Court File No. 00-CV-192059CP

ONTARIO
SUPERIOR COURT OF JUSTICE

EDMUND METATAWABIN,
ST. ANNE'S IAP CLAIMANT T-00185
ST. ANNE'S IAP CLAIMANT S-20774
ST. ANNE'S IAP CLAIMANT S-16753

Requestors

LARRY PHILIP FONTAINE et. al.

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA, et.al.

Defendants

Proceeding under the *Class Proceedings Act, 1992, S.O. 1992, c. 6*

VOLUME I

REQUEST FOR DIRECTIONS TO COMPEL CANADA TO COMPLY WITH IRSSA ANCILLARY ORDERS OF JANUARY 14, 2014 AND JUNE 23, 2015

May 12, 2020

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Copy of Request for Directions will be also copied

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A. RELIEF SOUGHT:

1. The Requestors seek the following Directions:

    a. A Direction that the ONSC and Chief Adjudicator enforce the IRSSA and the two St. Anne's IRSSA Ancillary Orders dated January 14, 2014 and June 23, 2015 by compelling Canada to forthwith file with the IRSA Secretariat, the revised POI reports/documents and the 2015 narrative/documents ("Fresh Evidence") for each St. Anne's IAP claim heard in the absence of that Fresh Evidence, including for IAP Claims T-00185, S-20774, S-16753, S-11733 and K-10106;

b. A Direction for the Chief Adjudicator and IRSA Secretariat to forthwith provide written notice to each St. Anne's IAP claimant, whose IAP claim was heard in the absence of the Fresh Evidence, which notice will contain:

    i. Canada had previously failed to provide full mandatory documentary disclosure and reports as required for his/her IAP hearing process;

    ii. The Secretariat EDI filing system has recently obtained Fresh Evidence from Canada which may impact the previous outcome of his/her IAP claim;

    iii. The Claimant can seek independent legal advice as to the impact from the Fresh Evidence and revised reports on his/her legal rights;

c. A Direction that Canada will pay for each IAP claimant who receives notice from the Chief Adjudicator above, funding of up to $1,500 plus HST and disbursements, for legal advice solely to the IAP claimant; such monies to be paid by Canada to the lawyer who confirms that he/she provided that legal advice, and upon confirmation from the Secretariat to Canada that said lawyer filed an authorization to obtain the revised disclosure for that IAP claimant;

d. A Direction that the Chief Adjudicator and Secretariat shall delay destroying the IAP documents for St. Anne's IAP claims until resolution of any and all legal proceedings arising from the Fresh Evidence; if there has already been destruction of documents in an IAP claim for which there is Fresh Evidence and revised reports, then Canada shall also file the POI reports/documents and narrative/documents that were before the original IAP hearing adjudicator;

e. A Direction that this RFD and all future St. Anne's RFD hearings to re-open to be convened by the ONSC in Timmins or Cochrane;

f. A Direction to the Chief Adjudicator to publish an expedited RFD form and process for St. Anne's IAP claimants who seek to re-open his/her IAP claim for Fresh Evidence. In such RFD's, Canada will file a response that contains the original and

revised reports and documents, and Canada is permitted to consent to the re-opening and re-hearing of that IAP claim by an adjudicator of original jurisdiction;

g. A Direction by the Court to grant cost immunity to any St. Anne's IAP claimant and/or claimant counsel, for bringing an RFD to re-open, unless that RFD is found to be frivolous and vexatious as per the Ontario Rules of Civil Procedure;

h. A Direction that the public version of all St. Anne's RFD court filings (RFD, evidence, facta) to date and in the future, to be filed with the NCTR for historical purposes, except if a document or part of a document is sealed u IAP confidentiality; and

i. A Sealing Order for the IAP confidential material in this RFD record;

j. Cost immunity to the Requestors for this RFD;

k. Reasonable legal costs of this RFD from Canada to Requestors' Counsel;

l. Such further and other relief as this Honourable Court deems appropriate for enforcement of the IRSSA for St. Anne's IRSSA Class Members.

B. ST. ANNE'S IRSSA CLASS MEMBERS REQUESTING DIRECTIONS

1. Dr. Edmund Metatawabin, Former Chief of Fort Albany First Nation:

a. Dr. Metatawabin is the Former Chief of Fort Albany First Nation. He has been an Executive member of Peetabeck Keyway Keykaywin Association (St. Anne's Survivors Association or "PKKA") since 1992, is an IRSSA Class member and is a survivor of child abuse at St. Anne's Indian Residential School ("St. Anne's").

b. Dr. Metatawabin was awarded the Order of Canada in 2019 by the Governor General of Canada, in recognition of his work for St. Anne's Survivors and survivors of other residential schools.

c. Dr. Metatawabin is representing an unidentified group of St. Anne's IAP claimants, whose IAP claims were adjudicated when Canada had not produced all the Fresh

Evidence for the original IAP adjudicator. The identity of each member of this group is known only to Canada and could be known to the Chief Adjudicator. Dr. Metatawabin's affidavit filed in support of this RFD, supports his ability to represent those unknown IAP claimants herein.

d. From 1992 until 2005, Dr. Metatawabin activated various arms of the Ontario justice system (Ontario Provincial Police investigation, criminal proceedings and civil proceedings) to investigate and record the child abuse that many Indigenous citizens had suffered at St. Anne's. Alarming levels of individual and community dysfunction, arising from widespread child abuse, were evident.

e. Documents containing details about child abuse and about the abusers were generated/gathered from 1992 until 2005, in an OPP investigation, in St. Anne's criminal proceedings against former supervisors, and in ONSC civil actions and ADR claims. Approximately 1000 former students individually provided details within these operations of the justice system, generating evidence that St. Anne's was the site of widespread sexual and horrific physical abuse of children, forced to reside there under federal IRS policy.

f. Dr. Metatawabin then became one of the Indigenous members of the Working Caucus Committee, which hired adjudicators for the IAP process under the IRSSA, when the IRSSA was an Agreement in Principle in 2005 and after the IRSSA was signed in 2006. The IRSSA was premised on full disclosure about abuse at the school and abuse allegations for each perpetrator, by Canada to the adjudicator hearing an IAP claim.

g. In 2013, Dr. Metatawabin became aware that the documents containing details of child abuse at St. Anne's, generated from 1992 to 2005, had not been disclosed by Canada nor by the Catholic Church entities, to the IRSA Secretariat for each confidential IAP hearing. Canada's narrative for St. Anne's previously stated there were no documents about sexual abuse, and that there were no documents about student on student abuse at this school.

h. Since 2013, Dr. Metatawabin remains the primary Indigenous leader for St. Anne's IRSSA class members. He has continually bought or assisted in bringing RFD's before the IRSSA Eastern Administrative Judge, to enforce IRSSA rights of vulnerable St. Anne's Survivors against Canada for non-disclosure and incomplete reports. He has personally attended almost every St. Anne's RFD hearing, travelling to Toronto from his home in Fort Albany on the shores of James Bay.

i. On January 14, 2014, an IRSSA Ancillary Order directed Canada to remedy breach of its mandatory disclosure requirements by June 30, 2014 and to produce revised narrative/POI reports by August 1, 2014. The Court also directed that it had exclusive jurisdiction to re-open IAP claims concluded without that evidence. (St. Anne's RFD #1).

j. On June 30, 2014, Canada first produced to the IRSA Secretariat, about 12,300 additional documents containing details about child abuse and alleged abusers at St. Anne's. This Fresh Evidence was contained in transcripts of criminal court proceedings, ONSC civil pleadings and related documents, 700+ signed witness statements to the OPP, as well as in church documents that had been seized by the OPP under court-issued search warrants ("12,300 Additional Documents").

k. Canada heavily redacted the 12,300 Additional Documents, plus the new narrative and POI reports were not compliant. Therefore, Dr. Metatawabin and St. Anne's IAP claimants brought another RFD to challenge for non-compliance. On June 23, 2015, the ONSC issued another IRSSA Ancillary Order that stipulated Canada's required content of revised St. Anne's POI reports and narrative, and that limited the redactions permitted by Canada on public court documents.

l. Since 2015, Dr. Metatawabin has supported the vulnerable St. Anne's IAP claimants who managed to find out about Fresh Evidence through the legal and media efforts of Dr. Metatawabin and PKKA. However, Dr. Metatawabin cannot, under IAP confidentiality, actively seek to find IAP Claimants whose IAP claims were heard in the absence of the Fresh Evidence and revised POI reports/ narrative.

m. Dr. Metatawabin invited Canada and the Chief Adjudicator to conduct a review of the St. Anne's RFD's, following the decision of the Supreme Court of Canada in April 2019, concluding that Fresh Evidence comes within "exceptional circumstances" for seeking judicial intervention, and that finality of IAP decisions are subject to compliance.

2. **IAP Claimant T-00185** (IAP Claim heard in 2010):

a. T-00185 attended St. Anne's orphanage and residential school for most of his childhood.

b. T-00185 was denied any IAP compensation in 2010, following an IAP hearing. T-00185 was believed that he had been sexually abused by other students, but there was insufficient evidence to prove that employees had knowledge/failed to take reasonable steps. He was also denied compensation for "other wrongful acts" committed by the boys' supervisor against T-00185 [this supervisor was actually criminally convicted for abusing St. Anne's boys, but Canada did not disclose that at the original IAP hearing.]

c. Since St. Anne's RFD #1 in 2014, T-00185 has never received notice from the IRSA Secretariat, that Canada had failed to make full disclosure in the IAP hearing process and that Fresh Evidence was owed by Canada for IAP Claim T-00185.

d. Instead, through the legal and media efforts of Dr. Metatawabin, T-00185 discovered in 2019 that there was Fresh Evidence for St. Anne's IAP claims determined before 2014.

e. Under the IRSSA Orders of January 14, 2014 and June 23, 2015, Canada was already obligated to file the Fresh Evidence for T-00185 with the Secretariat;

f. In order to make an informed decision whether or not to bring an RFD to the Court to re-open IAP Claim T-00185, Claimant T-00185 and his legal counsel should have access through the Secretariat to Canada's fresh narrative and POI reports/documents for that IAP claim.

g. The Chief Adjudicator has not enforced the IRSSA Ancillary Orders of January 14, 2014 and June 23, 2015 for St. Anne's Claims against Canada. The Chief Adjudicator found[1] that adjudicators and the Chief Adjudicator lack power to compel Canada to comply with mandatory disclosure of reports/documents in accordance with the IRSSA and the St. Anne's IRSSA Ancillary Orders. No RFD for directions has been brought directly by the Chief Adjudicator from the supervising Courts on this gap of power, and the Chief Adjudicator has not participated, despite being served, in any RFD brought by St. Anne's IAP claimants seeking the fresh evidence and to re-open.

h. Canada refuses, despite requests from counsel forT-00185, to file the revised POI reports/documents for IAP Claim T-00185 with the IRS Adjudication Secretariat. Canada states T-00185 has to bring an RFD.

i. T-00185, through his counsel, has notified the Chief Adjudicator, Oversight Committee and Court Counsel for the IRSSA Supervising Judges, that Canada has still not filed the fresh POI reports/documents for IAP Claim T-00185 and other IAP claims heard without the fresh evidence.

