Federal Court Cour fédérale

Date: 20230810

Docket: T-2169-16

Citation: 2023 FC 1093

Ottawa, Ontario, August 10, 2023

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

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

Plaintiffs

and

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

Defendant

and

AUDREY HILL AND SIX NATIONS OF THE GRAND RIVER ELECTED COUNCIL

Moving Parties

ORDER AND REASONS

[1] A class action was instituted on behalf of survivors of Indian Day Schools. Canada and representatives of the survivors entered into an agreement to settle the class action. Pursuant to the settlement agreement, survivors could claim compensation.

[2] In the initial version of the settlement agreement, survivors had only one year to file their claims. Many survivors expressed the opinion that this period was too short. In response to this criticism, Canada and the representative plaintiffs agreed to extend that period to two and a half years. This Court then approved the settlement agreement. As a result, survivors had until July 13, 2022 to claim compensation.

[3] The Moving Parties, Audrey Hill and the Six Nations of the Grand River Elected Council, are asking this Court to extend this deadline to December 31, 2025. They say that insufficient efforts were made to inform survivors about the details of the claims process. They criticize the lack of support for survivors who wish to file a claim. They argue that the COVID-19 pandemic compounded these difficulties and prevented many survivors from making a claim.

[4] The Court dismisses the motion and refuses to extend the deadline.

[5] The Court rejects the Moving Parties' contention that the settlement agreement gives the Court a general power to extend the deadline. The agreement only provides for extensions in individual cases for a maximum of six months. The intention of the parties was that the claims process would then be closed.

[6] The Court also declines to exercise its supervisory jurisdiction to extend the deadline for filing claims. Supervisory jurisdiction can only be used in exceptional circumstances where the settlement agreement is not being implemented. It cannot be used to change the agreement. The Court carefully reviewed the evidence brought by the Moving Parties and found that the measures provided by the agreement with respect to notice and class member assistance were implemented. While additional forms of assistance could have been provided to survivors who wish to make a claim, this was not required by the agreement. The Moving Parties' contention that large numbers of survivors have been prevented from filing a claim is not supported by the evidence. Rather, approximately 185,000 survivors have made a claim within the deadline or the six-month extension period.

I. Background

[7] The present motion arises in the context of the settlement of a class action aimed at providing compensation to survivors of "Indian Day Schools."

[8] The Moving Parties are Audrey Hill and the Six Nations of the Grand River Elected Council [Six Nations or the Council]. Ms. Hill is herself a day school survivor and a member of the class. She also provided assistance to other persons in her community who wished to submit a claim for compensation pursuant to the settlement. Six Nations is the largest on-reserve First Nation community in Canada and the one with the most day schools. Its Council has provided assistance to community members who wished to submit a claim.

[9] The deadline to submit a claim was July 13, 2022. Class members could individually ask for an extension for special reasons until January 13, 2023. The Moving Parties are now seeking an order extending the deadline until December 31, 2025 for all class members, as well as an order for an independent assessment of the size of the class and the take-up rate. The plaintiffs and defendant oppose this motion.

[10] To provide the context in which this motion is brought, I will briefly summarize the settlement of residential schools class actions and explain in what respects the settlement of the present action differs. I will then outline how certain events during the implementation of the settlement of this action led the Moving Parties to bring this motion.

A. *Residential Schools and Day Schools*

[11] As the Supreme Court of Canada once said, “we cannot recount with much pride the treatment accorded to the [Indigenous] people of this country”: *R v Sparrow*, [1990] 1 SCR 1075 at 1103. Residential schools are one of the darkest chapters of Canada’s history. One of the aims of the residential school system was to encourage the assimilation of Indigenous children into non-Indigenous society. To this end, it was thought necessary to separate Indigenous children from their parents, families and communities. As the Court explained in *Canada (Attorney General) v Fontaine*, 2017 SCC 47 at paragraph 1, [2017] 2 SCR 205 [*Fontaine*]:

> From the 1860s to the 1990s, more than 150,000 First Nations, Inuit, and Métis children were required to attend Indian Residential Schools operated by religious organizations and funded by the Government of Canada. As Canada has acknowledged, this system was intended to “remove and isolate children from the influence of their homes, families, traditions and culture” (“Statement of Apology to former students of Indian Residential Schools” of the

> Right Honourable Stephen Harper on behalf of Canada, June 11, 2008 (online)). Thousands of these children were abused physically, emotionally, and sexually while at residential schools.

[12] A number of class actions were initiated on behalf of survivors of the residential schools. In 2006, many of these class actions were settled through the Indian Residential Schools Settlement Agreement [IRSSA]. One component of the IRSSA is the Independent Assessment Process [IAP], aimed at offering compensation to survivors who were victims of physical or sexual abuse at the residential schools. Survivors had five years to make a claim. They had to describe the abuse they suffered at an in-person hearing before an adjudicator.

[13] The IRSSA, however, did not address all wrongs committed by Canada with respect to the education of Indigenous children. It did not cover day schools operated by Canada in Indigenous communities. These schools were different from residential schools in that the students returned home every night and were not separated from their parents, families and communities. Nevertheless, day schools, like residential schools, were the backdrop of egregious cases of physical and sexual abuse. As Chief Hill of Six Nations states in his affidavit, day schools were

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

B. *The Present Class Action and Its Settlement*

[14] The plaintiffs began a class action on behalf of former day school students. The class action was certified on consent. Canada and the plaintiffs then negotiated a settlement, known as the Indian Day Schools Settlement Agreement [IDSSA or Agreement].

[15] The Agreement provides a basic amount of compensation to all former day school students. This is known as "Level 1" compensation and amounts to $10,000 per person. Canada provides an initial amount of $1.27 billion to fund Level 1 compensation, which can be increased to $1.4 billion if needed. Moreover, former students who were victims of physical or sexual abuse may receive compensation ranging from $50,000 to $200,000 (these are Levels 2–5). There is no upper limit to the total amount of compensation paid for claims at Levels 2–5. The claims process is entirely in writing. Contrary to the process under the IRSSA, there are no oral hearings. In this regard, section 9.03 of the Agreement states that the claims process is intended to be expeditious, cost-effective, user-friendly and culturally sensitive and aims at "mitigat[ing] any likelihood of retraumatization." Moreover, section 6.04 of the Agreement provides that class members will receive notice of the settlement in accordance with a notice plan appended to the Agreement. (Unfortunately, I must draw the attention to the low quality of the French version of several documents in this matter, in particular the notice plan.)

[16] In the initial version of the Agreement, one feature of the claims process was that class members had to file their claims within one year of the Implementation Date, defined as either

the end of the opt-out period or the exhaustion of any appeal process regarding the approval order.

[17] Canada and the plaintiffs sought approval of the Agreement pursuant to rule 334.29(1) of the *Federal Courts Rules*, SOR/98-106. Many class members filed notices of opposition. One frequently mentioned ground was that the claims period was too short. Before the hearing of the motion for approval, Canada and the plaintiffs addressed this issue by amending the Agreement to extend the claims period to two and a half years. This was accomplished by amending the definition of "Claims Deadline," in section 1.01, to mean two years and six months (instead of one year) after the Implementation Date.

[18] In the context of the motion for approval, the parties submitted to the Court the expert report of Peter Gorham, who calculated that the best estimate of the number of persons who attended day schools from 1920 to 1994 was 190,000, and the best estimate of the number of such persons who were still alive in 2017 was 127,000. The latter figure appears to be the basis for the $1.27 billion fund appropriated for the payment of Level 1 claims and is described in certain documents as an estimate of the class size. However, the class is somewhat larger because the 127,000 figure does not include persons who passed away between 2007 and 2017, whose estates are entitled to make claims.

