Federal Court of Appeal | Cour d'appel fédérale

Date: 20250328

Docket: A-235-23

Citation: 2025 FCA 74

CORAM: **STRATAS J.A.**
GLEASON J.A.
HECKMAN J.A.

BETWEEN:

AUDREY HILL and SIX NATIONS OF THE GRAND RIVER ELECTED COUNCIL

Appellants

and

HIS MAJESTY THE KING IN RIGHT OF CANADA, GARRY LESLIE MCLEAN, ROGER AUGUSTINE, CLAUDETTE COMMANDA, ANGEL ELIZABETH SIMONE SAMPSON, MARGARET ANNE SWAN and MARIETTE LUCILLE BUCKSHOT

Respondents

Heard at Toronto, Ontario, on February 6, 2024.

Judgment delivered at Ottawa, Ontario, on March 28, 2025.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: GLEASON J.A.
HECKMAN J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

A. Introduction

[1] The appellants appeal from the Order of the Federal Court dated August 10, 2023 (*per* Grammond J.): 2023 FC 1093. The Federal Court dismissed the appellants' motion for an order extending the time to file claims under an agreement settling a class action. Under that settlement agreement, eligible survivors of certain "Indian day schools" are to receive compensation. For the following reasons, I would dismiss the appeal from the Order of the Federal Court.

B. Background

[2] The appellants are Ms. Audrey Hill, who attended a day school and the Six Nations of the Grand River Elected Council.

[3] Ms. Hill has been active in assisting people in her community who wanted to claim compensation under the settlement agreement. As the Federal Court noted, her considerable efforts are worthy of much praise. The Six Nations of the Grand River Elected Council is the largest on-reserve First Nation Community in Canada. It had more day schools than any other Nation. It also provided vital assistance to people in the community who wanted to claim compensation under the settlement agreement, and also deserves much praise for its efforts.

[4] The motion in the Federal Court, which is the subject of this appeal, mainly concerns the deadlines for claimants to file claims under the settlement agreement. In an earlier draft of the settlement agreement, class members had just one year to submit a claim. This struck some as being too short. Negotiations followed.

[5] As a result of those negotiations, the period in the settlement agreement for claimants to submit a claim was extended by 150%: claimants now had up to 2.5 years to submit a claim, with "relief from strict application of the claims deadline" in "extraordinary cases", but the extension of time could be no more than six months. The settlement agreement then came before the Federal Court for approval.

[6] The Federal Court approved the settlement agreement: 2019 FC 1075 (*per* Phelan J.). The approval process is no trivial thing. It is a formal process involving notice to the class, the receipt of objections, the hearing of submissions, and careful judicial scrutiny of the settlement agreement to ensure it is fair and reasonable. Only one part of the Federal Court's approval was appealed, on an issue of no concern here. That appeal was dismissed: *Jack v. McLean*, 2021 FCA 65.

[7] The Federal Court's approval is not in issue here. But it is significant in one sense: submissions that, in substance, concern the inappropriateness or unfairness of provisions in the settlement agreement can no longer be made.

[8] In their motion in the Federal Court, the subject-matter of their appeal to this Court, the appellants requested a further extension of nearly 3.5 years for all class members to make a claim—more than doubling the time set out in the negotiated, agreed-to and court-approved settlement agreement. They also asked for an independent assessor to determine the size of the class and the take-up rate for the settlement, neither of which was covered in the settlement agreement.

[9] In support of their requests, the appellants alleged that efforts to inform class members of their rights were insufficient and class members did not have adequate support and guidance on whether to file a claim and how to do so. They added that the COVID-19 pandemic—which began within two months after the approval of the settlement agreement—worsened these problems and prevented many potential claimants from filing a claim.

[10] The representative plaintiffs in the class action and the respondent Crown opposed the appellants' motion.

