Federal Court of Appeal  Cour d'appel fédérale

Date: 20240105

Docket: A-300-21

Citation: 2024 FCA 2

CORAM: **WOODS J.A.**
LASKIN J.A.
RIVOALEN J.A.*

BETWEEN:

JESSIE WALDRON

Appellant

and

HIS MAJESTY THE KING IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA, GARRY LESLIE MCLEAN, ROGER AUGUSTINE, CLAUDETTE COMMANDA, ANGELA ELIZABETH SIMONE SAMPSON, MARGARET ANNE SWAN AND MARIETTE LUCILLE BUCKSHOT

Respondents

and

DELOITTE LLP, ASSEMBLY OF FIRST NATIONS, AND FEDERATION OF SOVEREIGN INDIGENOUS NATIONS

Interveners

*Rivoalen J.A. was appointed Chief Justice of Manitoba on June 1, 2023 and did not participate in the disposition of this appeal. Judgment is being given by the remaining members of the panel in accordance with subsection 45(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

Heard at Saskatoon, Saskatchewan, on March 29, 2023.

Judgment delivered at Ottawa, Ontario, on January 5, 2024.

REASONS FOR JUDGMENT BY:	LASKIN J.A.
CONCURRED IN BY:	WOODS J.A.

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REASONS FOR JUDGMENT

LASKIN J.A.

I. Overview

[1] Jessie Waldron, a survivor class member under the Indian Day Schools Settlement Agreement (IDSSA), appeals from an order of the supervising judge (*McLean v. Canada (Attorney General)*, 2021 FC 987, Phelan J.). In his order, the supervising judge dismissed Ms. Waldron's motion to require the claims administrator under the IDSSA to consider the further documentation of abuse she submitted following the filing of her original claim for compensation, and to increase the level of compensation to which she is entitled. Her motion also sought a declaration recognizing a similar entitlement on the part of other members of the survivor class.

[2] The supervising judge determined that the individual relief Ms. Waldron claimed was not available under the IDSSA, and that she was seeking in effect to have the Court amend the agreement—something it had no jurisdiction to do. He also held that Ms. Waldron, as a class member and not a representative plaintiff, had no entitlement to seek relief on behalf of the class.

[3] I sympathize with Ms. Waldron's position. However, for the reasons that follow, I would dismiss the appeal.

II. Background

A. *The IDSSA*

[4] The underlying action was certified as a class action in 2018, on consent. As certified, the action alleged among other things that in its operation of Indian day schools, Canada breached fiduciary, constitutional, statutory, and common law obligations owed to survivors of the school system, and that it infringed their Aboriginal rights.

[5] Settlement negotiations took place over 17 days during the period August to December 2018. The parties reached a settlement in principle in November 2018 and a settlement in March 2019. The settlement was documented in the IDSSA. Recital G to the IDSSA states:

> 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. They have negotiated this Settlement Agreement with these objectives in mind.

[6] Among the benefits the IDSSA provides is individual compensation to Indian day school survivors. Further details concerning the compensation payable and the claims process are set out below beginning at paragraph 15.

[7] In addition to a claims process for survivor class members, the IDSSA provides for the establishment of a $200 million legacy fund, which the parties agreed would support legacy projects contributing to truth, healing, and reconciliation. The IDSSA states that it is intended that both survivor class members and family class members (spouses, former spouses, children, grandchildren, and siblings of survivor class members) benefit from these projects.

[8] The IDSSA contains (in section 1.12) a release in favour of Canada. It also contains an "entire agreement" clause (in section 1.13), and states (in section 14.02) that except as expressly provided, no amendment may be made to the agreement unless agreed to by the parties—that is, the representative plaintiffs and the Attorney General—in writing and approved by the Federal Court.

[9] In August 2019, after a three-day settlement approval hearing in May 2019 (about which more will be said later in these reasons), the supervising judge approved the IDSSA, including the claims process and a draft claim form. In giving his approval, he described the IDSSA (*McLean v. Canada*, 2019 FC 1075 at para. 1) as "the culmination of litigation concerning tragic, scarring events in the lives of those who attended Indian Day Schools. These events include mockery, belittlement, and physical, sexual, cultural and emotional abuse, which are soul damaging." He recognized that "[h]ealing will be a long-term process at best."

[10] The settlement approval order described the settlement as "fair, reasonable and in the best interests of the Plaintiffs and the Class Members" (*McLean v. Canada*, 2019 FC 1074 at para. 2). In his reasons for granting the settlement approval order (2019 FC 1075 at para. 145), the supervising judge similarly concluded that the settlement agreement was "fair and reasonable and in the best interests of the Class as a whole."

[11] The approval order expressly incorporated the IDSSA, and required that it be implemented in accordance with the approval order and further orders of the Court (2019 FC

1074 at para. 3). The order addressed the further role of the Court in the following terms (2019 FC 1074 at para. 9):

> This Court, without in any way affecting the finality of this Order, reserves exclusive and continuing jurisdiction over this action, the Plaintiffs, all Class Members who have not opted out of the Settlement Agreement, and the Defendant for the limited purposes of implementing the Settlement Agreement and enforcing and administering the Settlement Agreement and this Order.

[12] No appeal was brought from the approval order by any party entitled to appeal.

[13] A class member did bring a motion to this Court under rule 334.31(2) of the *Federal Courts Rules*, S.O.R.98/106, for leave to exercise the right of appeal of the representative plaintiffs. The motion was heard by Rivoalen J.A. (as she then was) and dismissed: *Ottawa v. McLean*, 2019 FCA 309.

[14] In dismissing the motion, she agreed (at paras. 19-21) with the statement of the Court of Appeal for Ontario in *Bancroft-Snell v. Visa Canada Corporation*, 2019 ONCA 822 at para. 22, leave to appeal refused, 2020 CanLII 23634 (SCC) and 2020 CanLII 23637 (SCC), that "[t]here are sound policy reasons why class members should not be entitled to appeal a settlement order where the representative plaintiff declines to do so." She was also (at para. 22) "not satisfied that the appeal itself [was] in the best interests of the Class."

B. *Compensation payable to survivor class members*

[15] Under the IDSSA, compensation is available to survivor class members who experienced harm associated with attending an Indian day school during the class period (which runs from

January 1, 1920 to the date of closure or transfer from Canada of the particular school). The amount of compensation to which a claimant is entitled is based on a grid, or levels of harm, established following an analysis of damage awards in analogous cases.

[16] There are five levels on the grid, from the lowest, level 1, to the highest, level 5. The higher the level, the more serious is the sexual or physical abuse and resulting harm required to establish a claim, and the greater is the amount of compensation payable if the claim is established—from $10,000 for a level 1 claim to $50,000, $100,000, $150,000, and $200,000 respectively for claims at levels 2, 3, 4, and 5.

C. *The claims process*

[17] In his reasons for granting settlement approval, the supervising judge described the claims process under the IDSSA (2019 FC 1075 at para. 43) as "based on a simple claim form on which claimants self identify a single level of compensation."