[19] My colleague Justice Michael Phelan approved the Agreement: *McLean v Canada*, 2019 FC 1075. He found that the Agreement, despite the objections and its alleged shortcomings, was fair and reasonable. He noted that the claims process was designed to avoid a number of issues

that arose in the administration of the IRSSA, in particular the traumatizing effects of oral hearings and the need for class members to retain lawyers. With respect to the claims deadline, he stated, at paragraphs 121 and 128:

> It should be of considerable comfort to many objectors that the process of objection worked – it made meaningful change possible. The time for claiming, while well intended, was extended from one year to two and a half years through an amendment to the Settlement, unquestionably as a result of objection.
>
> . . .
>
> <u>Timing of claims process</u>: This objection to the one-year claim filing requirement was one of the most consistent issues of objection. It was a major impediment to be addressed. As seen by the amendments to the Settlement, it was revised in a reasonable fashion to two and a half years.

[20] A motion by an objector for leave to appeal Justice Phelan's approval order was dismissed: *Ottawa v McLean*, 2019 FCA 309. Moreover, the Federal Court of Appeal dismissed appeals from Justice Phelan's refusal to grant Indigenous representative organisations leave to intervene at the approval hearing, largely because the concerns put forward by these organizations were already addressed by other opponents: *Nunavut Tunngavik Incorporated v McLean*, 2019 FCA 186; *Whapmagoostui First Nation v McLean*, 2019 FCA 187.

C. *Implementation of the Settlement Agreement*

[21] The Agreement's Implementation Date was January 13, 2020 and class members could then start to file their claims.

[22] Barely two months later, the COVID-19 pandemic forced all levels of government in Canada to implement drastic measures to fight the spread of the virus. Restrictions on indoor gatherings and travel were in place, with varying degrees of intensity, for a good portion of the following two years.

[23] The impacts of the pandemic were felt particularly strongly in Indigenous communities. COVID-19 risk factors are more prevalent in Indigenous communities. Many of these communities face challenges in accessing basic services, such as running water, affordable food or health services. High-speed Internet, which was critical in mitigating the impact of restrictions on gatherings, is often difficult to access in Indigenous communities.

[24] In July 2020, the Court approved an amendment to the notice plan. Argyle Public Relationships [Argyle], a communications firm that assists in the delivery of the plan, was to offer community support sessions in about 60 Indigenous communities. Because of the pandemic, these sessions did not start before January 2021.

[25] Meanwhile, the Moving Parties undertook to assist class members in the Six Nations community in various ways. In addition to filing her own claim, Ms. Hill assisted 23 persons in this process. In his affidavit, Chief Hill describes the Council's efforts to raise awareness about the Agreement and the claims process among the members of Six Nations and to provide assistance to those members who wished to file a claim. For more than a year, an employee of the Council was assigned full-time to assist Six Nations members who wished to file a claim, even though the Council had no obligation to do so and received no funding. This employee, Ms.

Martin, filed an affidavit in support of the present motion. In the weeks before the Claims Deadline, the demand for assistance grew considerably. The Council had to assign additional employees to assist community members.

[26] I pause here to commend the Moving Parties for having provided assistance to members of their community, while being under no obligation to do so. I am certain that many other persons or organizations across the country acted similarly, and they are to be commended as well.

[27] As a result of the knowledge and experience acquired while providing assistance to community members, the Moving Parties have raised a number of issues with respect to the Agreement or its implementation, which can be briefly summarized as follows:

- The class size estimate is unreliable, which makes it impossible to calculate the take-up rate;
- The notice plan does not include any form of in-person outreach to community members;
- The dissemination of information regarding the Agreement was hampered by the COVID-19 pandemic;
- There was a lack of personalized assistance for class members;

- Assistance provided by telephone is inappropriate given the nature of the harms at stake;

- These difficulties were compounded by the lack of Internet access, language barriers and low level of literacy in many Indigenous communities.

[28] According to the Moving Parties, given these shortcomings, a number of class members never made a claim, because they were not ready to do so before the Claims Deadline or were not even made aware of the claims process.

[29] As the Claims Deadline approached, a number of Indigenous representative organizations called on the parties to the Agreement to provide more time for former day schools students to file their claims. In particular, in December 2021, the Assembly of First Nations adopted a resolution calling on the parties to the Agreement to extend the Claims Deadline by one year. The shortcomings mentioned above were frequently relied on to justify the requests. However, the parties did not change the Claims Deadline.

[30] According to the data provided at the hearing, there are about 185,000 persons who filed a claim, about 7,300 of whom asked for an extension during the six months following the Claims Deadline. The parties to the Agreement have relied on the large number of claims filed to explain why they have not agreed to extend the Claims Deadline.

[31] In December 2022, the Moving Parties brought the present motion, seeking an extension of the Claims Deadline until December 31, 2025 and an independent determination of the take-up rate.

[32] I should also note that other class members have brought a motion seeking relief in respect of the issue of progressive disclosure, that is, where a class member files a Level 1 claim and later recovers memory of events justifying a claim at a higher level. Justice Phelan dismissed this motion, noting that the Agreement does not allow a class member to file more than one claim: *McLean v Canada (Attorney General)*, 2021 FC 987 [*Waldron*]. The Federal Court of Appeal recently heard an appeal from this decision, but has not yet rendered judgment.

II. Analysis

[33] To explain why I am dismissing this motion, I proceed in six parts. I first give an overview of the applicable legal framework. I then explain why I grant standing to the Moving Parties. Next, I analyze the interpretation of the Agreement put forward by the Moving Parties. In a fourth part, I review the Moving Parties' claim that the class members have been deprived of the benefits of the Agreement. The fifth and sixth parts pertain to the existence of a gap in the Agreement and to the Moving Parties' request for an assessment of the take-up rate.

A. *Legal Framework*

[34] The legal framework governing the resolution of this matter must first be explained. After recalling certain basic principles regarding class actions, I describe the circumstances in which the Court's supervisory jurisdiction may be invoked.

(1) Class Actions

[35] A class action is a procedural vehicle that allows a representative plaintiff to bring an action on behalf of members of a class, without the latter's explicit consent. Proceeding collectively promotes a more efficient use of judicial resources, enables the pursuit of claims that would otherwise be uneconomical and deters potential tortfeasors: *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at paragraphs 27–29, [2001] 2 SCR 534. The class action has become an essential tool to improve access to justice. A class action is often the only realistic way to pursue a claim and to obtain compensation.

[36] Because the representative plaintiff acts on behalf of the class members without their consent, class action legislation (in this case, the *Federal Court Rules*) provides safeguards aimed at ensuring that the actions of the representative plaintiff are in the interests of class members. To that end, the Court's approval is needed for certain crucial steps in the action.

[37] Most class actions, like most lawsuits, end in a negotiated settlement. By nature, a settlement involves mutual concessions between the parties. Because the concessions made by the representative plaintiff bind class members, rule 334.29 provides that a settlement must be

approved by the Court. The test for approving a settlement is not perfection; it is whether the settlement is fair and reasonable: see, for example, *Merlo v Canada*, 2017 FC 533 at paragraphs 16–18. Moreover, when approving a settlement, the Court cannot amend the agreement of the parties; it must approve it as is or reject it. Were it otherwise, parties would be discouraged from settling the matter, as their bargain could be upended by the Court.