C. The Federal Court's decision

[11] The Federal Court dismissed the motion broadly on the following grounds:

- The settlement agreement did not give the Federal Court any power to extend the deadlines for filing claims;

- The settlement agreement provided for a 2.5 year period in which to file a claim, with extensions available of up to six months because of special circumstances (such as the effects on individuals of the COVID-19 pandemic); on the subject of deadlines and extensions, this, so-to-speak, occupied the field;

- In law, the Federal Court did have a supervisory jurisdiction to extend the deadline for filing claims—a power that could be exercised if the settlement

agreement were not being implemented, the class was not receiving the benefit of the agreement, or there were gaps in the agreement—but that power could not be used to change the agreement;

- The settlement agreement, especially the provisions regarding notice and class member assistance, were being implemented in accordance with their terms, there was no gap, and the class was receiving the benefit of the agreement; thus, the Court could not resort to its supervisory jurisdiction;

- It is true that additional forms of assistance for the filing of claims could have been put into the settlement agreement but the settlement agreement, a product of negotiation, did not require that assistance to be given.

D. The standard of review

[12] Many of the Federal Court's findings are factually based or are findings of mixed fact and law suffused by the facts. As is well-known, this Court defers to such findings on appeal. It cannot easily replace the Federal Court's factual findings with its own. This Court can do so only if the Federal Court committed palpable and overriding error. See *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[13] Some of these findings involve the interpretation of the settlement agreement. Absent an extricable question of law, deference is owed to the first-instance court's interpretation of agreements: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 at

paras. 52-55; *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*, 2024 SCC 20, 492 D.L.R. (4th) 389 at paras. 27-28; *Corner Brook (City) v. Bailey*, 2021 SCC 29, [2021] 2 S.C.R. 540 at para. 48; *Resolute FP Canada Inc. v. Hydro-Québec*, 2020 SCC 43, [2020] 3 S.C.R. 789 at paras. 48-49; *Uniprix Inc. v. Gestion Gosselin et Bérubé Inc.*, 2017 SCC 43, [2017] 2 S.C.R. 59. Absent an extricable question of law, an appellate court can interfere with a first-instance court's interpretation of an agreement only upon showing "palpable and overriding error": *ibid*. "Palpable and overriding error" is a high, rarely met standard: *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at paras. 38-39. This Court described the standard in this way:

> Palpable and overriding error is a highly deferential standard of review: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Peart v. Peel Regional Police Services* (2006), 217 O.A.C. 269 (C.A.) at paragraphs 158-59; *Waxman v. Waxman* (2004), 186 O.A.C. 201 at paragraphs 278-284. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

(*Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at para. 46.)

[14] Although the law is what I have said, it arises in this case in a deeply tragic context. The Supreme Court has said, with understatement, that "we cannot recount with much pride the treatment accorded to the [Indigenous] people of this country": *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1103. In this case, the Federal Court (at para. 11) correctly recognized that residential schools were aimed at "encourag[ing] the assimilation of Indigenous children into non-Indigenous society", with many "Indigenous children [separated] from their parents, families and communities" and thousands abused physically, emotionally and sexually: see also *Canada*

(Attorney General) v. Fontaine, 2017 SCC 47, [2017] 2 S.C.R. 205 (*Fontaine* (SCC)) at para. 1; see also Prime Minister Stephen J. Harper. "Statement of Apology to former students of Indian Residential Schools", June 11, 2008 (online: *Government of Canada* <https://www.rcaanc-cirnac.gc.ca/eng/1100100015644/1571589171655>) and the Affidavit of Chief Mark Hill of the Six Nations (Appeal Book, p. 392).

[15] Day schools differed from residential schools. Students returned home at the end of the day at school and were not separated from their families. However, the abuses at such schools were devastating. Chief Mark Hill of the Six Nations put it well in his affidavit:

> [Day schools were] devastating for Indigenous individuals, families, and communities. Students were regularly subject to horrifying physical and sexual abuse, and were systematically punished and humiliated for nothing more than being who they were: Indigenous children. The negative effects of attending an [Indian Day School] were profound and caused lasting damage [to] our people's self worth, mental and physical health, and their ability to lead safe and happy lives.

