Federal Court of Appeal | Cour d'appel fédérale

Date: 20240320

Docket: A-62-23

Citation: 2024 FCA 53

CORAM: **RENNIE J.A.**
MACTAVISH J.A.
MONAGHAN J.A.

BETWEEN:

SALT RIVER FIRST NATION #195

Appellant

and

CHIEF SHANE GOTTFRIEDSON, on behalf of the TK'EMLUPS TE SECWÉPEMC INDIAN BAND and the TK'EMLUPS TE SECWÉPEMC INDIAN BAND, and CHIEF GARRY FESCHUK, on behalf of the SECHELT INDIAN BAND and the SECHELT INDIAN BAND

and

HIS MAJESTY THE KING IN RIGHT OF CANADA as represented by THE ATTORNEY GENERAL OF CANADA

Respondents

Heard at Vancouver, British Columbia, on December 14, 2023.

Judgment delivered at Ottawa, Ontario, on March 20, 2024.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: MACTAVISH J.A.
MONAGHAN J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] Salt River First Nation #195 (Salt River) sought to intervene in the settlement approval motion of a class action two weeks prior to the date set for the hearing. It also sought to join the class, despite the deadline to opt in to the class action having passed. The Federal Court dismissed its request to intervene and to join the class (*Tk'emlúps te Secwépemc First Nation v. Canada*, 2023 FC 237, 2023 A.C.W.S. 647).

[2] The judge disposed of the motion in writing and prior to receipt of the respondents' motion records. Salt River appeals on grounds relating to both the manner in which its motion was determined and the substance of the decision. The respondents—the representative plaintiffs (Gottfriedson respondents) and the Attorney General of Canada—argue that the Federal Court did not err in dismissing Salt River's motion, in either the process followed or in the reasons provided for its decision. The respondents also argue that the appeal is in any event moot, as the Federal Court's decision approving the settlement was not stayed and the settlement funds have been transferred to the trust established to manage the settlement funds in accordance with its terms.

[3] Both Salt River and the Gottfriedson respondents seek to adduce fresh evidence on this appeal. While the fresh evidence is not dispositive of an issue in the appeal, for reasons that will become clear, it should be admitted. It provides essential information relating to the grounds of appeal and the question of mootness. The Gottfriedson respondents had no opportunity to put

their evidence before the Federal Court prior to its disposition of the motion and none of the parties are prejudiced by its admission.

The class action and settlement agreement

[4] The underlying class proceeding was certified in 2015 (*Gottfriedson v. Canada*, 2015 FC 706, [2015] F.C.J. No. 698). In broad terms, the action was brought by the representative plaintiff Bands seeking compensation for losses of Indigenous culture, language and social cohesion arising from the residential schools system. Uniquely in the context of class actions, and at the request of the Bands, the Band class claims proceeded on an opt-in basis. The Band class included "any… Indian Band(s) that: (i) has or had some members who are or were Survivors, or in whose community a Residential School is or was located; and (ii) is specifically added to this claim in relation to one or more specifically identified Residential Schools" (Federal Court decision at paras. 2-3).

[5] A Federal Court judge was assigned to case manage the proceeding.

[6] In 2022, the judge issued two orders extending the opt-in periods for Bands; on February 8, 2022 the opt-in period was extended until May 31, 2022, and on June 15, 2022, the opt-in period was further extended until June 30, 2022. These orders included steps to be taken by class counsel to provide notice of the extensions to Bands not already in the class, including posting the extended deadline on the dedicated class action website and emailing all Bands known to class counsel who had not yet opted in (Federal Court decision at paras. 5-7).

[7] The reasons why the deadlines were extended twice are significant. The discovery of unmarked graves at the sites of former residential schools had a dramatic effect on the course of the litigation. Counsel described this as “a game changer” and advised the Federal Court that there was now a renewed interest in the class proceeding and that Bands needed time to assess and digest the implications of these discoveries on many levels, not just legal. Consequently, the deadlines were extended and new Bands were allowed to join the class.