[38] These principles remain relevant in spite of this case's historical and political ramifications. The plaintiffs have chosen to frame their claims in private law terms and to pursue them with the tools afforded by civil procedure. The Supreme Court of Canada twice considered the IRSSA. In *Fontaine*, at paragraph 35, it remarked that the IRSSA "is at root a contract, the meaning of which depends on the objective intentions of the parties." See also *JW v Canada (Attorney General)*, 2019 SCC 20 at paragraph 102, [2019] 2 SCR 224 [*JW*]. This also applies to the Agreement at issue in the present case.

(2) Supervisory Jurisdiction

[39] The Moving Parties are relying on the Court's supervisory jurisdiction over class actions. At every step of a class action, even after settlement, the Court retains jurisdiction to address unforeseen issues. This is a corollary of the Court's role of protecting unrepresented class members: *Fantl v Transamerica Life Canada*, 2009 ONCA 377 at paragraph 39. Depending on the circumstances, supervisory jurisdiction may flow from class action legislation, from the order approving a settlement or from the provisions of the settlement agreement itself: *Fontaine*, at paragraph 32; *JW*, at paragraph 114. In this case, the approval order makes it explicit that the Court retains jurisdiction.

[40] Supervisory jurisdiction "is limited and shaped by the terms of the agreement, once it is approved and determined to be fair, reasonable and in the best interests of the class": *JW*, at paragraph 120. In other words, courts cannot rely on their supervisory jurisdiction to amend a settlement agreement: *Fontaine*, at paragraph 59. Quite the opposite, when courts have exercised their supervisory jurisdiction, they made it clear that they were giving effect to the settlement agreement instead of amending it.

[41] For this reason, the circumstances in which courts may intervene have usually been described in terms of a breach of the settlement agreement. However, there does not appear to be any generally accepted formulation of a test for the exercise of supervisory jurisdiction. The cases that the parties brought to my attention can be roughly classified in three categories.

[42] First, as in *Fontaine*, the court may be asked to solve a dispute regarding the interpretation of a provision of the settlement agreement. This, of course, assumes that the matter does not fall within the exclusive jurisdiction of the adjudication processes created by the agreement.

[43] Second, courts may intervene in cases of serious failures to implement the settlement agreement. After reviewing the case law arising under the IRSSA, Justice Côté in *JW* found that this would apply only in very narrow circumstances, described as a "failure by the IAP adjudicator to apply the terms of the IAP Model, which amounts to failure to enforce the IRSSA": *JW*, at paragraph 140. Justice Abella, for her part, stated, at paragraph 35:

> Judges, in short, have an ongoing duty to supervise the administration and implementation of the Agreement, including the

> IAP. In exercising this supervisory role in the Requests for Directions context, judges can intervene if there has been a failure to apply and implement the terms of the Agreement. In determining whether this failure exists, Supervising Judges will focus on the words of the Agreement, so that the benefits promised to the class members are delivered.

[44] Third, courts may intervene to fill gaps in the settlement agreement. As Justice Côté noted in *JW*, at paragraph 141, "circumstances will inevitably arise that were not foreseen by the parties and are therefore not provided for in their agreement." She found that the Chief Administrator's lack of power to order the reopening of a case that was manifestly wrongly decided constituted a gap. She also relied on *NN v Canada (Attorney General)*, 2018 BCCA 105 [*NN*], where claims were reopened further to the discovery of new evidence. Likewise, Justice Abella recognized the presence of a gap as sufficient grounds for judicial intervention: *JW*, at paragraph 27.

[45] Of course, courts may also intervene where this is expressly contemplated by the settlement agreement, as exemplified by *Heyder v Canada (Attorney General)*, 2023 FC 28. The settlement agreement in that case contained a provision allowing the claims administrator to grant extensions of time of no more than 60 days, and the Court to grant an extension of time beyond 60 days. In contrast, the Agreement in this case does not provide the Court with any power to grant extensions of time beyond a set period.

B. *Standing*

[46] Before applying the foregoing principles to the case at hand, I must address the Moving Parties' standing to bring the present motion.

[47] Ms. Hill seeks leave to participate pursuant to rule 334.23(1), which 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.

[48] Six Nations, on its part, seeks public interest standing. The test for public interest standing comprises three prongs: “whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court”: *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at paragraph 2, [2012] 2 SCR 524 [*Downtown Eastside*]. These three factors are not “hard and fast requirements,” but must be “assessed and weighed cumulatively” and “applied in a flexible and generous manner”: *Downtown Eastside*, at paragraph 20.

[49] Given the conclusions I reach on the merits of the motion, the issue of standing is not determinative. I will therefore state only briefly the reasons why I grant standing to the Moving Parties.

[50] I will analyze the standing of Ms. Hill and Six Nations together. There is little case law regarding rule 334.23 or its equivalent in the class action legislation of other Canadian jurisdictions. Given the grounds put forward by Ms. Hill for her intervention, the *Downtown*

Eastside test, while not directly applicable, provides useful guidance as to what factors may be considered relevant.

[51] The first prong of the *Downtown Eastside* test does not translate into a full review of the merits; rather, the aim is to ensure that the matter may be decided according to legal rules: *Downtown Eastside*, at paragraph 42. Here, the Moving Parties argue that the impacts of the COVID-19 pandemic have resulted in a failure to deliver the benefits promised by the Agreement. They assert that their claims fall in the categories of circumstances that, according to *Fontaine* and *JW*, justify the exercise of the Court's supervisory jurisdiction. They say that they are not seeking an amendment to the Agreement. Whether their claim really amounts to this is a matter for the merits. To the extent described below, their claim is justiciable and not frivolous.

[52] Ms. Hill did not cease to be a class member when her claim was paid. She therefore falls within the ambit of rule 334.23. Moreover, both Moving Parties have the genuine interest required by the second prong of the *Downtown Eastside* test. Such a genuine interest is not the same as a legal right; otherwise there would be no need for public interest standing. Both Ms. Hill and Six Nations have devoted considerable time, energy and resources to helping class members. They have "engaged with the issues they raise" and have "sought unsuccessfully to have the issue determined by other means": *Downtown Eastside*, at paragraph 43. Moreover, the fact that Six Nations is an Indigenous governing body is an additional factor weighing in the balance on this prong of the test: see, by way of analogy, *Fontaine v Canada (Attorney General)*, 2014 BCSC 2531.

[53] I am also satisfied that there is no other practical and effective means of bringing the issue before the Court, given the position taken by the Plaintiffs. To the extent that the Moving Parties' case hinges upon the effects of the COVID-19 pandemic, the issue could not have been raised at the settlement approval hearing, which took place in 2019.

[54] To the extent that rule 334.23 requires Ms. Hill to prove that she is able to represent the class, I am satisfied that she has done so, given the quality of the evidence and submissions she provided.

[55] Lastly, reconciliation between the Crown and Indigenous Peoples is an additional factor that warrants granting standing to the Moving Parties. A significant number of Indigenous representative organizations, including the Assembly of First Nations, have expressed concerns with the claims process set out in the Agreement. Reconciliation requires that the merits of these concerns be analyzed, within the bounds of the Court's role.

