

CANADA / JUDGMENT

D.G. v. Attorney General (Canada)

2020 BCCA 197

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 197 D.G. v. Attorney General (Canada)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

D.G. v. Attorney General (Canada),

2020 BCCA 197

Date: 20200710

Docket: CA46381

Between:

D.G.

Appellant

(Plaintiff)

And

The Attorney General of Canada

Respondent

(Defendant)

SEALED IN PART

Before:

The Honourable Mr. Justice Frankel

The Honourable Mr. Justice Abrioux

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated August 26, 2019 (Fontaine v. Canada (Attorney General), 2019 BCSC 1431, Vancouver Docket L051875).

Counsel for the Appellant:

(via videoconference)

R. Olschewski

Counsel for the Respondent:

(via videoconference)

C.A. Coughlan

B. Thompson

Place and Date of Hearing:

Vancouver, British Columbia

May 22, 2020

Place and Date of Judgment:

Vancouver, British Columbia

July 10, 2020

Written Reasons by:

The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:

The Honourable Mr. Justice Frankel

The Honourable Mr. Justice Abrioux

Summary:

The appellant sought compensation under the Indian Residential Schools Settlement Agreement ("IRSSA") for alleged sexual assault. The claim succeeded at first instance; however, it was denied on review on grounds that the IRSSA does not compensate for consensual sexual activity and the appellant had not proven the absence of consent. A supervising judge under the IRSSA refused to intervene in that determination, finding there was no jurisdiction for judicial recourse. The appellant appealed, submitting that the compensation denial was based on a misinterpretation (and therefore misapplication) of the terms of the IRSSA. Held: Appeal dismissed. The supervising judge correctly found there was no jurisdiction to intervene with the IRSSA internal review. The reviewer applied the proper terms of the IRSSA to the appellant's claim, and, to the extent that his interpretation of the IRSSA was open to scrutiny by the supervising judge, the

appellant has not shown palpable and overriding error in the judge's decision that the IRSSA does not provide compensation for consensual sexual activity.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

INTRODUCTION

- [1] This appeal asks whether a supervising judge under the Indian Residential Schools Settlement Agreement ("IRSSA") erred in declining to intervene in a decision denying the appellant compensation for alleged sexual assault.
- [2] I am of the view the judge correctly held that she did not have jurisdiction to grant the relief sought. The appellant did not establish that the impugned decision failed to apply the terms of the IRSSA, which is the basis on which she sought judicial recourse.
- [3] As a result, I would dismiss the appeal.

BACKGROUND

Indian Residential Schools Settlement Agreement

- [4] The IRSSA is a contract negotiated between various stakeholders that established "a process for the resolution of claims arising from the long and tragic history of abuse suffered by thousands of Indigenous children who attended Residential Schools across Canada": *Fontaine v. Canada (Attorney General)*, 2019 BCCA 246 at para. 2 [Fontaine].
- [5] There are "two avenues to compensation" under the IRSSA:
- [3] The first is a "common experience" payment to all eligible former students; the second is an individual payment to eligible claimants who establish specific compensable harms. These latter claims are adjudicated [pursuant to an Independent Assessment Process ("IAP")], which is governed by detailed rules set out as Schedule D to the IRSSA, often referred to as the IAP Model.
- [4] Individual IAP claims are managed and decided by highly trained, independent adjudicators who are tasked with assessing the credibility of each claim and determining whether compensation is payable under the terms of the IAP Model. The hearings are conducted in an inquisitorial manner, with the goal of being respectful to claimants and conducive to obtaining a full description of their experiences.

[Per Fisher J.A. in *Fontaine*; emphasis added.]

See also *J.W. v. Canada (Attorney General)*, 2019 SCC 20 at paras. 62-77; *N.N. v. Canada (Attorney General)*, 2018 BCCA 105 at paras. 10-12; *Brown v. Canada (Attorney General)*, 2019 BCCA 245 at paras. 3-8 [Brown]; *Independent Counsel v. Fontaine*, 2019 BCCA 269 at paras. 10-13; and *National Administration Committee v. Canada (Attorney General)*, 2019 BCCA 270 at paras. 3-11.

Compensable Abuse

- [6] Schedule D to the IRSSA (the "IAP Model") recognizes three forms of "compensable abuse": (1) sexual and physical assaults arising from or connected to the operation of an Indian Residential School ("IRS") that were committed by adult employees of the government or church entity operating the school, or other adults lawfully on the premises; (2) sexual and physical assaults committed by one student of the IRS against another; and (3) any other "wrongful act or acts" committed by adult employees or other adults lawfully on school premises and proven to have caused serious psychological consequences for the claimant (art. I).
- [7] Collectively, these categories of abuse constitute "continuing claims" under the IAP Model. According to the terms of the Model, it is the responsibility of an IAP adjudicator to "assess the credibility of each allegation" made by the person who seeks IRSSA compensation and, where the allegation has been "proven on the civil standard" (balance of probabilities), to "determine whether what has been proven constitutes a continuing claim " (Appendix IX, art. I). The IAP Model directs that the "compensability of proven continuing claims must be determined only by reference to the terms of [the] IAP, including instructions issued pursuant to it" (Appendix IX, art. I).