[16] Also part of the context is Canada's objective of reconciliation with Indigenous peoples, an objective of paramount importance. This Court described what reconciliation means in some detail in *Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34, [2020] 3 F.C.R. 3 at paras. 47-50.

[17] Does this context, and the pressing considerations associated with it, affect the standard of review in this case? Do they somehow loosen the rather tough appellate standard of palpable and overriding error?

[18] No they do not. The Supreme Court has said so. In an authority that binds us—especially because it too concerns settlement agreements in this context—the Supreme Court has ruled that the normal appellate standard of review, including the tough standard of palpable and overriding error, applies to the review of decisions of first-instance courts even in this context: *Fontaine* (SCC) at para. 35 (interpreting the 2006 "Indian Residential School Settlement Agreement"). The standard of palpable and overriding error also applies to factually suffused findings on questions of mixed fact and law in this context: *Hébert v. Wenham*, 2020 FCA 186 at para. 11.

[19] In short, it is firmly settled that when matters in this context arrive in this Court, the usual appellate standard of review set out in *Housen*, including the tough palpable and overriding error standard, still applies.

E. The effect of the COVID-19 pandemic

[20] Another key circumstance is the effect of the debilitating COVID-19 pandemic on the issues in this case.

[21] The settlement agreement's implementation date was January 13, 2020. From that time, under the settlement agreement, class members could file their claims. But just two months later, by the end of March 2020, the COVID-19 pandemic hit, full force. All governments in Canada took drastic, unprecedented measures to combat the spread of the COVID-19 virus. These included severe restrictions and prohibitions on in-person socialization, in-person gatherings and travel. The measures, though somewhat relaxed several months after they were imposed, stayed

in place for the better part of two years. In other words, during a good chunk of the time claimants could file a claim under the settlement agreement, normal public activity was hindered.

[22] Considering the claimants in this case, this was no small thing. The risk factors for contraction and spread of the COVID-19 virus were greater in Indigenous communities. Other factors, such as the availability of running water, affordable food, and access to health care, complicated matters. Much of Canadian society was able to carry on some activity in isolation through access to high-speed Internet; but many Indigenous communities did not have (and still do not have) access or satisfactory access to that.

[23] The Federal Court was able to react to the pandemic by approving an amendment to the notice plan. That amendment allowed for community support sessions. However, these sessions did not start until the following calendar year, in January 2021.

[24] The evidence shows that the appellants worked hard to try to make class members aware of the settlement agreement, as well as its terms and the process for making claims. Ms. Martin, an employee of the Council assigned full-time to assist Six Nations members who wanted to file a claim, deposed that just before the deadline for making claims, the demand for assistance increased and, as a result, more personnel were devoted to assisting claimants.

[25] An analysis of the relevance of the COVID-19 pandemic to the issues in this case will be dealt with below.

F. Analysis

[26] The appellants submit that the Federal Court had in law a supervisory jurisdiction that it should have exercised when deciding their motion.

[27] Courts do have a supervisory power to intervene in exceptional circumstances when there is a serious failure to apply or implement the terms of a settlement agreement. Put another way, parties must have recourse to the courts "to ensure that the implementation and administration of the [settlement agreement] take place in the way the parties agreed": *J.W. v. Canada (Attorney General)*, 2019 SCC 20, [2019] 2 S.C.R. 224 at para. 30. Exceptional circumstances justifying the intervention of the courts can also exist where there is a gap in the settlement agreement or unforeseen issues. In exercising their supervisory power, courts are to be guided by the plain language of the agreement, viewed in light of its remedial, benefit-conferring objectives and the spirit of the agreement, which includes here the desire to address the damage caused by the long-standing day school policy: *J.W.* at paras. 31 and 143-144; see also *N.N. v. Canada (Attorney General)*, 2018 BCCA 105 at paras. 156-157. Courts must intervene when necessary to ensure that the benefits promised under the agreement are delivered: *J.W.* at paras. 22-35 and 140. In this case, the Federal Court's approval of the settlement agreement (at para. 73) also expressly states that the Federal Court retains supervisory jurisdiction.

