Federal Court  Cour fédérale

Date: 20220601

Docket: T-620-20

Citation: 2022 FC 780

Ottawa, Ontario, June 1, 2022

PRESENT: The Honourable Mr. Justice Phelan

PROPOSED CLASS PROCEEDING

BETWEEN:

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

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

I. Proceeding

[1] This is a motion by the purported plaintiffs (Lucy Tookalook and Tanya Jones [referred to here as the Proposed Participants] on behalf of Nunavik Inuit class members against the Attorney General of Quebec and Attorney General of Canada) in a class action application filed

in Quebec Superior Court (No. 500-06-001177-225). The Quebec action has not been certified as a class action.

[2] The Proposed Participants ultimately seek to have their class carved out by the Federal Court from the certification of the Stonechild action and/or such Federal Court action stayed at least with respect to Nunavik Inuit class members pending an authorization decision of the Superior Court of Quebec.

[3] The Proposed Participants seek status firstly as participants in this class proceeding under Rule 334.23(1) of the *Federal Courts Rules*, SOR/98-106, or alternatively as interveners under Rule 109 in the same proceeding. The two aspects of the motion are dealt with separately below but with the same result.

[4] This motion for status (amended version dated March 28, 2022) came to this Court very late in these certification proceedings. It was filed a few weeks before the oral hearing of the certification motion in Vancouver on April 12, 2022. The Stonechild action is dated June 10, 2020, and has been registered in the National Class Action Database since July 2020.

[5] Contrary to the wishes of the Stonechild Plaintiffs who asserted significant prejudice and other good reasons that the motion not be heard by this Court, in order to better understand the alleged competing interests in the litigation, the Court granted the Proposed Participants an opportunity to make oral argument after the contested certification argument. Ultimately, the

Proposed Participants' position played no role in the Court's conclusion with respect to the certification proceeding.

II. Background

[6] The Stonechild action was commenced in the Federal Court on June 10, 2020. The Tookalook action was initiated in the Quebec Superior Court on February 21, 2022.

[7] In the Stonechild action, the Plaintiffs seek redress on behalf of a national class of First Nations (status, non-status Indians), Inuit and Métis persons who were removed from their "off reserve" homes throughout Canada between January 1, 1992 and December 31, 2019, and placed in the care of individuals who were not members of the Indigenous group, community or "people" to which they belonged.

[8] The Stonechild Plaintiffs have carefully structured their claim, as they are entitled to do, to engage solely the liability of the single Defendant Canada. They allege that Canada breached a duty, owed to the class, to protect and preserve their aboriginal identity. That duty is grounded in the honour of the Crown, the fiduciary relationship between Canada and Indigenous Peoples and Canada's constitutional responsibility for all Indigenous people as Indians under s 91(24) of the *Constitution Act* (see *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12).

[9] The Stonechild action seeks relief for Canada's several liability in this Court through a certified class action which the Plaintiffs contend will allow for the issue of Canada's liability

towards class members to be determined efficiently in a single forum which they believe will provide for timely access to justice for tens of thousands of members of the proposed class.

While Canada opposes certification, it does concede that the pleadings disclose a reasonable cause of action.

[10] The Plaintiffs in the Stonechild action purport not to seek or foreclose relief against the provinces or territories for causes of action related to the provision of Indigenous child welfare services. One alternative to the Federal Court action would require those class members to seek relief against Canada (and potentially others) in 13 jurisdictions – a matter further considered in the Stonechild certification matter.

[11] The Proposed Participants' action in Quebec is on behalf of Nunavik Inuit individuals who were part of Quebec's child welfare system.

[12] The Proposed Participants' Quebec action is grounded in breaches by the Governments of Canada and Quebec of the James Bay and Northern Quebec Agreement [Agreement] signed in 1975 under which the Quebec and federal governments share responsibility for the Inuit of northern Quebec. The action is framed in terms of discrimination against the Inuit of Nunavik through the joint failure to provide adequate child and family services or essential services.

[13] The Proposed Participants assert an overlap between the class members in each action as an Inuit child placed into care with a non Inuit family after January 1, 1992, would be a member of both class actions as would be the child's parents and grandparents.

[14] Canada takes no position on this motion. It presumably will have its day in court if the matter is heard by the Quebec Superior Court.

III. Analysis

A. *Rule 334.16(1)*

[15] The Proposed Participants had more serious hurdles to overcome. They had to establish that they had a right at this stage to bring an intervener application in light of Rule 334.16(1).

334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if …	334.16 (1) Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :

[Emphasis by Court]

[16] The essential problem is that the Proposed Participants' motion is, at best, premature as the Stonechild matter had not been certified.