3. **IAP Claimant S-20774** (IAP Claim heard in 2009):

a. IAP Claim S-20774 was decided in 2009. She received IAP compensation for child abuse at St. Anne's, but her claim was decided under Canada's pre-2014 narrative that stated there was no sexual abuse at St. Anne's and the Claim was decided in the absence of the 12,300 Additional Documents.

b. Since St. Anne's RFD #1 in 2014, S-20774 has never received notice from the IRSA Secretariat, that Canada had failed to make full disclosure in the IAP hearing process and that Fresh Evidence was owed by Canada for IAP Claim S-20774.

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[1] Chief Adjudicator Re-Review Decision H-15019, paragraph 37 and footnote 10; Chief Adjudicator Re-Review Decision C-14114, paragraphs 141-146.

c. S-20774 became aware through the work of Dr. Metatawabin that there are likely new POI reports/documents for St. Anne's. Therefore, S-20774 wants the fresh POI reports/documents and narrative filed by Canada with the Secretariat for her IAP claim, so that she can obtain a legal opinion whether to ask the Courts to re-open her IAP claim.

d. S-20774 is already entitled to revised POI reports/documents from Canada under the IRSSA Ancillary Orders of January 14, 2014 and June 23, 2015;

e. The IRSSA Secretariat does not have the fresh POI reports/documents for S-20774; the Chief Adjudicator placed the burden on S-20774 to ask Canada to file the fresh POI reports/documents to comply with the IRSSA Ancillary Orders of January 14, 2014 and June 23, 2015. Canada has not, despite requests from claimant counsel, filed the fresh POI reports/documents for IAP Claim S-20774 with the IRS Adjudication Secretariat.

f. Continuing non-compliance by Canada prevents S-20774 from knowing what evidence Canada should have revealed about sexual abuse at St. Anne's and about the abusers, which she was entitled to know in the IAP process. She is still unable to obtain the Fresh Evidence/reports which prevents her from obtaining a legal opinion based on review comparing the Fresh Evidence and original evidence, to enable her to decide whether to bring an RFD to Court to re-open her IAP claim.

g. S-20774 has, through her counsel, notified the office of the Chief Adjudicator and Oversight Committee, as well as Court Counsel for the IRSSA Supervising Judges, that Canada has still not filed the fresh POI reports/documents for IAP Claim S-20774. The Chief Adjudicator found adjudicators have no power to compel mandatory disclosure by Canada, but no RFD has been brought to the Courts for Directions to fill the gap, by the Chief Adjudicator.

4. **IAP Claimant S-16753** (IAP Claim heard October 25, 2013)

   a. IAP Claim S-16753 was decided on October 25, 2013, after St. Anne's RFD #1 was already commenced. Canada did not seek an adjournment pending outcome of St. Anne's RFD #1.

   b. S-16753 was unaware until 2019 that Canada had not complied with mandatory disclosure to adjudicators for St. Anne's IAP claims. No notice was received from the IRSA Secretariat about the Orders of January 14, 2014 and June 23, 2015.

   c. S-16753 is already entitled to revised POI reports/documents from Canada under the IRSSA Ancillary Orders of January 14, 2014 and June 23, 2015;

   d. The IRSSA Secretariat does not have the fresh POI reports/documents for S-16753; the Chief Adjudicator placed the burden on S-16753 to ask Canada to file the fresh POI reports/documents to comply with the IRSSA Ancillary Orders of January 14, 2014 and June 23, 2015. Canada has not, despite requests, filed the fresh POI reports/documents for IAP Claim S-16753 with the IRS Adjudication Secretariat.

   e. Continuing non-compliance by Canada prevents S-16753 from knowing what evidence Canada should have revealed about sexual abuse at St. Anne's and about the abuser, which he was entitled to know in the IAP process. He is still unable to obtain the Fresh Evidence/reports which prevents him from obtaining a legal opinion, based on review of the Fresh Evidence and original evidence, as to whether or not to bring an RFD to Court to re-open her IAP claim.

   f. S-16753 has, through his counsel, notified the office of the Chief Adjudicator and Oversight Committee, as well as Court Counsel for the IRSSA Supervising Judges, that Canada has still not filed the fresh POI reports/documents for IAP Claim S-16753. The Chief Adjudicator has found adjudicators have no power to compel mandatory disclosure by Canada, but no RFD has been brought to the Courts for Directions to fill the gap, by the Chief Adjudicator.

GROUNDS FOR THE REQUEST FOR DIRECTION

THE IAP MODEL

5. Under the IAP Model (Schedule D to the IRSSA), Canada is the creator of the evidentiary foundation for every IAP claim. Under Appendices IV and VIII of the IAP Model, Canada accepted the duty and obligation to make full advance disclosure of all the documents in its possession or control about child abuse and about alleged persons of interest (POI's) at each Indian Residential School. Those document collections, in turn, form the factual foundation for the Narrative for each IRS, and in each POI report that Canada was obliged to create. Both the Narratives and the POI reports must be meaningful summaries of the documents, identifying all the allegations or incidents of physical or sexual abuse at the IRS. Production of the documents and creation of the Narratives and POI reports was a commitment that Canada made as part of the negotiated resolution of the class proceedings. This responsibility was not to be undertaken by Canada in its role of adversary to the Claimants, but rather as part of its commitment to truth and reconciliation. POI's were given criminal immunity and could not be found personally liable.

6. The purpose of the document production, the Narratives and the POI reports was to ease the evidentiary burden for claimants in a confidential and inquisitorial setting. Claimants are entitled to know what the defendants about the POI and all allegations of abuse. Claimants can rely upon these documents as providing corroborating and similar fact evidence. The reports and documents from Canada also make the adjudicative function easier. With the benefit of full documentary production, summarized in the Narrative and POI reports, the Adjudicator can fulfill his or her inquisitorial function and make individual findings of fact and credibility, relying on those documents. Further, for finding of

aggravating factors such as oppression, inability to complain, racism, etc, the total points for abuse proven and harms suffered are increased on a percentage basis.

7. For each IAP claim, the IAP adjudicator and claimant were intended to reasonably assume that Canada has fulfilled its obligations under the IRSSA and Appendix VIII, and that it has prepared truthful Narrative and POI reports, and produced all its documents containing allegations of physical or sexual abuse about each IRS. Claimants have no discovery obligations. Findings of fact and credibility of claimants are weighed against the fact record created by Canada, which is assumed to be an accurate reflection of all its available information, as stipulated in Appendix VIII (page 30). The IAP model also provides there shall be no new evidence on review or re-review (page 14).

8. IAP Appendix X, Section 3 of the IAP model (pages 40-41) provides the following term, pertaining to use of Canada's documents by the IAP adjudicator of original jurisdiction:

   Appendix X, Section 3: Document Collections: Adjudicators will be provided with Canada's, and potentially a church's, document collection on each school for which they are holding hearings. This material will also be available to Claimants and their counsel. The approach to the use of this kind of information is as follows: Adjudicators are expected to inform themselves from this material, which may be used as a basis for findings of fact or credibility. Where any of it is so used by adjudicators, it must be cited and its relevance and the rationale for use set out in the report. Because this information is specific to the school in question and is provided in advance, it is expected that adjudicators will be familiar with it before starting a hearing to which it is relevant. Given this, before relying on specific documents to help decide a given case, the adjudicator should seek the consent of the parties, or put the relevant extracts to any witnesses who may be able to comment on them, or whose testimony they may contradict or support. Where there are no such witnesses, or where one or more parties contest the use of the documents, the adjudicator may still use them in his or her decision, but wherever possible should advise the parties of the proposed use of the document so that they may address it in their submissions.

9. IAP Claimants receive only the POI reports for his/her IAP claim. Canada files the POI reports and unredacted documents therein, with the IRSA Secretariat on the EDI system for each IAP claim separately, and the claimant (or claimant counsel) access Canada's filings only through the IRSA Secretariat. IAP Claim Documents and reports are not

exchanged directly between counsel. Canada's documents about a POI and all allegations against that POI, can be located by the adjudicator and claimant only through Canada's POI report.

FRESH EVIDENCE

10. In April 2019, the Supreme Court of Canada decided that for IAP hearings, "Fresh Evidence" for an IAP claim comes within the definition of "exceptional circumstances", thereby permitting an IAP claimant the right to seek judicial intervention. The SCC found the IRSSA Courts have exclusive jurisdiction to determine whether to re-open for Fresh Evidence, perhaps with input from the Chief Adjudicator. The SCC found there is a duty on the Courts to enforce the IRSSA for claimants in exchange for forfeiting his/her right to sue in Superior Courts for child abuse. Also, finality of an IAP decision is conditional upon compliance with the IAP model[2].

11. Canada owes production of Fresh Evidence for St. Anne's IAP claims, but Canada has not done so. Remedial filings have not been made with the IRSA Secretariat for every IAP claims decided without the Fresh Evidence and revised POI reports/narrative.

12. The ONSC Order and Decision of January 14, 2014 already held that Canada had not complied with its mandatory disclosure obligations and narrative/POI reports for St. Anne's IAP claims. The Order provides, inter alia, in paragraphs 6 that Canada had to produce for the IAP, the OPP documents, transcripts of criminal or civil proceedings, any other relevant and non-privileged documents in the possession of Canada; in paragraph 7 that Canada shall by August 1, 2015 revised its Narrative and POI Reports for St. Anne's; and paragraph 8 that the Courts under the IRSSA have the exclusive jurisdiction to re-open settled IAP claims on a case-by-case basis.

13. On June 30, 2014, Canada first produced 12,300 Additional Documents to the IRSA Secretariat for St. Anne's in mass, but not filed separately into each IAP claim. These document were ONSC civil pleadings, transcripts of criminal proceedings and OPP

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[2] *J.W. v Canada (Attorney General), 2019 SCC 20.*

investigation documents to the IAP, that contained details of child abuse and/or information about the POI's.