[28] The appellants further say that under that supervisory jurisdiction, the Federal Court should have adjusted the deadline in the settlement agreement for filing claims or should have filled in a gap in the settlement agreement on that subject, allowing further claims to be filed.

[29] The Federal Court appreciated that it did have a supervisory jurisdiction in law. But it found that on the evidence before it, the Court could not exercise it.

[30] On this, the Federal Court did not commit any reviewable error.

[31] It did not err in law. In fact, the appellants conceded that the Federal Court "correctly articulat[ed] the test for when to intervene": appellants' memorandum of fact and law, at para. 49. Despite that concession, in part due to the context in which this appeal arises, I investigated the matter fully, at all levels of court, to see if there was any authority that might broaden the potential scope for intervention under the Court's supervisory jurisdiction on the unusual facts of this case. There is none.

[32] The Supreme Court completely foreclosed this in *J.W.* The Court's supervisory jurisdiction 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": *J.W.* at paras. 24-28 and 120. As mentioned, and as will be further developed below, the settlement agreement in this case has specific wording concerning the deadline for claims and extensions of that deadline. It speaks to the issue. There is no gap. And the Federal Court has approved the settlement agreement on the basis that it is fair, reasonable and in the best interests of the class.

[33] Full negotiation culminating in a settlement agreement, along with court approval of that agreement, forecloses any further general review of the terms of the agreement by the Court: *J.W.* at paras. 24, 35 and 123-140; see also *Fontaine v. Canada (Attorney General)*, 2017 ONCA

26 at paras. 50-53 and *N.N.* at paras. 76-77. Only where there is a complete gap in the sense that the parties should have addressed themselves to an issue but did not, can the Court possibly intervene: *J.W.* at paras. 26-27 and 145.

[34] Yet another Supreme Court authority stands in the way of the appellants: *Fontaine* (SCC). The Court does have a supervisory jurisdiction. But under its supervisory jurisdiction, the Court cannot amend a settlement agreement: *Fontaine* (SCC) at para. 59; Federal Court's reasons at para. 40.

[35] The Supreme Court's decisions in *J.W.* and *Fontaine* essentially confirm that agreements settling class actions, such as the one in issue here, are contractual settlements of private law tort claims negotiated carefully by parties with sophisticated counsel and, as a result, must be respected: see also *Nunavut Tunngavik Incorporated v. McLean*, 2019 FCA 186. They strongly affirm the orthodox contractual backdrop in the area of settlement agreements such as this: *J.W.* at para. 102; *Fontaine* at para. 35. The Federal Court was faithful to these authorities when it approved the settlement agreement, making it binding: it appreciated its binding force and found that it was fair, reasonable and in the best interests of the class. And the Federal Court in its reasons for order leading to this appeal appreciated this too (at para. 38).

[36] It follows that I cannot accept the appellants' submission that courts' interpretations of settlement agreements must take into account the fact that these agreements have a "public law flavour" and, thus, can be interpreted in a significantly different way from other agreements. In any event, as I have said, based on the authorities, agreements such as this must be viewed in

light of their remedial, benefit-conferring objectives and their spirit—two broad considerations. Even if we were to be mindful of a "public law flavour", that is not a licence to go further and amend the settlement agreement.

[37] As mentioned, the settlement agreement in this case has specific wording concerning the deadline for claims and extensions of that deadline. It speaks to this issue. And the Federal Court has approved the settlement agreement on the basis that it is fair, reasonable and in the best interests of the class.