[8] After the June 30, 2022 deadline expired, six additional First Nations were granted leave to join the class in August 2022, and the Huron-Wendat were granted leave by the Court in September 2022. The seven Bands were let in following the deadline on consent, by agreement between class counsel and counsel for the Attorney General. No motion records nor supporting affidavits were filed.

[9] The common issues trial began on September 12, 2022, and was scheduled to last 48 days. The parties subsequently requested an adjournment, and on September 20, 2022, the trial was adjourned to allow for settlement negotiations.

[10] On January 18, 2023, a settlement was reached: the Government of Canada agreed to pay $2.8 billion to a trust fund administered by a not-for-profit entity. The funds were to be distributed by the trust to Bands in support of the “Four Pillars” of the settlement agreement: a) revival and protection of Indigenous languages; b) revival and protection of Indigenous cultures; c) protection and promotion of heritage; and d) wellness for Indigenous communities and their members. Two hundred thousand dollars was allocated to each Band to allow them to develop a

plan as to how their share of the settlement funds would be spent. A list of the Band class members formed part of the agreement. There were 325 Band class members.

[11] The settlement approval hearing took place on February 27 and 28, 2023. The Federal Court approved the settlement for reasons released on March 9, 2023 (*Tk'emlúps te Secwépemc First Nation v. Canada*, 2023 FC 327, 2023 CarswellNat 605 [Settlement Approval decision]). Three months later, on June 8, 2023, Canada settled the trust by transferring the settlement funds to the administering entity, and it is on this basis that the respondents contend the appeal is moot.

Salt River's involvement in the class action

[12] Salt River is a band under the *Indian Act*, R.S.C. 1985, c. I-5. It is situated in the Northwest Territories, near the Alberta border. Its claim that it meets the first criterion for inclusion in the Band class, and thus that it would have been able to opt in prior to the deadline, is not disputed.

[13] Salt River states that it was unaware of the class action and the opt-in requirement until late January 2023, when its Acting Chief was shown a news article about the settlement. Following a search of the former Chief's office and of all Band Council meeting minutes and resolutions for the past three years, Salt River was not able to find any notice of the proceeding or of the opt-in requirement. It claims that its ignorance of the class action was due to its limited administrative capacity and the health issues of its former Chief, with the Chief holding the only full-time position on Salt River's Council.

[14] Shortly thereafter, on February 13, 2023, Salt River filed a notice of motion to intervene in the imminent settlement approval hearing. It did not request that the motion be dealt with in writing under rule 369 of the *Federal Courts Rules*, S.O.R./98-106. The motion was to be heard February 21, 2023. Salt River's motion was supported by several affidavits indicating that it had not received notice of the class action.

[15] On February 15, 2023, the Gottfriedson respondents wrote to the Court to advise that they would be responding to the motion. They began drafting a responding affidavit and written representations to be served and filed in accordance with the deadlines in the *Federal Courts Rules* (*i.e.* two days before the motion was to be heard, per rule 365(1)(*a*)).

[16] Two days later, on February 17, 2023, the Federal Court judge dismissed the motion, prior to receiving the responding materials and without an oral hearing.

[17] Salt River appealed the order dismissing its motion for leave to intervene and join the class, but did not move to stay the settlement approval hearing pending disposition of its appeal.

The Federal Court decision

[18] In dismissing Salt River's motion to intervene, the judge first noted that while Salt River was technically seeking intervener status in the class proceeding, it was in substance seeking to be added to the class. The judge then held that Salt River could not now opt in to the class, since it had not opted in by the twice-extended deadline of June 30, 2022. The judge noted that she was "satisfied" that class counsel took the steps set out in the Court's deadline extension orders

to communicate the extended deadlines to potential Band class members across Canada (Federal Court decision at para. 8). The judge did not explain the basis upon which this conclusion was reached.

