Federal Court  Cour fédérale

Date: 20210923

Docket: T-2169-16

Citation: 2021 FC 987

CLASS PROCEEDING

BETWEEN:

GARRY LESLIE MCLEAN,
ROGER AUGUSTINE,
CLAUDETTE COMMANDA,
ANGELA ELIZABETH SIMONE
SAMPSON, MARGARET ANNE SWAN and
MARIETTE LUCILLE BUCKSHOT

Plaintiffs (Respondents)

and

HER MAJESTY THE QUEEN IN RIGHT OF
CANADA as represented by
THE ATTORNEY GENERAL OF CANADA

Defendant (Respondent)

and

JESSIE WALDRON and
RANDY KEVIN POOYAK

Moving Parties

and

DELOITTE LLP

Intervener

REASONS FOR ORDER

PHELAN J.

I. Introduction

[1] This proceeding constituted two motions to permit two Class Members [Ms. Waldron and Mr. Pooyak] to change the level of their previously filed claims concerning the Indian Day School Settlement Agreement [IDSSA] and to obtain a declaration on behalf of the Class to permit the filing of further documentation of abuse and to modify their claim level selections.

[2] The two motions are essentially identical. The issues are the same and they have been advanced and opposed as if brought by a single party. These reasons will apply to both motions.

[3] The two motions are brought by Class Members [the Moving Parties] who retained their own counsel (often referred to in these various proceedings as “Independent Counsel”) rather than by Class Counsel (who in fact oppose the motions, as does the Defendant “Canada”).

[4] For the reasons to follow, these motions will be dismissed without costs, as no costs were requested.

[5] These motions seek an interpretation of the IDSSA with which none of the parties agree and which does not accord with a fair reading of the text. It is also inconsistent with the context in which the settlement was arrived and contrary to the purpose or intent of the IDSSA as understood by the parties.

[6] The motions would, in effect, alter the terms of the IDSSA which were agreed to by the parties and approved by the Court "as fair and reasonable and in the best interests of the parties". As sympathetic as the Court is to the survivors of the Indian Day Schools and the pain they suffered, the Court cannot rewrite the IDSSA.

[7] At the heart of the dispute is the right of a Class Member to make, what is often called, "progressive disclosure," where additional narrative and documents are provided over time. This model has the effect of changing the level of harm originally claimed to a higher level – a feature of the Independent Assessment Process [IAP] under the Indian Residential Schools Settlement structure. The parties were at pains to avoid using the IAP process.

II. Background

A. *The IDSSA*

[8] The underlying action was commenced in December 2016 and certified on June 21, 2018. On March 12, 2019, the parties entered into the IDSSA.

[9] This Court held a settlement approval hearing in Winnipeg from May 13 to 15, 2019.

[10] At the hearing, individuals in support of the settlement addressed the Court, followed by thirteen counsel and thirty individuals who objected to the IDSSA. Some of the counsel advancing this motion were among the thirteen counsel opposed to the IDSSA.

[11] Mr. Racine, on behalf of a number of objectors, raised the concern that Class Members would have difficulties making Level 2 to 5 claims. He also addressed the issue of availability of Class Counsel.

[12] Ms. Sunchild and Mr. Seed appeared on behalf of a large number of other objectors. Ms. Sunchild raised concerns that survivors could have difficulty disclosing sexual abuse and that Claimants might submit a Level 1 claim to avoid the personal difficulties of disclosing abuse to justify a higher claim level.

[13] Those submissions were considered by the Court. The Court then approved the IDSSA on August 19, 2019, subsequently set an Implementation Date of January 13, 2020, and approved the Claim Form to be used in the administration of compensation.

[14] The IDSSA sets out a Claims Process that, as expressed in the Agreement, is to be "expeditious, cost-effective, user-friendly and culturally sensitive." It provides two and a half years for Class Members to file their claims. It also importantly provides both emotional and legal support through the Office of the Claims Administrator, Class Counsel (whose services are free), or through counsel of the Class Members' choosing.

[15] The IDSSA is a comprehensive document that addresses a broad range of considerations and mechanisms consistent with the settlement of a complex class action. The salient features, including some of the competing positions, are set forth in the Court's Approval Order and Reasons of August 19, 2019 (see *McLean v Canada*, 2019 FC 1075 [*McLean*]). An overriding

goal, as expressed by the parties, was to avoid the excesses, complexities, and other negative features of the Indian Residential School Settlement Agreement [IRSSA] and its processes.