Compensation Claim in this Case

- [8] The appellant brought a claim for compensation under the IAP, alleging sexual assaults by an adult employee of an IRS.
- [9] At the material time, the appellant lived on the premises of an IRS with her family. Her father worked at the school. The appellant was not registered as a student (she attended school elsewhere). However, she interacted with IRS residents and attended some of the school's sporting activities as a spectator.
- [10] The appellant had an intimate relationship with a man who worked at the IRS as a coach and cottage supervisor (the "Employee"). The appellant was 16-17 years old at the time. The Employee was nine years older. He was married and had two children. The appellant and Employee had sexual intercourse on numerous occasions. The sexual contact occurred on IRS property.
- [11] The appellant became pregnant. When her family learned of that fact, she left the family's home at the IRS and lived with a sibling. About a year after giving birth, the appellant resumed her relationship with the Employee. They eventually moved in together, married and had additional children. They have since divorced.
- [12] The appellant brought a claim under the IAP based on the start of her relationship with the Employee and the sexual contact that occurred while she was living on school premises. She argued that the relationship was exploitive, based on the Employee's age, his "position of power" and the manipulative way in which he pursued sexual contact with her.

Initial Adjudication (August 2017)

[13] An IAP adjudicator decided in the appellant's favour, awarding her \$149,667 in compensation for sexual abuse. The adjudicator found that the appellant was not a student or resident of the IRS at the time of the impugned relationship. As such, her claim fell to be decided under the second component of the first category of compensable abuse addressed in the IAP Model:

Sexual and physical assaults, as particularized in the Compensation Rules and Instructions below, arising from or connected to the operation of an IRS, whether or not occurring on the premises or during the school year, committed by adult employees of the government or a church entity which operated the IRS in question, or other adults lawfully on the premises, where the Claimant was a student or resident, or where the Claimant was under the age of 21 and was permitted by an adult employee to be on the premises to take part in authorized school activities.

[IAP Model, art. I(1); emphasis added.]

[14] The IAP Model establishes a five-part test (or criteria) for compensation where the victim of sexual assault committed by an adult was not a student or resident of an IRS:

Where a sexual or physical assault was committed by an adult on a non-student, the following tests must be met:

- a) Was the alleged perpetrator an adult employee of the government or a church entity which operated the IRS in question? If so, it does not matter whether their contract of employment was at that IRS.
- b) If the alleged perpetrator was not an adult employee, were they an adult lawfully on the premises?
- c) Was the Claimant under the age of 21 at the time of the assault?
- d) Did an adult employee give the Claimant permission i) to be on the premises ii) for the purpose of taking part in school activities?
- e) Did the assault arise from, or was it connected to, the operation of the school? This test will be met where it is shown that a relationship was created at the school which led to or facilitated the abuse. If the test is met, the assault need not have been committed on the premises. The permission to be on the premises for an organized activity creates the circumstances in which an assault may be compensable if the other tests are met, but it does not also circumscribe the location in which an assault must have been committed to qualify as one which arose from or was connected to an IRS.

[IAP Model, Appendix IX, art. I(A)(2); emphasis in the original.]

- [15] With reference to these criteria, the IAP adjudicator concluded that the Employee was an adult employee of the government or church entity that operated the IRS in question; the appellant was under 21 at the time of the sexual relationship; she had permission to be on the premises of the IRS for the purpose of taking part in the school's activities; and the alleged sexual assaults arose from and were connected to operation of the IRS.
- [16] After making these findings, the adjudicator turned to the question of "whether the alleged assaults [could] be categorized as a compensable form of abuse in the IAP Model". To resolve this issue, she instructed herself that she would have to decide whether the appellant had been exploited by the Employee in a way that rendered her "incapable of consenting to the sexual activity".
- [17] The adjudicator took this position because the appellant acknowledged at the IAP hearing that she was attracted to the Employee and wanted a romantic relationship with him. She further acknowledged that the relationship was at all times physically consensual. However, she argued that her consent while living at the IRS had been coerced by virtue of the Employee's age and position of power. In support of this position, the appellant called a witness who was a past resident of the IRS and knew the Employee. Among other things, this witness testified about the manner in which the Employee interacted with female students at the IRS and said she heard from others that the Employee's wife caught him having sex with a student. The witness also testified that she had received compensation under the IAP for a sexual assault committed on her by the Employee.
- [18] In deciding the issue of consent, the adjudicator turned for interpretive assistance to s. 153(1.2) of the Criminal Code, R.S.C. 1985, c. C-46, which enumerates specific factors for a court to consider in assessing whether a relationship is "exploitative" for the purposes of a conviction under s. 153(1). The latter provision makes it a criminal offence to touch a 16- or 17-year-old for a sexual purpose if the relationship between the alleged perpetrator and the young person is "exploitative".
- [19] Among other things, the adjudicator noted that the Employee was nine years older than the appellant when the sexual relationship commenced. She found that he was the person who initiated contact. He was "persistent and secretive in that regard". The appellant was initially hesitant to see the Employee, but eventually gave in to the pressure to have sex. The Employee did not use violence or threats to obtain consent or to control the appellant; however, he was "well aware of the degree of power, control or influence he was able to impart on the [appellant] through other means". He would express anger and frustration when she first refused his sexual advances, making her feel that he would no longer see her if she was not willing to have sex.