[18] The IDSSA called for the process to be administered by a claims administrator appointed by the Federal Court on the recommendation of the parties. The settlement approval order appointed Deloitte as claims administrator. The order described the claims administrator's role as follows (2019 FC 1074 at para. 11):

> Subject to the Court's ongoing supervision and orders, the Claims Administrator will develop, install and implement systems, forms, information, guidelines and procedures for processing and making decisions on Claim Applications in accordance with the Settlement Agreement and will develop, install and implement systems and procedures for making payments of compensation in accordance with the Settlement Agreement.

[19] Section 9.03 of the IDSSA is entitled “Principles Governing Claims Administration”. The principles it enumerates include the following.

> - The Claims Process is intended to be expeditious, cost-effective, user-friendly and culturally sensitive.
>
> - 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 […] 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 […] 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.

[20] According to the partner of Deloitte who manages its engagement as claims administrator, Deloitte designed the claims process on the basis that claimants would submit one claim form for processing and adjudication, and that “progressive disclosure”—the ability for claimants at the intake stage to change their self-identified level of harm or add narrative or further documents to their claim form once submitted—was not to be part of the process.

[21] Sections 9 and 10 of the IDSSA, together with Schedule B, set out further particulars of the claims process and the role of the claims administrator. The IDSSA provides two and a half years for Class Members to file their claims. It also provides for both emotional and legal support to class members in the claims process through the office of the claims administrator, class counsel (whose services are free to class members), or counsel of the class member’s choosing.

[22] The claims administrator's determination of whether a claimant is entitled to compensation, and if so at what level, is to be based on the information provided in the claim form, the final version of which was also approved by the supervising judge. A decision of the claims administrator is final and binding on the claimant without any recourse or appeal, except as set out in the claims process.

[23] The claim form sets out descriptions of harm corresponding to each of the five levels. Claimants are to describe their experience at an Indian day school by reference to these descriptions and self-identify the level of compensation they are claiming, corresponding to the most serious harm they claim to have suffered. Claimants are also to provide supporting documentation, the nature of which depends on the level of compensation claimed. Claimants may, in the alternative, submit a declaration that they do not have access to the required documentation.

[24] According to the approved claims process, the claims administrator, after reviewing a claim form, is to send one of three acknowledgment letters to the claimant: a letter confirming the claimant's eligibility as a class member; a letter denying the claimant's eligibility as a class member; or a letter requesting additional information (such as a missing signature or copy of a document) to determine the claimant's eligibility as a class member.

[25] As noted above, level 1 is the lowest level of claim. To meet the requirements for a level 1 claim, the claimant need only allege verbal abuse or physical abuse, "including but not limited to culturally unreasonable or disproportionate acts of discipline or punishment." The claim form

instructs claimants to select level 1, and place a mark in the corresponding box, if that description "represents the most serious abuse/harm that [the claimant] experienced." It states that if the claimant selects level 1, "no further description is required."

[26] Canada is to pay $1.27 billion (and up to $1.4 billion if required) to fund the payment of level 1 claims, and has no right to be informed of or object to claims at that level.

[27] As the self-identified level of claim increases from level 2 to level 5, claimants must disclose increasingly more serious physical and/or sexual abuse to establish their claims. These claims can be supported by disclosing physical or mental impairment over time that is linked to abuse.

[28] The claim form instructs claimants to identify the abuse or harm they suffered by reference to the descriptions of level 2 to 5 abuse or harm set out in the grid. They are then instructed to "Select [their] Claim Level, by placing a mark in one box below, for the Level of abuse/harm [they] suffered as identified above [on the form]." Beside four boxes, one for each level from 2 to 5 and the corresponding compensation level, the form then states, "Place a MARK in ONE box" (emphasis in original). The claim form contains no provision for making multiple claims or for changing the level of a claim once selected.

[29] Canada has the right to provide the claims administrator with supplemental information regarding eligibility for compensation at levels 2 to 5. It is to transfer funds directly to the claims administrator as necessary to provide for payment of claims at these levels.

[30] If the claims administrator determines that a claim meets or exceeds the criteria for a class member's selected level, payment is processed at the level assessed by the claims administrator. If the claims administrator is of the view that the claim does not meet the criteria for the self-identified level, it must notify the class member and provide brief reasons for this conclusion. The class member then has the right to have the claim reconsidered, and may submit a response to the claim administrator's reasons and provide additional information.

[31] If, despite the response and the additional information provided, the claims administrator remains of the view that the class member is eligible for compensation only at a level below the self-identified level, the class member has a right of review by a third party assessor. The third party assessor may invite the class member to provide more information, including by means of a video recording of the class member's evidence.

[32] The claims process expressly contemplates in only two circumstances the possibility that survivor class members may submit additional documentation in support of their filed claims: (1) in response to an acknowledgment letter from the claims administrator requesting missing information (such as a signature or a copy of personal identification) or (2) in the course of reconsideration or third party review of a claim made at one of levels 2 to 5. According to the claims administrator, it would also consider missing information submitted by a claimant where the claimant identified the omission to provide missing information before the claims administrator requested it. Beyond these limited circumstances, there is nothing in the claims process that could be considered provision for progressive disclosure.

D. *Implementation of the claims process*

[33] The supervising judge approved the amended claim form on January 7, 2020. Implementation of the claims process began shortly afterwards, on January 13, 2020. The claims deadline, which was specified as two years and six months after settlement implementation, was therefore July 13, 2022. As of May 2021, the claims administrator had received 111,642 claims from an estimated class of 140,000, and had adjudicated and paid some 72,000 claims. Some 90% of the paid claims were at level 1.

[34] The claims administrator proceeded on the basis that under the court-approved claims process, progressive disclosure was not permitted. However, two sets of difficulties arose in the early stages of implementing the claims process.

[35] First, the claims administrator observed that claimants were submitting multiple claim forms through different methods of delivery, with additional narratives, additional support documents, and altered claim levels. In the first 78 days of the claims period, from January 13, 2020 to March 31, 2020, the claims administrator received 40% more written submissions than claims—41,171 submissions related to 29,199 claims. This required the claims administrator to spend significant time on measures to ensure there were no duplicate claims or double payments.

[36] In early February 2020, the claims administrator advised the parties of this situation. Following consultation with the parties, the claims administrator provided what it described as a "temporary allowance or exception", by which claimants would be permitted to increase the level of their claim as long as the claim had not yet been adjudicated or paid.

[37] Second, the COVID-19 pandemic created further complications. Because government offices were ordered to be closed, claimants had difficulties in obtaining supporting documents. In addition, employees of the claims administrator could not attend at their offices to process claims, and the claims administrator could not determine the date that claim forms were received. Where claimants had submitted multiple claims, the claims administrator could not determine which version was the first. The temporary allowance also addressed these issues.

[38] Court approval was not sought for the temporary allowance.

