Case In Point

Class Action Brought by Off-Reserve Indigenous Children and Their Families Certified

Date: June 24, 2022

In *Stonechild v. Canada*, Justice Phelan of the Federal Court recently certified a class proceeding brought on behalf of off-reserve Indigenous children and their families. Under the Federal Court system, this avoids the necessity or prospect of up to thirteen separate provincial and territorial class actions.

The claim seeks to hold the government of Canada (Canada) liable to off-reserve Indigenous children and their 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.

The class proceeding challenges, on behalf of the Primary Class Members, 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, thus resulting in their loss of identity, culture, family, and federal benefits.

The claim also seeks relief for the parents and grandparents of the Primary Class Members, known as the Family Class.

The claim is grounded in Canada's duty to protect apprehended Indigenous children and youth from harm – specifically 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.

The motion for certification was contested by Canada. While Canada accepted that the plaintiffs have a reasonable cause of action, a certifiable class and appropriate representative plaintiffs, it asserted that the resolution of the issues raised in the claim requires the presence and participation of the provinces and territories, which operate the child welfare systems. As translated into the terms of the certification test under the Canadian law of class proceedings, Canada specifically took issue with the common question and preferability prongs of the certification test, arguing that the questions posed in the claim are only theoretically common and would in reality require individual assessments based on the jurisdictional issues involved.

Justice Phelan noted that while Canada raised what it described as "jurisdictional issues," it did not assert that the Court does not have jurisdiction over a claim against Canada alone. Instead, Canada simply took the position that the plaintiffs should be suing the provinces as well. With respect to access to jurisdiction, the Court held that a single class proceeding was evidently more effective and efficient and may well be "the only way this type of litigation could proceed." A single national jurisdiction is also, according to the Court, more efficient with regards to judicial economy.

For these reasons, and others noted in the decision, the class proceeding was certified.

This decision is a significant development given its cultural and societal context, and represents an application of class proceedings law to what appears to be a novel type of claim.