- [20] The adjudicator found that at the time the appellant was living at the IRS premises, the Employee was not interested in a long-term relationship; rather, "his interests were purely driven by a desire to have sex with the [appellant]". Furthermore, he used his age and his position as a staff member to coerce or otherwise influence the appellant to enter into a relationship. He engaged in a "deliberate series of grooming techniques designed specifically to break down the [appellant's] resistance to his sexual advances".
- [21] In light of these conclusions, the adjudicator found that the nature of the relationship between the appellant and the Employee vitiated the appellant's consent to sexual intercourse. As such, the appellant met the criteria for compensable abuse under the IAP Model:

I find that the [appellant's] evidence was sufficiently credible and reliable to prove on a balance of probabilities that the Employee was a[n] IRS staff member who subjected her to numerous acts of vaginal intercourse that occurred on the IRS premises while she was lawfully on the premises as a non-resident and living on-site with her parents.

- [22] Under the IAP's compensation rules, "repeated, persistent incidents of anal or vaginal intercourse" attract a rating of SL5 (the highest rating available for "acts" that form the subject matter of a compensable abuse claim), as well as a range of 45-60 "points" to use when assessing the quantum of compensation for proven sexual assault (IAP Model, art. II).

Internal Review under the IRSSA

- [23] The IRSSA provides for internal review of an IAP adjudicator's decision. As noted by Justice Fisher in *Fontaine*, there are two levels of review for claimants who, like the appellant in this case, advance a "standard track" claim:
- [5] The first level permits review to determine (1) whether the adjudicator's decision contains a palpable and overriding error, or (2) whether the decision properly applied the IAP Model to the facts as found. The second level permits review only on the second basis, where the standard of review is correctness: *Fontaine v. Canada (Attorney General)*, 2017 ONCA 26 at paras. 64-66 .
- [24] With a "standard track" claim, the Attorney General for Canada ("AGC") is limited at both levels of internal review to asking whether the adjudicator properly applied the IAP Model: *J.W.* at paras. 69-70, per Côté J.

First Review of Adjudication (December 2017)

- [25] The AGC sought a review of the adjudicator's decision, challenging three aspects of the decision: (1) the appellant's eligibility to seek compensation as a non-student; (2) the finding that she had permission to be on school premises for the purpose of taking part in school activities; and (3) the finding that the appellant proved a sexual assault.

- [26] The IAP reviewer agreed with the initial adjudicator that the appellant was eligible for compensation as a non-student and that she had permission to be on the IRS premises to participate in school activities (namely, attending the school's gymnasium to watch IRS students practising and competing in various sports).
- [27] However, the reviewer did not agree that the appellant proved she was sexually assaulted and, as such, held that the adjudicator misapplied the IAP Model by awarding compensation for consensual sexual activity:
- [33] The IAP provides compensation not for "sexual acts" but for certain "sexual assaults." The term "sexual abuse" is also used in the IAP Model. This terminology makes clear that consensual sexual activity is outside the range of acts that are compensable in this process.
- [45] In this case, [the appellant] needed to prove that she was sexually assaulted. Assault, by definition, entails a lack of consent. This [appellant], who was 17 years old at the time, testified that the relationship was consensual and was something she wanted. The adjudicator was not wrong to turn her mind to whether the [appellant's] consent was valid, but there is no legal justification for basing her determination on the presumed inner motives of the alleged abuser. Rather, the adjudicator needed to look at the conduct of the supervisor and how it affected [the appellant].
- [46] I find that the adjudicator misapplied the IAP Model in relying on speculation as to the supervisor's motives, rather than the evidence of his conduct, as a basis for determining that [the appellant's] consent was rendered incapable of consenting to a sexual relationship.
- [47] Had the adjudicator actually considered the facts as she found them in the context of the factors set out in the cited Criminal Code provisions, she would have been led to another conclusion .
- [Emphasis added.]
- [28] The reviewer set aside the adjudicator's decision and dismissed the claim for compensation.

Second Review of Adjudication (March 2018)

- [29] The appellant sought a second review of the adjudicator's decision. Among other things, she argued that the first IAP reviewer substituted her own decision for that of the initial adjudicator by re-interpreting the facts underlying the claim and by ignoring the predatory aspects of the Employee's conduct. From the appellant's perspective, the evidence established the Employee as a "lothario who sought out sexual relationships with girls, using his position and influence in order to do so" and the reviewer failed to appreciate the significance of that evidence (at para. 24).
- [30] The second reviewer agreed with the first reviewer that to decide compensability, it was proper for the adjudicator to determine if the appellant was "subjected to sexual intercourse without her consent" (at para. 42). Moreover, there was nothing wrong with the adjudicator's

decision to consider provisions of the Criminal Code in making that determination. The "IAP Model provides no direction or guidance as to the meaning of sexual assault". In those circumstances, "it is acceptable to seek guidance from the way in which the common law or statute law have addressed the issue" (at para. 43).