[39] On May 27, 2020, after further consultation and agreement with the parties, the claims administrator informed the parties that the temporary allowance would end. It set June 15, 2020 as the last day for claimants either to submit additional information or to declare they would be doing so. Public notice of the date was disseminated via Facebook, the Federal Indian Day School Class Action website, and the claims administrator's website.

E. *Ms. Waldron's claims*

[40] Ms. Waldron is a survivor of an Indian day school, the Waterhen Indian Day School in Saskatchewan. She gave evidence that once she learned of the IDSSA, she attempted to obtain information about the process of making a claim, and help in doing so and in disclosing the abuse that she experienced. She stated that she did not think she was just a level 1 claimant, but wanted to be sure.

[41] However, she stated, her efforts to obtain information and assistance were largely unsuccessful. She therefore filed a level 1 claim, in June 2020. She deposed that she "was so fed up and just wanted to get it over with," and that she filed a claim at level 1 "out of confusion and frustration."

[42] In September 2020, a law firm representing Ms. Waldron filed another claim on her behalf, outlining abuses at levels 3 and 4. Later that month, the claims administrator advised that it would not accept the new claim form or the new claim level selections.

[43] In declining to accept Ms. Waldron's second claim, the claims administrator stated that "the Claims Process is designed for Claimants to submit their Claim form only once" and that the "June 15th deadline [on the availability of the temporary allowance] was instituted in line with the Duties of the Claims Administrator ([under section]10.01) to develop, install and implement systems, guidelines and procedures for processing and making decisions on Applications."

[44] The claims administrator accordingly accepted Ms. Waldron's claim only at level 1, and not at level 3 or level 4. She received and cashed a cheque for the $10,000 level 1 amount.

F. *The motions in the Federal Court*

[45] Ms. Waldron and another similarly situated survivor class member (who has not pursued an appeal to this Court) brought motions in the Federal Court, which were heard together by the supervising judge. They sought orders allowing them to change their claims to level 4 and instructing the claims administrator to consider the further information they had submitted to

support their higher claim levels. They also sought a declaration that the IDSSA permits class members to submit further documentation and/or modify their claim level selection prior to receiving a decision on their claims.

[46] Before the supervising judge, the moving parties explained that they were frustrated, were panicked, or sought to end quickly the process of filing a claim. As a result, they initially submitted level 1 claims they knew did not reflect the most severe harm they experienced at their day school. They sought to file new, higher level claims at a later date, which they contended the IDSSA permitted them to do.

G. *Potential consequences of granting the motions*

[47] The claims administrator, which was granted leave to intervene, submitted evidence of the practical and administrative difficulties that would result from granting the motions.

[48] According to the claims administrator, implementing progressive disclosure would likely result in the suspension of the claims adjudication process until all information for each claim was known. In addition, the claims administrator would have to check the many contacts it received from claimants daily by phone, email, and mail for additional information before adjudicating and paying claims. Level changes from level 1 to higher levels would further delay adjudication to take into account any information provided by Canada.

H. *Dismissal of the motions*

[49] The supervising judge dismissed the motions (*McLean v. Canada (Attorney General)*, 2021 FC 987, Phelan J.). He held (at paragraph 49) that while the Federal Court has continuing and exclusive jurisdiction over the implementation of the IDSSA, it is severely limited in its review of the settlement agreement and its administration. It is not, he stated, the role of the Court to impose additional terms that it considers appropriate or to rewrite the agreement. In coming to this conclusion, he relied on statements in *J.W. v. Canada (Attorney General)*, 2019 SCC 20 at paras. 34, 120, in stating that courts may intervene in class action settlements only in very limited circumstances, where relevant negotiated terms of the settlement are not applied or where there is a gap in the settlement agreement.

[50] Here, the supervising judge reasoned (at paragraph 52), the relief the moving parties were seeking would essentially insert into the IDSSA a term permitting progressive disclosure, or the filing of multiple claims at different compensation levels. However, he stated, the IDSSA does not provide for progressive disclosure or multiple claims, so that to grant the individual relief sought would be inconsistent with the IDSSA and the intent of the parties. Accordingly, he concluded that he could not grant that relief.

[51] The supervising judge also determined (at paragraphs 55-56) that the moving parties had no authority to seek a declaration on behalf of the class, and thus to supplement the court-approved responsibilities and obligations of the representative plaintiffs and class counsel. He noted that the moving parties had not sought leave under rule 334.31 of the *Federal Courts Rules* (referred to above at paragraph 13).

[52] The supervising judge then considered (beginning at paragraph 57) the moving parties' submission that on a proper reading, the IDSSA provides for progressive disclosure as part of the intake phase of the claims process. In interpreting the IDSSA, he stated, he had considered the text, the context, and the stated or manifested intention of the parties.

[53] Looking first to the text (at paragraph 59), he found nothing in the IDSSA suggesting that progressive disclosure or the right to file modified claims was a feature of the agreement. He noted that the IDSSA's use of the singular "claim" was consistent with the position that it permitted a claimant to file only one claim. He also pointed to the reference in the IDSSA to filing the claim form with "all supporting documents", which he found indicative of finality to the filing of a claim.

[54] Looking to context (at paragraph 65), the supervising judge observed that "a key factor in the structure of the IDSSA was to avoid many of the problems associated with the Indian Residential Schools Settlement Agreement [IRSSA], including the [Independent Assessment Process (IAP)] and its progressive disclosure feature." Under the IRSSA, a precursor to the IDSSA entered into in 2006, survivors of residential schools (as opposed to survivors of day schools with entitlements under the IDSSA) could seek compensation through the specially designed IAP. As the Supreme Court observed in *Canada (Attorney General) v. Fontaine*, 2017 SCC 47 at paras. 2-9, this entailed disclosure by claimants at an in-person hearing of "acutely sensitive particulars—both of the abuse suffered, and of its consequences—for examination by an adjudicator."

[55] The supervising judge noted (at paragraph 67) that at the settlement approval hearing, there was considerable evidence and submissions regarding the differences between the IRSSA process and the process then proposed for the IDSSA. Among the concerns expressed about the process under the IDSSA was that it could take time for class members to feel able to disclose the sexual abuse to which they had been subjected. Given the requirement to document claims at levels higher than level 1, class members could as a consequence end up claiming and taking level 1 benefits when they should be entitled to more: appeal book at 882-883, 911, 973-974. (This was in fact the position of Ms. Waldron, according to her evidence on this motion.) The supervising judge stated (at paragraph 69) that he was aware of the desire of some class members to have a process more like that of the IRSSA. On the other hand, he stated, there was also evidence that the simpler, paper-based, non-confrontational approach proposed for the IDSSA would be preferable to the "extremely adversarial, confrontational and difficult" process adopted in the IAP, and would, among other things avoid re-traumatization: appeal book at 1257-1258, 1299.

[56] As a result, the supervising judge stated (at paragraph 69), he had been aware in approving the settlement of the concerns regarding the lack of provision for progressive disclosure, but nonetheless had found the settlement to be reasonable. He found that although the term "progressive disclosure" was not used at the settlement approval hearing, in light of what had transpired there he understood that the IDSSA claims process "was not meant to follow such a feature." It would, he stated, 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."