C. *Interpretation of the Late Claims Provision*

[56] The Moving Parties first argue that the Court's intervention is necessary to give effect to the Agreement as they interpret it. According to them, the Agreement should be interpreted in a manner that gives the Court discretion to extend the Claims Deadline, without any precise limit. This interpretation is based on schedule B of the Agreement, which sets out the details of the claims process. Section 29 of schedule B reads as follows:

> 29. It is recognized that in some extraordinary cases, a Claimant may be entitled to relief from strict application of the Claims

> Deadline; however, in no event may the Claims Deadline be extended by more than six (6) months.

[57] The Moving Parties seek to read this section as providing two independent rights: an *extension* of the Claims Deadline by no more than six months; and a more general right to *relief from strict application* of the Claims Deadline, which would not be subject to the six-month limitation.

[58] This interpretation is untenable. Rather, there is every indication that section 29 creates only one right, namely, for an individual to apply for an extension of no more than six months. This is buttressed by the recognized methods of legal interpretation: ordinary meaning, context and purpose.

[59] In its ordinary meaning, a sentence composed of two parts separated by the conjunction "however" pertains to a single subject and the second part is a qualifier or restriction on the first part. The first part of section 29 gives individuals the right to apply for an extension of time. A logical reading of the second part is that is restricts the scope of the first part, that is to say, that an individual may apply for an extension for no more than six months. If the intention was to provide two separate rights, one wonders why the second part begins with "however" and is framed in negative terms. In addition, the fact that section 29 provides a right to "a claimant" seems to foreclose the class-wide extension requested by the Moving Parties.

[60] The immediate context also belies the interpretation put forward by the Moving Parties. Section 29 forms part of a section of schedule B called "deadline extension." Section 30 sets out

the process for requesting an extension, provides that such a request must be made within six months of the Claims Deadline and gives examples of grounds for making such a request. Section 31 provides that requests for extensions are decided by the Claims Administrator or, in certain cases, by the Exceptions Committee, and that their decisions are final. This immediate context does not support the idea that section 29 creates two distinct entitlements, as there is a single process. It is implausible that the parties to the Agreement would have created an entitlement without a process. Moreover, this context reinforces the idea that section 29 is concerned only with individual requests, not class-wide extensions, and that this Court has no role to play in implementing section 29.

[61] An additional indication that there is only one extension process and that it is limited to a six-month period is found in section 1 of the Agreement, which defines “Request for Deadline Extension” as

> . . . a request for an extension of the Claim Deadline made by a Survivor Class Member in accordance with Schedule I; however, no requests may be made more than six (6) months after the Claims Deadline . . .

[62] There is, however, no definition of the “request for relief” that the Moving Parties suggest is a distinct entitlement.

[63] The Moving Parties assert that the presumption of consistent expression and the presumption against surplusage require the Court to adopt their proposed interpretation. I disagree. While some care was obviously taken in the drafting of the Agreement, it has not gone through the rigorous drafting process typical of statutes. At the hearing of this motion, counsel

for the Moving Parties acknowledged that it was poorly drafted. It is plausible that the parties have used synonyms to refer to the same concept and that they repeated certain things to emphasize them. Therefore, I attach little weight to the use of two different expressions, "relief from strict application" and "extension," in section 29 of schedule B. In addition, the structure of section 29 closely parallels that of the definition of "Request for Deadline Extension," yet the latter uses the concept of extension instead of that of relief in the former. Likewise, the reference to "extraordinary cases" in section 29 does not appear to differ in substance from the somewhat more elaborate description of the relevant criteria in section 30. It is also obvious that parts of sections 28–31 are intended to be redundant and merely to repeat concepts or rules already set forth in the Agreement itself.

[64] Regard may also be had to the purpose of the provision. In this regard, the Moving Parties relied on the preamble to the Agreement, which states, in its relevant portion, that the parties "intend there to be a fair, comprehensive and lasting settlement of claims related to Indian Day Schools, and further desire the promotion of healing, education, commemoration, and reconciliation."

[65] While this is the overall purpose of the Agreement, one must also pay attention to the purpose of the specific provision at issue: *R v Safarzadeh-Markhali*, 2016 SCC 14 at paragraphs 27–28, [2016] 1 SCR 180. Sections 28–31 of schedule B aim at bringing closure to the claims process, with a limited additional window for class members who show valid reasons for not being able to meet the initial deadline. See, by way of comparison, *Lavier v MyTravel Canada Holidays Inc*, 2011 ONSC 3149 at paragraphs 35–36; *Myers v Canada (Attorney General)*, 2015

BCCA 95 [*Myers*] (dealing with the IRSSA). While such closure benefits Canada, class members received other benefits in exchange. Thus, section 29 should be given an interpretation that favours this purpose, instead of thwarting it. Yet, the interpretation put forward by the Moving Parties would effectively deprive Canada of the benefit of the Claims Deadline, as there would never be any closure to the claims process.

[66] Designing a claims process with a fixed deadline does not offend the more general purpose of reconciliation. I echo the words of Chief Justice Bauman of the British Columbia Court of Appeal in *Myers*, at paragraph 25:

> I acknowledge the profound importance of these objectives and the need to encourage their attainment. Still, the IRSSA is a settlement of massive litigation. The parties to it gained many advantages and made many compromises in consideration therefor. In particular, the respondents sought the certainty of a bright-line deadline for IAP claims. Granting an extension to these four appellants could potentially open the door to many more IAP claims. One must appreciate the holistic nature of the settlement agreement, and the give and take evidenced in it, before ignoring the clear terms of the document and sacrificing the certainty won by the respondents by acceding to this Request for Direction. That would take from the respondents a concession they won for a price in the agreement; it could also potentially compromise the equities struck between the parties in the overall negotiation process that led to and, forms the basis of, the IRSSA.

[67] To summarize, the Moving Parties’ contention that section 29 of schedule B to the Agreement creates two distinct processes for extending the Claims Deadline is devoid of merit. Section 29 creates a single process and it is subject to an ultimate time limit of six months after the Claims Deadline. Therefore, the Moving Parties cannot rely on the provisions of the Agreement to justify the relief they are seeking in this motion.

D. *Failure to Deliver Benefits*

[68] Because the Agreement does not contain any provision allowing a class-wide extension of time beyond the six-month extension period, the Moving Parties can only succeed if they bring themselves within the parameters recognized by the case law for the exercise of the Court's supervisory jurisdiction. As explained above, the main ground for doing so has been described in a variety of ways, including the failure to deliver the benefits afforded by the settlement agreement. I will use the latter terminology.

[69] To demonstrate that there has not been a failure to deliver the benefits afforded by the Agreement in the present case, I will proceed in three steps. I will first describe the barriers to access to justice that inevitably arise in claims of this kind. I will then describe the measures contemplated by the Agreement to mitigate these barriers; in other words, I will attempt to delineate what was promised. Third, I will review the implementation of the Agreement to determine if these promises were kept or these benefits were delivered.

[70] It is often said that the supervising judge does not have the power to amend or vary the Agreement. Likewise, the exercise of supervisory jurisdiction does not amount to an appeal or a reconsideration of the settlement approval order. These constraints are reflected in the analysis that follows. The focus is on the benefits promised by the Agreement and whether these benefits were provided: *JW*, at paragraph 35. While additional measures can always be proposed to further improve access to the claims process, the Court cannot order them if the benefits of the Agreement have in substance been delivered.