14. But Canada heavily redacted the documents and documents were not summarized in the POI reports/narrative. Revised POI reports are essential for adjudicators and claimant counsel to pull out documents pertaining to each POI, plus the narrative was not correct.

15. The contents of the revised POI reports and the redactions permitted by Canada were further addressed by the ONSC in the Order and Decision of June 23, 2015. Canada had to produce further and better POI reports and narrative.

16. By November 2015, the narrative for St. Anne's went from 12 pages before St. Anne's RFD #1, to almost 900 pages in length, with concise summaries of the Additional Documents. The 2015 narrative confirms widespread sexual and serious physical abuse of children, as documented in civil pleadings, transcripts of criminal proceedings and OPP signed witness statements. The POI reports also changed drastically after the June 23, 2015 Order in cases not yet determined. Due to the church documents (seized by the OPP under court search warrants in the 1990's) finally coming into the IAP, the presence, positions and duration of supervisors were confirmed, whereas pre-2014 POI reports from Canada were erroneous. For instance, the POI report for Sister Anna Wesley in 2007 was one page in length, whereas the 2015 version is 220 pages in length, just summarizing the thousands of pages of details about her abuse of St. Anne's children. As another example, the pre-2014 POI reports for Father Lavoie were one or two pages, with supposed gaps in when this Priest had access to St. Anne's children, whereas the 2015 POI report is almost 100 pages, summarizing thousands of pages of details of sexual abuse of children. Only in 2016, did Canada produce a 50 page memo summarizing all the additional documents that contain details about the electric chair used by supervisors at St. Anne's and its effect on children abused therein. Only in 2018 and 2019 were two St. Anne's IAP claimants first compensated for being abused in the electric chair.

17. Claimant counsel did not know, except for their own existing IAP clients, whether Canada did or did not file revised POI reports/documents and the 2015 narrative/documents in other IAP claims. However, Canada knows for which IAP claims the original adjudicator had

none of these documents and erroneous narrative and POI reports. Canada's non-disclosure might result in wrongful denial of a claim, or in under-compensation. For instance, a claimant might have been believed about SL1 abuse (fondling) but not believed about SL4 abuse (intercourse).

18. Since autumn 2015, St. Anne's IAP claimants, who may have suffered a miscarriage of justice due to Canada's non-disclosure of mandatory reports/evidence, have found out generally about additional St. Anne's evidence, and come forward to the Courts. Prior to the SCC decision in April 2019, Canada's arguments in St. Anne's RFD's were successful, with Canada making preliminary objections for lack of standing, lack of jurisdiction of the Courts, settlement privilege and protecting finality of IAP decisions. Canada's arguments were previously accepted by IRSSA Courts. Canada also took the legal position that St. Anne's IAP claimants had to first seek review or re-review, despite the IAP model prohibiting new evidence on review or re-review. Canada has raised various objections and arguments, to oppose every review, re-review and RFD of St. Anne's IAP claimants seeking to re-open his/her IAP claim for Fresh Evidence.

19. Since the SCC decision in April 2019, which rejected those legal positions of Canada, Canada has still not filed revised POI reports and documents with the IRSA Secretariat for the IAP Claims decided by adjudicators, who did not have Canada's revised POI reports and the 12,300 Additional Documents from Canada. Each St. Anne's IAP claimant has standing to bring an RFD to re-open to the Courts for Fresh Evidence, but by Canada not filing the Fresh Evidence with the Secretariat, claimants have no notice of Fresh Evidence for his/her IAP claim. Any gap in the power of adjudicators and/or Chief Adjudicator to operate the IAP and to enforce the IRSSA Ancillary Orders of January 14, 2014 and June 23, 2015 is to be filled by the Courts.

20. The Chief Adjudicator and Oversight Committee have declined to take any steps or bring an RFD to compel Canada to file the Fresh Evidence owed in each IAP Claim determined when Canada was in violation of its St. Anne's disclosure/report obligations.

21. In 2018, the Ontario Court of Appeal recognized Metatawabin would have standing, but found that re-opening of St. Anne's IAP claims by the Court would be on a case-by-case

basis. However, the ONCA did not have before it, in that Appeal, that the Chief Adjudicator found adjudicators have no power to enforce the Orders of January 14, 2014 and June 23, 2015 for each St. Anne's IAP claim heard in the absence of the revised POI reports/documents. Since 2018, more St. Anne's claimants whose claims were decided without the Fresh Evidence have come forward.

22. Canada has avoided responding to the merits of all these RFD's by these making preliminary objections. Therefore, the IRSSA Courts did not have Canada's original and fresh POI reports/documents and the 2015 narrative/documents, in the RFD record before them, to assess potential impact of the Fresh Evidence.

23. The IAP process is confidential and the identity of IAP claimants is supposed to remain confidential. Edmund Metatawabin and PKKA do not have any resources to find the people whose IAP claims were heard in the absence of the Fresh Evidence. The onus should not be on individual IAP claimants to know about this non-disclosure of documents and the complex legal issues surrounding non-disclosure.

24. Meanwhile, every St. Anne's IRS student whose rights have been violated and whose IAP claim has potentially been affected, such as T-00185, S-20774 and S-16753 cannot obtain the Fresh Evidence from the Secretariat.

25. In addition to federal officials in Canada's Department of Justice having the Fresh Evidence prior to June 30, 2014, claimant counsel at Wallbridge Wallbridge were in possession of and/or authored all or some of the Fresh Evidence, without the knowledge of IAP claimants who were their clients. Former clients of Wallbridge Wallbridge, including IAP Claimants T-00185, S-20774, S-16753 and H-15019 were not contacted about the Fresh Evidence owed by Canada after January 14, 2014 and do not wish to be penalized by not having Canada's Fresh Evidence filed in his/her IAP claim because Wallbridge Wallbridge had the Fresh Evidence at the time of his/her original IAP hearing. Former client, St. Anne's IAP Claimant T-00178 brought an RFD, that was sent to British

Columbia and was dismissed, in part because the Fresh Evidence owed by Canada included documents authored by Wallbridge Wallbridge[3].

26. Nelligan O'Brien Payne (NOP) represented the Catholic Church entities that operated St. Anne's, and NOP authored ONSC pleadings as counsel for all those church entities, which denied allegations of child abuse at St. Anne's and NOP defended a pilot mediation project. NOP received the Fresh Evidence as co-defence counsel with federal officials in Canada's Department of Justice, prior to the IRSSA. However, NOP subsequently represented St. Anne's survivors in IAP claims, without disclosing possible professional conflicts and without disclosing the Fresh Evidence to their IAP clients nor to IAP adjudicators. Former clients of NOP do not wish to be penalized by not having Canada's Fresh Evidence filed in his/her IAP claim because NOP had the Fresh Evidence and/or NOP did not challenge Canada for non-disclosure of the Fresh Evidence.

27. The Chief Adjudicator has commenced legal proceedings to end the IAP process, whereas there has not yet been compliance by Canada for every St. Anne's claim heard without the Fresh Evidence.

EVIDENCE TO BE RELIED UPON

a) Affidavit of Dr. Edmund Metatawabin, sworn May 11, 2020

b) Affidavit of St. Anne's IAP CLAIMANT T-00185 sworn March 12, 2020

c) Affidavit of St. Anne's IAP CLAIMANT S-20774 sworn March 14, 2020

d) Affidavit of St. Anne's IAP CLAIMANT S-16753 sworn May 5, 2020

e) Affidavit of St. Anne's IAP Claimant K-10106 sworn March 31, 2016 and Supplementary Affidavit of St. Anne's IAP Claimant K-10106 sworn May 12, 2020

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[3] *Fontaine v. Canada (Attorney General), 2017 BCSC 946* at paragraph 79, and *IAP Claimant H-15019 v Wallbridge Wallbridge and Attorney General of Canada, 2020 ONCA*

f) Affidavit of St. Anne's IAP Claimant S-11733 sworn November 16, 2016 and Supplementary Affidavit of Evelyn Korkmaz, IAP Claimant S-11733, sworn May 12, 2020

g) Such further and other evidence as counsel may file, including affidavits filed by St. Anne's IRSSA class members in previous St. Anne's RFD's and in CPAC recordings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12th Day of May, 2020

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Copy of Request for Directions will be also copied

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Court File No. 00-CV-192059CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

EDMUND METATAWABIN,
ST. ANNE'S IAP CLAIMANT T-00185
ST. ANNE'S IAP CLAIMANT S-20774
ST. ANNE'S IAP CLAIMANT S-16753

Requestors

LARRY PHILIP FONTAINE et.al.

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA, et.al.

Defendants

Proceedings under the *Class Proceedings Act*, 1992, S.O. 1992 C.6

AFFIDAVIT OF DR. EDMUND METATAWABIN
Sworn May 11, 2020

REQUEST FOR DIRECTIONS
TO COMPEL CANADA TO FILE FRESH POI REPORTS/DOCUMENTS
AS PER IRSSA ANCILLARY ORDERS JANUARY 14/14 AND JUNE 23/15

I, **EDMUND METATAWABIN**, a member of Fort Albany First Nation, in the Province of Ontario, HEREBY SWEAR THAT THE FOLLOWING IS THE TRUTH:

1. I am one of hundreds of Indigenous survivors of horrific child abuse, experienced while we were children forced to reside at St. Anne's Indian Residential School (St. Anne's). The second section of this affidavit outlines my efforts over the past 30 years to seek justice for survivors of St. Anne's and other residential schools.

2. In February 2019, I was awarded the Order of Canada by the Governor General, for my work for St. Anne's survivors. I accepted on behalf of all the children who attended St. Anne's, including the children who died at the school.

3. I was an active member of the Working Caucus Committee that hired adjudicators for the IRSSA, when it was still an Agreement in Principle, and then signed in 2006. I expected the terms of the IAP adjudication process would be followed by the Government and churches. I

trusted the IAP process would bring forward everything the Government and churches already knew about child abuse at each school and about each perpetrator, for each private IAP hearing. The requirement for each IAP adjudicator to receive and review the child abuse documents about the whole school and about the named perpetrator, prior to questioning a survivor, was a key component to a fair hearing for me[1].

4. I swear this affidavit, and I am bringing this Request for Directions (RFD) to stand with other St. Anne's Survivors, because the Government has not complied with Court Orders that we already won in 2014 and 2015. Canada breached the IRSSA for disclosure and reports of documents with allegations about child abuse at St. Anne's, which we established. However, the Government has not filed with the Secretariat the fresh St. Anne's revised POI reports (and unredacted documents about each POI) in each St. Anne's IAP claim heard by IAP adjudicators who did not have that revised mandatory evidence from the Government. As a result, those St. Anne's IAP claimants have never received notice from the Chief Adjudicator/Secretariat that there is fresh evidence in his/her IAP claim.