[16] Sections 9 and 10 of the IDSSA, along with Schedule B, describe the Claims Process and the role of the Claims Administrator.

[17] Section 9 sets out in general terms the circumstances under which the Claims Administrator pays compensation. It confirms that decisions of the Claims Administrator and Third Party Assessor are final except as set out in the Claims Process. It also sets out the Principles Governing Claims Administration.

> **9.03 Principles Governing Claims Administration**
>
> (1) The Claims Process is intended to be expeditious, cost-effective, user-friendly and culturally sensitive. The Claims Administrator will identify and implement service times for the Claims Process no later than six months following the Implementation Date.
>
> (2) The intent is to minimize the burden on the Claimants in pursuing their Claims and to mitigate any likelihood of re-traumatization through the Claims Process. The Claims Administrator, Third Party Assessor, and the Exceptions Committee and its Members, shall, in the absence of reasonable grounds to the contrary, assume that a Claimant is acting honestly and in good faith. In considering an Application, the Claims Administrator, Third Party Assessor, and Exceptions Committee and its Members, shall draw all reasonable and favourable inferences that can be drawn in favour of the Claimant, as well as resolving any doubt as to whether a Claim has been established in favour of the Claimant.

[18] Section 9.02 states that compensation will be determined in accordance with the Claims Process at Schedule B. This schedule sets out each step in the Claims Process, beginning with the manner in which the Claims Administrator receives claims under "Phase 1 : Intake":

> 1. The Claimant files his/her application form and all supporting documentation with the Claims Administrator prior to the Claims Deadline. In making that Application, the Claimant self-identifies the Level of Harm that he/she has suffered, in accordance with the Harms Grid.
>
> 2. The Claims Administrator (i) digitizes all paper applications, and (ii) assesses the Claimant's eligibility as a Class Member. A Claimant is eligible for compensation if he/she both attended a Federal Indian Day School during the Class Period and has not released Canada for abuses suffered at the Federal Indian Day School through a previous individual settlement.
>
> 3. The Claims Administrator sends one of three Acknowledgement Letters to the Claimant; that is, one of (i) a letter confirming the Claimant's eligibility as a Class member; (ii) a letter denying the Claimant's eligibility as a Class member; or (iii) a letter requesting additional information to determine the Claimant's eligibility as a Class member.
>
> 4. The Claims Administrator sorts the applications of eligible Claimants in accordance with Claimants' self-identified Levels.

[19] Under "Phase 2 : Assessment", Schedule B outlines processes for Level 1 claims and for Level 2-5 claims, respectively. For Level 1 claims, the Claims Administrator reviews the claim and makes a determination as to eligibility. If eligible, the Claims Administrator approves the claim and payment is processed. If the Claims Administrator is of the opinion that a Claimant is eligible for a higher level, the Claimant is advised of this and may choose to remain at Level 1 or be reclassified at a higher level.

[20] Class Members claiming Levels 2 – 5, including those who have been re-classified, are assessed by the Claims Administrator after Canada has had the opportunity to provide supplemental information regarding eligibility on a limited number of claims. If the Claims Administrator determines that an application meets or exceeds the criteria for a Class Member's claimed level, the payment is processed at the level assessed by the Claims Administrator. If it does not meet the criteria, the Class Member can elect to have the claim reconsidered.

[21] The IDSSA sets out a reconsideration process and, ultimately, a right of review by the Third Party Assessor. It is in those circumstances that Schedule B explicitly sets out the possibility for Class Members to provide additional documentation in support of their Claim.

[22] The Claims Administrator's duties, which are addressed under section 10.01 of the IDSSA, include "developing, installing, and implementing systems, forms, information, guidelines and procedures for processing and making decisions on Applications in accordance with this Agreement."

[23] In addition to a Claims Process for Survivor Class Members, the IDSSA includes a $200 million Legacy Fund, paid to the McLean Day Schools Settlement Corporation, which the parties agreed would support legacy projects contributing to truth, healing, and reconciliation. The IDSSA explicitly states that it is intended for both Survivor Class Members and Family Class Members (spouses, former spouses, children, grandchildren and siblings of Survivor Class Members) to benefit from these projects.

