

A-235-23

Court File No. ~~T-2169-16~~

FEDERAL COURT OF APPEAL

BETWEEN:

AUDREY HILL and SIX NATIONS OF THE GRAND RIVER
ELECTED COUNCIL

FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE	
FILED	AUG 29 2023 E. Silva
OTTAWA, ON	1

Appellants

and

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

Respondents

and

HIS MAJESTY THE KING IN RIGHT OF CANADA AS
REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Respondents

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellants. The relief claimed by the appellants appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellants. The appellants request that this appeal be heard at Toronto, Ontario

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the Federal Courts Rules and serve it on the appellants' solicitor or, if the appellants are self-

represented, on the appellants, WITHIN 10 DAYS after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the Federal Courts Rules instead of serving and filing a notice of appearance.

Copies of the Federal Courts Rules, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

August 29, 2023

Issued by: *Elizabeth Silva*
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TO: **The Chief Administrator**
Federal Court
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AND TO: **OFFICE OF THE DEPUTY ATTORNEY GENERAL OF CANADA**
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Solicitors for the plaintiffs, Garry McLean et. al

APPEAL

THE APPELLANTS APPEAL to the Federal Court of Appeal from the Order of Mr. Justice Sebastien Grammond dated August 10, 2023, by which the Appellants' motion for, amongst other things, directions to allow class members relief from a class action Claims Deadline was dismissed.

THE APPELLANTS ASK that the Order be set aside and an Order granted:

- i) setting out directions to allow class members relief from the Claims Deadline,
- ii) extending the Claims Deadline to December 31, 2025, or such date as to this Court seems just;
- iii) independently determining the claims take up rate;
- iv) such as to this Court seems just; and
- v) the Appellants will not seek costs, so long as no costs are sought against them.

THE GROUNDS OF APPEAL are as follows:

1. This appeal, and the underlying motion, concern the effect of the COVID-19 pandemic on the settlement of the Indian Day Schools class action. As stated by Phelan J., the judge who approved the settlement:

This settlement agreement is 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. Healing will be a long-term process at best.

2. The Settlement Agreement was premised on positive requirements for ongoing in-person notice and assistance, that such notice and assistance be "robust" and "culturally sensitive", "establishing a fair, comprehensive and lasting settlement of Day School claims", and the "promot[ion of] healing, education, commemoration and reconciliation". These requirements were fundamental terms of the agreement.

3. In March 2020, a few weeks into the claims period, the COVID-19 pandemic struck, ending the in-person notice and severely curtailing the claims assistance that class members were contractually entitled to. The Respondents abjectly failed to respond to the exigencies of COVID-19.

4. The Appellants moved to provide relief from the Claims Deadline, in order to obtain, for class members, the benefits of the Settlement Agreement.

5. In dismissing the Appellants' motion, the Court committed several errors, including failing to give any consideration to the admissions from the Respondents regarding the far reaching negative effects of COVID-19 on the claims process, and that in-person notice and claims assistance was contractually required. As stated in evidence from class counsel, sworn January 12, 2021:

The impact of COVID-19 cannot be overstated for Q2, 2020. ... When it became clear that such visits to Indigenous communities were no longer advisable, Class Counsel began to develop a travel plan to be implemented once travel was permitted ... In-person services will resume as soon as the relevant health officials deem it safe to do so.

6. The Court below completely disregarded this evidence and rejected additional evidence of the moving parties, which was unchallenged and unanswered, that the COVID-19 pandemic, which spanned 95 percent of the Claims Period, materially impaired the ability of class members to make claims. The Court made palpable and overriding errors in this regard.

7. The Court further erred by fundamentally misinterpreting the contractual duties set out in the Settlement Agreement and by failing to find that, following the onset of COVID 19, notice and claims assistance failed the above-noted contractual requirements, and included virtually no in-person notice or claims assistance.

8. The Court further erred in its interpretation of the Settlement Agreement and in particular, incorrectly interpreted the contractual right to relief from the "Claims Deadline" in "extraordinary cases" set out in s. 29 of Schedule "B".

9. The Court erred in failing to find that the benefits of the Settlement Agreement, following the onset of COVID-19, failed to be delivered.

10. The Court erred in failing to find a "gap" in the Settlement Agreement,

11. The Court erred in wrongly and unfairly rejecting expert evidence filed by the Moving Parties where that evidence was unchallenged by the Respondents and not contradicted by any other evidence.

12. The Court erroneously held that sufficient claims had been made despite also finding that the Court could not determine the claims “take up rate” and that the Respondent's evidence of class size was underestimated and unreliable.

13. The Court erred in failing to recognize the *sui generis* nature of the Settlement Agreement, holding it to be a mere contract.

14. The Court erred regarding the evidentiary threshold that applied to the Moving Parties. Amongst other things, the Court erroneously held that the moving parties were required to directly establish that COVID-19 prevented the filing of claims for compensation within the Claims Period.

15. The Court erred in, on the one hand, declining to Order production of documents on grounds that the Moving Parties “have already assembled an extensive evidentiary record”, and then, on the other hand, dismissing the Moving Parties’ motion on grounds that such evidence failed to meet the necessary threshold for the relief sought.

16. Such further and other grounds as counsel may submit and to this Court may seem just.

The Appellants request the Federal Court to send a certified copy of the following material that is not in the possession of the appellants but is in the possession of the tribunal to the appellants and to the Registry:

1. n/a



August 23, 2023

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