5. St. Anne's IAP claimants, whose claims were breached by the Government, should not have to bring an RFD to have the fresh evidence filed because that is already owed under IRSSA Court Orders.

6. I believe that the Courts and their agents have not enforced the two IRSSA Orders for each St. Anne's IAP claim and that the rights of survivors continue to be violated by the Government, without consequence.

[1] Pages 30, 39-41 of IAP process. http://www.residentialschoolsettlement.ca/Schedule_D-IAP.PDF

DECLARATION BY SUPREME COURT OF CANADA OF IAP RIGHTS 2019

7. For this affidavit and RFD, I state my reliance on the Supreme Court of Canada (SCC) declaration in April 2019, that the Superior Courts in Canada have a duty to enforce the terms of the IRSSA for IAP claimants. This declaration is from the highest Court in Canada, and I believe the other Judges and agents of the Courts are obligated to operationalize that duty, for each St. Anne's IAP claims for which there is fresh evidence.

8. The SCC pronounced in 2019 that in exchange for each IRS survivor forfeiting our rights to sue in Superior Courts for sexual, physical and emotional child abuse suffered at residential schools, survivors are entitled to enforcement of the IAP process as per the IRSSA. If there are gaps in the IAP, the Courts have the power to fill the gaps. The SCC clarified past decisions and pronounced that fresh evidence permits an IAP claimant to bring a Request for Direction (RFD) to the Courts, to try to re-open a claim. The SCC confirmed that fresh evidence constitutes "exceptional circumstances", to permit court intervention. The courts have the power to decide whether to re-open an IAP claim for fresh evidence, and the SCC quoted the case we won in St. Anne's RFD #1, and that we are still seeking to enforce. Previous decisions that accepted Government arguments to prioritize finality of IAP decisions over re-opening of claims (even if there is fresh evidence or non-compliance) were rejected.

9. I understand that the Chief Adjudicator and Secretariat are agents of the court, and not agents of the Government. The video link[2], which records the questions and comments of Justices in the SCC on October 10, 2018, confirms that the Justices questioned the Chief Adjudicator's lawyer, asking if there any other "gaps" in the IAP process.

10. So, this affidavit and this RFD are based on these new pronouncements of the SCC in 2019 and my belief that all earlier rulings by Judges and arguments by the Government, that are not consistent with this SCC decision are no longer valid. I believe the "duty" on the Courts includes a requirement for IRSSA Judges and Chief Adjudicator fill the gap in power, that supposedly adjudicators cannot compel mandatory disclosure by the Government for the confidential IAP hearings. The Courts and Chief Adjudicator must somehow force the Government to file revised every required POI report, revised narrative and underlying

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[2] *J.W. v. Attorney General (Canada), 2019 SCC 20.* Listed as SCC case # 37725. https://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=37725&id=2018/2018-10-10--37725&date=2018-10-10

additional documents with the Secretariat, for each St. Anne's IAP claim. The Chief Adjudicator must also give direct notice to each IAP claimant for whom fresh evidence exists for his/her IAP claim, so each claimant can make an informed decision with legal counsel.

11. Right after the SCC decision, I took immediate steps to invite a review of St. Anne's IAP claims for which there is new evidence. Now shown to me and attached hereto as **Exhibit A** is a copy of my letter dated May 14, 2019 addressed to the Prime Minister, Minister of INAC, Attorney General of Canada, and copied to the Chief Adjudicator and others. I have never received a response to that letter from the Government nor from the Chief Adjudicator.

12. Since April 2019, I am not aware that the Chief Adjudicator has brought an Request for Directions, to ask the Court to fill the gap in power, which would enable the Chief Adjudicator to compel the Government to comply with IRSSA Ancillary Orders of January 14, 2014 and June 23, 2015, for each and every St. Anne's IAP claims heard without that fresh evidence.

13. Until St. Anne's survivors' rights are enforced by the Courts, the IAP is not final. Government officials violate our rights without checks. St. Anne's survivors continue to suffer. Many survivors have left this world without having satisfactory closure for what happened to him/her at St. Anne's because the Government has not fulfilled its legal obligations, to reveal the depth of their evidence about the widespread abuse of children and the abuse by each named perpetrator.

14. I am sad to say that Stella Chapman died in March 2020. She publicly revealed on January 15, 2018 that she was IAP claimant C-14114, at a national press conference in Ottawa[3]. She developed cancer in 2018, shortly after the Court denied hearing her RFD.

15. Stella Chapman gave up her health, to pursue the miscarriage of justice that she suffered. Her IAP claim had been denied in 2013 and she filed an RFD in November 2016 to the Court, asking to re-open for fresh evidence. The Government fought hard against re-opening her IAP claim, making her instead seek review and re-review without the fresh evidence. The Government did not file the revised POI report/documents as ordered in 2014, so Stella Chapman went back to court in December 2017, asking the Court to make the Government file the fresh evidence and for the Court to re-open her IAP claim. The Government objected to her

[3] https://www.cpac.ca/en/programs/headline-politics/episodes/57989071/#

standing and objected that the Court did not have the power to re-open. I attended and supported Stella Chapman during her efforts to seek justice.

16. The Court would not hear her RFD[4]. Her additional evidence was not received, which she told me included her evidence the Government had still not filed the revised perpetrator reports and documents, owed under the 2014 and 2015 Orders. St. Anne's survivors decided to challenge the Minister of INAC in public and to speak directly for ourselves even if the Court would not take our evidence. With the help of Charlie Angus, we organized a national press conference for January 15, 2018. The Minister knew we were going to speak directly to the national media, because on FaceBook, during the weekend before the press conference, she was claiming she had contacted me. I never received any communications from the Minister. I was supposed to attend that national press conference on January 15, 2018, intending to travel from Fort Albany to Ottawa, but I could not attend due to weather conditions. I was included in the meeting before the press conference, by telephone, and my son, Shannin Metatawabin, appeared on my behalf and read my statement to the media/public. I told the public that the justice system was failing Indigenous peoples in Canada.

17. The Court had not compelled the Government to file the revised POI reports and documents, for the Court to decide whether to re-open IAP claim C-14114 for all the fresh evidence. Right after the press conference, the Court instead ordered[5] Stella Chapman to proceed with a re-hearing four days later, without the revised evidence owed under the Orders in 2014 and 2015.

18. I was shocked and insulted to read that decision, and angry that the Court would attack survivors and our lawyer for standing up to the Minister for our rights. Stella Chapman told me that she was very scared when the Court made that Order. We all felt silenced after that Court Order of January 15, 2018, which criticized our lawyer for bringing forward our legal issues and then later ordered our lawyer to pay the Government for bringing RFD's to the Court for Stella Chapman and Angela Shisheesh. Only after the Divisional Court in February 2020 found that there was a reasonable apprehension of bias for Justice Perell to make that decision have we felt we can come forward again.

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[4] Fontaine v. Canada (Attorney General) 2018 ONSC 103
[5] Fontaine v. Canada (Attorney General) 2018 ONSC 357

19. The Ontario Court has never decided whether to re-open any St. Anne's claim for any RFD brought by a St. Anne's IAP claimant, with full revised disclosure from the Government before the Court for that IAP claim, prior to the RFD being dismissed or adjourned.

20. Stella Chapman and her family, myself and many others, have been deprived of feeling a peaceful and just closure to the IRS child abuse. That can only come when one's story of abuse is understood and acknowledged, when the details are known to the survivor about each person who abused him/her, and when the courts show us that the justice system is prepared to enforce individual Indigenous legal rights against Government officials and against lawyers who have not properly represented St. Anne's survivors in his/her IAP hearing.

INDIGENOUS LAW OF ORAL TRADITIONS

21. I believe it is essential to understand Indigenous law of oral tradition. We are required, in our culture, to tell the truth when we tell our sacred stories from the past. We must be careful to take actual facts from the past, to deliver them to the future. Elders, in particular, have special responsibility to deliver sacred messages and truths from the past to future generations in a certain way.

22. Since 1992, St. Anne's survivors' stories about child abuse have been brought forward under our oral tradition. Our oral stories have been recorded into documents by various legal processes in the Ontario justice system. Many of us told the specific details of how we suffered horrific sexual, physical and psychological abuse at St. Anne's, in our stories spoken to the police, to judges and to our own lawyers. It took courage for each survivor to trust the justice system, to reveal to people in authority in the justice system, as what had really happened inside this Catholic/Government institution.

23. We each have told the specific events that happened to us at St. Anne's. While details may vary, as to time and degree and specifics, the whole truth is reflected in the combined oral stories from all St. Anne's survivors and recorded into these documents.

24. The whole truth about widespread child abuse at St. Anne's is shocking. Some church officials were the worst in-house sexual predators, but other adult supervisors were also sexual predators, who violated our innocent bodies and minds. They covered for each other's crimes and they instilled fear and silence in every child by means of religious brainwashing, torture, violence, threats, all to ensure our powerlessness. Our stories confirm the use and ominous

presence of a home-made electric chair to torture children, beating of sick children and forcing us to eat our own vomit in front of other students, using cat-of-nine-tails whip and sawbelt straps on bare skin for punishments, simultaneous slaps over both ears, hand slaps that would draw blood, teaching children to hurt each other, demonizing Indigenous beliefs/customs, freezing us outside for prolonged periods in -40 degree weather in inadequate clothing, humiliating us with relentless racial slurs, and more such degrading and frightening conduct by supervisors. The supervisors taught the children to act in this fashion, so some students repeated it onto other children.

25. The St. Anne's missionaries tried to brainwash us to reject our own culture and ourselves. They followed the direction of Bishop Vital Grandin, 1875, who voiced the goal of residential schools to be: "*We will instil in them a pronounced distaste for the native life so that they will be humiliated when reminded of their origin. When they graduate from our institutions, the children have lost everything native, except their blood*".

26. When these documents, recording our oral testimonies, are summarized and read by a fact-finding judge or adjudicator, only then should individual IAP testimonies to be heard and judged. This IAP process was not supposed to isolate the testimony of each survivor from the required disclosure by the Government. The child abuse that was already recorded in documents was to first be revealed and summarized by the Government to the adjudicator, under the IRSSA.

27. It must also be recognized that some survivors may suffer from severe dysfunction due to child abuse, some are not strong in the English language and abuse details do not translate easily, and some were/are very scared of authorities and testifying. Therefore, possible supporting evidence being reviewed first by the IAP adjudicator, before questioning, was a critical for a fair hearing.