- [31] However, consistent with the result of the first review, the second reviewer concluded that the initial adjudicator's determination of compensable abuse was erroneously grounded in findings about the Employee's "character and motivation" in seeking out contact with the appellant, rather than whether consent to sexual intercourse had been vitiated in the circumstances (at para. 43). The erroneous approach resulted in a misapplication of the IAP Model:
- [46] The [appellant] testified in 2015 . At that point the [appellant] was a mature and experienced adult. Looking back, she affirmed that she consented to the sexual intercourse. If the [appellant] had testified instead, that she was, for example pushed into sexual activity, that she was overwhelmed by the charm, influence or power of the [Employee] or in some other way that indicated that her ability to consent was in jeopardy, then there would have been evidence that would have supported a conclusion that at 17 years of age, a young person, she was not legally capable of providing consent. This kind of evidence was not given. In my view, the observations made by the Adjudicator about the [Employee] are not capable of proving an absence of consent on the part of the [appellant]. The same can be said of the evidence of the witness who described the [Employee] that Counsel describes as that of a lothario. It follows that I agree with the conclusion reached by the Review Adjudicator. The application of the Model was made to the Adjudicator's conclusions as to the character and motivation of the [Employee] and not to the evidence received from the [appellant] which indicated a consensual relationship.

[Emphasis added.]

- [32] The application for a second review was dismissed.

Request for Direction (April 2018)

- [33] There is no right of appeal or right to judicial review of a decision rendered under the IAP Model. Thus, as Justice Fisher explained in *Fontaine*:
- [6] The only avenue for judicial consideration is "judicial recourse" as provided in the court orders that approved the IRSSA and the Court Administration Protocol (CAP) appended to those orders. The order approving the IRSSA in the Supreme Court of British Columbia provided for supervision as follows:
13. This Court shall supervise the implementation of the Agreement and this judgment and, without limiting the generality of the foregoing, may issue such orders as are necessary to implement and enforce the provisions of the Agreement and this judgment.

- [7] The CAP required the courts to designate two Administrative Judges (one Eastern and one Western) and nine supervising judges. Parties to the IRSSA access judicial recourse through Requests for Direction (RFDs) made to a supervising judge.
- [34] In response to the outcome of the second review, the appellant filed a request for direction ("RFD") with British Columbia's supervising judge, who is also the Western Administrative Judge under the IRSSA. She asked for a declaration that she had "suffered sexual abuse as defined at SL5 of the Compensation Rules", as well as an order restoring the initial adjudicator's compensation award. Alternatively, the appellant asked that her claim be "determined in the manner that is most just and expeditious in the circumstances".
- [35] In the RFD, the appellant submitted that both IAP reviewers were wrong to overturn the decision of the initial adjudicator. They: (1) ignored established facts (especially facts revealing the "loathario" nature of the Employee's conduct); (2) substituted their own findings of fact to justify the conclusions they reached; and (3) wrongly replaced the adjudicator's interpretation of the established facts, as well as the applicable provisions of the IAP Model, with their own interpretation.
- [36] In her submissions before the supervising judge, the appellant broadened the scope of her suggested bases for recourse, arguing for the first time that the reviewers also erred in importing a requirement of non-consent into the category of compensable abuse for sexual assault committed by an adult employee against a non-student or non-resident under the age of 21.
- [37] The appellant contended that evidence of her subjective consent to sexual activity with the Employee was irrelevant to the determination of whether she proved compensable abuse. She said non-consent is not an essential element of the criteria applicable to allegations of sexual or physical assault brought by non-students or non-residents. The appellant argued that the IAP Model presumes that sexual activity between an adult employee of an IRS and a person under the age of 21 is exploitive. As such, it is not required that a claimant prove non-consensual sexual contact before they are entitled to compensation.
- [38] The latter submission was not made before the initial IAP adjudicator or on the internal reviews. Instead, the appellant argued before all three IAP decision makers that the evidence on the adjudicative hearing, including the testimony of the independent witness who described her own involvement with the Employee, proved that the appellant's consent to sexual activity had been vitiated by the circumstances surrounding the relationship with the Employee, including his position with the IRS, his age and his manipulative conduct.
- [39] At the hearing of the appeal in this Court, counsel for the appellant explained that in the IAP proceedings, he adopted this approach in marshalling the appellant's claim because he considered it strategically prudent to do so after the initial adjudicator expressed her view that she considered consent to be a live issue. This was also the position taken by the AGC in responding to the claim. Rather than take issue with the merits of that proposition, appellant's counsel elected to build an evidentiary case on behalf of the appellant that he

saw as sufficient to prove non-consent.

Decision of Supervising Judge (August 2019)

