

Federal Court



Cour fédérale

Date: 20230426

Docket: T-1584-21

Ottawa, Ontario, April 26, 2023

PRESENT: The Honourable Mr. Justice Manson

CERTIFIED CLASS PROCEEDING

BETWEEN:

**BRAELYN CATCHEWAY
AN INFANT, BY HER LITIGATION GUARDIAN
TIMOTHY CATCHEWAY**

Plaintiff

and

HIS MAJESTY THE KING

Defendant

ORDER

UPON motion made by the Plaintiff, Braelyn Catcheway, by her litigation guardian Timothy Catcheway, for an order:

- a) certifying this action as a class proceeding;
- b) certifying the class;
- c) appointing the representative Plaintiff;
- d) setting out the common issues of fact or law for the class; and,
- e) appointing class counsel;

AND UPON reading the Notice of Motion dated March 11, 2022, and the affidavits of: Dr. Sheila Carr-Stewart, sworn March 8, 2022; Timothy Catcheway, sworn March 9, 2022, Eduardo Tanjuatco, sworn March 11, 2022; Jonathan Allen, sworn July 18, 2022, Dr. Sheila Carr-Stewart, sworn August 11, 2022 and Timothy Catcheway, sworn August 18, 2022;

AND UPON considering the Federal Courts Rules on class proceedings, including but not limited to Rules 334.1, 334.11, 334.12, 334.16 and 334.17, and the relevant jurisprudence;

AND UPON considering the submissions of counsel for the parties and being informed of the consent of the Defendant to the terms of this Order;

THIS COURT ORDERS that:

1. This action be certified as a class proceeding (the “Class Proceeding”) against the Defendant, His Majesty the King (“Canada”).
2. The following definitions apply to this Order:
 - a. “Student” means an Indigenous individual ordinarily resident on reserve and enrolled in elementary or secondary education at a First Nation Managed School during the Class Period;
 - b. “First Nation Managed School” (“School”) means a school in Canada listed in a schedule to be determined by counsel for the Plaintiff and Canada prior to the publication of Notice of Certification and if the parties cannot agree, the court will determine the list after hearing submissions;

- c. “On-Reserve Education” means the elementary and secondary curriculum offered by First Nation Managed Schools to students; and
 - d. “Common Conduct” means any federal Crown conduct, policy or policies, funding formula or methodologies that were applied in the same way across all Schools and for all of the Class Period.
3. The class (the “Class”) shall be defined as:
 - a. All individual Students who attended a First Nation Managed School for educational purposes at any time during the period from and including April 17, 1985 until October 18, 2021 (the “Class Period”).
4. Braelyn Catcheway, by her litigation guardian Timothy Catcheway, is appointed as the representative Plaintiff on behalf of the Class.
5. Pursuant to Rule 334.17 (1) (c) of the Federal Courts Rules, the Class claims Canada was in breach of section 15 of the Canadian Charter of Rights and Freedoms concerning the provision of Indigenous On-Reserve Education for the Class.
6. The Class claims the following relief pursuant to Rule 334.17 (1) (d) of the Federal Courts Rules:
 - a. an order for damages pursuant to the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c. 11, s. 24(1);

- b. an order for punitive damages pursuant to the Charter of Human Rights and Freedoms, C.Q.L.R., c. C-12, s.49 and the Civil Code of Quebec, C.Q.L.R., c.C-1991, s. 1621;
 - c. an order for exemplary and punitive damages;
 - d. costs of notice and of administering the plan of distribution of the recovery in this action, plus applicable taxes, pursuant to Rule 334 of the Federal Courts Rules;
 - e. pre-judgment and post-judgment interest;
 - f. costs of this action; and
 - g. such further and other relief as this Court deems just.
7. The following common issues are certified for the purposes of this Class Proceeding:
- a. What Common Conduct did Canada employ during the Class Period to fund On-Reserve Education at the Schools?
 - b. Alternatively, what conduct, policy or policies, funding formula or methodologies applied to only some Schools and/or for only some of the Class Period?
 - c. Did Canada, through any Common Conduct found to exist in common issue question (a) create or contribute to a disproportionate impact on the class members based on race, ethnic origin or an analogous ground under subsection 15(1) of the Canadian Charter of Rights and Freedoms?

- d. If the answer to common issue question (c) is yes, is this disproportion impact saved by subsection 15(2) of the Canadian Charter of Rights and Freedoms?
- e. If the answer to common issue question (c) is yes, and the answer to common issue question (d) is no, does the disproportionate impact constitute substantive discrimination by reinforcing, perpetuating or exacerbating disadvantage through, for example, stereotyping, prejudice or arbitrariness?
- f. If the answer to common issue question (e) 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?
- g. If the answer to common issue question (e) is yes, and the answer to common issue question (f) is no, do the discriminatory impacts 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?
- h. If the answer to common issue question (g) 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 pursuant to Federal Courts Rule 334.28 and, if so, in what amount?
- i. If the answer to common issue question (h) is yes, did any of Canada's Common Conduct violate Class Members' Charter section 15 (1) rights of such a nature that it warrants an award of punitive damages, subject to consideration of any other compensation that is ultimately awarded to the Class Members?

- j. If the answer to common issue question (i) is yes, what amount of punitive damages should be awarded against the Defendant?
8. If the answer to common issue question (b) is that there was conduct, policy or policies, funding formula or methodologies applied to only some Schools and/or for only some of the Class Period, the parties will make submissions to the Court for further orders or directions as to the conduct of the Class Proceeding, including but not limited to whether this action can and should continue as a class proceeding or be decertified to proceed as an individual action.
9. Klein Lawyers LLP (“Class Counsel”) are appointed to act on behalf of the Class in this Class Proceeding.
10. The balance of the Plaintiff’s motion for class certification as set out in her Notice of Motion, dated March 11, 2022, is abandoned without prejudice to either party.
11. No other proposed class proceeding may be commenced with respect to the matters addressed in this action, absent leave of this Court.
12. The form of notice of certification, the manner of giving notice, the manner and timing for opting out, and such related matters, shall be determined by separate order(s) of the Court.
13. The parties shall schedule a case management conference with the Court within 6 months of the date of this Order to report to the Court on the status of these proceedings, including the exchange of information and documents, and the progress of any potential resolution.

14. There shall be no costs on this motion for certification of a class proceeding.

"Michael D. Manson"

Judge