28. After promises of truth and reconciliation, we relied in good faith on Government officials to produce all these documents of our oral stories, recorded by the justice system, and we relied on the Government to provide truthful reports to each IAP adjudicator. Claimants had to agree to keep confidential everything they learned from the Government in the IAP process.

29. It was also important that IAP testimonies could be added to the child abuse stories already recorded by police, criminal and civil legal processes, prior to the Settlement Agreement. The Truth and Reconciliation Commission component of the IRSSA remains critical because

some day all the survivors will be gone. If some IAP claims were denied when the Government was in breach of that IAP hearing, then we fear that in the future, Government and church officials will continue to deny the truth about St. Anne's.

BREACH OF IRSSA BY GOVERNMENT FOR ST. ANNE'S IAP CLAIMS

30. Some survivors came to me, saying they had been deeply hurt because they were not believed in the IAP process when they told their story to adjudicators. I found out, after the 2012 deadline for filing IAP applications, that the Government had failed to disclose the documents about child abuse that had been generated by the police and in criminal and civil proceedings before the IRSSA.

31. Starting in August 2013, and into 2015, 60 St. Anne's IAP claimants and I brought two major Court proceedings against the federal Government. We were able to prove there was breach by the Government of its mandatory disclosure requirements for the confidential IAP hearings. The Court found in 2014, as a result of cross examinations, that federal officials in the Department of Justice had all these documents about child abuse in their possession but withheld them from AANDC officials, whereas the AANDC officials were responsible to file documents and reports with the IAP. (paragraphs 117 and 118). So, the Government officials played a shell game, to hide these documents, and instead rely on a report that falsely stated there were no documents about sexual abuse at St. Anne's. We successfully proved that the withholding of these documents about child abuse and the false Government IAP reports, constituted breach of the IRSSA by the Government. Now shown to me and attached hereto as **Exhibits B and C** respectively are the IRSSA Ancillary Orders and Reasons of January 14, 2014 and June 23, 2015, since known as St. Anne's RFD #1 and St. Anne's RFD #2. The Government did not appeal either of these Orders.

32. I understood that after we won in 2014, the Court would have exclusive jurisdiction to decide whether to re-open IAP claims previously decided when Canada was in breach of the IRSSA disclosure/report obligations, and the court would decide if the claim was possibly prejudiced by the non-disclosure.

33. In St. Anne's RFD #1, we established that the Government and church lawyers had already obtained an ONSC court order in 2003, granting the lawyers in St. Anne's civil actions, access to the OPP investigation documents and to copy all documents that pertained to 150+ St.

Anne's plaintiffs and/or to 180 listed perpetrators at St. Anne's. Now shown to me and attached hereto as **Exhibits D and E** respectively are the Order of Justice Trainor dated August 1, 2003 and the motion record filed by Department of Justice officials in support of that Order.

34. On June 30, 2014, I was advised that the Government produced to the IAP Secretariat about 12,300 additional documents (comprising 40,000 pages), containing horrific details about child abuse and establishing the presence and *modus operandi* of perpetrators at St. Anne's. These 12,300 documents were the documents generated/gathered from up to 1000 St. Anne's survivors giving their oral stories, given to the police and taken through criminal and civil legal processes, prior to the start of the IAP. The Government lawyer had had all these documents.

35. Some Court decisions since 2014 wrongfully state that only the OPP investigations documents were produced by the Government on June 30, 2014. That is not true. The "Fresh Evidence", first produced by the Government on June 30, 2014 to the IAP Secretariat, came from various court and police legal processes, including:

a. ONSC criminal proceedings transcripts, including trials and guilty pleas of eight former supervisors

b. ONSC public court records, including civil pleadings and other public court documents for 150+ St. Anne's plaintiffs

c. Ontario Provincial Police (OPP) investigation from 1992 to 1996, including:

   (i) 700+ signed witness statements from St. Anne's survivors, handwritten by OPP officers and signed by each witness

   (ii) Church documents, seized by the OPP under Court search warrants, from Catholic church offices in Montreal, Ottawa, Moosonee and Fort Albany

36. I believe this non-disclosure was a very serious breach of the IRSSA by the Government for St. Anne's survivors. These were our oral stories, conveyed to people in authority in the justice system, and recorded into documents. The Government was further ordered to send these same documents to the Truth and Reconciliation Commission (TRC). If we had not challenged the Government for breach of the IRSSA, the TRC would never have received those documents containing our oral stories, to ensure the knowledge of these crimes committed against us, by future generations of our people.

37. I believe the Government failed to act in good faith, in holding back these child abuse documents, and they fought hard against us getting this Fresh Evidence into the IAP. We were

not permitted by the Court to find out why the Government officials in Department of Justice had withheld these documents, nor to find out the systems used to try to bury this evidence, nor identify the decision makers involved. Anonymity protects the government officials who violate our rights, particularly in a Settlement Agreement to address child abuse of Indigenous people in these institutions.

38. I am advised by Fay Brunning and by other claimant lawyers, that after June 30, 2014, the narrative and the POI reports about the perpetrators changed drastically. For instance, I am advised that due to new disclosure of the church documents, seized by the OPP in the 1990's, some of the revised POI reports confirm the presence and dates of many POI's being at St. Anne's. The church had not produced those church documents directly to the Secretariat when the IRSSA was signed.

39. I am advised that due to excessive blacking out of POI names by the Government, the documents were practically useless. The only way for an adjudicator and claimant to determine which of 12,300 additional documents pertains to a specific POI, is through the Government's POI report. Excessive blacking-out of public court documents, and failure to summarize abuse details in the revised POI reports by Government officials, led us to challenge the Government again in Court, and we won a second IRSSA Order and Reasons on June 23, 2015, which is **Exhibit C** above. I am advised the further amended St. Anne's narrative was filed by the Government with the Secretariat, sometime around November 1, 2015.

ST. ANNE'S SURVIVORS BRING RFD'S TO COURTS; MORE VIOLATION OF RIGHTS DISCOVERED

40. The reason for any St. Anne's survivor asking the Court to re-open for Fresh Evidence is because the Government officials in the Department of Justice breached their disclosure obligations under the IRSSA. After the St. Anne's IRSSA disclosure Order on January 14, 2014, until the SCC decision in April 2019, the Government has played legal games with us, blocking our ability to have the Courts determine St. Anne's RFD's to re-open, and not producing the Fresh Evidence and revised POI reports to the claimants or to the Courts.

41. Crown non-disclosure is a fundamental violation of our justice system. The cloak of confidentiality of IAP hearings should not be mis-used by the Government to withhold evidence to unknowing claimants.

42. Whether the Government officials actually filed revised St. Anne's POI reports/documents for each confidential IAP claim heard without that revised disclosure, is the responsibility of the Courts and their agent (Chief Adjudicator).

43. We found out that for St. Anne's IAP Claimant H-15019, final submissions were heard on July 25, 2014, which was after we won the Order in St. Anne's RFD #1. However, the Government still had not filed the revised reports and evidence on July 25, 2014. Claimant H-15019 was told nothing. We found out that the adjudicator, the Government lawyer and the claimant lawyer failed to require the Government to file the revised disclosure as per the IRSSA Order of January 14, 2014, and no an adjournment was requested. IAP Claim H-15019 was denied in September 2014. His IAP Review was opposed by the Government and denied in 2015.

44. Claimant H-15019 came to me to ask for help. Like many others, he has challenges in his life, due to the extreme abuse he suffered at St. Anne's. He chose to have his IAP testimony filed in the public court record in 2017. It took him 2 years, and being challenged by the Government in Court and IAP decisions, before he was finally awarded compensation in July 2017 on the Fresh Evidence, after other St. Anne's survivors were prepared to testify that their civil pleadings were true.

45. After every court appearance and decision, I have tried to explain the Government position and Court rulings to our people, in Cree and in English on Wawatay Radio and in our gatherings. They make no sense to us, in Cree or in English. It is obvious to me, and to our people, that the Government is being permitted to create barriers, to defeat re-opening claims that may have been prejudiced, and the Courts are not enforcing our rights.

46. It has been demoralizing to try to re-open claims decided without the revised reports/documents. The Government has used its vast resources and created legal technicalities, to prevent the Judges from reviewing the fresh evidence and from deciding whether to re-open IAP claims.

47. The process, we were told, requires a St. Anne's claimant to bring an RFD to the Court, to prove the revised evidence/reports could change the outcome. But the Secretariat does not even have the Fresh Evidence and revised POI reports for each IAP claim from the Government. Claimants are forced to walk blindly into court, without the Fresh Evidence, and then forced back into IAP reviews, rather than being given re-hearings on the Fresh Evidence.

48. The IRSSA Judges have never, since 2014, re-opened any St. Anne's IAP claim. The IRSSA Judges have never had filed before them, by the Government, all the revised POI reports and underlying documents for that IAP claim, to be compared to the original evidence before the original adjudicator.

49. For each of the five St. Anne's RFD's brought before IRSSA Judges[6], prior to the SCC decision in 2019, I am advised that the Government never filed the original and revised St. Anne's POI reports/documents for that IAP claim with the deciding Judge. To date, the Government has never been required to respond to the merits of a St. Anne's RFD, after the Government has filed the fresh evidence for the Judge to compare that to what the Government had filed for the original IAP hearing.

50. I have been given copies of two St. Anne's IAP re-review decisions of the Chief Adjudicator in 2017[7], which were both made part of public court records in British Columbia in 2018. Both decisions confirm that adjudicators have not enforced the two Superior Court Orders, which we won for St. Anne's IAP claims on January 14, 2014 and June 23, 2015. The Chief Adjudicator found that IAP adjudicators do not have the power to compel the Government officials to file mandatory reports/documents for an IAP hearing, only the courts have that power.

51. This is a huge gap in the IAP, in my view. The Courts are to enforce the Government mandatory disclosure in these confidential IAP hearings, but the Judges do not participate in IAP hearings. Adjudicators supposedly have no power to enforce the Court orders in the confidential hearings. Now shown to me and attached hereto as **Exhibits F and G** are Re-Review Decision H-15019 (see paragraph 37 and footnote 10) and Re-Review Decision C-14114 (see paragraphs 143-146). The Chief Adjudicator did not bring this gap in power to the Courts, and the video of the October 10, 2018 arguments confirms he did not raise the gap in power to the Supreme Court of Canada.