- [40] The supervising judge declined to grant the relief sought in the RFD. Her reasons are indexed as *Fontaine v. Canada (Attorney General)*, 2019 BCSC 1431 ("RFJ").
- [41] Before analysing the merits of the RFD, the judge instructed herself on the test for judicial intervention in IAP cases.
- [42] Citing the Supreme Court's decision in *J.W.*, she noted there is a "high threshold" for judicial recourse: the courts "should only intervene where there is a failure to apply or implement the terms of the IRSSA and the IAP Model or where there is a gap in the IRSSA's provisions" (RFJ at para. 52). A disagreement with the result under review does not mean there has been a failure to apply or enforce the IRSSA, and judges must be careful not to usurp the role of IAP adjudicators (RFJ at para. 55).
- [43] In *J.W.*, Côté J. penned the majority view on judicial recourse.[1] She noted that jurisprudentially, the scope of judicial intervention with IAP decisions has been narrowly defined. A narrow approach respects the intentions of the parties to the IRSSA, who "went to great lengths to ensure that the IAP would be a complete code" (*J.W.* at para. 130). This includes an intention to "grant adjudicators exclusive jurisdiction to interpret the terms of the IAP" (*J.W.* at para. 130). Relying on Justice Côté's articulation of the test for intervention, the supervising judge instructed herself that judicial recourse under the IRSSA "does not extend to questions of interpretation of the IRSSA and the IAP Model" (RFJ at para. 56; emphasis added). See *J.W.* at paras. 60, 122-124, 130-132.
- [44] At the same time, the judge acknowledged that after the release of *J.W.*, there have been decisions from this Court opining that the "exact bounds" of permissible intervention remain uncertain (see, for example, *Brown* at para. 84 and *National Administration Committee* at para. 9). From her perspective, some of those decisions have also applied a less deferential standard of review than allowed for by the majority position in *J.W.* on matters involving the interpretation of the IRSSA and IAP Model (RFJ at paras. 79, 82). The judge described the decision in *Brown*, for example, as holding that where "[IAP] adjudicators have failed to take into account some term of the IRSSA that is relevant to the interpretation of the IAP Model's provision in question, deference should not extend to the same extent to [the] adjudicators' interpretive choices as it otherwise would" (RFJ at para. 82). The judge went on to express her view that "[c]ontrary to the guidance provided by *J.W.* and earlier cases, this requires the court to scrutinize the manner in which adjudicators interpret the IAP Model" (at para. 82; emphasis added).
- [45] In light of the post-*J.W.* decisions, the supervising judge decided to analyse the RFD using what she understood to be Justice Côté's standard for judicial recourse, as well as a perceived broader application of that standard by this Court.

- [46] At the RFD hearing, the appellant did not allege there was a gap in the IRSSA requiring a judicial remedy. Rather, the principal argument in support of the RFD was that the first and second reviewers made interpretive errors that resulted in a failure to apply the terms of the IRSSA. The reviewers construed the terms "sexual assault" and sexual "abuse" in the IAP Model to encompass only non-consensual sexual activity. Consequently, the appellant was denied compensation that she was entitled to under the Model. It was (and remains) the appellant's position that properly construed, the IAP Model provides for compensation to non-students or non-residents in both consensual and non-consensual scenarios involving sexual activity, provided that the other pre-conditions for application of the Model have been met.
- [47] Applying J.W., the supervising judge held that the RFD could not succeed. In J.W., Justice Côté stated that "as long as it can be said that an adjudicator has turned his or her mind to the compensation category raised by the claimant, then the adjudicator has applied the terms of the IRSSA" (at para. 124). In the absence of a schematic gap (which was not alleged here), there is no room for interference. The supervising judge was satisfied that:
- [81] in addressing the Non-Student/Non-Resident Test, the Re-Review Adjudicator turned his mind to the provisions of the IAP Model applicable to the [appellant's] claim. I am also satisfied that in conducting the review, the Re-Review Adjudicator confined himself to the question of whether there was a failure to apply the IAP Model to the facts.
- [Emphasis added.]
- [48] The judge reached the same result by applying what she perceived to be the less deferential standard for intervention adopted in Brown:
- [82] I further conclude that this RFD cannot succeed applying the principles articulated in Brown.
- [83] Reading the Non-Student/Non-Resident Test as a whole, together with the [Student-on-Student] Sexual Assault Test and the relevant provisions of the IAP Model regarding categories of compensable claims and having regard to the IRSSA's definition of "Non-resident Claimants" and its provisions requiring claimants falling under that definition to sign a release in order to gain entry into the IAP it is apparent that the parties to the IRSSA intended the Non-Student/Non-Resident Test to apply only to and compensate for physical or sexual assaults committed on non-students by adults, and not to consensual sexual activity.
- [84] Whether the [appellant] consented, and if so, whether that consent was vitiated were therefore the key factual issues arising from the [appellant's] claim, and the Adjudicator, Review Adjudicator and Re-Review Adjudicator all recognized them as such.

[85] Taking into account the guidance provided in Brown, I conclude that the Review and Re-Review Adjudicators applied all relevant provisions of the IAP Model and IRSSA in the present case. They were entitled to conclude that the [appellant's] consent was not vitiated by the [Employee's] motivation and that the Adjudicator misapplied the IAP Model in concluding that the relevant test had been met and that the consensual sexual activity engaged in by the [appellant] was "compensable abuse" for the purposes of the IAP Model.

[Footnotes omitted; emphasis added.]

[49] The relief sought in the RFD was declined.

ISSUE ON APPEAL

[50] There is only one issue on appeal, namely, whether the supervising judge correctly held there was no jurisdiction for her to interfere with the decision of the second IAP reviewer.

POSITIONS OF THE PARTIES

[51] The appellant says there has been a failure to apply the terms of the IRSSA in this case and the supervising judge should have intervened to correct it.

[52] It is contended that both IAP reviewers wrongly considered consent to be an issue for determination by the initial adjudicator. (In fact, that was also the perspective of the initial adjudicator. The appellant says the initial adjudicator similarly erred on this point. However, she reached the right result on the evidence; as such, the error was of no consequence because it did not lead to a failure to apply the terms of the IRSSA.)