(1) Barriers to Access to Justice

[71] In a class action like the present one, class members are likely to face important barriers to access to justice. Even when the class action is managed collectively, the individual issues are such that claims must be made individually and some sort of evidence is required. The barriers that arise in this context can be roughly classified in two categories: barriers related to the specific nature of the harm resulting from sexual abuse or serious physical abuse and barriers related to the specific circumstances of Indigenous communities.

[72] It is increasingly acknowledged that sexual assault causes insidious and long-lasting forms of trauma, including what is called post-traumatic stress disorder. In many cases, the memory of the events is repressed. Survivors may not fully appreciate the link between their psychological condition and the abuse. Realizing the situation is often accompanied by feelings of guilt and shame. Serious physical assaults may also give rise to some of these specific harms. Overcoming these barriers and disclosing the abuse takes time and, quite often, professional help. The law has gradually adapted to these realities. For example, the legislation of most provinces has been amended to remove limitation periods for claims based on sexual assault. Increasing attention is also being paid to the fact that the legal process may retraumatize survivors, for example by requiring them to describe the abuse they suffered or subjecting them to cross-examination.

[73] The circumstances of Indigenous communities give rise to another set of barriers. Indigenous persons may not be fluent in English or French and may have low levels of schooling

and literacy. Written materials may not be the best way of reaching out to an Indigenous audience. Word of mouth or the community radio may be much more effective. There may be little trust of, familiarity with or understanding of bureaucratic processes and the legal system. Many communities lack reliable access to high-speed Internet. For these reasons, providing meaningful notice to class members residing in Indigenous communities presents specific challenges, and communications strategies used with non-Indigenous Canadians may be entirely inappropriate. In saying this, I do not wish to minimize the capacity and agency of Indigenous persons; nevertheless, these issues are statistically more prevalent in Indigenous communities.

[74] The evidence brought forward by the Moving Parties bears witness to these barriers. In particular, Ms. Hill's own journey towards making her claim took more than a year. She initially thought that she was only eligible for a Level 1 claim. However, while trying to fill out her claim form, she experienced a feeling of mental block, which she recognized as a sign that there was something more. After she underwent traditional healing, she began remembering traumatic events that happened at day school. Recovering these memories caused her significant anxiety. She also experienced difficulty finding records and obtaining letters corroborating her story.

(2) What Was the Promised Benefit?

[75] A clear understanding of the benefits that the Agreement promised to class members in relation to these barriers is crucial to assess the Moving Parties' contention that these benefits were not delivered.

[76] There is every indication that the parties to the Agreement were fully aware of the barriers described above. Some of them arose conspicuously in the implementation of the IRSSA, despite efforts made to design a claims process adapted to the realities of the survivors.

[77] However, this does not mean that the Agreement promised the complete elimination of these barriers. This would be impossible. Rather, the parties bargained for a precise set of measures aimed at mitigating the impacts of these barriers on class members. These measures included a paper-based claims process that would not require survivors to testify before an adjudicator and the provision of free legal assistance by class counsel. On the other side of the bargain was a claims period shorter than in the IRSSA. The nature and sufficiency of these measures were discussed in the context of the settlement approval process. As we saw above, this resulted in the lengthening of the claims period from one year to two years and a half.

[78] As Justice Phelan noted when approving the Agreement, these measures are not perfect. In other words, they are not expected to completely overcome the barriers described above. It was certainly not expected that all class members would file a claim. What was promised was a reasonable process that included certain defined features aimed at mitigating the impact of these barriers. Thus, when assessing whether the benefits promised by the Agreement were delivered, the focus should be on whether the agreed upon measures were implemented. The fact that some of these barriers persist does not, without more, warrant the Court’s intervention.

[79] I will thus review the provisions of the Agreement regarding notice to class members and the provision of in-person assistance.

(a) *Notice Plan*

[80] Rule 334.34 provides that the representative plaintiff must give notice of any proposed settlement and of the Court's approval of a settlement, in a form approved by the Court. Section 6.04 of the Agreement provides that the parties will seek approval of the Court for a notice plan substantially similar to that appended as schedule F. Pursuant to section 6.05, Canada will fund the implementation of the notice plan. Justice Phelan approved the notice plan as part of the settlement approval order: 2019 FC 1074.

[81] The notice plan is divided in two phases. Phase one was intended to notify class members that a settlement had been reached and that the approval of the Court would be sought. After the settlement was approved, phase two aimed at informing class members of the claims process and the possibility of opting out of the settlement. The notice plan approved by the Court differs somewhat from schedule F to the Agreement and is more focused on phase two. Under the heading of "Effective Notice," the following excerpts aptly summarize what the plaintiffs undertook to do:

> The goal of Notice is to reach as many class members as is practicable in a clear, easily understandable manner, taking into account any special concerns about the education level or language needs of the class members. The notice must include: (1) contact information for Class Counsel to answer questions; (2) the address for the website, maintained by the Claims Administrator or Class Counsel and that provides links to the Settlement Agreement as amended, Notices of Certification and of Settlement Approval, motion materials for Settlement Approval and for Approval of Class Counsel Fees as well as other important documents in the case. The Notice of Settlement Approval must state all deadline dates, including those for the 90-day Opt Out period, the Implementation Date [to be updated as developments provide] and, if available, the period [start date/end date] within which claims

> forms will be available and will be accepted by the Claims Administrator.
>
> *Methods of Communication*
>
> Given the importance of unrepresented class members understanding and preserving their legal rights through either the claims process or the opt-out process, notice to all class members must be robust. As with the first phase notice, information regarding i) Settlement Approval including a summary of the Court's Decision, ii) Opt-Out process and date deadlines, and iii) anticipated Implementation Date will be communicated by email, telephone, facsimiles, community messaging; by television and radio; by social media as well as digital/internet advertising; and by letter mailing where required and practical. The goal of Notice is to reach as many anticipated class members as is practicable.
>
> *Language of Communication*
>
> […]
>
> Notice materials and Opt-Out forms will be made available in English, French, Cree, Ojibwe, Dene, Inuktitut and Mi'kmaq.

[82] Moreover, the notice plan contains a distribution of responsibilities between Class Counsel and Argyle. Class Counsel must send information to class members who have registered on Class Counsel's web site (numbering approximately 80,000 as of the date of approval) and to a broad range of Indigenous governing bodies and representative organizations. It must also continue "visits to local communities as Class Counsel may be invited to attend." Argyle, on its part, must maintain the web site, Facebook page and Twitter account and must develop content for a wide variety of media. Thus, beyond Class Counsel's duty to offer information sessions in Indigenous communities when invited, the notice plan does not require that individual, in-person notice be given to class members.

(b) *Class Member Assistance*

[83] Two measures were intended to provide class members with assistance in the claims process.

[84] First, with respect to legal advice, section 13.03(1) of the Agreement reads as follows:

> Class Counsel agrees that it will provide legal advice to Survivor Class Members on the implementation of this Settlement Agreement, including with respect to the payment of compensation, for a period of four (4) years after the Implementation Date.

[85] Section 13.03(2) states that this service will be provided at no cost to class members. This is also reflected in the short-form notice of settlement, which states that "Class Counsel will be available to assist you in the completion of Claims Forms at no cost."

[86] The second measure derives from an amendment to the notice plan in July 2020. The parties undertook to propose improvements to the notice plan after a few weeks of implementation. The amendment also reflected the demand for in-person assistance and the anticipated barriers resulting from the COVID-19 pandemic. According to this amendment, Argyle was to develop a Claimant Assistance Plan, pursuant to which 45-minute one-on-one, in-person assistance sessions were to be provided to class members in selected Indigenous communities over multi-day events. It was anticipated that approximately 11,000 class members could benefit from these sessions.