52. Those two Re-Review decisions of the Chief Adjudicator, and evidence that the Government was not complying with revised disclosure obligations, were put before the IRSSA Judges in Ontario and British Columbia for RFD's pertaining to St. Anne's IAP claimants H-

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[6] St. Anne's IAP Claimants H-15019, K-10106, C-14114, T-00178 and E-10290

[7] Re-Review Decision St. Anne's Claimant H-15019 dated January 19, 2017 and Re-Review Decision St. Anne's Claimant C-14114 dated August 8, 2017, both made public in the British Columbia Supreme Court for the Government's legal challenge against the Chief Adjudicator having power to re-open St. Anne's IAP claims.

15019 and C-14114. St. Anne's survivors have brought forward their evidence to prove this ongoing violation, and AFN and Claimants H-15019 and C-14114 have asked to cross examine the Government, but the IRSSA Judges have not yet addressed this gap.

53. It makes no sense to me that IAP adjudicators supposedly have no power to force the Government to comply with the St. Anne's Court Orders that we already won in 2014 and 2015.

54. It makes no sense to me, that a St. Anne's IAP claimant is somehow expected to decide whether to ask the Court to re-open his/her IAP claim, when the claimant does not yet have access to the fresh evidence/reports from the Secretariat where those revised reports/filings were supposed to be filed by the Government. The Court and Chief Adjudicator have not yet enforced revised disclosure/reports from the Government owed under the two Orders that St. Anne's survivors won in 2014 and 2015.

55. It makes no sense to me that a Judge can dismiss a St. Anne's RFD to re-open for fresh evidence, without the Judge already having received and reviewed the revised reports/documents from the Government, and comparing the revised reports/documents to what the Government's reports/documents were before the original IAP adjudicator.

56. This RFD court system has been frustrating, confusing, financially draining and degrading. St. Anne's IAP Claimants[8] and St. Anne's IRSSA class members[9], have filed affidavits, brought forward more facts, and revealed our individual circumstances to the Courts, attempting to show miscarriages of justice and to show the IAP system failed to enforce Orders that we already won.

57. St. Anne's survivors found out, and filed documentary evidence that, in addition to Government lawyers withholding all this Fresh Evidence, some claimant counsel also had the Fresh Evidence, but did not file it for their St. Anne's IAP clients. Claimant K-10106 and other survivors filed evidence that one law firm, Nelligan O'Brien Payne, had defended the Church in civil claims and the mediation process for which I was primary negotiator. That law firm worked for the Church, denying child abuse at St. Anne's, but survivors came forward and I found out that same law firm went on to represent St. Anne's survivors in the IAP process. The Nelligan lawyers had been defending the civil actions and mediation claims for the church,

[8] RFD's and/or affidavits have been filed by St. Anne's IAP claimants H-15019, K-10106, E-10290, S-11733, C-14114, T-00178. Three more St. Anne's IAP Claimants are included in this RFD: T-00185, S-20774 and S-16753.
[9] Myself, Angela Shisheesh, Patrick Etherington, George Scott, George Paul-Martin, Edmund Mudd

working with the Government lawyers. These professional conflicts of interest in the operation of the IAP, were not dealt with by the Courts, because we were wrongly found to not have standing. The evidence setting out these professional conflicts was filed by St. Anne's IRSSA class members[10].

58. To prove the depth of my knowledge that there were professional conflicts on the part of some claimant counsel, now shown to me and attached hereto as **Exhibit H** is a letter dated March 14, 1997 from Nelligan Power to St. Anne's survivors legal counsel, Roger Tucker, asking St. Anne's Survivors to wait, before responding to positions that I was raising, until completion of the criminal proceedings against former supervisors. Until the mediation process was ended in 2003 or 2004, I sat across the table from Nelligan Power, which became Nelligan O'Brien Payne, and that firm was acting for the Church and working with the Government lawyers against St. Anne's survivors.

59. St. Anne's survivors, after we proved the Government was in breach of the IRSSA, have not experienced expedited access to the Courts, nor decisions that are easily understood. Instead of the Court hearing the merits of our requests to re-open claims, we have been dragged through preliminary objections by the Government, and given confusing decisions, that seem to concentrate on blocking access to the Courts to allow the Courts to determine whether to re-open. What I understand has happened is as follows:

d. Amendment to the IAP by the Court; the Supreme Court of Canada confirmed the remedy for fresh evidence is a re-hearing and there is to be no new evidence on review or re-review; however the Government previously convinced the Court to amend the IAP in July 2016[11] by arguing that St. Anne's IAP claimant H-15019, prior to bringing an RFD to re-open, had to seek re-review because the Government "consented" for the re-review adjudicator to consider new evidence; the Court then similarly required St. Anne's Claimant C-14114 to seek review and/or re-review prior to her RFD to the Court but the Government did not file any revised reports/evidence[12]; because the Chief Adjudicator re-opened both St.

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[10] ONSC civil pleadings were not produced until 2014, but had been exchanged between lawyers for the Government, church and St. Anne's plaintiffs. The Government did not file the ONSC civil pleadings until after St. Anne's RFD #1. Also see counsel of record for Order of Justice Trainor dated August 1, 2003, and Motion record.
[11] *Fontaine v. Canada (Attorney General), 2016 ONSC 4328.*
[12] Re-review Decision C-14114, August 8, 2017

Anne's IAP Claims H-15019 and C-14114, the Government then challenged the power of the Chief Adjudicator to do so[13] (even though that was the Government's idea in the first place, and the Government position would have left St. Anne's IAP claimants with ability to re-open their claims).

e. Litigation Chill: threats from the Government for St. Anne's survivors to pay costs personally[14] to the Government, for bringing an RFD. When we sought cost immunity, the Court also gave cost immunity to the Government, Wallbridge and Nelligan O'Brien Payne, and only agreed to hear the Government's objections to standing and jurisdiction of the Courts.

f. Attack our "Standing" to bring RFD's to the Courts: Government repeatedly made preliminary objections that we lack "standing" to bring an RFD to the Courts, which led to rulings by the IRSSA Judges that myself and K-10106[15], Angela Shisheesh and C-14114[16] did not have "standing" to come before the Courts, so the Courts did not deal with issues we raised about breach of the IRSSA (but the SCC declaration has confirmed that fresh evidence does give the Courts jurisdiction to intervene).

g. Lack of "Exceptional Circumstances": Government repeatedly made preliminary objections, which led to rulings by the IRSSA Judges, that fresh evidence is not an "exceptional circumstance", so courts supposedly have no jurisdiction to intervene[17].

h. Finality of IAP Decisions Is More Important Than Breach of IRSSA: In these various Court decisions, Government arguments were accepted, that finality of IAP decisions must be enforced by the Courts. The SCC did not agree. Shutting down the IAP in the face of non-compliance by the Government feels like a repeat

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[13] *Fontaine v. Canada (Attorney General), 2018 BCSC 63.* This was overturned for St. Anne's IAP claims by the BCCA, because there was breach of the IRSSA for St. Anne's IAP claims, not "progressive disclosure" by the Government. *Independent Counsel v. Canada (Attorney General), 2019 BCCA 269.*

[14] *Fontaine v. Canada (Attorney General), 2016 ONSC 4328* ("costs in the cause"), and *Fontaine v. Canada (Attorney General), 2016 ONSC 7913.*

[15] *Fontaine v. Canada (Attorney General), 2017 ONSC 2487.*

[16] *Fontaine v. Canada (Attorney General), 2018 ONSC 103.*

[17] *Fontaine v. Canada (Attorney General), 2017 ONSC 2487*, and *Fontaine v. Canada (Attorney General), 2018 ONSC 103,* and *Fontaine v. Canada (Attorney General), 2018 ONSC 6893.*

of the residential schools being shut down, which happened without investigating violation of our human rights and widespread child abuse.

i. Protection of Government Lawyers: the Government lawyers wrongly withheld 12,300 documents containing details of child abuse from up to 1000 St. Anne's survivors, contained in civil pleadings, criminal trials and OPP signed witness statements, which constituted breach of the IRSSA. But the Government lawyers were then permitted to oppose St. Anne's RFD's to re-open, and allowed to appear in IAP hearings, to oppose any use of this fresh evidence;

j. Protection of Lawyers who are in Professional Conflicts: Some St. Anne's claimants were represented by two law firms who also had the Fresh Evidence that the Government failed to produce and I put this before the Courts four times. Despite affidavit evidence that IAP claimants were not told about the missing evidence by these two law firms, and despite evidence that these two law firms did not file any of the supporting documents for their own clients, there has been no Court or Law Society investigation as to professional conflict of interest of those two law firms having acted for St. Anne's survivors, who trusted them and their professional obligations within a justice system that is supposed to address institutional child abuse[18].

k. Government Arguing, and British Columbia Courts Findings, that St. Anne's fresh evidence was "progressive disclosure": Government lawyers moved some St. Anne's matters to British Columbia, and argued that the revised reports/documents for St. Anne's IAP claimants T-00178, H-15019 and C-14114 were supposedly "progressive disclosure", rather than truthfully acknowledging that the Government lawyers breached the IRSSA for St. Anne's IAP claims[19]. This misrepresentation by the Government about St. Anne's revised disclosure was finally overturned by the BCCA in July 2019[20].

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[18] Wallbridge and Nelligan O'Brien Payne. *Fontaine v. Canada (Attorney General), 2016 ONSC 4328*, *Fontaine v. Canada (Attorney General), 2016 ONSC 7913* and *Fontaine v. Canada (Attorney General), 2017 ONSC 2487*, and *Fontaine v. Canada (Attorney General), 2018 ONCA 421.*

[19] *Fontaine v. Canada (Attorney General), 2017 BCSC 946*, *Fontaine v. Canada (Attorney General), 2018 BCSC 63.* The "progressive disclosure" arguments of Government lawyers and BCSC mistaken findings based on Government arguments, was finally overturned at the BCCA in *Independent Counsel v. Fontaine, 2019 BCCA 269*. But St. Anne's IAP claimants H-15019, C-14114 and T-00178 had to go to British Columbia to prove this.