[19] The judge also dismissed Salt River's request for intervener status. Citing the test from *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 13, 481 C.R.R. (2d) 234 [*Canadian Council*], the judge concluded that Salt River was not directly affected by the outcome of the class proceeding, and that in any event, any interest raised by Salt River would be adequately represented at the settlement approval hearing by the other Band class members. The judge noted that Salt River's proposed challenge to the validity of the opt-in regime had not been raised by the parties in the context of the class action, as the only issue before the Court at the upcoming hearing would be whether the proposed settlement agreement was in the best interests of the class members (Federal Court decision at paras. 14-16).

[20] Finally, the judge held that Salt River's intervention would not be in the interests of justice due to Salt River's delay in seeking intervener status, the impending settlement hearing, and the disruption and prejudice to parties if Salt River were allowed to intervene. The judge was also not satisfied that Salt River provided any reasonable explanation for its delay, given the "extensive outreach by Class counsel to all Indian Bands known to Canada and Class counsel", as well as "extensive media coverage" of the proceeding (Federal Court decision at para. 20).

Issues before us

[21] Salt River contends that the Federal Court's failure to hold an oral hearing, despite one being requested and the importance of the issues, amounted to a breach of procedural fairness. The other two errors alleged by Salt River relate to the substance of the decision itself; more particularly, Salt River argues that the judge erred in applying a bright-line rule in considering whether it could opt in after the deadline, and secondly, in denying its motion to intervene. Salt River contends that the Court erred in concluding that it did not have a genuine interest in the proceeding as a potential class member.

[22] Salt River seeks to have the Federal Court's order set aside, as well as an order granting it leave to intervene and to join as a class member. In the alternative, Salt River seeks to have this matter remitted to the Federal Court for a hearing.

[23] The Attorney General and the Gottfriedson respondents argue that the judge did not err in disposing of the motion in writing, given the powers conferred on case management judges by rules 384.1 and 385 of the *Federal Courts Rules* as well as the general powers of the Court under rule 3 of the *Federal Courts Rules*. The Gottfriedson respondents argue that an oral hearing was not required as a matter of natural justice here, especially given the judge's familiarity with the matter.

[24] The Gottfriedson respondents also argue that there was no error in the Court's decision to deny the motion to intervene and/or to deny Salt River's request to join the class. The Gottfriedson respondents note that as an intervener, Salt River was precluded from raising any

issue beyond whether the settlement was fair, reasonable, and in the best interests of the class (Gottfriedson Respondents' Memorandum of Fact and Law at paras. 51-52, citing *Tsleil-Waututh Nation v. Canada (Attorney General),* 2017 FCA 174, 414 D.L.R. (4th) 373). The question of whether Salt River could join the class should not be before the Court. The Gottfriedson respondents emphasize that the judge cited the correct legal test for intervention, and that her decision, as case management judge, is entitled to deference.

[25] Finally, the Gottfriedson respondents argue that there was no error in denying Salt River entry to the class. They argue that the judge did not have the jurisdiction to do so on Salt River's motion, since the Court's jurisdiction on the settlement approval hearing was limited to approving or denying the settlement agreement as it stood. They contend that even if the Court had the necessary powers, it would not be in the best interests of the Band class, nor favourable to the integrity of the process, to add Salt River to the class at this stage. Denying Salt River entry into the class also would not prejudice Salt River as it would retain its rights against Canada.

The fresh evidence motion

[26] The Gottfriedson respondents bring a motion to admit fresh evidence on this appeal. They seek leave to admit the evidence that they would have put before the judge on the motion below, had she not dealt with the motion without hearing from them. This evidence deals mainly with the steps taken by class counsel to provide notice of the class action to Bands across Canada (including Salt River), and evidence that the trust has now been settled (which came to be after the settlement approval hearing). The Attorney General takes no position on this motion.