[57] The supervising judge further found (at paragraph 77), based on the parties' actions and submissions, that the intention of the parties did not support progressive disclosure as a binding concept in the IDSSA. He described it as "compelling", given the contractual nature of the IDSSA, that neither party to the agreement supported the moving parties' position.

[58] The supervising judge went on to note (at paragraph 78) that the claims adjudicator, in accordance with its duties and responsibilities, had set up the claims process in conjunction with the parties, in a manner reflective of their understanding of the IDSSA. After reviewing the intake and assessment phases of the IDSSA claims process, he concluded that the intention of the parties was that "a Claimant was to file for a single harm level with all the relevant documentation," and that the parties' actions were consistent with that intention.

[59] The supervising judge stated (at paragraph 85) that he accepted the evidence of the claims administrator as to the practical and administrative difficulties that would result from "unscrambling the egg", and adopting the moving parties' view as to the proper interpretation and application of the IDSSA. While these difficulties could not alone justify the position of the parties to the settlement agreement on the intention underlying claims process and their understanding of its terms, they helped to demonstrate that under the claims process, "a single claim was to be filed and dealt with."

[60] The supervising judge then addressed the submission that what the claims administrator did in permitting a form of progressive disclosure until June 15, 2020 reflected the proper interpretation and application of the IDSSA. He described this argument (at paragraph 92) as

inconsistent with the evidence showing that the "temporary allowance or exception" was indeed an exception and not the norm, and found that it had been implemented "for good reasons". He acknowledged that "[i]n hindsight, it might have been preferable for the Claims Administrator to receive Court approval of the exception"—which, he stated, would likely have been provided. But, he went on, "its absence does not vary the terms of the IDSSA." While the exception resulted in some claimants obtaining an opportunity to make progressive disclosure, to which they were not entitled under the IDSSA, the moving parties had received the benefits to which they were entitled, according to the parties' intentions and the text and context of the agreement. There was no "gap" to fill.

[61] Having also found, as noted above, that the moving parties had no entitlement to claim relief on behalf of the class, the supervising judge dismissed the motions.

III. Issues on appeal

[62] Based on the written and oral submissions of the parties, I would distill the issues on appeal as follows.

(1) What standard or standards of review apply?

(2) Did the supervising judge err in interpreting the IDSSA?

(3) Did the supervising judge err in determining that he had no jurisdiction to grant Ms. Waldron the individual relief she claimed?

(4) Did the supervising judge err in determining that Ms. Waldron had no entitlement to seek relief on behalf of the class?

[63] I will consider each of these issues. As will be seen, they are to a large degree interrelated.

(1) What standard or standards of review apply?

[64] Ms. Waldron acknowledges that, as the Supreme Court stated in respect of the IRSSA in *Fontaine* at para. 35, the IDSSA "is at root a contract". Its interpretation, like that of other contracts, is therefore reviewable, absent extricable questions of law, as a question of mixed fact and law, on the deferential standard of palpable and overriding error. However, she submits that the correctness standard applies in this appeal because, and to the extent that, it "raises extricable questions of law related to the interpretation of the IDSSA and the supervising judge's jurisdiction under [the] approval order" (appellant's memorandum at paragraph 23).

[65] The Attorney General submits that the substantive issues raised in this appeal are principally concerned with interpretation of the IDSSA, and to that extent are subject to review on the deferential palpable and overriding error standard. However, he recognizes that the supervising judge's determination of the scope of his jurisdiction to intervene raises a question of law, subject to review for correctness.

[66] Similarly, class counsel rely on *Fontaine* in submitting that the supervising judge's interpretation of the IDSSA is reviewable for palpable and overriding error, absent an extricable error of law. They also accept, based on the Supreme Court's decision in *J.W.*, that Ms. Waldron's entitlement to obtain the relief sought and the supervising judge's entitlement to grant it are subject to review for correctness.

[67] I accept the parties' substantial agreement on the issue of standards of review. I will consider the second issue identified above—whether the supervising judge erred in interpreting the IDSSA—on the standard of palpable and overriding error, except to the extent that it involves extricable questions of law, which call for correctness review. I will treat the third and fourth issues as reviewable on the standard of correctness.

[68] Before I proceed with consideration of the remaining issues, it may be helpful to offer, by way of further legal context, a few reminders about the distinctive nature of class action settlements.

- First, class action settlements differ from most other settlements of litigation in requiring the approval of a judge before they can take effect: see rule 334.29(1).

- Second, negotiating a settlement will invariably entail trade-offs and compromise: *Châteauneuf v. Canada*, 2006 FC 286 at para. 7. We do not know what trade-offs and compromises were made here.

- Third, the well-established test for judicial approval is that the settlement be shown to be fair, reasonable, and in the best interests of the class as a whole: *Condon v. Canada*, 2018 FC 522 at para. 17. As the supervising judge recognized, this standard does not require perfection, only reasonableness: 2019 FC 1075 at para. 76.

- Fourth, the judge's assessment of a proposed settlement is "a binary, take-it-or-leave-it proposition. […] The Court is not permitted to change the settlement terms, impose additional terms or promote the interests of certain class members over those of the whole class": *Toronto Standard Condominium Corporation No. 1654 v. Tri-Can Contract Incorporated*, 2022 FC 1796 at para. 17.

- Fifth, the focus on the interests of the class as a whole may mean that a settlement is approved even if it does not meet the needs or demands of particular class members, or benefits some ahead of others: *Condon* at para 17; *Manuge v. Canada*, 2013 FC 341 at para. 24; *Hébert v. Wenham*, 2020 FCA 186 at para. 9, leave to appeal refused, 2021 CanLII 49683 (SCC).

- And sixth, a judicially approved settlement is nonetheless binding on every class member who has not opted out of the proceeding: see rule 334.29(2). Here, Ms. Waldron did not opt out of the class proceeding within the period for doing so.

[69] I will now proceed to the remaining issues.

(2) Did the supervising judge err in interpreting the IDSSA?

[70] Ms. Waldron submits that the supervising judge committed a series of extricable errors of law in interpreting the IDSSA. She submits that (a) contrary to the law governing the interpretation of contracts, the supervising judge relied on the parties' subjective intention and on post-contract conduct to support his interpretation; (b) he denied Ms. Waldron the benefit of the basic procedural right to amend a claim; (c) he overlooked the principles set out in section 9.03 of the IDSSA, which she says require an interpretation that favours claimants; (d) he made findings of fact for which there was no supporting evidence (which Ms. Waldron also submits was a palpable and overriding error of fact); and (e) he failed to consider the honour of the Crown and reconciliation in his interpretation.

[71] The intervener the Federation of Sovereign Indigenous Nations (FSIN) makes further submissions asserting error by the supervising judge in failing to consider the honour of the Crown as a relevant interpretive principle. The FSIN also submits that he erred in failing to consider as an element of his interpretation of the IDSSA whether it conforms to international law and Canada's international obligations.