(3) Was the Benefit Delivered?

[87] This brings us to the crux of the case. Were class members deprived of the benefit of the agreement, either because of the COVID-19 pandemic or for other reasons?

[88] Like anyone seeking relief from the courts, the Moving Parties bear the burden of proof. It must be emphasized that the Moving Parties are not seeking any form of individual relief. It is true that, at the hearing, they insisted on an alternative form of relief that would direct the Claims Administrator to accept all individual claims beyond the Claims Deadline. While an individual decision would be made in each case, the Claims Administrator would be directed to presume that certain circumstances common to all class members, such as the COVID-19 pandemic, warrant an extension in every case. There is little practical difference between this and an order extending the Claims Deadline. In both cases, the relief sought is class-wide.

[89] It follows that the evidence justifying such relief must be class-wide as well. In other words, the Moving Parties cannot rely merely on evidence that a discrete number of class members were individually deprived of the benefit of the Agreement, as in the *JW* and *NN* cases. Rather, to justify a class-wide extension, they must show that the class was deprived of the benefit of the Agreement because a substantial proportion of its members were prevented from filing a claim. In other words, the evidence must be commensurate with the relief sought, and there is "a high bar for judicial intervention": *JW*, at paragraph 28. I will now turn to a review of the evidence in this regard.

(a) *Evidence Regarding Individual Cases*

[90] The first category of evidence consists of the personal observations of the Moving Parties' affiants. In their affidavits, Ms. Hill and Ms. Martin state that they believe that many class members have not been able to file a claim because they were unaware of the settlement or because of the barriers described above. They have met people who missed the deadline or who initially sought assistance and then did not come back. According to Ms. Martin, this may affect disproportionately those who are experiencing homelessness, who struggle with addiction, are incarcerated or reside outside Canada.

[91] While I do not doubt the sincerity of Ms. Hill's and Ms. Martin's assertions, they do not allow me to draw class-wide conclusions regarding the inability of a substantial portion of the class to file claims. For example, Ms. Martin states that Six Nations assisted approximately 600 class members in preparing their claims. While she expresses the belief that many other class members did not submit a claim, she does not provide any estimate of their number nor any information that would allow me to assess the magnitude of the problem.

[92] Undoubtedly, some class members were not able to file their claims before the deadline. Without more, however, this does not constitute a breakdown of the Agreement or a failure to provide the benefits promised by the Agreement. One must acknowledge that in a settlement of this kind, there will be a certain number of class members who will never make a claim. Perfection is not required and the benefits the settlement affords to the class as a whole must be

balanced against some members' inability to make a claim: *Fontaine*, at paragraph 62. In particular, where there is a deadline, it is inevitable that some members will miss it.

[93] On the basis of the observations of Ms. Hill and Ms. Martin, I cannot conclude that a significant proportion of class members were unable to file claims before the Claims Deadline or that there has been a class-wide failure to provide the benefits promised by the Agreement.

[94] The Plaintiffs argue that a negative inference should be drawn from the fact that the Moving Parties did not bring evidence from a single class member who was not properly notified about this action or was unable to file a claim before the Claims Deadline. I decline to do so. It should be obvious that class members who lack knowledge of this action or are not ready to file their claim are unlikely to identify themselves to the Moving Parties. Even if such persons were known to the Moving Parties, it is unlikely that they would be willing to provide evidence in a public proceeding. Confidentiality would be lost. Moreover, if a class member has not yet recovered memory of their abuse in day schools, by definition this is not susceptible of being put in evidence. Realistically, the Moving Parties cannot be expected to offer direct evidence from class members who have been unable to file a claim. They are, however, required to offer some evidence demonstrating the scope of the problem.

(b) *Take-Up Rate*

[95] In a class action, the take-up rate is the proportion of class members who actually file a claim and receive compensation. The take-up rate is often considered a measure of the success of

the claims process: Catherine Piché, *L'action collective: ses succès et ses défis* (Montreal: Thémis, 2019) at 137.

[96] The fact that approximately 185,000 claims were filed while the class size was estimated at 127,000 may be viewed as a sign of tremendous success. It may also mean that the class size estimate was flawed. Indeed, the Moving Parties filed the expert report of Dr. Nathan Taback, who alleges that Mr. Gorham's class size estimate suffers from a number of methodological flaws. Therefore, the Moving Parties ask me to give no weight to Mr. Gorham's estimate and to assume that the class is actually much larger than the 185,000 persons who have filed claims. They also ask me to order a study that, using a methodology put forward by Dr. Taback, would produce a more accurate estimate of the class size. The Plaintiffs and Defendant, on their part, argue that the actual number of claims is within the range identified by Mr. Gorham and that there is no cause for concern.

[97] In my view, while class size was likely underestimated, this alone does not warrant any inference regarding the actual class size nor a finding that a substantial proportion of class members were unable to file a claim.

[98] Let us begin with the degree to which the class size was likely underestimated. At the outset, it must be emphasized that the finding of underestimation flows entirely from the discrepancy between Mr. Gorham's estimate and the actual number of claims filed. Mr. Gorham concluded that there were from 120,000 to 140,000 class members who were alive in 2017, with a "best estimate" at 127,000. However, two adjustments must be made to enable a proper

comparison with the number of claims actually filed. The Agreement defines the class as including former students who were alive in 2007, not 2017. Thus, former students who died between 2007 and 2017 should be added to the estimate. The evidence contains statements to the effect that about 1,800 to 2,000 class members pass away every year, which would suggest an upwards adjustment of 18,000 to 20,000. This is compatible with the information given by the parties at the hearing that about 10% of the claims are made by estates. The other adjustment pertains to the fact that a proportion of the claims are rejected. At present, this proportion is very small, but the defendant suggested that it might increase because the claims that are still in process are more likely to be rejected for lack of proper documentation. Although the latter component remains speculative at this stage, I accept that the gap between the high bound of the estimate and the number of claims is smaller than it appears and might possibly be less than 20,000. Even then, it remains that the class size was most likely underestimated.

[99] This finding, however, does not assist the Moving Parties. The fact that the number of persons who filed a claim is larger than Mr. Gorham's estimate merely shows that the estimate is unreliable. It says nothing about persons who did not file a claim. It does not prove the actual size of the class. It does not show that there remains a large number of class members who were unable to file claims. Thus, it does not support a finding that the class has been deprived of the benefits of the Agreement.

[100] Nor is Dr. Taback's evidence useful in this regard. While Dr. Taback criticizes certain aspects of Mr. Gorham's methodology, he never asserts that the alleged shortcomings result in an overestimation or an underestimation. At most, Dr. Taback suggests that not enough is known

about the provenance of the data used by Mr. Gorham and that the latter should have given a more fulsome justification for the assumptions he made when data was missing. Moreover, Dr. Taback's criticism appears trivial in certain respects, for example when he concludes that 20% of the data is flawed, based mainly on a discrepancy of 705 pupils in 1957–1958, or when he highlights what amounts to a discrepancy of at most 3% for the years 1922–1929 and 1938–1944. Dr. Taback, however, does not put forward his own estimate of the size of the class, nor does he try to estimate the magnitude of the error caused by the alleged methodological flaws in Mr. Gorham's estimate. Quite simply, the Moving Parties have not brought any positive evidence of the size of the class.