[24] Prior to the approval hearing, on May 13, 2019, the parties agreed to amend the IDSSA by extending the claims period to two and a half years after Implementation. The parties also extended the opt-out period from 60 days to 90 days. This was in response to concerns that the initial one-year claims period was too short, as it did not provide enough time to file a Claim. These extensions significantly lengthened the time that Claimants had to gather their information and make their Claim.

[25] To facilitate the retention of non-Class counsel, the Court subsequently established a fee approval protocol to govern approval of fees charged by non-Class counsel.

B. *Pooyak Claim*

[26] Mr. Pooyak is a survivor of the Indian Day School system. He self-identified his Claim at Level 2. While Mr. Pooyak's evidence was provided via hearsay without explanation for the absence of direct evidence, the Court accepts his evidence of the difficulty he had in disclosing the abuse (a common feature of abuse cases) and failing to disclose the full details of his Claim. There is no issue that both Moving Parties had the benefit of the presumption of honesty established in the IDSSA. The issue at stake is the right to make additional claims or increasing claims for compensation.

[27] It was not until July 15, 2020, that Mr. Pooyak retained Sunchild Law to assist him. In November 2020, Sunchild Law submitted additional documents in an effort to claim Level 5 compensation instead of Level 2.

[28] In accordance with the Settlement process, the Level 2 claim had already been sent to Canada for review. The Level 2 claim was accepted in February 2021 and Mr. Pooyak received a cheque for $50,000.

[29] In response to Sunchild Law's request for reassessment of the Level 5 claim, the Claims Administrator advised that no additional narratives were permitted after June 15, 2020, and therefore the November 2020 filing was not eligible for level assessment. It is this decision that is the subject of Mr. Pooyak's motion.

C. *Waldron Claim*

[30] Mr. Racine's firm, Bergerman Smith LLP [BSL], is representing "JR", "NS", and Ms. Waldron in respect of their IDSSA claims. All three initially filed for Level 1 compensation and then subsequently filed for Level 4 compensation.

[31] JR filed his Level 4 claim on May 28, 2020, which was accepted.

[32] NS, having originally filed a Level 1 claim, then filed a Level 4 claim on December 17, 2020. On February 4, 2021, the Level 1 claim was paid.

[33] Ms. Waldron originally filed a Level 1 claim. On September 2, 2020, BSL filed another claim on Ms. Waldron's behalf, outlining abuses at Levels 3 and 4. On September 18, 2020, the Claims Administrator indicated that it would not accept the new Claim Form or the new claim level selections.

[34] On September 30, 2020, the Claims Administrator outlined its reasons for rejecting Ms. Waldron's new claims:

> … While claimants are invited to send information to complete their claim, they are not entitled to change their level selection.
>
> As previously mentioned, the Claims Process is designed for Claimants to submit their Claim form only once. The June 15th deadline was instituted in line with the Duties of the Claims Administrator (10.01) to develop, install and implement systems, guidelines and procedures for processing and making decisions on Applications. …

[35] Ms. Waldron's Claim was accepted at Level 1, not at Level 4.

[36] In summary, the Moving Parties could not or chose not to obtain adequate support to complete their original Claims Forms despite the mechanisms created by the IDSSA to provide that support.

[37] The Moving Parties were either frustrated, panicked, or sought to quickly end the process of filing a Claim. They submitted Claims they knew did not reflect the most severe harm experienced at their day school.

[38] Upon reflection and with some encouragement from others, they regretted their original choice of action and sought to file new, higher level Claims.

[39] As a result, the Moving Parties retained Independent Counsel to pursue these additional Claims for higher level compensation. After the Claims Administrator advised them that such further Claims could not be considered, they brought these motions.

D. *Settlement Implementation/June 15, 2020 Deadline*

[40] In respect of the creation of the exception to the process required under the IDSSA and the June 15, 2020 deadline, the Court accepts the evidence and submissions of the Plaintiffs, Defendant, and particularly of the Intervener Claims Administrator, Deloitte LLP [Deloitte], whose viewpoint was helpful to the Court.