[53] The appellant says the reviewers' opinion that consent was a live issue arose out of an erroneous interpretation of the IAP Model. The reviewers held that the test for compensable sexual assault of non-students or non-residents by an adult requires proof of non-consensual sexual contact (either actual or vitiated through threats, violence, coercion, exploitation, a legal incapacity to consent, or otherwise). The appellant says this is not a requirement under the IAP Model for non-student or non-resident claimants who allege sexual assault by an adult, and, in declining to grant the relief sought in the RFD, the supervising judge has endorsed the application of a different IAP Model, one that incorporates a non-negotiated term. The appellant says that had the terms of the Model been properly construed, the facts found by the initial adjudicator would clearly meet the test for compensable abuse. The appellant proved "repeated, persistent incidents of anal or vaginal intercourse" by an adult employee of an IRS when the appellant was under the age of 21 and permitted to be on IRS premises to take part in authorized school activities.

- [54] The AGC supports the supervising judge's refusal to intervene and submits that the judge correctly applied the law governing judicial recourse in IAP cases, as established in *J.W.* The appellant does not allege a gap in the IRSSA requiring remedial intervention; as such, the judge's enquiry was properly restricted to the narrow question of whether the second reviewer turned his mind to the compensation category applicable to the appellant's claim.
- [55] According to the AGC, the second reviewer did precisely that. Furthermore, once the supervising judge was satisfied this had occurred, there was no room for judicial recourse because the appellant could not demonstrate that the second reviewer failed to apply the terms of the IRSSA. Even if the judge disagreed with the interpretive approach of the reviewers (which was not the case), that was not an allowable basis on which to intervene. The AGC says *J.W.* makes clear that interpretive errors--even where unreasonable--fall within the exclusive jurisdiction of the IAP adjudicators, including first and second reviewers.

STANDARD OF REVIEW

- [56] When reviewing a supervising judge's determination on whether judicial recourse is available in an IAP case, this Court is bound to apply a standard of correctness: *J.W.* at para. 109; *Brown* at para. 72.
- [57] Where an appeal raises a question about a supervising judge's interpretation of the IRSSA, the standard of review is that of palpable and overriding error: *Brown* at paras. 71 (citing *Canada (Attorney General) v. Fontaine*, 2017 SCC 47 at para. 35) and 87.

DISCUSSION

- [58] It is not necessary to decide in this case whether the supervising judge was correct to view *Brown* (and other decisions of this Court) as having expanded the scope of judicial recourse available under the IRSSA beyond that established by the majority position in *J.W.* This is because, as the AGC has aptly pointed out, the judge ultimately gave the appellant the benefit of a broader intervention threshold than the one she considered mandated by *J.W.*
- [59] The judge was satisfied that the second IAP reviewer turned his mind to the "provisions of the IAP Model applicable to the [appellant's] claim" (RFJ at para. 81). From her perspective, this meant the reviewer had met the *J.W.* standard for non-intervention. However, she nonetheless went on to consider the appellant's submission that both reviewers erred in their interpretation of the Model and, as a result, failed to apply the terms of the IRSSA to her claim.
- [60] The judge scrutinized the interpretation adopted by the reviewers and, after considering the relevant language and provisions of the IRSSA, she agreed with the reviewers that consent was a live issue before the initial adjudicator and something that required determination. The judge found it "apparent" from what she reviewed that "the parties to the IRSSA intended the Non-Student/Non-Resident Test to apply only to and compensate for physical

or sexual assaults committed on non-students by adults, and not to consensual sexual activity" (RFJ at para. 83; emphasis added). Whether the appellant "consented, and if so, whether that consent was vitiated were therefore the key factual issues arising from [her] claim, and the Adjudicator, Review Adjudicator and Re-Review Adjudicator all recognized them as such" (at para. 84).

- [61] Having reached this conclusion, the judge was satisfied that even with a recourse threshold that allows for some review of the interpretive choices made by IAP decision makers (Brown at para. 106), it could not be said that the second reviewer failed to apply the terms of the IRSSA.
- [62] In my view, the supervising judge was correct in her determination on jurisdiction to intervene. Moreover, to the extent that the determination involved an interpretation of the compensable claims criteria for sexual assault committed by an adult on a non-student or non-resident, the appellant has not persuaded me that the judge committed palpable and overriding error.
- [63] It is apparent from the second reviewer's decision that when assessing the conclusions reached by the initial adjudicator, he turned his mind to the category of compensable abuse governing sexual assault alleged to have been committed by an adult employee on a non-student or non-resident, as well as its five-part test for proving sexual or physical assault (IAP Model, art. I(1) and Appendix IX, art. I(A)(2), respectively). He also made note of the physical acts that underlay the claim, the harms said to have arisen from those acts, and their nexus to the compensation rules under the IAP Model. Like the first reviewer, he did not agree with the initial adjudicator's interpretation of the found facts (namely, her conclusion that the appellant's consent was vitiated), but factual issues are within the exclusive jurisdiction of the IAP adjudicators (J.W. at paras. 128-129).
- [64] On appeal, the appellant does not contend that there is a part of the IRSSA or IAP Model, a specific provision, or factors explicitly delineated in those documents that apply to the appellant's claim but were overlooked or ignored by the reviewers. Rather, she says that the manner in which the reviewers construed the criteria specific to sexual or physical assault committed by an adult employee on a non-student or non-resident led to an improper limiting of the category of compensable abuse available to the appellant and, in that sense, the reviewers failed to apply the terms of the IRSSA. Because of their erroneous interpretation, which introduced a requirement of non-consent for the alleged sexual activity, the reviewers excluded the appellant from compensation that she would have otherwise been entitled to receive.
- [65] The supervising judge determined that the IAP decision makers properly construed the meaning of the term "sexual assault" (or sexual "abuse", used interchangeably in the IAP Model). I agree, having considered the issue in light of the principles of contractual interpretation established by the Supreme Court in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47.