[101] In the end, the Moving Parties' assertion that the class could be much larger than the 185,000 persons who filed a claim is based on mere speculation. For example, at the hearing, counsel relied on 2016 census figures regarding the Indigenous population in Canada to hypothesize that the class could be as large as 400,000 persons. There is absolutely no basis in the evidence for such speculation. As mentioned above, Dr. Taback does not offer any estimate of the size of the class and nothing in his report supports a figure three times higher than Mr. Gorham's estimate. Moreover, it is well known that there has been a substantial increase in the Indigenous population over the last 30 years, because of both natural increase and successive reforms to the registration provisions of the *Indian Act*. Yet the last day schools closed about 30 years ago. Therefore, speculation based on today's figures is bound to be misleading.

[102] What, then, is the significance of the fact that 185,000 claims were filed? In my view, this shows that a very significant number of class members were either unaffected by the barriers

described above or were able to overcome them before the Claims Deadline. Even though I am unable to calculate the size of the class or the take-up rate, the large number of claims filed is a relevant factor when assessing the Moving Parties' submissions regarding insufficiency of notice and support. This is not a situation where only a small proportion of the estimated class filed claims.

(c) *Insufficiency of Notice*

[103] The Moving Parties rely on the expert report of Todd Hilsee, a well-known class action notification expert, for the proposition that the notice plan was deficient and that the COVID-19 pandemic only made things worse. In my view, however, Mr. Hilsee's evidence is directed mainly at the sufficiency of the notice plan approved by the Court, which is not grounds for the Court's intervention at this late stage.

[104] Mr. Hilsee oversaw the notice plan for the IRSSA. In his affidavit, he indicates that this plan included an individualized in-person component, which saw a team of 15 persons "fan out across Canada" to hold information sessions in more than 600 communities. He states that more than 26,000 class members were reached in this manner. However, the Agreement in the present case does not provide for any form of in-person, individualized notice. In his opinion, this is a shortcoming that justifies an extension of the Claims Deadline.

[105] Mr. Hilsee's opinion, however, overlooks the fact that Justice Phelan approved the notice plan in spite of the lack of an individualized, in-person component. The Court can only exercise its supervisory jurisdiction if there has been a failure to deliver the benefits contemplated by the

Agreement, including the notice plan. Criticizing the notice plan that was approved does not show that it was not implemented or that its benefits were not delivered.

[106] Likewise, Mr. Hilsee's criticism of the use of "free media tactics" to raise awareness about the settlement misses the mark. This was contemplated by the notice plan. Any criticism should have been made at the settlement approval hearing. Moreover, such methods were used alongside other methods of notice, which, contrary to "free media tactics," include the Court-approved notice of settlement.

[107] Mr. Hilsee does not assert that there was a failure to implement any component of the notice plan as approved. Nor does he provide evidence that a substantial number of class members ignored the existence of the settlement. He does not attempt to measure the real-world effectiveness of the notice plan. While he mentions the COVID-19 pandemic, he does not explain its impact on the notice plan, which did not include an in-person component. Quite simply, there is no evidence that the notice plan was not implemented as promised or was ineffective.

[108] Beyond Mr. Hilsee's evidence, the Moving Parties made a number of assertions regarding the inadequacy of the notice plan. Ms. Hill commented that she found presentations made by class counsel to be confusing, in particular because they could have encouraged class members to make their claims at Level 1 instead of the higher levels. However, this criticism appears to be directed mainly at the existence of incentives to claim at Level 1 rather than the presentations themselves. To the extent that this relates to the phenomenon of progressive

disclosure, this was addressed in the *Waldron* matter. In the absence of more precise evidence regarding the contents of the presentations, this falls short of proving a systemic failure to provide adequate notice to class members.

[109] Chief Hill stated that the COVID-19 pandemic restricted “word of mouth” communication, which is so important in Indigenous communities. Yet, interpersonal communications were not entirely shut out during the pandemic, and constitute only one of several means by which class members were to be reached.

[110] Rather, the fact that 185,000 persons filed claims strongly suggests that the notice plan was effective, in spite of the criticisms brought forward by Chief Hill, Ms. Hill and Mr. Hilsee. To this obvious inference, Mr. Hilsee simply replies, “something must be wrong, either with the settling parties’ estimate of the class size and/or whether the claims received truly reflect the harms suffered by Class members.” But one cannot brush aside an inconvenient fact so easily. Even though the class size was likely underestimated, the filing of claims by 185,000 persons makes it very difficult to find that there has been a failure to provide the benefits of the Agreement in relation to the notice plan.

(d) *Lack of Individualized Assistance*

[111] The main theme of the Moving Parties’ submissions is that class members needed individualized in-person assistance to complete the claim form and that the unavailability of such assistance prevented many of them from filing a claim. Once again, this submission must be

assessed not against a standard of perfection, but in light of what was promised in the Agreement.

[112] With respect to individualized assistance, the Agreement promised two main things. First, class counsel undertook to provide legal assistance to class members for a four-year period after the implementation date. Second, as a result of the amendment approved by Justice Phelan in July 2020, Argyle was to hold community support sessions in approximately 60 Indigenous communities and large urban centres. During these sessions, a team of support workers were to offer class members 45-minute, one-to-one sessions in order to help them with the claims process.

[113] There is no serious issue that these benefits were delivered. Class counsel's quarterly reports describe, albeit in summary form, the legal advice provided to individual class members. While Ms. Hill recounts an unsatisfactory experience with calling class counsel, the evidence before me does not show that, on a class-wide basis, class counsel failed to provide the services promised or that these services were inadequate.

[114] Likewise, while the community support sessions were suspended with the beginning of the COVID-19 pandemic, they resumed in January 2021. The list found in appendix B to Chief Hill's affidavit shows that 29 sessions were held in January-March 2020 and 62 more sessions were held after January 2021. There is no evidence that these sessions were inadequate in any way. One such session took place at Six Nations on November 7-8, 2021. Other than to say that the event was organized on short notice and that the turnout was "fairly low," Ms. Hill provides

little evidence that this session did not fulfil the promise made in the Agreement and its July 2020 amendment.

[115] Rather, the Moving Parties's submissions are tantamount to taking their efforts to help Six Nations members as a benchmark for what the Agreement should have provided. This is illustrated by Ms. Hill's description of the steps she takes when assisting a class member:

> When people asked me for help, I began by inviting them over, offering them a tea, and talking with them until they felt comfortable. I helped survivors identify their support network before we began to talk about their memories. I made sure they had at least three places to turn, and I always offered myself to be one of those supports. They had my phone number so that they could call me when they needed. It was common for the survivors I assisted to have difficult emotional reactions to their memories, the same way I did. They needed to know that they had a relationship with me, and that I would be available whenever they needed to talk, even in the middle of the night.
>
> To understand their narrative, I would start by asking them about their first year at the IDS – usually kindergarten or grade 1—and then go through each grade. I would ask them questions about more mundane things like taking the bus, what they had for lunch, what games they played. People remembered much more, and were able to organize and process their memories more, when they were able to focus on their school experiences this way. Often, survivors glossed over the traumatic aspects of their experience. I would gently direct them to the places where I could identify that they left something out. I would take notes and help them write out their narrative.
>
> It was often difficult and tiring for survivors to discuss their memories of the day schools, and they would require a break from the process before we were finished. It could be difficult and tiring for me as well. The first meeting between myself and the survivor could last anywhere between one to three hours, depending on the person. Then we would stop, and I would let them decide when to come back and continue. Sometimes, it could take a person months before they were ready to resume completing their claim.