[41] Following settlement approval, the Court approved a Claim Form on January 7, 2020. The Claims Process began on January 13, 2020. As evidenced by the Claims Administrator's witness, the process was designed such that Class Members would only submit one claim for compensation. The parties and the Claims Administrator accepted that progressive disclosure would not be permitted at the intake stage in light of the Court approved Claims Process.

[42] However, shortly after Implementation, the Claims Administrator observed that Claimants were submitting multiple claims forms through different methods of delivery. Such claims forms included additional narratives, support documents, and altered claim levels.

[43] The COVID-19 pandemic created further complications, both in terms of Claimants being able to access their supporting documents and in terms of Deloitte employees attending at their office to process the forms.

[44] Given these unusual circumstances, and after consultation with the parties, the Claims Administrator provided a “temporary allowance or exception” whereby Claimants could update their Claim Form if the Claim had not been fully adjudicated or payment had not been issued.

[45] On May 27, 2020, the Claims Administrator informed the parties that this temporary allowance would have to end. The Claims Administrator set June 15, 2020 as the last day for Claimants to either submit additional information or declare they would be doing so. Public notice of the date was widely distributed over Facebook, the Federal Indian Day School Class Action website, and the Claims Administrator’s website.

III. Issue

[46] The principal issue is whether the Class Members may file more than one Claim (application as it is phrased) for compensation under the IDSSA.

[47] The Moving Parties contend that the pre-June 15, 2020 process is the one provided for in the IDSSA and that they are not seeking to change the IDSSA. The parties, on the other hand, say that the pre-June 15, 2020 process was an exception to the IDSSA arising from the COVID-19 pandemic and resulting unusual circumstances.

IV. Analysis

A. *Jurisdiction – Court*

[48] This Court has continuing and exclusive jurisdiction over the implementation of the IDSSA. However, courts are severely limited in their review of a settlement and its administration. It is not the Court's role to impose terms that it thinks appropriate nor to rewrite the IDSSA. This Court specifically addressed those limitations in *McLean* at paras 68-70 and 74-75.

[49] In *JW v Canada (Attorney General)*, 2019 SCC 20 [*JW*], the Supreme Court of Canada reiterated both the obligation on courts to supervise class action settlements and the limitations on such court supervision. A court may only intervene in very limited circumstances – where relevant negotiated terms are not applied or where there is a gap in the agreement.

[50] In *JW*, Justice Abella recognized that finality and expediency are important goals, but concluded that it is paramount for the agreed-upon terms to be applied and implemented (para 34). Justice Côté likewise emphasized that the court's supervisory role is "limited and shaped by the terms of the agreement, once it is approved and determined to be fair, reasonable and in the best interests of the class" (para 120).

[51] The Supreme Court of Canada, while recognizing the importance of claimants receiving the benefits of a settlement, emphasized that the terms of the settlement agreement and the intentions of the parties controlled the process of court supervision and interpretation.

[52] In the present case, the Moving Parties seek to insert a term of “progressive disclosure” – the ability to file multiple claims at different compensation levels. Such claims are not provided for in the IDSSA and are inconsistent with the intent of the parties. Accordingly, this Court lacks the required supervisory jurisdiction.

B. *Jurisdiction – Moving Parties*

[53] The IDSSA binds all Class Members, including the Moving Parties. Some of the issues raised here were also raised in some form at the Settlement Approval Hearing.

[54] The Moving Parties, to the extent relief is not focused on their specific Claims, also seek a declaration that the IDSSA permits “Survivor Class Members to submit further documentation” as earlier described.

[55] With that declaration, the Moving Parties seek to claim relief on behalf of all Class Members. However, in my view, the Moving Parties and their Counsel do not have the authority to supplement the Court-approved responsibilities and obligations of the Representative Plaintiffs and Class Counsel.

[56] The Moving Parties have not sought leave of the Court to appeal an order, as contemplated by Rule 334.31 of the *Federal Court Rules*, SOR/98-106. The Moving Parties have no authority to seek a declaration on behalf of the Class. I address the issue of their own particular Claims later.

C. *The IDSSA and Progressive Disclosure*

[57] The Moving Parties assert that a proper reading of the IDSSA mandates that it encompasses progressive disclosure as part of the intake phase of the Claims Process. As stated in *Canada (Attorney General) v Fontaine*, 2017 SCC 47, the interpretation of a settlement agreement "must be grounded in the text and read in light of the entire contract" (para 37).