[20] *Independent Counsel v. Fontaine, 2019 BCCA 269.*

l. Rulings that St. Anne's Claimant C-14114 cannot bring a gap in the IAP to the Court[21], even when the Chief Adjudicator articulated this gap in his Re-Review Decisions H-15019 and C-14114, and even though the Chief Adjudicator did not bring his own RFD to fill the gap. The IRSSA Judge would not receive that new evidence from C-14114. And then we find out the IRSSA Judge ordered the Chief Adjudicator to not participate in RFD's[22] some of which included St. Anne's legal matters. Those rulings were later overturned by the Ontario Court of Appeal[23]. (The SCC confirmed the Chief Adjudicator should bring RFD's for gaps in the IAP to the Courts).

m. Compelling Re-hearings without revised Government Disclosure: The Court refused to accept fresh evidence from C-14114 in late 2017, which she filed to prove that the Government had still not filed Fresh Evidence owed for IAP Claim C-14114[24]; Stella Chapman had filed her RFD in 2016 but the Government was not ordered to produce the Fresh Evidence. Stella Chapman then appeared at a National Press Conference on January 15, 2018 calling on Government to file the Fresh Evidence, but the Court ordered C-14114 to proceed to re-hearing, without the Court re-opening her claim and without all the revised POI reports[25].

n. Unsupported Findings of "Settlement Privilege": The Court found in April 2017, that there was "settlement privilege" between the Government, church and each St. Anne's plaintiff over testimonies given in civil actions[26]; there was no evidence filed or tested to support that position from the Government, nor from Wallbridge, and no notice was given to former St. Anne's plaintiffs. This Government position was subsequently denied by IRSSA Class member Angela Shisheesh and by four former St. Anne's plaintiffs[27] and Shisheesh had to bring her own RFD; the Government withdrew its legal position, agreeing those sworn

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[21] *Fontaine v. Canada (Attorney General), 2018 ONSC 103.*
[22] *Fontaine v. Canada (Attorney General), 2018 ONSC 5197, and Fontaine v. Canada (Attorney General), 2018 ONSC 5706*
[23] *Fontaine v. Canada (Attorney General), 2018 ONSC 1023*
[24] *Fontaine v. Canada (Attorney General), 2018 ONSC 103*
[25] *Fontaine v. Canada (Attorney General), 2018 ONSC 357.*
[26] *Fontaine v. Canada (Attorney General), 2017 ONSC 2487*
[27] *Fontaine v. Canada (Attorney General), 2018 ONSC 103, Fontaine v. Canada (Attorney General), 2018 ONSC 3957.*

testimonies were also taken for defence of those civil claims, orally admitted when I attended in the Ontario Court of Appeal in March 2018[28]. Angela Shisheesh and St. Anne's survivors who were plaintiffs in civil actions, never agreed to give control over their testimonies to the Government and Church.

o. Onus placed on St. Anne's IAP Claimants to prove terms of Court Order; The Government officials argued that specific civil pleadings of St. Anne's plaintiffs (that contained supporting evidence for H-15019) were not tested, or that each St. Anne's plaintiff had to testify in the IAP before that evidence could found to be true by an IAP adjudicator; Claimant H-15019 challenged this position and the Government admitted in Court that the lawyers had transcripts of examinations for discovery for those civil pleadings; the Court then ordered Claimant H-15019 to prove the Order of January 14, 2014 included transcripts of examinations for discovery[29]. When the Court found there was "settlement privilege" over the testimonies and a deemed undertaking, Angela Shisheesh and another St. Anne's plaintiff then agreed to testify[30] that her/his allegations in ONSC civil pleadings were true and that he/she had already been tested by Government and church lawyers.

p. Punishment of our Lawyer for bringing our legal proceedings, arising out of Government breach of the IRSSA: Even when we found lawyers willing to bring RFD's without payment of fees, our lawyers have been repeatedly attacked by the Government lawyers in court documents for having filed evidence that proves the Government is still violating our rights. The Judge in Ontario ordered one of our lawyers to pay costs personally, for bringing an RFD to the Court for St. Anne's IAP claimant C-14114 and IRSSA Class Member Angela Shisheesh; Claimant C-14114 was seeking for the Court to compel the Government to file the revised disclosure and for the Court to re-open. After two years of appeals, those costs orders against our lawyer have been overturned by Divisional Court. The Government should not be permitted to attack our lawyers, when we bring

[28] *Fontaine v. Canada (Attorney General), 2018 ONCA 421.*
[29] *Fontaine v. Canada (Attorney General), 2017 ONSC 1149*
[30] *Fontaine v. Canada (Attorney General), 2017 ONSC 4275*

forward RFD's to re-open and other RFD's identifying legal issues arising out of the Government's breach of IRSSA.

q. Failure to Provide Public Versions of our RFD proceedings for Truth and Reconciliation Purposes: it is important to us that future generations of Indigenous peoples can read and study the legal steps that we have taken to enforce our rights in the Courts; the Courts have not responded to St. Anne's survivors' requests to finalize the public version of St. Anne's RFD records (after IAP Claimant H-15019 elected to release the transcript of his IAP testimony about severe sexual abuse by a Priest into the public record) whereas the Courts have issued sealing orders[31] for the Government RFD heard in British Columbia, sealing even the Government legal arguments, which legal arguments have since been overturned for St. Anne's IAP claims H-15019 and C-14114 by the BCCA. The Courts should determine what documents form the public court records, and have them sent to the National Centre for Truth and Reconciliation.

60. We do not have resources for all these court proceedings and the burden should not be on us, to police the operations of the IAP system. But we are prepared to bring matters forward ourselves, have our IRSSA rights enforced by the Courts. I was deeply offended in 2017, when the IRSSA Judge accepted the arguments of the Government that I lacked standing to bring forward a further RFD for St. Anne's Survivors, when I have been granted that role and responsibility by my people for almost 30 years and was recognized in St. Anne's RFD #1 and other RFD's[32] for my role. I have worked hard, within the justice system, to follow the rules and make sure others follow the rules.

61. The Courts owe us the duty to enforce the IRSSA. We established breach of the IRSSA by the Government in 2014, so an enormous body of evidence about child abuse at St. Anne's was not filed for many St. Anne's IAP claims by the Government lawyers. It is obvious to me that the Courts' agents likely did not enforce the IRSSA at the outset, by testing[33] Government and church officials for full disclosure, to ensure the narrative POI reports used by IAP adjudicators were truthful. The Courts should appreciate when Indigenous leaders such as

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[31] *Fontaine v. Canada (Attorney General), 2018 BCSC 172*
[32] *Fontaine v. Canada (Attorney General), 2014 ONSC 4024.*
[33] *Fontaine v. Canada (Attorney General), 2015 ONSC 1435.*

myself, bring forward legal issues with evidence from vulnerable IAP claimants, for the Courts to enforce the IRSSA.

62. I believe that protection of lawyers and shutting down the IAP, has become more important to the IRSSA judges, than enforcement of the legal rights of vulnerable survivors of St. Anne's. It should not matter how many RFD's are brought by St. Anne's survivors whose IAP claims were decided when the Government breached his/her IAP hearing process. The issue is whether each claimant should have re-hearing on the fresh evidence. These RFD's arise because the Government breached St. Anne's IAP hearings and that breach has had far reaching impacts. The Government should have considered the consequences of its actions, when its lawyers withheld all this evidence from AANDC officials starting in 2006. IAP claimants are entitled to be given notice if his/her IAP hearing process was breached.

63. In July 2017, it was extremely disturbing for me to find out that two days before the Ontario IRSSA Judge heard the Government's objections to my standing and the jurisdiction of the Court to hear my RFD on March 24, 2017, on March 22, 2017 Wallbridge was allowed by the IRSSA judges to appear in Vancouver and represent St. Anne's IAP Claimant T-00178. The IRSSA Judge in Ontario had granted Wallbridge leave to intervene in December 2016, on our allegations that their firm was in a professional conflict. But the IRSSA Judges did not tell me or my counsel, Michael Swinwood and Fay Brunning, that in February 2017, another St. Anne's claimant (whose claim was denied in 2012) had asked to file an RFD to re-open through his original legal counsel, Wallbridge. My legal counsel and I were not made aware that Wallbridge was being permitted to represent a St. Anne's claimant for an RFD in British Columbia, which was heard on March 22, 2017. St. Anne's survivors have no connection with British Columbia.

64. I found out in July 2017 that the IRSSA Judge in BC accepted arguments from the Government lawyers that the new evidence for St. Anne's was supposedly "progressive disclosure" and that IAP claimants should be penalized if his/her claimant lawyer also had the documents at the time of the original IAP hearing:

Further, here, it is not clear that the "new" information is in fact new at all. As Canada points out, the information in question was something that was in the possession of T-00178's counsel possession, given that it was a pleading that he drafted in 2001 in relation to other civil claims. In this regard it is significant that IAP claimants and their counsel bear the responsibility of putting together a claim sufficient to obtain compensation. Nothing in the IRSSA/IAP regime precluded the Requestor from producing documents (such as this pleading) beyond those articulated as

mandatory. This again augurs against finding the existence of an exceptional circumstance[34].

65. That was my position that Wallbridge should have produced all supporting documents for each of its IAP claimants, which was being argued in an RFD in Ontario on March 24, 2017 and for which Wallbridge had retained legal counsel. In my RFD, we took the position that because Wallbridge had authored the St. Anne's civil pleadings, and they had the criminal transcripts and OPP documents before the IAP began, St. Anne's IAP claimants should not have been represented by Wallbridge Wallbridge in IAP hearings without those documents being known to survivors and being filed if supportive. The IAP adjudicators did not have all the supporting evidence that was already in the possession of the Government lawyers, Wallbridge Wallbridge and Nelligan O'Brien Payne, being the lawyers in the Cochrane St. Anne's ONSC actions.

66. There is no explanation that will satisfy me, as why the IRSSA Judges referred St. Anne's Claimant T-00178 to British Columbia and allowed Wallbridge Wallbridge to appear as his counsel on March 22, 2017, just two days before I was asking the IRSSA Judge in Ontario to help locate St. Anne's IAP claimants whose claims may have been wrongfully denied, and to declare a professional conflict of Wallbridge Wallbridge.

67. I only found out in July 2017 about concurrent St. Anne's RFD in British Columbia, when Claimant T-00178 came to Ontario. Claimant T-00178 found out about my legal proceedings for St. Anne's survivors in Ontario and about survivors giving statements for a documentary I was co-producing about child abuse at St. Anne's. I did not know the confidential IAP claim of T-00178 had been denied in 2012 and I never spoke to him about his IAP claim, until July 2017. He was then first advised about all the Fresh Evidence and the alleged professional conflict of Wallbridge. Meanwhile, the time for an appeal of his RFD had expired.