[27] Salt River does not oppose the fresh evidence motion, however, it seeks to introduce evidence in response to the fresh evidence of the Gottfriedson respondents. Specifically, Salt River seeks to introduce an affidavit from class counsel dated January 12, 2022, which explains why the Gottfriedson respondents sought to reopen the opt-in period and provide further notices to potential class members. The affidavit notes that the discovery of unmarked graves brought renewed interest in the class action and, importantly for the purposes of this appeal, that the previously published notice was confusing. This evidence therefore explains why certain Bands may not have initially opted in. Salt River also seeks to introduce evidence that shows that it was unable to find a record of the email notice of the class action sent by class counsel (Appellant's Supplemental Motion Record on Fresh Evidence Motion at pp. 2 and 19).

[28] Importantly, Salt River observes that the fresh evidence of the Gottfriedson respondents does not contradict the fact that it did not become aware of this class action until January 2023 (Appellant's Written Representations on Fresh Evidence Motion at para. 8).

The fresh evidence should be allowed in

[29] The test for fresh evidence on appeal was set out in *Bell Canada v. Adwokat*, 2023 FCA 106, 2023 CarswellNat 1503 at para. 4 [*Adwokat*]: it must be established that the evidence "(1) could not have been adduced at trial with the exercise of due diligence; (2) is relevant in that it bears on a decisive or potentially decisive issue on appeal; (3) is credible in that it is reasonably capable of belief; and (4) is such that, if believed, could reasonably have affected the result in the [C]ourt below." Even where these criteria are not met, a court has limited residual discretion to admit new evidence on appeal where the interests of justice require it (*Adwokat* at para. 4).

[30] Regarding the parties' due diligence, this criterion is obviously met for the evidence that only came into existence after the motion. However, it is also satisfied for the other evidence, which existed at the time of the motion but which was not before the Federal Court due to the Court choosing, of its own initiative, to decide the matter early and on the basis of Salt River's materials only. The due diligence criterion is not solely temporal—rather, it focuses on the conduct of the parties (*Barendregt v. Grebliunas*, 2022 SCC 22, 469 D.L.R. (4th) 1 at para. 59). Both parties here acted with due diligence in preparing and submitting their materials, but were cut off at the pass, so to speak. Therefore, under the unique circumstances of this case, the evidence could not have been adduced in the Court below with the exercise of due diligence.

[31] The proposed fresh evidence is relevant and credible: it is relevant to the issues of adequacy of notice, Salt River's reasons for missing the opt-in deadline, and the issue of mootness. Nor is there any reason to doubt its credibility: the evidence is uncontroversial and mostly supported by documentation.

[32] The final criterion—whether the evidence would have affected the result in the Court below—presents difficulties. The Gottfriedson respondents seek to admit evidence that they say only reinforces the decision below, or that speaks to what the judge can be assumed to have known when she reached the conclusion that she was "satisfied" that notice had been sent to Salt River. Salt River, in contrast, seeks to contextualize the Gottfriedson respondents' evidence. In my view, the evidence submitted could conceivably have affected the outcome below.

[33] Based on the above analysis, the evidence can be admitted under both the traditional test, as well as the broader interests of justice test. It is sufficient to say that the *Adwokat* criteria have been met, but it is also in the interests of justice that this Court has a full record before it. Salt River's fresh evidence is directly responsive to that of the Gottfriedson respondents and the motions were not opposed by either party. I would allow both motions to adduce fresh evidence.

Whether the appeal is moot

[34] The first question to be determined is whether the appeal is moot since the settlement approval hearing has taken place, the settlement has been approved, the approval order is final and has not been appealed, and the settlement has been implemented.

[35] A matter is moot where there is no longer a live controversy which affects the rights of the parties (*Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342 at 353 [*Borowski*]). That is the case here. The settlement funds have been settled in the trust and the settlement approval order has not been stayed. The Attorney General has no further role in the proceeding.