[58] When interpreting the IDSSA, the Court must have regard to the text, the context, and the stated or manifested intentions of the parties.

D. *Textual Interpretation*

[59] Schedule B of the IDSSA provides:

> The Claimant files his/her supporting documentation with the Claims Administrator prior to the Claims Deadline. In making the Application, the Claimant self identifies the Level of Harm that he/she has suffered in accordance with the Harms Grid.

[60] There is nothing in the IDSSA suggesting that progressive disclosure or the right to file changed Claims was a feature of the Agreement.

[61] The parties set July 13, 2022 as the deadline for filing any Claims. However, this does not suggest that Claimants should be permitted to refile, change, or make multiple claims prior this deadline.

[62] The text of the IDSSA refers to filing an application (or Claim – essentially the same thing). The use of the singular, while not determinative, is consistent with the parties' interpretation of a single claim. So too is the reference to filing the application form with "all supporting documents" indicative of a finality to the application filing. A proper assessment of the Claim can only take place when the Claims Administrator has received all the relevant information. The assessment mechanism is also consistent with a Claimant filing a single application that properly identifies the relevant harm level.

[63] Absent some other indication of a finality to filing, no Claim could be finally settled from its filing up to July 13, 2022; all Claims would be in a suspended state awaiting a possible claim for an increase in compensation. There is nothing in the IDSSA that specifies that payment would necessarily be final although the Moving Parties have suggested such a mechanism.

[64] Therefore, while the wording of the IDSSA is not definitive, it is consistent with the single claim approach. That consistency runs throughout the "context" and the "intention of the Parties" considerations.

E. *Context*

[65] As indicated in the Settlement Approval decision, a key factor in the structure of the IDSSA was to avoid many of the problems associated with the IRSSA, including the IAP process and its progressive disclosure feature.

[66] At the hearing, there was extensive reference to the Claims Process, the support available to potential claimants, the need for supporting documentation, and the desire for an expeditious process.

[67] There was considerable evidence and submissions regarding the Claims Forms, the need for emotional and legal support, concerns for the complexity of the process, and the lack of provision for ongoing disclosure. There was concern expressed for the difference between the IDSSA and the IRSSA.

[68] Counsel for the Moving Parties (not then acting for these Claimants) expressed concern that Class Members might submit Claims that did not capture the most severe harms experienced. One of those counsel apparently foretold the type of situation said to have happened here, where a Claimant would take the relatively easy step of accepting Level 1 compensation rather than experience the more arduous steps required for higher levels.

[69] This Court was aware of the concerns raised and the desire of some Class Members to have a process more like the IRSSA, but the Court concluded:

> The departures from the IRSS model cannot be said to be unreasonable. It would have been unreasonable to perpetuate some of its acknowledged abuses and difficulties. Even such organizations as the Assembly of First Nations have recognized a number of issues with the IRSS model. The Indian Day School model takes a different approach (*McLean* at para 134).

[70] Although the term “progressive disclosure” was not used in the Settlement Approval hearing, and therefore the doctrine of *res judicata* may not be strictly applicable, the Claims

Process was not meant to follow such a feature. It would be inconsistent to now import or interpret the IDSSA Claims Process in a manner giving effect to that aspect of the IRSSA. It would not be a fair and reasonable interpretation given this context.

[71] In accordance with the terms of the IDSSA , the Claims Administrator was charged with the duties and responsibilities of:

a) developing, installing and implementing systems, forms, information, guidelines and procedures for processing and making decisions on Applications in accordance with the IDSSA; and

b) developing, installing and implementing systems and procedures for making payments of compensation in accordance with the IDSSA.

[72] The Claim Form was approved by Order of this Court, dated January 7, 2020. In that same Order, the Implementation Date for the Claims Process was set at January 13, 2020.

[73] Consistent with the terms of the IDSSA, with the information received at Intake ("Phase 1"), the Claims Administrator performs an initial assessment of the Class Member's Claim Form for eligibility. The Claims Administrator focuses on whether the Claimant attended at a Schedule K School during the referenced time period and is not rendered ineligible for a reason such as having already received a prior settlement. The Claims Administrator then (i) provides correspondence to the Claimant regarding their eligibility as a Class Member and (ii) sorts the Claim in accordance with the self-selected harm level.