[38] The Federal Court followed *J.W.* and *Fontaine* to the letter and was correct in doing so. It found the settlement agreement to have been carefully negotiated by sophisticated, well-advised parties. It found no failure on the part of anyone to apply the relevant terms of the settlement agreement. It found no gap in the settlement agreement. On these matters, in the interpretation of agreements and whether they have been carried out on the facts, deference is owed: see the authorities in paragraph 13, above. Here, the Federal Court committed no reversible error.

[39] In argument before us, the parties focused upon section 29 of Schedule B of the settlement agreement. It provided that "in some extraordinary cases, a Claimant may be entitled to relief from strict application of the Claims Deadline; however, in no event may the Claims Deadline be extended by more than six (6) months".

[40] Before the Federal Court and in this Court, the appellants attempted to find ambiguity and gaps in the settlement agreement concerning the deadline for claimants to file claims. Their

position is that section 29 of Schedule B gave claimants two independent rights: an extension of the deadline to file a claim by no more than six months and a more general right to relief from strict application of the deadline, which is not subject to the six-month provision.

[41] The Federal Court rejected the appellants' attempts to find ambiguity and gaps (at para. 60). It considered the clause to be clearly worded. It dismissed the appellants' interpretation as "untenable", "implausible" and "devoid of merit". These findings can only be set aside on the basis of palpable and overriding error. There is none here. In fact, I would agree with the Federal Court that section 29 of Schedule B is perfectly clear and cannot possibly be interpreted as giving the appellants a more general right to relief from strict application of the deadline.

[42] The appellants rely on the presumption of consistent expression and the presumption against surplusage in support of their position concerning section 29 of Schedule B. But, as the Federal Court held (at para. 63) neither presumption can rebut the ordinary meaning of the words of the section, even when those words are seen in their context.

[43] The appellants say that section 29 must be interpreted in light of the preamble of the settlement agreement. The preamble states that the parties "intend there to be a fair, comprehensive and lasting settlement of claims related to Indian Day Schools, and further desire the promotion of healing, education, commemoration, and reconciliation". However, one must also pay attention to the specific purpose of the provision in issue, section 29 of Schedule B. Interpreting the agreement, the Federal Court found that the section "aim[s] at bringing closure to the claims process, with a limited additional window for class members who show valid

reasons for not being able to meet the initial deadline" (at para. 65). The Federal Court added that its interpretation was consistent with the objective of reconciliation, citing *Myers v. Canada (Attorney General)*, 2015 BCCA 95 at para. 25 and *Lavier v. MyTravel Canada Holidays Inc.*, 2013 ONCA 92. The Federal Court's interpretation can be set aside only on the basis of palpable and overriding error, and the appellants have demonstrated none.

[44] As well, it is perhaps worth repeating at this point that it was no part of the Federal Court's task—nor is it our task—to amend this contractual language: see paragraph 34 above. To do so would be contrary to the law of contract that governs this Court, even in this particular context: *Fontaine* (SCC).

[45] In its approval of the settlement agreement, the Federal Court construed the agreement. The Federal Court (at paras. 121, 128 and 145) considered the deadline for filing claims and the objections to its length, but nevertheless approved the settlement agreement as fair, reasonable and in the best interests of the class. The appellants, through their motion, cannot undercut the Federal Court's view of the Claims Deadline and its approval of the settlement agreement, including the deadline for claims.

[46] On this point, the appellants rely on *Heyder v. Canada (Attorney General)*, 2023 FC 28. In *Heyder*, the Federal Court considered whether it should exercise its discretion to grant leave to allow late claims to be brought. The appellants say that *Heyder* confirms that the Court has the discretion to allow late claims.

[47] I disagree. *Heyder* is distinguishable on a fundamental point. The agreement at issue in *Heyder* expressly allowed the Federal Court to consider late claims. But the settlement agreement in this case does not. To accede to the appellants' submission here would be to help ourselves to the power to amend the settlement agreement, a power that the Supreme Court has repeatedly said we do not have.

[48] The appellants also submit that the COVID-19 pandemic was an unforeseen circumstance and the settlement agreement is silent as to the consequences of that circumstance on the claims process. Here, they say, is a gap the Federal Court should have filled.