[36] There are, however, a number of reasons why this Court should exercise its discretion and entertain the appeal. *Borowski* provides that a court, in determining whether to hear a case that is moot, can consider the existence of an adversarial context, the concern for the judicial economy and the role of the court as an adjudicative branch in the political framework (at 358-363). Here, there is a robust adversarial relationship between the parties and the issues have been fully argued before us. Judicial economy is not in play, as the mootness argument was essentially

woven into the fresh evidence motion and the substantive questions on appeal. These factors aside, it is in the interests of justice that the Court consider the substantive issue. As the circumstances here demonstrate, there is value in giving appellate guidance to judges considering whether to approve class action settlements.

Error in deciding the motion in writing

[37] I begin with a review of some basic principles.

[38] First, the standard of review for an allegation of procedural unfairness is functionally correctness: a court must ask whether the procedure was fair having regard to all of the circumstances (*Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502 at para. 79; *Canadian Pacific Railway Company v. Canada*, 2018 FCA 69, [2018] F.C.J. No. 382 at para. 54). For an alleged error of fact-finding, the standard is palpable and overriding error. A court can take into account the motion judge's role as case management judge in its analysis (see, for example, *Paradissis v. Canada*, 2019 FCA 70, 303 A.C.W.S. (3d) 881 at para. 6, citing *Turmel v. Canada*, 2016 FCA 9, 481 N.R. 139).

[39] Second, a court is not required to hold an oral hearing in disposing of a motion.

[40] In dealing with class actions, case management judges are given wide powers under the *Federal Courts Rules*, including the power to "give any directions or make any orders that are necessary for the just, most expeditious and least expensive outcome of the proceeding", per rule 385(1)(*a*). Judges are also authorized to deal with motions in writing under rule 369 of the

Federal Courts Rules, and can exercise their discretion to do so based on the nature of the motion, the evidence, the issues, and the arguments (*Adams v. Canada (Parole Board)*, 2022 FC 273, 2022 W.C.B. 494 at para. 19). Finally, this Court recently held in *ViiV Healthcare Company v. Gilead Sciences Canada, Inc.*, 2021 FCA 122, 460 D.L.R. (4th) 272, that a court can act on its own initiative when confronted with a "problematic motion", though it should not be quick to do so, and it must always invite submissions and consider them (at paras. 22-27). I hasten to add that there was nothing problematic about Salt River's motion. It was promptly brought upon Salt River becoming aware of the proceeding and substantially in proper form (despite it being framed as an intervention motion, when it was in substance a motion to be added to the class, as the judge properly recognized).

[41] Wide as the discretion of a case management judge may be, it is not unlimited. There are other factors that bear on how it should be exercised, and in this case those include the nature of the issues, the allegations, and, importantly, the expectations of the parties as to how their case will be presented. Put otherwise, counsel may present a much different argument if they know that the motion is to be disposed of in writing only. Here, all parties proceeded on the understanding that there would be an oral hearing with respect to Salt River's motion.

[42] The nature of the evidence put before the Court by Salt River also constrained its exercise of discretion. Representatives of Salt River averred, under oath, that they had not received notice of the class action. This was a serious matter.

[43] Class counsel contend that the judge was entitled to rely on her familiarity with the case and assume that the notices that the Court had directed to be sent were in fact sent and reached their recipients.

[44] As a general proposition I agree, but again, there are limits. That assumption cannot be relied on in the face of sworn evidence to the contrary. While the judge does not say so directly, it is implicit in her reasons that she did not believe Salt River's affiants. The judge's reliance on the proposition that all that was to have been done, had in fact been done, was undermined by the uncontroverted evidence that the notice of the proceeding had not been received. Therefore, the Federal Court erred in making findings of fact not supported by the evidence before it on the motion: namely, that class counsel had effectively communicated the opt-in deadline to potential Band class members, including Salt River, contrary to Salt River's affidavits asserting the opposite. I note, parenthetically, that the fresh evidence clarifies that while notice had been sent to Salt River, it was unaware of the proceeding.

[45] Finally, there are circumstances where an oral hearing is required. For the reasons that the judge expressed in the Settlement Approval decision, this settlement was historic in nature and designed to address decades of cultural assimilation through the residential school system. If Salt River was to be denied the opportunity to participate in this settlement, it should have had the right to make the oral submissions that both it and the *Federal Courts Rules* contemplated and that the parties requested and anticipated. To this I would add that the judge did not consider the overarching objective of reconciliation in deciding to render the decision on the motion in writing and without the benefit of full submissions.