[72] The intervener the Assembly of First Nations (AFN) similarly submits that international law norms are applicable in interpreting the IDSSA. It also recounts its knowledge of and experience with issues that arose under the IRSSA, and in particular with Canada's interpretation and discharge of its document disclosure obligations, the litigation of entitlement to destroy claimants' records, privacy issues, and procedural fairness.

[73] I will discuss in sequence these claims of error. I will then consider what follows from my assessment to determine whether any of these claims are made out.

(a) *Subjective intention and post-contract conduct*

[74] As a document that "is at root a contract," construing the IDSSA requires ascertaining "the objective intentions of the parties": *Fontaine* at para. 35. That exercise requires reading the contract as a whole, giving the words used their ordinary and grammatical meaning, and doing so consistently with the surrounding circumstances, or factual matrix: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 at paras. 47, 50, 58.

[75] The factual matrix comprises "objective evidence of the background facts at the time of the execution of the contract […], that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting": *Sattva* at paras. 50, 58. While the surrounding circumstances will be considered, they "must never be allowed to overwhelm the words of [the] agreement," or in effect to create a new agreement: *Sattva* at para. 57.

[76] Evidence of subjective intention of the parties "has no independent place" in the determination of contractual meaning: *Eli Lilly & Co. v. Novopharm Ltd.*, 1998 CanLII 791 (SCC), [1998] 2 S.C.R. 129 at paras. 54-59; *Sattva* at para. 59; *ING Bank N.V. v. Canpotex Shipping Services Limited*, 2017 FCA 47 at paras. 111-112, 117, 120-121, 125.

[77] Nor does the factual matrix include subsequent or post-contract conduct. This, it has been held, is a category of conduct that may be considered only when ambiguity remains after the text is construed in light of the factual matrix, and only if the court is mindful of the inherent dangers associated with it: *Re Canadian National Railways and Canadian Pacific Ltd*. (1978), 95 D.L.R. (3d) 252 at 262 (B.C.C.A.), aff'd 1979 CanLII 229 (SCC), [1979] 2 S.C.R. 668; *Shewchuk v. Blackmont Capital Inc*., 2016 ONCA 912 at paras. 40-46; and for other recent examples, *Wade v. Duck*, 2018 BCCA 176 at paras. 28, 31; *Magasins Hart Inc. v. 3409 Rue Principale Inc*., 2020 NBCA 49 at paras. 50-52.

[78] Ms. Waldron submits that the supervising judge committed extricable legal errors in interpreting the IDSSA by relying on subjective intentions and post-contract conduct. She puts forward at least five instances of this reliance: appellant's memorandum at paras. 35-40.

- First, she submits, he relied on evidence of the parties' post-contract conduct in the absence of any finding of ambiguity or acknowledgment of the inherent dangers of doing so.

- Second, she says, he looked to the subjective intentions of the parties to the IDSSA, and conducted an analysis of those intentions separately from his analysis of the text of the IDSSA and the circumstances surrounding its execution. He was wrong, she says, to consider the parties' intentions separately and "in addition to" the text and context, when conclusions as to their intentions "flow" from the text and factual background and determining their objective intentions is "the goal of the exercise".

- Third, she submits, he was wrong to consider it "compelling" that neither party to the IDSSA supported the moving parties' position.
- Fourth, he relied on the claims administrator's subjective understanding of the claims process long after the execution and approval of the IDSSA.
- Fifth, he relied on the claims administrator's account of the difficulties a right to amend would entail.

[79] The dividing line between pre- and post-contract conduct is not always easy to discern. That may be especially so in this case, where the IDSSA incorporated the claims process and claim form, and was therefore not complete until they were finalized and approved. Moreover, in both *Fontaine* and *J.W.*, the Supreme Court appears to have relied, in interpreting the IRSSA, on conduct that could be seen as post-contractual, as well as the intentions of the parties in negotiating the agreement.

[80] The issue in *Fontaine* was whether the IRSSA should be interpreted as requiring that documents generated in the IAP be destroyed, to preserve confidentiality. Under the heading "The Surrounding Circumstances" (at paras. 42-45), the Supreme Court considered, among other things, (1) evidence that both claimants and alleged perpetrators had relied on assurances of confidentiality, and that, without those assurances, the IAP could not have functioned; (2) evidence that confidentiality was also crucial to the participation of the church defendants; and (3) evidence that, according to the chief adjudicator, confidentiality was often the "key factor" in whether a claim proceeded. In addition, the Court relied on the finding of the supervising judge in that case that the negotiators of the IRSSA intended the IAP to be a confidential and private process.

[81] In *J.W.*, the issue was whether, under the IRSSA, decisions of IAP adjudicators were subject to judicial review. Under the heading "Judicial Recourse Is Available Only Where the Adjudicator Failed to Apply the Terms of the IAP," a four-judge majority considered among other things (at paras. 134-136, 175), the delays that had resulted from court involvement in the claims process during implementation of the settlement agreement, as well as statistics bearing on timeliness, and stated that further court involvement would result in further delay and "would surely be contrary to the intentions of the parties […]" in creating the claims process set out in the agreement.

[82] I return to the question whether the supervising judge made an extricable legal error in relying on subjective intentions and subsequent conduct. In my view, he did so, largely in the manner submitted by Ms. Waldron. I do not agree that he erred in separating his analysis of the parties' intentions from his analysis of the text and context—the order and manner in which these factors are considered is not material as long as (if applicable) they are considered. But in providing his analysis he did not advert to or apply either the requirement to focus on the parties' objective rather than subjective intentions or the limits on consideration of post-contract conduct set out above in paragraph 77. While his analysis resembled in some respects that of the Supreme Court in *Fontaine* and *J.W.*, in my view it fell short in its identification and application of the rules of contractual interpretation. I consider below, in concluding on the issue of contractual interpretation, the consequences of this error.

(b) *Right to amend*

[83] Ms. Waldron submits (at paragraphs 41 to 43 of her memorandum) that the supervising judge also committed an extricable error of law in his textual interpretation of the IDSSA in concluding that there was "nothing in the IDSSA suggesting that progressive disclosure or the right to file changed Claims was a feature of the Agreement." She says that the provision in the IDSSA for filing a claim does not preclude the availability of "basic procedural rights" such as the right to amend, and invokes case law of this Court stating that the purpose of that right is to determine "the real question in controversy between the parties." She submits, in consequence, that the IDSSA should be interpreted as including a right on the part of claimants to amend a claim while a decision on the claim is pending.

[84] I would not accept this submission. There may be an implicit right to amend in some litigation or administrative proceedings (though I note that in the former context, the *Federal Courts Rules* are explicit in conferring the right, and also in most cases require leave before amendments may be made: see rules 75-76 and 200-201). But the claims process under the IDSSA is a different kind of proceeding; it is prescribed by contract, so that the rules governing litigation do not apply. To recognize an implicit right to amend the IDSSA would also run counter to the "entire agreement" and the "no amendment without consent of the parties" clauses of the IDSSA, and would ignore the binding nature of the Agreement and its judicial approval. It would, in addition, deprive class action settlements of any certainty.