[49] The Federal Court characterized this submission (at para. 120) as an invitation to imply a term into the settlement agreement "allowing for an extension of the Claims Deadline where the claims process is affected by a significant public health crisis". In its view, the settlement agreement dealt with the deadline for making claims exhaustively and clearly. Among other things, it allowed for a six-month extension in exceptional circumstances (of which the impacts of the COVID-19 pandemic on a class member was surely one). Thus, there was no gap for the Court to fill. The Federal Court said (at para. 121):

> The lack of a specific provision allowing for an extension of the Claims Deadline in cases of unforeseen circumstances does not constitute a gap in the Agreement. It simply means that the parties did not intend to provide extensions beyond the six-month limit set forth in sections 28-31 of Schedule B. These provisions allow for extension in individual cases, in particular in "exceptional circumstances," which may include the impacts of the COVID-19 pandemic on a class member.

[50] On this, I agree with the Federal Court. The appellants seek to have this Court amend or rewrite this portion of the settlement agreement, a task we cannot do. Under the appellate

standard of review, we must accept the Federal Court's finding that there was no gap in the agreement, absent a showing of palpable and overriding error. No such showing has been made here.

[51] The Federal Court also considered a wider issue: whether the COVID-19 pandemic worked in conjunction with the settlement agreement to deprive the class of the benefits promised under the agreement, thereby triggering the Court's supervisory jurisdiction. Was the COVID-19 pandemic so debilitating and destructive to the claims process, such that the class was deprived of the promised benefits?

[52] The Federal Court said the appellants' evidence on that point was not sufficiently firm. It found (at para. 122) that it was "far from clear" that the pandemic had the degree of impact on the claims process that the appellants asserted. It noted that the notice plan under the settlement agreement did not depend on in-person activities and the pandemic affected mainly in-person activities. It added that although the pandemic may have slowed the processes under the settlement agreement, class members still had 2.5 years, plus a six-month extension to file their claims if needed, due to COVID-19. The Federal Court took comfort from the fact that 185,000 class members were able to file claims. All of these findings are factual ones supported by the evidence. They are not vitiated by palpable and overriding error and so we cannot set them aside. It is not our task to reweigh the evidence.

[53] In this Court, the appellants focus on the Federal Court's attraction to the number of claimants—185,000. The appellants say that the number, presented by the Federal Court as

significant, is in fact meaningless. They say that the potential number of claimants is not known with certainty and so we cannot say whether 185,000 was a tiny or a large proportion of the potential number of claimants. They say that, for all we know, 185,000 might be a very small proportion of those who could have filed a claim, leading to the conclusion that the pandemic debilitated the claims process, denying justice to many.

[54] I do not accept the appellants' submission.

[55] The Federal Court was not saying that the process reached a high proportion of potential claimants and, thus, was as good as it could possibly be in the circumstances. Instead, the Federal Court was making a less ambitious but nevertheless legally significant point: the claims process did not depend on in-person activities, the pandemic affected in-person activities the most, a very long time for submitting claims was in place, and despite the existing barriers and the pandemic, a very large number of class members made claims: see para. 102. As will be seen, this finding was made in conjunction with its finding that, despite the barriers the Court recognized (see paragraphs 60-62, below), the class could receive the benefits promised to it under the settlement agreement.

[56] In my view, the appellants are overlooking the context surrounding the Federal Court's use of the 185,000 number. In the settlement approval process, the Federal Court received an estimate of the class size and adopted it (at para. 16). That class-size estimate looked at potentialities and did not try to estimate how many claims might be filed in the process. This is seen by the fact that the settlement agreement did not set out required participation levels or take-

up rates. In the end, as the Federal Court noted (at paras. 100-101), the appellants did not provide any positive evidence of the size of the class and, due to the lack of evidence, were seen by the Federal Court to be engaged in speculation about the significance of the 185,000 number.