[116] It would be ideal if all class members could benefit from such a level of assistance. As I mentioned above, Ms. Hill should be commended for having volunteered her time to provide such assistance to a number of survivors.

[117] There is, however, nothing in the Agreement that requires that individualized assistance of this nature be afforded to class members. It is true that section 9.03 of the Agreement states that the intent of the claims process is "to minimize the burden on the Claimants . . . and to mitigate any likelihood of retraumatization." However, such a statement of intent cannot form the basis for requiring an individualized class member assistance program that goes far beyond what the parties to the Agreement contemplated.

[118] The evidence does not show that the COVID-19 pandemic impacted class member assistance to a point that the benefits of the Agreement were not delivered. While the pandemic delayed the resumption of the community support sessions, in-person sessions were held in 2021 and 2022 in 62 communities. Moreover, Ms. Hill and Ms. Martin were able to assist many class members in person despite the pandemic. Even when Six Nations' administrative office was closed, Ms. Martin was able to arrange for one-on-one in-person meetings.

[119] In sum, the evidence does not show, on a class-wide basis, that class members were deprived of the assistance promised in the Agreement. While more intensive forms of assistance could undoubtedly have been provided, these would exceed the promise of the Agreement.

E. *Gap in the Agreement*

[120] As we have seen above, the Court's supervisory jurisdiction may be invoked where there is a gap in the settlement agreement to deal with unforeseen circumstances. The Moving Parties argue that the COVID-19 pandemic is an unforeseen circumstance and that the Agreement is silent as to the consequences of such an event on the claims process. In essence, the Moving Parties are asking me to imply a term in the Agreement allowing for an extension of the Claims Deadline where the claims process is affected by a significant public health crisis.

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

[122] Moreover, it is far from clear that the COVID-19 pandemic had the degree of impact on the claims process that the Moving Parties assert. As explained above, the notice plan did not depend on in-person activities. More than 60 in-person community support sessions took place during the pandemic. While I accept that the pandemic may have slowed down a wide variety of processes, it remains that class members had two years and a half (plus a six-month extension) to file their claims, and that close to 185,000 of them did so before the ultimate deadline. The facts do not support the assertion that the pandemic amounts to *force majeure* justifying a class-wide

extension. In saying this, I do not wish to prevent individual class members from asserting personal circumstances related to the COVID-19 pandemic to support a request for deadline extension for no more than six months.

F. *Independent Review of Take-Up Rate*

[123] The Moving Parties also ask the Court to order an independent assessment of the take-up rate or, perhaps more accurately, a new estimate of the class size, according to the method suggested by Dr. Taback. They state that Mr. Gorham's estimate is unreliable and that, as a result, the Court can have no confidence that the take-up rate is acceptable. If the independent assessment reveals that it is not, then this could form the basis for a request for further measures.

[124] This request is based on a misconception of the supervisory role of the Court. It is not for the Court to undertake its own investigation of the claims process. The parties obtained an estimate of the class size to assess their potential liability and to help set the financial parameters of the settlement. The Agreement does not set any minimum take-up rate nor does it provide for any particular measures if a specific level is not achieved. The Moving Parties have refrained from stating what, in their view, would be an acceptable take-up rate. The Court cannot, without amending the agreement, add a process whereby the claims deadline is indefinitely extended until an unspecified target is met.

[125] In addition, I am far from convinced that the method proposed by Dr. Taback would provide accurate figures in a reasonable time. The entirety of Dr. Taback's description of this method is found in the following few lines:

> Another approach to estimating the take up rate is to survey areas, such as reserves, of Canada where people that attended Federal Day Schools are known have lived. One strategy for a reserve with a land membership office is as follows:
>
> a. Use data from land membership office to estimate the total number of status members that attended federal day schools.
>
> b. Develop an outreach strategy to encourage community members that attended federal day schools to consent to an interview with the reserve.
>
> c. Encourage community members to reach out to other community members who might be part of the class.
>
> d. Record relevant data from these interviews (e.g., name of school, dates attended, has a claim been filed, if yes when was it accepted? If no, why not?).
>
> This prospective approach for surveillance of take-up using community partners is one way to reach former Federal Day School students that are unlikely to be reached by traditional outreach strategies that rely on traditional media. This method of sampling is called Snowball Sampling and is often used to recruit members of a group that are difficult to locate (e.g., homeless people, people incarcerated).

[126] Such a short description does not show much awareness of the hurdles that would face the proposed investigation. Dr. Taback's curriculum vitae does not mention any experience working with Indigenous communities. The use of the concept of "land membership office" suggests a lack of familiarity with these communities. Dr. Taback does not provide any realistic assessment of the availability of reliable data from the sources he has in mind. He does not explain how data derived from snowball sampling can generate quantitative findings nor how many communities would need to be surveyed to produce accurate results. It is purely speculative to assert that his proposed method would produce a better estimate of the class size than Mr. Gorham's.

III. Disposition

[127] For the foregoing reasons, while the Moving Parties are granted leave to participate in this action, their motion is dismissed. Contrary to the interpretation they put forward, the Agreement does not allow for an indefinite extension of the time limit to make claims. The evidence they brought does not show that there was, on a class-wide basis, a failure to provide notice or class member assistance as promised by the Agreement. The fact that the Agreement does not provide for an extension of time beyond the six-month extension period does not constitute a gap. Lastly, there are no grounds to order an independent review of the take-up rate.

[128] In closing, it bears emphasizing that this decision should not be taken as a dismissal of the concerns put forward by the Moving Parties. Nor is it an exhaustive assessment of the degree to which the Agreement was successful in mitigating the barriers to access to justice described above. Rather, the Court's task was to decide whether the evidence brought by the Moving Parties satisfied the high threshold for the exercise of the Court's supervisory jurisdiction, especially given the nature of the relief sought. Once the Court finds that the Moving Parties failed to meet this threshold, it is not its role to comment further. Others are in a better position to conduct a more fulsome assessment of the claims process. The Court can only express the hope that the experience gained in this proceeding, whether positive or negative, will be useful in the design of future class action settlements.

ORDER in T-2169-16

THIS COURT ORDERS that

1. Audrey Hill is granted leave to participate in the present action for the purposes of bringing the present motion.
2. Six Nations of the Grand River Elected Council is granted public interest standing for the purposes of bringing the present motion.
3. The motion is dismissed.

"Sébastien Grammond"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2169-16
STYLE OF CAUSE:	GARY LESLIE MCLEAN, ROGER AUGUSTINE, CLAUDETTE COMMANDA, ANGELA ELIZABETH SIMONE SAMPSON, MARGARET ANNE SWAN AND MARIETTE LUCILLE BUCKSHOT v HIS MAJESTY THE KING IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA AND AUDREY HILL AND SIX NATIONS OF THE GRAND RIVER ELECTED COUNCIL
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 12-13, 2023
ORDER AND REASONS:	GRAMMOND J.
DATED:	AUGUST 10, 2023

APPEARANCES:

Graham Ragan John J. Wilson	FOR THE PLAINTIFFS
Travis Henderson Sarah-Dawn Norris	FOR THE DEFENDANT
Richard Macklin Yolanda Song	FOR THE MOVING PARTY SIX NATIONS OF THE GRAND RIVER ELECTED COUNCIL
Louis Sokolov	FOR THE MOVING PARTY AUDREY HILL

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