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# *Children at the Core:*

# The Fight for Indigenous and Children's Rights Through *Stonechild* and Other Class Actions

Presented by:

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# INTRODUCTIONS

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# OVERVIEW

## Building Blocks for Indigenous and Children's Rights in Canada

1. Indigenous Child Welfare in Canada
2. Class Actions as Vehicles to Address Systemic Wrongs
3. UNCRC and UNDRIP: Pressing for Realization through *Stonechild* and Other Class Actions

# **1991: Canada signs the UN Convention on the Rights of the Child**

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**1991: start of the class period in  
*Stonechild* and other class actions**

# - PART 1 – Indigenous Child Welfare in Canada

**“Before the healing can take place, the  
poison must first be exposed.”**

(from Tomson Highway’s *Dry Lips Oughta Move to Kapuskasing*)

# Millennial Scoop: Egregious over-representation of Indigenous children in care

## Indigenous children in foster care

**7.7%**  
of all children  
under 14 are  
Indigenous



**53.8%**  
of children in  
foster care  
under 14 are  
Indigenous

Census 2021 Data

In Canada, 53.8% of children in foster care are Indigenous, but account for only 7.7% of the child population according to Census 2021.

Results from the 2011 National Household Survey also show that 38% of Indigenous children in Canada live in poverty, compared to 7% for non-Indigenous children.

# A Legacy of Residential Schools in Canada

## The Sixties Scoop:

Around 20,000 Indigenous children were “scooped up” from their families and communities for placement in foster homes or adoption outside their communities, resulting in serious cultural loss (1950s - 1980s)

## Indigenous Children in the Child Welfare System:

There are more than three times as many Indigenous children in the system today (removed and isolated from the families) than at height of Residential Schools

Primary reason for removal is not abuse (rate is lower than for non-Indigenous), but “neglect”: overcrowded housing, failure to provide necessities (in other words: poverty).

# - PART 2 -

## Class Actions as Vehicles to Address Systemic Wrongs

**“At a time of truth and reconciliation, federal responsibility to Indigenous children should not be hidden behind provincial and territorial walls.”**

(from the opening paragraph of Justice Phelan’s judgment certifying the *Stonechild* class action; 2022 FC 914 at para 1)

# Class Actions as a Procedural Tool for Substantive Change

## Three goals:

1. Judicial economy;
2. Access to justice;
3. Behaviour modification

(per Chief Justice McLachlin in *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 15)

“First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public.”

# Defining Systemic Negligence

- *Rumley v British Columbia*, 2001 SCC 69
- *White v Canada (Attorney General)*, 2002 BCSC 1164

# ***Rumley v British Columbia*, 2001 SCC 69**

## **Defining Systemic Negligence**

- *Rumley v British Columbia*, 2001 SCC 69
- *White v Canada (Attorney General)*, 2002 BCSC 1164

The Supreme Court of Canada, affirming *Rumley v British Columbia*, 1999 BCCA 689:

"... Claimants will not have to prove that the abuse was caused by a particular staff member or other student in the absence of a claim for vicarious liability. **In essence the claims will be based on systemic negligence, the failure to have in place management and operations procedures that would reasonably have prevented the abuse.**" (at para 18)

These are actions (or omissions) **whose reasonability can be determined without reference to the circumstances of any individual class member.**" (at para 30)

# ***White v Canada (Attorney General), 2002 BCSC 1164***

## **Defining Systemic Negligence**

- *Rumley v British Columbia*, 2001 SCC 69
- *White v Canada (Attorney General)*, 2002 BCSC 1164

**“[Systemic negligence] is not negligence that occurs without any individual acts, omissions or decisions, rather it is negligence which arises when individual acts, omissions or decisions are directed towards a general rather than a specific set of circumstances.” (at para 47)**

**“The fact that the negligence is described as "systemic" does not imply that it is unattributable to an individual or individuals, rather it implies that the impugned acts or omissions are said to be negligent because they create or maintain a system which is inadequate to protect the plaintiff class from the harm alleged.” (at para 48)**

# Systemic Negligence and the Crown

- *Cloud v Canada*, 2004 CarswellOnt 5026, ONCA
- *Canada v Greenwood*, 2021 FCA 186
- *Nasogaluak v Canada (Attorney General)*, 2021 FC 656, rev'd in part 2023 FCA 61

