelan"
Judge

Ottawa, Ontario
June 10, 2021

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2166-18
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