[17] I agree with the Plaintiffs and with the BC Supreme Court in *Burnett v St Jude Medical, Inc*, 2008 BCSC 148 [*Burnett*], dealing with a similar rule in British Columbia, that there must first be a certified class proceeding before class member rights standing could be recognized.

[18] While there is no authoritative pronouncement on this provision, it is evident that the Stonechild proceeding is not yet certified under Rule 334.16, is not yet a "class proceeding" within the meaning of Part 5.1 of the Rules and no classes or subclasses existed at the time of the

motion hearing. The Proposed Participants are not therefore “class members” in the Stonechild action.

[19] The phrase in Rule 334.23(1) - “at any time” – must be read in the context of an existing “class proceeding”. Rule 334.23(1) contemplates a right to participate in a “class proceeding” not just any related proceeding.

[20] Rule 334.16(1), prior to listing the relevant certification factors, provides “Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding” [emphasis added] indicative that the Rules do not contemplate a proceeding becoming a class proceeding before certification.

[21] Rule 334.23(1) then follows allowing a class or subclass to participate in the class proceeding.

[22] Therefore, the Proposed Participants who arguably are class members under the Stonechild definition of class members must await the certification decision before seeking rights of participation.

[23] Although the Proposed Participants argue that provisions equivalent to Rule 334.23 have been interpreted by the BC and Ontario courts to allow class members to actively participate at all stages of the class proceeding including motions taking place prior to the certification of the action to protect their interest, I can find no such support for this proposition.

[24] As indicated earlier, the British Columbia Supreme Court has held to the opposite effect on a provision which more closely mirrors the Federal Court Rule – or more properly since the Federal Court class action rules were heavily influenced by BC legislation – the Federal Court Rule mirrors the BC legislation (*Class Proceedings Act*, RSBC 1996, c 50).

> 15 (1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding.

[25] The Ontario provision (*Class Proceedings Act*, SO 1992, c 6) is more broadly worded and is broader in application.

> 14 (1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a proceeding under this Act, permit one or more class members to participate in the proceeding.

[26] The Ontario provision allows for participation at "any time in a proceeding under this Act" whereas the Federal Court Rule allows for participation only in "a class proceeding". Importantly, the Ontario Act contemplates participation pre-certification under the interpretative rules in s 1(3) of the Ontario Act where a reference to a "class member" includes a reference to a person who would be a class member if the action is certified.

> 1 (3) If the context so requires, a reference in this Act to a representative plaintiff, defendant or party, or to a class or subclass member, includes a reference to a person who would, if a proceeding under this Act were certified as a class proceeding, be a representative plaintiff, defendant or party or class or subclass member, as the case may be.

[27] In BC's *Burnett* case, the Province who was not a party attempted to rely on sections 12 and 15 of the BC *Class Proceeding Act* as authority for the Court to make an order to allow it to participate in the class proceeding. The Court held "… but those sections apply to a "class proceeding" which is defined under the statute as a proceeding certified as a class proceeding".

[28] The *Burnett* matter of standing was ultimately resolved in the Province's favour by the invocation of the Supreme Court's inherent jurisdiction, a matter not available to the Federal Court and where, as has been often recognized, the class action rules are essentially a complete code. The Supreme Court was additionally able to rely on its unique jurisdiction under the provincial *Law and Equity Act*, RSBC 1996, c 253, another tool unavailable to this Court.

[29] Therefore, in my view, the Proposed Participants do not have the status or right to bring this motion and on those grounds alone, it must be dismissed.

B. *Intervention Test – Rule 109*

[30] The central issue is whether the Proposed Participants should be granted leave to intervene and if so, on what terms and what relief.

[31] Rule 109 confers discretionary power on the Court to grant leave to any person to intervene in a proceeding. It also describes the contents of the notice of motion including most particularly how participation would assist the Court. Lastly, the Rule provides the Court with the authority to set the terms of that participation.

109 (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.	**109 (1)** La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.
(2) Notice of a motion under subsection (1) shall	**(2)** L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :
(a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and	**a)** précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;
(b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.	**b)** explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.
(3) In granting a motion under subsection (1), the Court shall give directions regarding	**(3)** La Cour assortit l'autorisation d'intervenir de directives concernant :
(a) the service of documents; and	**a)** la signification de documents;
(b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.	**b)** le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

[32] The central issue to be decided on a motion to intervene is whether the proposed intervention will assist the Court in deciding the issues of fact or law in the principal proceeding.

(1) Preliminary

[33] In *Rothmans, Benson & Hedges Inc v Canada (Attorney General)*, [1989] FCJ No 468, [1990] 1 FC 84 (FCA), that Court set forth non-exhaustive factors to be considered by the Court, the weight of any and all factors being the responsibility of a court hearing the motion.

[34] The Proposed Participants' motion raises a number of issues, both technical and substantive, which justify dismissal of the motion.