[57] Another obstacle lies in the way of the appellants in this appeal. In their motion in the Federal Court, the appellants sought a class-wide extension of the deadline to file claims. The Federal Court held, consistent with *J.W.*, that to get that relief, the appellants had to show the class, and not just particular individuals, was deprived of the benefit of the settlement agreement. Here, the Federal Court found the class-wide evidence to be insufficient. Again, this finding can be set aside only for palpable and overriding error and none has been shown here.

[58] In particular, the Federal Court found that the appellants fell well short of proving a class-wide impact. They did not show that a substantial portion of class members were prevented from filing a claim. Rather, the appellants put forward general statements from Indigenous governments and what the appellants called “anecdotal evidence” from persons reporting on the adverse effect of the COVID-19 pandemic on the claims process. The Federal Court did not find this evidence to be of sufficient weight on the issue of the impact on the class. It begged the question whether despite the effects of COVID-19 on the claims process—which effects indisputably existed—a substantial portion of class members were prevented from filing a claim. Nor did the appellants focus on the actual ability and potential to file a claim during the pandemic. In the Federal Court’s view, anecdotal evidence that a certain number of claimants was unable to file claims was not enough to show that a substantial portion of class members were prevented from filing a claim. Again, this is a factually suffused finding of mixed fact and

law based on a sound reading of the law expressed in *J.W.* It can only be undercut by an error of law or palpable and overriding error, neither of which has been shown here.

[59] The appellants submit that the Federal Court erred in law by setting an evidentiary threshold that was so high, no one could satisfy it. I do not agree that the Federal Court did that. Rather, the Federal Court required the appellants to show that a substantial portion of class members were prevented from filing a claim and they did not do so. Establishing that was not impossible. Polling a representative sample of the class might have given reliable information about class members' ability to file a claim in time.

[60] The Federal Court was sensitive and appropriate when it examined the evidence on the COVID-19 issue. It examined in some detail, with sensitivity, the barriers to access to justice in a case like this. It identified two barriers (at para. 71): the barriers related to the specific harm resulting from sexual and serious physical abuse and the barriers related to the specific circumstances of Indigenous communities.

[61] On the former, the Federal Court acknowledged (at para. 72) the presence of "insidious and long-lasting forms of trauma" where memories can be repressed and feelings of guilt and shame can prevail—matters that can take time and professional help to overcome. Even then, legal processes can retraumatize survivors.

[62] On the latter, the Federal Court acknowledged (at para. 73) that some members of Indigenous communities may not be fluent in French or English and may have low levels of

schooling—matters that may make written materials about the class action settlement less effective. It acknowledged that in such circumstances, oral communication may be more effective. As well, there may be distrust of bureaucratic processes or the legal system. The Federal Court appropriately acknowledged that all of these circumstances might make the provision of meaningful notice about a class action settlement more challenging in Indigenous communities.

[63] In a key finding, the Federal Court found (at paras. 76-77) that "[t]here is every indication that the parties to the Agreement were fully aware of the barriers" but that "does not mean that the Agreement promised the complete elimination of these barriers", which would be "impossible". Rather, the parties, sophisticated and well-represented by counsel, "bargained for a precise set of measures aimed at mitigating the impacts of these barriers on class members" (at para. 77), by setting out a "reasonable process" (at para. 78). Aware of these barriers, the parties lengthened the deadline for filing claims from one year to 2.5 years. And in the case of special circumstances (one of which would have been COVID-19), claimants could obtain an extension for up to six months.

[64] Given this context, the Federal Court asked itself whether the "benefits promised by the agreement were delivered", focusing on whether "the agreed upon measures were implemented" (at para. 78). The Federal Court recognized that the settlement agreement never promised that the barriers could be completely overcome, nor could it do so. There was no evidence before it of a substantial number of class members who were unable to submit claims before the deadline. It

concluded its analysis by saying that "[t]he fact that some of these barriers persist does not, without more, warrant the Court's intervention" (at para. 78).