- [66] As noted in J.W., the IRSSA represents a "contractual settlement of private law tort claims, to which effect has been given by court orders" (per Côté J. at para. 102). The IAP awards "individual payments to claimants who establish specific compensable harms" (per Abella J. at para. 9; emphasis added). This is the overarching legal context for the resolution of remedial claims brought by non-students or non-residents who allege sexual or physical assault by an adult that arose from or was connected to the operation of an IRS.
- [67] In light of that context, the judge's conclusion that the non-student or non-resident compensation criteria for sexual assault do not encompass consensual sexual activity makes sense. It is consistent with the ordinary meaning of the term "sexual assault" as defined at common law. As pointed out by the supervising judge, both the description of the compensable abuse category at issue in this case and the five-part test specified for its application to non-students or non-residents use the predicating language of "assault". The words "sexual assault" and "assault" appear repeatedly in this portion of the IAP Model. Under tort law, the constituent elements of a sexual assault (or battery) require proof of an intentional touching in a sexual manner that was harmful or offensive: PP v. DD, 2017 ONCA 180 at para. 71. Consent is a defence to sexual battery, but will be invalid if it:

72 has been obtained by duress, force or threat of force, given under the influence of drugs, secured through deceit or fraud as to the nature of the defendant's conduct, or obtained from someone who was legally incapable of consenting or where an unequal power relationship is being exploited

PP citing Norberg v. Wynrib, [1992] 2 S.C.R. 226 at 246-47.

- [68] To sustain a conviction for sexual assault in the criminal law context, there must be proof of non-consent (actual or vitiated): R. v. Barton, 2019 SCC 33 at paras. 87-88; R. v. J.A., 2011 SCC 28 at para. 1; s. 265(1)-(3), 273.1, Criminal Code.
- [69] The appellant says it was intended under the IRSSA that as long as a non-student or non-resident claimant proves one or more of the physical "acts" referenced in the IAP compensation rules (such as vaginal intercourse), a sexual assault has been established for the purpose of compensation and it is not necessary to address the issue of consent. However, that contention ignores the lead-in qualifying language found at the start of the compensable abuse category that governs the appellant's claim, namely: "Sexual and physical assaults, as particularized in the Compensation Rules " (IAP Model, art. I(1); emphasis added). Had the parties to the IRSSA intended that proof of one of the delineated acts, standing alone, would constitute a compensable harm, there would have been no need for the qualification.

[70] On a plain reading of the IAP Model, it is readily apparent that the "acts" listed under the compensation rules constitute the physical particulars of an alleged sexual assault; they do not define whether an assault has occurred. I note that this same approach reveals itself under art. II of Appendix IX - "Application of the Compensation Rules". There, IAP adjudicators are instructed that the:

first step in applying the [compensation] framework is to determine which acts of abuse have been proven on the civil standard of proof. The most serious act or acts of proven abuse, whether physical or sexual, determines the single range within which points for all abusive acts suffered over the course of attendance at one or more residential schools are to be assigned.

[Emphasis added.]

Again, had it been intended by the parties to the IRRSA that proof of a particularized act of sexual contact involving an adult, on its own, would meet the test for a compensable sexual assault, there would have been no need to qualify the words "act" or "acts" with the language of "abuse". Instead, what emerges from these provisions, read together, is that proof of sexual assault committed against a non-student or non-resident under the IAP requires a claimant to establish more than a sexual act. The claimant must also prove that the sexual act was abusive (wrongful).

[71] Before the supervising judge, and again on appeal, the appellant pointed to the IAP Model's compensation criteria for sexual assault committed by students as instructive on the interpretation issue. The appellant makes two arguments on this point. First, she says the criteria for assaults committed by students explicitly requires that a claimant prove non-consensual sexual activity by establishing that the activity was of "an exploitative or predatory nature". The criteria for sexual assault committed by adults do not contain this same language. The logical inference to draw from the difference, contends the appellant, is that claimants who seek compensation for sexual assault committed by adults are not required to prove non-consensual sexual activity, actual or through vitiation.

[72] Second, the criteria for sexual assault committed by students deems an assault to have been predatory or exploitive "where the perpetrator was significantly older than the victim, or where the assault was occasioned by threats, coercion or violence" (Appendix IX, art. I(B)). In this case, the first and second reviewers denied the appellant compensation, notwithstanding a substantial age difference between the appellant and the Employee, because she did not prove the absence of consent. The appellant says endorsing the reviewers' interpretation of the IAP Model results in an absurdity that could not have been intended by the parties to the IRSSA. A claimant who consented to sexual intercourse with a significantly older student would be entitled to compensation because the IAP Model deems that conduct predatory and exploitive; however, consensual sex with a significantly older adult employee of an IRS would not be compensable.