(c) *Principles in section 9.03*

[85] Ms. Waldron submits (beginning at paragraph 62 of her memorandum) that in his analysis of the text and context of the IDSSA, the supervising judge "overlooked a crucial feature of the Claim Process favouring Claimants, established in section 9.03, entitled 'Principles Governing Claims Administration'." Section 9.03(2), quoted in part above at paragraph 19, states:

> 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.

[86] Ms. Waldron submits that "section 9.03 is key to understanding the Claims Process, its purpose and the intent of the parties." She says that in accordance with a plain reading, "the Claims Administrator had an obligation to adopt an interpretation of the IDSSA that would allow Claimants to change the level of self-harm self-identified and to file additional information …."

[87] In my view, it cannot be said that the supervising judge "overlooked" section 9.03 in interpreting the IDSSA. As the Attorney General points out (at paragraph 47 of his memorandum), the supervising judge referred to the content of the provision in his reasons granting settlement approval: 2019 FC 1075 at paras. 41, 107, 132. In his reasons on Ms. Waldron's motion, he quoted section 9.03(2) in full (at paragraph 17).

[88] Moreover, appellate courts must presume that first-instance courts (like the Federal Court) considered and assessed all of the evidence before them, absent proof to the contrary: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 46; *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157 at paras. 66-67. Ms. Waldron has not rebutted this presumption.

[89] In any event, the requirement in section 9.03(2) that "all reasonable and favourable inferences" be drawn in the claimant's favour appears to refer to the assessment of individual claims, not to the structure of the IDSSA's claims process. The requirement is directed to "the Claims Administrator, Third Party Assessor, and the Exceptions Committee and its Members." Their role (with the partial exception of the claims administrator) relates to the disposition of individual claims. While the claims administrator does play a role in establishing that structure, its terms are unlikely to depend on inferences to be drawn concerning the claims of individual class members.

[90] Similarly, the requirement in section 9.03(2) that claimants be presumed, "in the absence of reasonable grounds to the contrary", to be "acting honestly and in good faith" also appears not to apply in interpreting the structure of the IDSSA's claims process. A claimant's honesty and good faith are important considerations in assessing specific claims under the IDSSA. However, these considerations do not affect the interpretation of the IDSSA or the claims process it establishes.

(d) *Honour of the Crown and reconciliation*

[91] Ms. Waldron, supported by the intervener FSIN, submits that the supervising judge erred in law by "failing to apply the rule that the IDSSA's interpretation must be informed by the honour of the Crown" (Ms. Waldron's memorandum at paragraph 49; FSIN's memorandum at paragraphs 14-17). They derive this "rule" from a description of the IRSSA set out by the Supreme Court of Canada in *Fontaine* at para. 14: that "the IRSSA, while not a treaty, 'is at least as important as a treaty' and its interpretation must be informed by the honour of the Crown."

[92] However, the passage of the Supreme Court's reasons on which Ms. Waldron and the FSIN rely is found in *Fontaine* under the heading "Judicial History". It merely recounts the reasons of the supervising judge at first instance; it does not represent a holding on the scope or application of the honour of the Crown. The Supreme Court does not return to this subject in the balance of its reasons.

[93] In *Manitoba Metis Federation Inc. v. Canada (Attorney General),* 2013 SCC 14 at para. 68, the Supreme Court observed that "not all interactions between the Crown and Aboriginal people engage [the honour of the Crown]" and that "[i]n the past, it has been found to be engaged in situations involving reconciliation of Aboriginal rights with Crown sovereignty."

[94] That is not the situation here. As the supervising judge noted in granting settlement approval (2019 FC 1075 at para. 129), this Court has recognized that while the statement of claim in this proceeding alleged a breach of Aboriginal rights, the IDSSA represents the settlement of tort-based claims involving only individual rights, and has no impact on any

collectively held Aboriginal or treaty rights: *Cree Nation of Eeyou Istchee (General Council) v. McLean*, 2019 FCA 185 at paras. 8, 11; *Nunavut Tunngavik Incorporated v. McLean*, 2019 FCA 186 at paras. 8, 11; *Whapmagoostui First Nation v. McLean*, 2019 FCA 187 at para. 11. Nor is this proceeding a contest solely between Indigenous peoples on one hand and the Crown on the other: there are Indigenous individuals—including the representative plaintiffs—on both sides of the issues.

[95] Where the honour of the Crown is engaged in negotiations, it requires among other things that the Crown's representatives not engage in, or even appear to engage in, "sharp dealing": *Manitoba Metis* at para. 73. But here it has not been submitted, as I understand it, that there was any "sharp dealing" in the negotiation of a settlement agreement that was judicially approved as fair and reasonable.

[96] Moreover, as this Court stated in *Saskatchewan (Attorney General) v. Witchekan Lake First Nation*, 2023 FCA 105 at para. 128, leave to appeal to S.C.C. refused, 40870 (21 Dec 2023), interpretation of a modern agreement from the perspective of the honour of the Crown "does not entitle a court to reopen and rewrite the settled terms of a modern agreement negotiated between sophisticated parties over many years and with independent legal advice." Nor can the honour of the Crown be "used to read in obligations supplementary to or different from those that have been expressly agreed to by the parties […]": *Witchekan Lake First Nation* at para. 129; *George Gordon First Nation v. Saskatchewan*, 2022 SKCA 41 at para. 172, leave to appeal refused, 2023 CanLII 19734 (SCC).

[97] It is also apparent from his reasons that the supervising judge was fully aware of the potential for the IDSSA, and its various provisions and benefits, to contribute to reconciliation. His reasons (at paragraph 23) and his reasons on the motion for settlement approval (2019 FC 1075 at paras. 1, 107) make this clear.

(e) *Supporting evidence*

[98] Ms. Waldron submits (at paragraph 53 of her memorandum) that the conclusion of the supervising judge that "nothing in the IDSSA" could suggest that "the right to file changed Claims was a feature of the Agreement" constitutes either an error of law or a palpable and overriding factual error because it is unsupported by the evidence.

[99] She argues in particular that the supervising judge erred in finding (at paragraphs 65 and 70 of his reasons) that "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," despite agreeing that the term "progressive disclosure" was not used at the settlement approval hearing.

[100] However, it is possible to raise or address concerns associated with progressive disclosure without expressly using the term. That, in my view, is what occurred at the settlement approval hearing. In their submissions in support of settlement approval (appeal book at 775-780, 794), class counsel explained the claim form and how it was designed to work. They wanted, they explained, "to try and create something that would be an apparent break," and were "mindful of not wishing to be involved in […] an independent assessment process, as was built

into the Residential School process." One of the ways they sought to address their concerns, they explained, was to create clear designations of the levels from 2 to 5, to guide claimants in their selection of a single applicable level. They stated:

> It is the heart, if you will, of the compensation model. And so it does require the individual to reflect, to have memory awakened or maybe restored, but what is then required is that one of those levels be then selected. That the individual sitting and reflecting on the worst thing that happened to them, chooses one of the levels.
>
> […]
>
> The question about the compensation being less, or the structure being less or different than in the Indian Residential School. You know, we learn from circumstances. There were many aspects of the Indian Residential School IAP, that frankly we heard time, and time, and time again how destructive it was to the individuals who had to go through it. And it was very much a part and parcel that we would not repeat the process that was part of the IAP.