[65] The Federal Court's analysis, realistic and sensitive, was fully in accord with governing Supreme Court authorities such as *J.W.* and *Fontaine*. There is no ground to intervene.

[66] When examining whether class members were deprived of the benefit of the agreement, the Federal Court returned to the issue whether the COVID-19 pandemic affected the mechanisms for informing and assisting class members under the settlement agreement. It concluded that the evidence fell short of showing that the pandemic affected class members to the point where it can be said that the benefits of the agreement were not delivered. Legally speaking, this was a correct question to ask.

[67] The Federal Court's response to that question, suffused by facts, can only be set aside for palpable and overriding error. The Federal Court found that the appellants had not established that the pandemic led to a situation where the benefits of the agreement were not delivered (at para. 119). It noted (at para. 118) that in-person community support sessions were held in 2021 and 2022 in 62 communities and that was buttressed by the efforts of the appellant Ms. Hill and another individual, Ms. Martin, a Council employee. It concluded (at para. 119) that "the evidence does not show, on a class-wide basis, that class members were deprived of the assistance promised in the Agreement". On these matters, the Federal Court did not commit palpable and overriding error. It relied on the evidence and formed rational conclusions from that evidence and never went astray on the law.

[68] The Federal Court did concede (at para. 119) that "[w]hile more intensive forms of assistance could undoubtedly have been provided [either in the settlement agreement or by persons implementing the agreement]", these would "exceed the promise of the Agreement". Speaking for myself, based on my own reading and appreciation of the record, fully cognizant of the barriers faced by the class members in these circumstances, I share the conclusion that more intensive forms of assistance could have been provided. The settlement agreement could have provided for more. But the settlement agreement, a product of compromise, did not so provide, and it is not for us to amend it.

[69] It was not the task of the Federal Court—nor is it the task of this Court—to rewrite the provisions of the settlement agreement. As previously said, the settlement agreement was the product of a careful negotiation between sophisticated, fully represented and advised parties and was found by the Federal Court, in an earlier approval process, to be fair and reasonable and in the best interests of members of the class. As the Supreme Court has recognized in *J.W.* and *Fontaine*, agreements such as this—especially where they have been previously approved by the Court—must be respected, not rewritten with the benefit of hindsight.

[70] The appellants also submit that the class did not receive effective notice and adequate assistance. Here again, the findings of the Federal Court, reviewable only for palpable and overriding error, determine the matter. The Federal Court found as a fact (at paras. 107 and 113) that there was no evidence of the court-approved notice plan not being carried out, nor was there any evidence that the notice was ineffective. It noted that, in reality, the appellants were complaining about problems in the provisions of the settlement agreement, matters that should

have been raised in the earlier settlement approval hearing. Again, I see no ground to interfere with the Federal Court's finding. Indeed, I agree with it.

G. Proposed disposition

[71] The Crown does not seek its costs and so I would award it none.

[72] I would amend the style of cause to delete the words "as represented by the Attorney General", as the Attorney General's representation of the Crown in cases such as this goes without saying. As well, I would list the Crown as the first and primary respondent, as it was the only respondent who appeared in this appeal. The style of cause on this document reflects these changes.

[73] Therefore, I would dismiss the appeal without costs.

"David Stratas"
J.A.

"I agree.
Mary J.L. Gleason J.A."

"I agree.
Gerald Heckman J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-235-23
STYLE OF CAUSE:	AUDREY HILL AND SIX NATIONS OF THE GRAND RIVER ELECTED COUNCIL v. HIS MAJESTY THE KING IN RIGHT OF CANADA, GARRY LESLIE MCLEAN, ROGER AUGUSTINE, CLAUDETTE COMMANDA, ANGEL ELIZABETH SIMONE SAMPSON, MARGARET ANNE SWAN AND MARIETTE LUCILLE BUCKSHOT
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 6, 2024
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	GLEASON J.A. HECKMAN J.A.
DATED:	MARCH 28, 2025

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