[73] The compensation criteria for sexual assault committed by students are found in Appendix IX, art. I(B) of the IAP Model. The scope of these criteria is not before the Court on the appeal. As such, there has not been full argument on the issue and nothing I say here should be taken as binding on their meaning. However, it is my view that on its face, art. I(B) does not support the appellant's position.

[74] Article I(B) does not require proof of "predatory or exploitative" circumstances as a pre-condition to establishing sexual assault. Rather, the existence of "predatory or exploitative" circumstances (deemed or otherwise) serves to demarcate between subcategories of already proven sexual assault for purposes of determining the onuses borne by the parties relevant to issues of vicarious liability and negligent supervision. It was explained this way in *Fontaine v. Canada (Attorney General)*, 2018 ONSC 103:

139 the first subcategory [of assaults committed by students] requires a claimant to prove (i) that the assault took place on school premises; (ii) that an adult employee of the government or church entity had or should reasonably have had knowledge of abuse of the kind at issue occurring at the IRS in question at the relevant time period; and (iii) that the relevant adult did not take reasonable steps to prevent such abuse. Thus, for the first subcategory, the claimant bears the burden of proving that an adult employee was or should have been aware of the abuse and did not take reasonable steps to prevent it.

140 For the second subcategory of claims where a claimant proves a predatory or exploitive sexual assault by a student involving actions in the SL4 or SL5 category of "Acts Proven", the claim will be compensable if Canada does not establish on balance of probabilities that reasonable supervision was in place. Thus, if the claimant proves predatory or exploitive acts at the SL4 or SL5 level, Canada bears the burden of proving that reasonable supervision was in place.

[Emphasis added.]

[75] Contrary to the appellant's suggestion, I do not see the IAP reviewers' interpretation of the term "sexual assault" resulting in an irreconcilable difference between the compensable abuse categories involving adult and student perpetrators. For both categories, assaultive (and therefore non-consensual) sexual activity remains the gateway to compensation for sexual assault. In my view, this is made even more clear by the way in which the continuing claims category for assaults committed by students has been defined:

The following categories of claims are compensable within this IAP.

Sexual or physical assaults committed by one student against another at an IRS where:

- b) in a case in which the proven assault is a predatory or exploitative sexual assault at the SL4 or SL5 level, the defendants do not establish on a balance of probabilities that reasonable supervision was in place at the time.

[IAP Model, art. I(2); emphasis added].

- [76] A final point. The appellant argues that in the portion of the supervising judge's reasons addressing the reviewers' interpretation of the non-student or non-resident criteria, she held that "only a [non-student or] non-resident would be required to show non-consensual intercourse" (appellant's factum at para. 37; emphasis added). The appellant rests this submission on the judge's statement, at para. 83 of her RFJ, that "it is apparent that the parties to the IRSSA intended the Non-Student/Non-Resident Test to apply only to and compensate for physical or sexual assaults committed on non-students by adults, and not to consensual sexual activity". I do not read paragraph 83 the same way as the appellant. The only test for compensable abuse before the supervising judge in this case was the one applicable to non-students or non-residents; as such, she was focused on the interpretation of that part of the IAP Model. She was not asked to consider or comment on the test applicable to students or residents for sexual assault committed by adults, and her reasons should not be read as rendering a consent analysis irrelevant to that category of continuing claims.
- [77] The position advanced by the appellant before the initial adjudicator, as well as the two IAP reviewers, was that her sexual relationship with the Employee while the appellant was living on IRS premises was exploitive and, by virtue of that exploitation, her consent to sexual activity with the Employee was coerced and not valid. The adjudicator accepted that characterization of the evidence, but the reviewers did not, finding that because of analytical errors made by the adjudicator, she failed to apply the terms of the IRRSA. Recognizing that she could not seek judicial recourse based on a disagreement over the facts or the inferences drawn from them, the appellant recast her argument in the RFD and argued that the reviewers failed to apply the terms of the IRRSA by erroneously incorporating a requirement for proof of non-consensual sexual activity.
- [78] The supervising judge appreciated the nature of the appellant's argument, satisfied herself that the second reviewer turned his mind to the proper terms of the IRSSA in reviewing the initial adjudicator's determination, and then (albeit reluctantly) agreed to scrutinize the interpretation brought to bear by the second reviewer to the test for compensation. She ultimately agreed with the interpretive choice made by him and found that the second reviewer was entitled to conclude that the initial adjudicator "misapplied the IAP Model in concluding that the relevant test had been met and that the consensual sexual activity engaged in by the [appellant] was 'compensable abuse' for the purposes of the IAP Model" (RFJ at para. 85).
- [79] Appreciating the "very limited" scope of judicial recourse in IAP cases (Brown at para. 81), I see no principled basis on which to interfere with the supervising judge's conclusion.

DISPOSITION

- [80] For the reasons provided, I would dismiss the appeal.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Mr. Justice Abrioux"

- [1] Four out of the seven judges who heard J.W. agreed with Justice Côté on the jurisdiction of supervising courts in respect of the IRSSA. Moldaver J. concurred with Justice Côté. Brown and Rowe JJ., although dissenting in result, also agreed with her reasons on this point, holding that it "correctly state[s] the law" (at para. 175).
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