[101] The supervising judge found (at paragraph 15 of his reasons) that an overriding goal of the IDSSA was "to avoid the excesses, complexities, and other negative features of the [IRSSA] and its processes." Particularly in light of the emphasis on claimants selecting a single level, and the relative simplicity of that approach, it was open to the supervising judge to infer that progressive disclosure was among these excesses, complexities, and other negative features. There was no want of support for or palpable and overriding error in his finding.

(f) *Conformity with international law*

[102] The interveners the AFN and the FSIN submit that the interpretation of the IDSSA must take into account international law norms and instruments, including the *United Nations Declaration on the Rights of Indigenous Peoples*, G.A. Res. 295, UNGAOR, 61st Sess., Supp.

No. 53, UN Doc A/61/53 (13 September 2007). I would disregard these submissions: they go beyond the permitted scope of the interventions.

[103] The Court expressed its concern about the breadth of these interveners' submissions at the hearing of the appeal. The order of the Court granting the AFN and the FSIN leave to intervene imposed limits on their participation. These included that they (1) not repeat any of the appellant's submissions, (2) rely only on evidence that is part of the record in this proceeding, and (3) address only issues raised by the notice of appeal.

[104] These limits are consistent with the principles governing interventions in this Court. An intervener must take the issues identified by the parties as it finds them, and cannot transform them or add to them: *Macciacchera (Smoothstreams.tv) v. Bell Media Inc*., 2023 FCA 180 at paras. 19-20. The interveners' oral submissions were subject to the same limitations, since ordinarily, only arguments included in a party's (or intervener's) memorandum may be advanced in oral argument: *Kilback v. Canada*, 2023 FCA 96 at para. 41.

[105] Ms. Waldron's notice of appeal raises no issues relating to international law. Accordingly, submissions on this subject do not assist the Court in resolving the issues the parties have raised. I would not consider these submissions further.

(g) *Experience with the IRSSA*

[106] As noted above, the AFN also makes extensive submissions concerning document disclosure, document destruction, and procedural fairness issues that arose under the IRSSA.

While some elements of the experience with the IRSSA are no doubt relevant here, as will be discussed further below, the relevant elements of that experience do not appear to include the specific issues to which the AFN refers. Those issues too go beyond what is raised in the notice of appeal. The facts the AFN asserts also go well beyond the record in this proceeding. I would disregard these submissions as well.

(h) *Conclusion on interpretation of the IDSSA*

[107] For the reasons I have set out, I conclude that the supervising judge committed an extricable error of law in his interpretation of the IDSSA, in impermissibly taking into account both the subjective intentions of the parties and their post-contract conduct, when the prerequisites for doing so were not met. Although this is the sole ground of attack on his interpretation that has succeeded, his decision on this point is therefore not entitled to deference, and it is appropriate that this Court interpret the agreement afresh, avoiding his error: *Apotex Inc. v. ADIR*, 2017 FCA 23 at para. 93; *Ottawa (City) v. ClubLink Corporation ULC*, 2021 ONCA 847 at paras. 46-47, leave to appeal refused, 2022 CanLII 69782 (SCC).

[108] In doing so I start, as required by *Sattva*, with the text of the IDSSA, read as a whole. In my view, there are ample indications in the text of the agreement (some of which I have already noted) that it does not contemplate claimants amending their claims, or providing progressive disclosure.

[109] These include, in the main body of the IDSSA,

- the definition of "Application" in section 1.01, which is cast in the singular and makes no reference to the possibility of amendment;

- the definition of "Claim" in section 1.01, which is also cast in the singular and refers to submitting "an Application";

- the references in section 9.03, which sets out certain principles governing claims administration, to the "expeditious" nature of the contemplated process;

- the references to the provision of further information only in the processes involving the Third Party Assessor and the Exceptions Committee; and

- the "entire agreement" clause in section 1.13.

[110] There are further indications in Schedule B, entitled "The Claims Process":

- the reference in section 1 to a claimant filing "his/her application form and all supporting documentation;" and

- the statement in section 4 that as part of the intake phase, "[the] Claims Administrator sorts the applications of eligible Claimants in accordance with Claimants' self-identified Levels."

[111] In addition, the claim form, as discussed above at paragraphs 25 and 28, expressly calls for claimants to self-select only one level—either level 1 or one of levels 2 to 5.

[112] On the other hand, like the supervising judge, I see nothing in the text that supports the interpretation that Ms. Waldron asked be adopted.

[113] I turn then to the factual matrix, as defined in *Sattva* as "knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting." Its key element here, in my view, is the parties' knowledge of the issues that arose with the IRSSA and its IAP, including their provision for in-person hearings and progressive disclosure. It was that pre-contractual knowledge that led the parties to adopt the claims process they adopted in the IDSSA, and especially its relatively simple, paper-based process based on self-assessment. The factual matrix therefore favours the interpretation adopted by the parties to the IDSSA.

[114] I conclude that, despite the error committed by the supervising judge, his interpretation of the IDSSA was correct.

(3) Did the supervising judge err in determining that he had no jurisdiction to grant Ms. Waldron the individual relief she claimed?

[115] In my view, the supervising judge made no error in this regard.

[116] As noted above, the supervising judge cited in considering the scope for judicial supervision of class action settlements the Supreme Court's decision in *J.W.* There, speaking for the majority on this issue, Côté J. stated (at para. 120) that

> In the context of the supervision of a settlement agreement, the terms of the agreement are determinative. While supervising judges are not free to approve an agreement that fully ousts their supervisory jurisdiction, their authority 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.

[117] She added (at para. 140) that "cases in which judicial intervention is warranted will be rare," and adopted as the test for the availability of judicial recourse in relation to the IRSSA a "failure by the IAP adjudicator to apply the terms of the IAP Model, which amounts to failure to enforce the IRSSA." She added (at para. 141) that "circumstances will inevitably arise that were not foreseen by the parties and are therefore not provided for in their agreement," and that should this situation—a "gap"—arise, "courts must have the power to intervene to ensure that the parties receive the benefits of the agreement, i.e., what they bargained for."

[118] Justice Abella, who wrote on this issue for the minority of the Court, agreed (at para. 28) that there is a high threshold for judicial intervention. Courts nonetheless have a duty, she stated (at para. 30), "to ensure that the claimants receive the benefits they bargained for." This entails, she further stated (at para. 35), "focus[ing] on the words of the Agreement, so that the benefits promised to the class members are delivered." She also recognized (at para. 26) the existence of a "gap" in a settlement agreement as a basis for judicial intervention.