[35] The Proposed Participants' motion is significantly late. The contested class action hearing was scheduled by the Federal Court in November 2021. The amended motion is dated March 28, 2022. The potential to disrupt and delay the Federal Court proceeding is obvious and of considerable prejudice to the Plaintiffs.

[36] While the Proposed Participants' Statement of Claim is dated in February 2022, its contemplation and preparation would have, of necessity, been some considerable time before that date. The Court is unaware of any efforts to alert the Court to the possibility that its scheduled hearing may be impacted by an intervention motion.

[37] Justice Stratas succinctly put the issue of lateness in this context in *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 13, at para 25:

> Where an intervention motion is late - and valid reasons sometimes exist - proposed interveners should candidly fess up, explain themselves, emphasize the importance of and critical need for their participation, and propose measures to minimize any prejudice:

> *Tsleil-Waututh Nation* at paras. 15 and 32. Here, however, owing to the degree of lateness, the Court doubts it would have accepted any explanation.

[38] Quite apart from the prejudice of lateness, Justice Stratas also addressed the Court's obligation to sort out the wheat from the chaff, addressed later in these Reasons, where, at paragraph 32, he wrote:

> In this area, the Court must be alert. Earnest and driven by their passion for their cause, some moving to intervene try to add new issues to a proceeding, sometimes deliberately, sometimes not. Thus, in considering a motion to intervene, the Court must gain a "realistic appreciation" of the "essential character" and "real essence" of both the issues in the proceeding and the issues the proposed intervener intends to raise: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 at paras. 49-50.

[39] The Court has already discussed the matter of lateness and of failure to comply with Rule 109(2). In addition to those deficiencies, the Proposed Participants do not meet the test for intervention status.

[40] The fact that a class member may be a member of two classes – Stonechild and Tookalook - does not operate to justify denying certification of the Stonechild action nor an alternative in the definition of the class nor support a stay of part of the Stonechild case.

[41] The Proposed Participants' basic point is that the Stonechild action does not meet the preferability requirement under Rule 334.16(1)(d) to the extent that that action would include Inuit in Nunavik. The Proposed Participants repeatedly claim overlap between their action and Stonechild. To that end, in argument, they filed a chart outlining their suggested overlap.

[42] While there may be overlap in the class members in the two actions, there is no overlap in the underlying claims themselves nor are they mutually exclusive of each other.

[43] As Justice Stratas commented, referred to in para 38 of these Reasons, the Court must gain a realistic appreciation of the essential character and real essence of the issues in the two matters.

[44] In my view, the Tookalook action pleads a very different claim and theory of liability to that of Stonechild and seeks compensation for different wrongdoings. The Stonechild action is grounded in Canada's exclusive jurisdiction and its alleged duty to protect and preserve the Aboriginal identity of Indigenous children and youth. It engages the honour of the Crown and positive obligations and obligations on Canada.

[45] The Tookalook action grounds liability on the Health and Social Services Provisions of the Agreement, the Northern Quebec Transfer Agreement 1981 and provincial obligation under Quebec law.

[46] I cannot find where the Proposed Participants' participation would assist this Court. Other than making the claim, the Proposed Participants offer nothing new and of assistance in this Court's deliberation of the Stonechild certification motion. All the points regarding preferability have been made. It is noteworthy that Canada has not pointed to the Tookalook action as a relevant issue in the preferability test as against certification.

[47] The Proposed Participants, in seeking the relief in this Court of a stay or carve out, presume facts and matters not in issue and not necessary.

[48] The Proposed Participants presume that their action will be certified – a presumption that this Court will not and should not make out of respect for the jurisdiction of the Quebec Superior Court.

[49] The Proposed Participants presume that it is necessary for this Court to carve out the Tookalook class and grant a stay dealing with that aspect. They fail to consider that the Quebec Superior Court may wish to carve out the Stonechild action from the Tookalook class. This Court should not be seen to be in any way interfering with that court's options.

[50] Lastly, the Proposed Participants do not address the opt out remedy available to members of either class.

[51] The Proposed Participants have not pointed to any cases where an intervener was able to request a carve out or a stay of proceedings under Rule 50 nor have they made out a case for a stay.

[52] In my view, the proposed intervention is prejudicial to the Plaintiffs, is unnecessary and of no assistance to the Court – even if the Proposed Participants had the right to seek such status.

IV. Conclusion

[53] Therefore, for all these reasons, the Proposed Participants' motion is dismissed with costs payable to the Plaintiffs forthwith in a lump sum of $2,000.

ORDER in T-620-20

THIS COURT ORDERS that the Proposed Participants' motion is dismissed with costs payable to the Plaintiffs forthwith in a lump sum of $2,000.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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