[46] The judge therefore erred in deciding the matter in writing and without hearing from the parties.

[47] This finding would be sufficient to conclude this matter; however, there are other concerns with respect to the Federal Court's treatment of Salt River's attempt to join the class.

Whether Salt River could join the class

[48] I do not accept that Salt River's failure to opt in by the deadline, on its own, constituted a sound discretionary basis for refusing Salt River's motion to be added to the class. The judge erred in law in her approach to the issue and her exercise of discretion cannot be sustained in light of the facts.

[49] Beginning with the law, the judge did not consider the jurisprudence with respect to whether a party should be allowed to opt in after the deadline. (I am assuming that there was, in fact "a deadline", given the multiple and unexplained extensions and its fluid nature.) Had the Court directed itself to the jurisprudence, it might have reached a different conclusion.

[50] Where a settlement amount is fixed, a court should apply a balancing test (considering factors such as prejudice to the parties and the reason for delay) in determining whether a potential class member should be allowed to join the class after the relevant deadline (*Harrington v. Dow Corning Corp.*, 2001 BCSC 221, 84 B.C.L.R. (3d) 368 at para. 22; *Boys and Girls Club of London Foundation c. Molson Coors Brewing Co.,* 2010 QCCS 6306, [2010] Q.J. No. 14108 at paras. 10-11; and *Gregg v. Freightliner Ltd.*, 2012 BCSC 415, [2012] B.C.W.L.D.

3314 at para. 73 [*Gregg*]; see also *Johnson v. Ontario*, 2022 ONCA 725, 475 D.L.R. (4th) 344 at para. 52).

[51] The Court in *Gregg* noted that, save for situations where a judge has become *functus*, "the jurisprudence does not appear to endorse an absolute bar on… extending the time to opt-in after a settlement agreement has been reached", pointing to a court's "broad discretion" in advancing the goals of class actions (at para. 64). This applies with particular force in the context of a class action addressing the harms caused to Indigenous culture by residential schools with the objective of reconciliation.

[52] I find it difficult to determine why the Federal Court denied Salt River class status. The only reason given by the judge appears to be that Salt River was out of time. The judge does not address what distinguishes Salt River from the other Bands allowed to join after the deadline (Federal Court decision at paras. 10-12). In addressing Salt River's request for intervener status, the principal factors apparently motivating the judge's decision were Salt River's delay in bringing the motion to opt in and prejudice to the class arising from a delay of the approval of the settlement (Federal Court decision at paras. 15-20).

[53] The uncontroverted evidence confirms the assertion that Salt River did not know of the class action until late January 2023, and it acted promptly upon learning of it. The judge, however, does not grapple with the question of whether Salt River's delay to join the class was excusable.

[54] Insofar as the timing of Salt River's motion was concerned, it will be recalled that the class action commenced in 2015. In September 2022, the common issues trial commenced and was scheduled to last approximately 10 weeks, with the damages portion of the trial set to proceed at a later date (Settlement Approval decision at para. 15). Other Bands were added to the class before trial began in August and September 2022 on the basis of no evidence at all—simply on the consent of counsel. The settlement itself was only announced January 18, 2023. There was evidence before the judge that Salt River did not become aware of the action until January of 2023. Further, there is no consistency in the treatment accorded to Bands that were allowed to join after the expiry of the opt-in period and Salt River which was not, and no explanation was provided by the Federal Court for its lack of consistency in its treatment of would-be class members.

[55] The hearing date for the settlement approval was entirely within the judge's control. Salt River's request could have been fairly considered had there not been a precipitous rush to have a settlement approval hearing on the date originally set. In exercising discretion with respect to scheduling decisions, judges must have an eye to the efficient administration of justice. But there is a strong countervailing principle, and that is that efficiency must not come at the expense of ensuring fairness to the parties.