[119] I have quoted above the provision of the settlement approval order in this case that addresses judicial supervision. I repeat it here for ease of reference:

> This Court, without in any way affecting the finality of this Order, reserves exclusive and continuing jurisdiction over this action, the Plaintiffs, all Class Members who have not opted out of the Settlement Agreement, and the Defendant for the limited purposes of implementing the Settlement Agreement and enforcing and administering the Settlement Agreement and this Order.

[120] The supervising judge correctly recognized (at paragraph 48 of his reasons) both the existence of and the limits on his supervisory jurisdiction under the order. He correctly

understood that it was "not the Court's role to impose terms that it thinks appropriate nor to rewrite the IDSSA." He correctly recognized (at paragraph 52) that to grant Ms. Waldron what she was seeking would give her relief for which the IDSSA did not provide.

(4) Did the supervising judge err in determining that Ms. Waldron had no authority to seek relief on behalf of the class?

[121] It follows from my conclusion on the preceding question that this question need not be addressed. The reasons why the supervising judge had no jurisdiction to grant Ms. Waldron the personal relief she claimed apply equally to her claim for relief for other class members. However, I will deal briefly with some further aspects of this question.

[122] In the class proceedings regime, it is ordinarily the representative plaintiff or plaintiffs (or, depending on the nature of the proceeding, one or more representative defendants, applicants, or respondents), who have the right and the responsibility to represent the interests of class members and instruct class counsel on their behalf: see rule 334.16(1)(e); *Canada v. John Doe*, 2016 FCA 191 at para. 75; *Bancroft-Snell* at paras. 3-4; *Coburn and Watson's Metropolitan Home v. Home Depot of Canada Inc.*, 2019 BCCA 308 at paras. 14-16, leave to appeal refused, 2020 CanLII 23626 (SCC) and 2020 CanLII 23639 (SCC).

[123] Ms. Waldron was not named as a representative plaintiff. Therefore, absent some proper basis to conclude otherwise, she had no entitlement to seek relief on behalf of the class, even if the supervising judge had jurisdiction to grant it.

[124] I have already noted (at paragraph 13 above) that the supervising judge, in coming to his conclusion on this issue, relied in part on Ms. Waldron's failure to seek leave under rule 334.31(2). But that rule did not apply in the circumstances before him.

[125] As this Court has confirmed, rule 334.31(2) applies only where a representative plaintiff or applicant has a right of appeal but chooses not to exercise it. In those circumstances, another class member may seek leave to step into the shoes of the representative party and exercise the right of appeal. To obtain leave, the class member must show that he or she will fairly and adequately represent the class in the appeal, and that the appeal itself is in the best interests of the class: *Frame v. Riddle*, 2018 FCA 204 at paras. 24-25; *Ottawa v. McLean* at paras. 11, 13. Even if Ms. Waldron had sought leave under rule 334.31(2), therefore, it would not have availed her: no right of appeal was in issue before the supervising judge.

[126] However, there was a route through which Ms. Waldron could potentially have sought authority to represent the interests of the class or some of its members—she could have applied for permission to participate in the proceeding under rule 334.23. That rule authorizes the court to permit class members other than the representative plaintiff to participate in a class proceeding. It reads as follows:

334.23 (1) To ensure the fair and adequate representation of the interests of a class or any subclass, the Court may, at any time, permit one or more class members to participate in the class proceeding.	334.23 (1) Afin que les intérêts du groupe ou d'un sous-groupe soient représentés de façon équitable et adéquate, la Cour peut, en tout temps, autoriser un ou plusieurs membres du groupe à

participer au recours collectif.

(2) When permitting a class member to participate in the proceeding, the Court shall give directions regarding the role of the participant, including matters relating to costs and to the procedures to be followed.

(2) La Cour assortit l'autorisation de directives concernant le rôle du participant, notamment en ce qui concerne les dépens et la procédure à suivre.

[127] Ms. Waldron did not seek permission under rule 334.23 either before the supervising judge or in her written representations or oral submissions in this Court. However, while this Court's decision was under reserve, the current supervising judge (Grammond J.) relied on this rule, together with the law of standing, in granting a class member leave to participate in a motion seeking expressly to amend the IDSSA: *McLean v. Canada (Attorney General)*, 2023 FC 1093 at paras. 50-55. (The decision is now on appeal to this Court (Court File A-235-23), but the appeal does not appear to challenge the participation element of the decision.)

[128] This Court advised the parties and interveners in this appeal that it would consider brief written submissions concerning the Federal Court decision. In response, Ms. Waldron submitted, among other things, that the decision reinforced her position that she should be granted standing. The interveners FSIN and AFN made submissions to the same effect. The FSIN also submitted that a motion is not a prerequisite for the Court to grant Ms. Waldron permission to participate, and referred to decisions under similar provisions in Ontario and British Columbia recognizing that the purpose of rule 334.23 is to protect the interests of class members.

[129] Class counsel submitted that the rule did not affect the supervising judge's determination that Ms. Waldron lacked the authority to seek a declaration on behalf of the class. They noted that the reasons of Grammond J. focused on the interest the class member might have in bringing her motion and not "the extraordinary nature of the relief she was seeking." The general rule remained, they submitted, that only a court-appointed representative party may act on behalf of and bind the class.

[130] The Attorney General and the intervener Deloitte did not provide submissions. None of the parties and interveners making submissions sought to provide evidence that might bear on the potential application of rule 334.23. Such evidence would include, for example, evidence of the kind the court must consider when appointing representative parties on certification who will fairly and adequately represent the interests of the class, or when appointing another class member under rule 334.31 to exercise the representative parties' right of appeal: see *Ottawa v. McLean* at paras. 13, 22.

[131] Given my conclusion on the jurisdiction of the supervising judge, it is not necessary that I decide on the application of rule 334.23 in order to resolve the questions before the Court. In all of the circumstances, I would decline to do so.

IV. Proposed disposition

[132] I would dismiss the appeal. Consistent with the position of the parties, I would make no award of costs.

"J.B. Laskin"
J.A.

"I agree.
Judith Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-300-21
STYLE OF CAUSE:	JESSIE WALDRON v. HIS MAJESTY THE KING IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA, GARRY LESLIE MCLEAN, ROGER AUGUSTINE, CLAUDETTE COMMANDA, ANGELA ELIZABETH SIMONE SAMPSON, MARGARET ANNE SWAN AND MARIETTE LUCILLE BUCKSHOT AND DELOITTE LLP, ASSEMBLY OF FIRST NATIONS, AND FEDERATION OF SOVEREIGN INDIGENOUS NATIONS
PLACE OF HEARING:	SASKATOON, SASKATCHEWAN
DATE OF HEARING:	MARCH 29, 2023
REASONS FOR JUDGMENT BY:	LASKIN J.A.
CONCURRED IN BY:	WOODS J.A.
DATED:	JANUARY 5, 2024

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