## ***Cloud v Canada*, 2004 CarswellOnt 5026 (ONCA)**

### **Systemic Negligence and the Crown**

- *Cloud v Canada*, 2004  
CarswellOnt 5026, ONCA
- *Canada v Greenwood*,  
2021 FCA 186
- *Nasogaluak v Canada*  
(Attorney General), 2021  
FC 656, rev'd in part 2023  
FCA 61

“On the appellants' claim of systemic breach of duty... this is a part of every class member's case and is of **sufficient importance to meet the commonality requirement. It is a real and substantive issue for each individual's claim to recover** for the way the respondents ran the school. ...the fact that beyond the common issues there are numerous issues that require individual resolution does not undermine the commonality conclusion.”  
(at para 8)

# **Canada v Greenwood, 2021 FCA 186**

## **Systemic Negligence and the Crown**

- *Cloud v Canada*, 2004 CarswellOnt 5026, ONCA
- *Canada v Greenwood*, 2021 FCA 186
- *Nasogaluak v Canada (Attorney General)*, 2021 FC 656, rev'd in part 2023 FCA 61

“... the required elements that a plaintiff must establish are the same in all negligence claims, regardless of whether or not they are pursued on a systemic basis. While the scope and content of the duty of care owed by a defendant and the evidence required to establish a breach will be different when the claim is made on a systemic basis, the elements of the tort of negligence are the same.” (at para 153)

## ***Nasogaluak v Canada (Attorney General)*, 2021 FC 656, rev'd in part 2023 FCA 61**

### **Systemic Negligence and the Crown**

- *Cloud v Canada*, 2004 CarswellOnt 5026, ONCA
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“... Similarity, I disagree with Canada’s characterization of these claims as individual because the framing of the pleadings is not. There will not need to be individual assessment until the common questions are answered. This is because the claims do not ask if an RCMP officer illegally assaulted a class member, but rather whether the operations of the RCMP create a system where illegal assaults happen. After this has been established, then it can be determined whether a particular class member was a victim of this system. The damage to the class member is both evidence of the system as well as potential cause for damages because of the alleged breach of their rights from the operation of the RCMP in the Territories.” (2021 FC 656 at para 102)

## – PART 3 –

# UNCRC and UNDRIP: Pressing for Realization through *Stonechild* and Other Class Actions

“This decision concerns children. More precisely, it is about how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities.”

(from the opening paragraph of the Canadian Human Rights Tribunal’s decision in 2016 CHRT 2 concerning on-reserve/First Nations child welfare; emphasis added)

# UN Declaration on the Rights of Indigenous Peoples

- In 2007, the United Nations adopted the United Nations Declaration on the Rights of Indigenous Peoples (the “Declaration”).
- In 2016, the Government of Canada endorsed the Declaration.
- In 2021, the *United Nations Declaration on the Rights of Indigenous Peoples Act* receives Royal Assent and comes into force (the “Act”).

## 4 The purposes of this Act are to

- (a) affirm the Declaration as a universal international human rights instrument with application in Canadian law; and
- (b) provide a framework for the Government of Canada’s implementation of the Declaration.

# The Declaration and Children's Rights

## **Article 2**

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

## **Article 7**

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

## **Article 8**

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

## **Article 8 (cont'd)**

2. States shall provide effective mechanisms for prevention of, and redress for:
  - (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
  - (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
  - (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
  - (d) Any form of forced assimilation or integration;
  - (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

...

# The Declaration and Children's Rights (cont'd)

## **Article 14**

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

## **Article 22**

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

# Convention on the Rights of the Child

## Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

where the parents are living separately and a decision must be made as to the child's place of residence.

...

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

...

## Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one

# Convention on the Rights of the Child (cont'd)

## **Article 20**

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

...

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children..

When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background

## **Article 24**

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

...

## **Article 30**

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

## – CONCLUSION –

UNCRC and UNDRIP both underscore and represent the obligations of the federal government towards Indigenous children in Canada. Class actions like *Stonechild* call on the government to recognize and live up to those obligations, **for the children.**

# Questions?

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