[74] At the assessment phase of the Claims Process ("Phase 2"), the Claim is considered on the basis of whether the Claim Form indicates a Level 1 claim or a Level 2 to 5 claim, which are sent into different processing streams. For Level 2 to 5 claims, the Defendant is entitled to provide supplemental factual information to the Claims Administrator on a certain proportion of claims on a graduating scale. The Defendant has 60 days to review the Claim Forms for Level 2 and 3 claims, and 90 days for Level 4 and 5 claims.

[75] A proper reading of the IDSSA within this context does not support an interpretation that progressive disclosure is a binding concept at either the intake phase or assessment phase.

[76] Further, the intention of the parties does not support such an interpretation, as evidenced by their actions and submissions.

F. *Intention of the Parties*

[77] In addition to the text and the context, the Court, in interpreting the IDSSA, must consider the intention of the parties. It is compelling that, given the contractual nature of the IDSSA, neither party supports the Moving Parties' position. The parties' submissions speak to the intent of the IDSSA and their actions are consistent with that intention.

[78] The Claims Administrator, in accordance with its duties and responsibilities, set up a Claims Process. It did so in conjunction with the parties, reflective of their understanding of the IDSSA. As initially envisaged, a Claimant was to file for a single harm level with all the relevant documentation.

[79] Circumstances changed – the pandemic invaded.

[80] I accept the Claims Administrator's evidence concerning the events and motives which led to a temporary variation of the Claims Process. The Moving Parties' criticism of the Claims Administrator, including their suggestion of ill motive, is without any substance or merit.

[81] In the process of administration, the Claims Administrator received approximately 111,642 claims from an estimated class of 140,000 Claimants. Approximately 72,000 have been adjudicated and paid.

[82] Further, there is no basis for concluding that there is a systemic problem with claims administration or that there are gaps between the IDSSA and how claims are being administered.

[83] I likewise accept the Claims Administrator's description of the difficulties inherent in giving effect to the Moving Parties' interpretation. The Moving Parties contest that description, but do so without evidence. They rely on so-called expert evidence from Mr. Stace and Dr. Poock, which is unnecessary and unpersuasive hearsay that this Court cannot accept.

[84] However, the practical and administrative difficulties associated with implementing what the Moving Parties contend is the proper interpretation and application of the IDSSA cannot alone justify the parties' position if to do so would violate the premise of the IDSSA.

[85] The difficulties pointed out by the Claims Administrator demonstrate that the parties established the Claims Process based on their intent to finalize the IDSSA and their understanding of its terms - that a single claim was to be filed and dealt with. The Claims Administrator clearly outlines the problems inherent in “unscrambling the egg.”

[86] The Moving Parties argue that what the Claims Administrator did in permitting a form of progressive disclosure was the proper interpretation and application of the IDSSA.

[87] This argument flies in the face of the evidence establishing that the Claims Administrator made an exception to the process to address problems it had processing Claims due to the pandemic. To suggest that the “exception” was in fact the “norm” is untenable both in fact and law.

[88] The parties and the Claims Administrator implemented an exception for good reasons. In hindsight, it might have been preferable for the Claims Administrator to receive Court approval of the exception – an approval this Court likely would have provided. However, its absence does not vary the terms of the IDSSA.

[89] Under the time-limited exception, some Claimants may have received the benefit of progressive disclosure to which they were not normally entitled. However, the Moving Parties have received the benefits to which they were entitled under the IDSSA as required by *JW*.

[90] The post June 15, 2020 regime is the one that the parties intended. It is also consistent with the text and context of the IDSSA.

V. Conclusion

[91] The Moving Parties request that the Court, in effect, amend the IDSSA to allow for multiple claims for compensation at different levels.

[92] The IDSSA does not incorporate this notion of progressive disclosure. The parties chose to exclude progressive disclosure from the model created by the IDSSA—an agreement that this Court found reasonable. There is no “gap” in the IDSSA for a court to fill. The temporary exception allowing a form of progressive disclosure is just that—an exception—not the rule.

[93] The Moving Parties received the benefits of the IDSSA as intended.

[94] Therefore, I am dismissing these motions without costs.

"Michael L. Phelan"
Judge

Ottawa, Ontario
September 23, 2021

FEDERAL COURT

SOLICITORS OF RECORD

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