[56] The judge seemed to proceed on the basis that the settlement approval hearing was an immovable target and did not consider whether Salt River's motion to join could have been heard prior to the settlement approval hearing. The February 27 date was an arbitrary one, entirely in the discretion of the judge to move.

[57] Nor did the judge explicitly consider the prejudice to Salt River if it was not allowed to join the class. The judge reasoned that since Salt River was not a member of the Band Class, it would not be directly affected by the outcome of the proceeding. This implies that Salt River would not be prejudiced by the Federal Court's decision, since Salt River would retain its rights against Canada.

[58] The judge erred in giving this any weight. It took eight years to reach this settlement, involving 325 Bands; how a single, small Band could achieve a proportionate outcome is, at best, conjecture. While Canada said in its submissions that it was "open" to reach a similar accommodation with Salt River, this Court notes that over a year has transpired since the settlement approval and no accommodation has been reached, nor is there any evidence that steps have been taken in this regard.

The motion to intervene

[59] At the risk of repetition, the judge erred in deciding the matter without holding an oral hearing. Again, as noted earlier at paragraph 47, while this is sufficient to conclude the matter, the Federal Court's consideration of Salt River's request to intervene requires comment. It is readily apparent that there were palpable and overriding errors in the application of the test by the judge.

[60] The judge erred in finding that Salt River would not be directly affected by the outcome of the settlement approval hearing and also simultaneously finding that Salt River's interests would be adequately represented by the Band class members who had opted in.

[61] It is obvious that Salt River would be directly affected by the outcome of the settlement approval hearing: it met the requirements to opt in to the Band class (which does not appear to be contested) and, absent a stay pending appeal, the approval of the settlement effectively put an end to its ability to join the class. Additionally, the conclusion that Salt River's interests could be sufficiently represented by class members cannot be sustained. It is, on its face, illogical: existing class members' interests would be diametrically opposed to Salt River's, as Salt River's inclusion may reduce the settlement funds available to all other class members.

[62] The only possible outcomes of the settlement approval hearing were the denial or approval of the settlement. However, in making that decision, a judge is required to consider expressions of support and objections and communications with class members during litigation (see Settlement Approval decision at para. 49). Given the unique circumstances of this action—an opt-in class action—this could have encompassed consideration of the adequacy of notice to Salt River.

[63] None of the parties to the settlement agreement had any interest in discussing the question of whether Salt River had received notice or should be a member of the class, and to this extent, Salt River could be characterized as having raised a new issue. Nevertheless, these were questions central to the settlement approval hearing itself, and in respect of which the judge had an obligation to be satisfied in determining whether the settlement was in the best interests of the class. Criticisms of communications between class counsel and class members, for example, can encompass both the content of the communications sent to class members, as well as the efforts deployed by class counsel to distribute such communications (*Lin v. Airbnb, Inc.*, 2021

FC 1260, 2021 CarswellNat 5129 at para. 52). This factor would be particularly relevant in cases such as this, where questions had been raised as to the effectiveness of the notices. Additionally, the objective of this settlement and its asserted historic significance should have been taken into account by the case management judge.

Conclusion

[64] As noted, the settlement funds have been transferred to the trust and no interim relief was sought to stay the settlement approval decision or the implementation of the settlement pending Salt River's appeal. Apart from the Federal Court's limited continuing supervisory jurisdiction over its administration, the action is at an end and the judge is *functus*. Despite the errors identified, there is no executory order that this Court can issue which would rectify the judgment of the Federal Court and I would therefore dismiss the appeal without costs.

"Donald J. Rennie"
J.A.

"I Agree.
Anne L. Mactavish J.A."

"I Agree.
K. A. Siobhan Monaghan J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-62-23
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DATED:	MARCH 20, 2024

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Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE RESPONDENT HIS MAJESTY THE KING IN RIGHT OF CANADA as represented by THE ATTORNEY GENERAL OF CANADA