68. According to the decisions, the same Government lawyer (Ms. Coughlan) appeared in British Columbia on March 22, 2017[35] and in Ontario on March 24, 2017[36]. I was in the courtroom on March 24, 2017 and at no time did the Government lawyer orally advise the Ontario judge about a St. Anne's RFD being heard two days earlier in British Columbia, for

[34] Fontaine v. Canada (Attorney General), 2017 BCSC 946, paragraph 79
[35] Fontaine v. Canada (Attorney General), 2017 BCSC 946
[36] Fontaine v. Canada (Attorney General), 2017 ONSC 2487

whom the Wallbridge firm appeared. At no time did the lawyer representing Wallbridge Wallbridge advise that Wallbridge had just represented a St. Anne's claimant in an RFD in BC.

69. I was later advised in July or August 2017, by Ms. Brunning and Mr. Swinwood, that Mr. Gover (the lawyer for IRSSA Judges) got a call in February 2017, from a lawyer at Wallbridge Wallbridge to bring an RFD for T-00178, and the RFD was sent to British Columbia, at the same time Wallbridge Wallbridge was represented by legal counsel in Ontario for my RFD. Now shown to me and attached hereto as **Exhibit I** is a copy of the letter from Mr. Gover sent to Ms. Brunning dated August 31, 2017. This separation of legal proceedings for St. Anne's survivors into two provinces, and splitting our efforts without us knowing, was completely unfair.

70. Unlike for the rest of us, on March 22, 2017 in British Columbia, the Government did not challenge the standing of Claimant T-00178 and the Government did not demand that Claimant T-00178 had to first complete review and re-review before he could bring an RFD.

71. I am also advised by Fay Brunning, that after she was retained in July 2017 by Claimant T-00178, that the Government had similarly not filed for the IRSSA Judge in British Columbia, all the revised POI reports and Fresh Evidence for T-00178 that were owed under the Orders we won in 2014 and 2015. I was advised by Claimant T-00178 that he also found out for the first time in the summer of 2017 that Wallbridge Wallbridge had previously represented on of the student POI's in his IAP claim.

72. The Government is recorded to have argued in British Columbia that the fresh evidence for St. Anne's was "progressive disclosure". By sending Claimant T-00178 to British Columbia, represented by Wallbridge Wallbridge, I believe it was not revealed that both the Government lawyers and Wallbridge Wallbridge had these ONSC civil documents, criminal proceeding documents and OPP investigation documents, but did not produce them for Claimant T-00178, nor for St. Anne's claimants H-15019 and S-11733, who also had their affidavits filed before the Ontario Court on March 24, 2017.

73. The Government lawyers who have opposed St. Anne's RFD's had separated our RFD's without our knowledge, created legal barriers, and failed to put all the revised POI reports/documents and revised narrative before the two deciding judges, whereas we have been split between different provinces and judges. We have not been able to keep up to the Government's legal tactics.

74. Wallbridge continued to have their lawyer show up for our RFD's, but they supported the position of the Government. Wallbridge adopted the legal position of the Government, that we did not have standing and that the Court did not have jurisdiction. Now shown to me and attached hereto as **Exhibits J and K** are the responding facta filed by the Government on March 6, 2017 and March 17, 2017 for the RFD for H-15019 and RFD brought by myself and K-10106, and **Exhibit L** is the factum filed on behalf of Wallbridge on March 22, 2017 in Ontario.

75. Then, Angela Shisheesh brought forward her own RFD in July 2017, after she agreed to testify in an IAP hearing, and after she found out that her civil pleadings were being contested as being "untested". She found out that Wallbridge had been supporting the Government in court. I was in court on September 22, 2017 when the lawyer for Wallbridge stated in a threatening way, that he would cross examine Ms. Shisheesh if she was granted standing to bring an RFD. Wallbridge did not support Angela Shisheesh when the Government challenged her standing in December 2017[37], and then did not support her and all the other St. Anne's plaintiffs in June 2018[38] to ensure their sworn testimonies from the civil actions can be sent to the Truth and Reconciliation Commission.

76. On what basis was the Court permitting Wallbridge, who represented a large number of the St. Anne's survivors in the IAP process, to oppose St. Anne's RFD's to re-open IAP claims, when Wallbridge had those documents as well. The facts were clear that Wallbridge was often original IAP counsel but the St. Anne's IAP claimant did not know about the missing evidence. In 2019, and for this RFD, more former clients of Wallbridge have approached me and they were told nothing by their former lawyers about fresh evidence for his/her IAP claim, since 2014.

77. I believe it is wrong that the Government has never been compelled to respond to the merits to our RFD's to re-open, never produced the fresh evidence/POI reports to the IAP claimant and to the Courts, and never had its officials tested on their evidence. We have consequently been blocked from finding out why this non-disclosure and ongoing violations have happened to us and under whose authority in Government these actions/positions have been taken.

78. This RFD process has been a nightmare revisited, for St. Anne's survivors, as we are being kept separated and not being heard by the courts on our combined evidence. When we

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[37] *Fontaine v Canada (Attorney General), 2018 ONSC 103.*
[38] *Fontaine v Canada (Attorney General), 2018 ONSC 3957*

were children, the persons in authority would keep us silent by keeping us separated, and instilling fear. All the evidence from St. Anne's IAP claimants and St. Anne's IRSSA class members filed in these RFD's still needs to be read together and reviewed again, under the proclamation of the law according to the SCC in 2019.

79. I discussed this never-ending violation of our rights, at a St. Anne's Healing Conference held in Fort Albany in March 2019. St. Anne's Survivors feel neglected and ignored by the Courts and we feel we are being punished for bringing forward evidence proving that Government officials have violated this IAP justice system. Many St. Anne's survivors do not have computers, and our internet connections are intermittent at best.

80. I am advised that the Chief Adjudicator and Oversight Committee have been made aware of Government officials not having filed revised POI reports/documents for St. Anne's IAP claims, and those IAP claimants have not received notice of fresh evidence. I am advised that the Chief Adjudicator has filed a "sunset RFD" in British Columbia to end the IAP without revealing the outstanding issues. I believe that shutting down the IAP and shutting up St. Anne's survivors, by blocking our access to public hearings in Courts on the merits of the RFD's, appear to be more important than enforcing the IAP justice system, promised for each Indigenous survivor of child abuse. I will not give up. The Supreme Court of Canada found that finality is subject to compliance.

81. As a person labelled as a "registered Indian", I have always found it very difficult to attain legal equality, compared to other citizens in this country. To establish our rights, Indigenous people have to keep bringing the Government to Court. Even when we already have Court orders that confirm our legal rights, we have to go back to the Courts to have the Orders enforced. This justice system, which St. Anne's Survivors are asking to enforce our IRSSA rights, is the same justice system that allows the *Indian Act* to exist, and under which the Government of Canada still treat us like wards of the Crown.

82. The Courts have a duty, so are responsible to use their powers to enforce Superior Court Orders, particularly when IRSSA Orders are still being violated by the Government. Under the IRSSA, the Courts appointed their own agents. Some effective penalty against Government officials, for violation of Court orders, should be ordered by the Courts or Chief Adjudicator. IAP adjudicators should not conduct re-hearings for St. Anne's claims, until there is full disclosure by the Government of revised POI reports/documents and the 2015 narrative so

adjudicators can make their findings of fact and credibility, including on the correct reports/documents, as per the IAP terms. Stella Chapman told me that she was very angry that her re-hearing proceeded on January 19, 2018, without the Government officials being forced to file all the evidence owed under the St. Anne's IRSSA Court orders. The Courts should fulfill their responsibilities to us, and we should not be blocked from bringing these violations back to the Court, so the public can hear and understand how the justice systems are failing us.

83. The SCC confirms that for fresh evidence, IAP claimants have standing and the courts have jurisdiction. In the combined RFD's already brought by St. Anne's IAP Claimants and/or St. Anne's IRSSA class members, the IRSSA Judges have received a lot of evidence, to be able to review the situation again and to find means to enforce our legal rights. However, since the SCC decision in 2019, the Courts have not required the Chief Adjudicator to bring forward an RFD, to address all gaps and/or to reconsider the merits of the St. Anne's RFD's.

84. A just and respectful RFD process should be outlined by the Ontario Court for St. Anne's IAP claimants, with funding for legal advice about how the fresh evidence impacts his/her claim, and possible RFD to deal with breach of the IRSSA by the Government. No St. Anne's claimant can be expected to bring forward an RFD to re-open until the Secretariat already has receipt of the fresh evidence for that IAP claim, and notice of the existence of fresh evidence has been given to that individual IAP claimant from an agent of the Courts.

85. St. Anne's IAP Claimants, whose IAP hearing process was violated by the Government, should not have any threat of costs orders against them for bringing an RFD. Some St. Anne's survivors are challenged individuals (perhaps dysfunction arising from child abuse at St. Anne's), so the Courts may need to review the original and revised evidence, to help make that determination for vulnerable claimants whose IAP hearing process was breached.

FRESH EVIDENCE AND POI REPORTS MAY CHANGE OUTCOMES OF IAP CLAIMS

86. General statistics about some compensation having been paid in a large percentage of St. Anne's IAP claims, does not reveal which claimants were denied compensation. For each IAP claim that was wrongly denied due to withholding of the mandatory reports/documents by the Government, for that claimant, the IAP process was a failure.

87. As well, statistics do not address under-compensation of claimants. Some survivors were perhaps compensated for more minor abuses, but not believed for more serious abuses. Individual IAP claimants have the right to decide whether he/she suffered a miscarriage of justice that the Court should hear. The Government has no power to determine which St. Anne's Indigenous claimant can seek to re-open. The Government has fought against re-opening every St. Anne's IAP claim, but its previous arguments have since been rejected by the Supreme Court of Canada.

88. As noted above, the church documents about St. Anne's only came into the IAP after St. Anne's RFD #1. The OPP obtained court search warrants and seized documents from the church in the 1990's but the church did not file the documents for the IAP. The Government had these church documents, when they got the court Order in 2003. The church documents now confirm the presence of some of these church officials who abused children.

89. As noted above, the ONSC civil pleadings and criminal trial transcripts containing specifics about child abuse at St. Anne's were filed with the Secretariat by the Government only in 2014, after St. Anne's RFD #1.

90. On June 23, 2015, the IRSSA Judge found that the Fresh Evidence for St. Anne's, confirmed that Father Lavoie was a serial sexual abuser of children[39]. The Chief Adjudicator then found in 2017 in Re-Review Decision H-15019, that the POI report for the Priest had changed significantly after the Government filed in 2016 the St. Anne's Fresh Evidence and new POI report. The Priest was proven to be present at St. Anne's when Claimant H-15019 said the Priest was there, not as per the pre-2014 POI report. Claimant H-15019 was finally compensated in 2017, after the Government produced the Fresh Evidence and revised POI report in 2016, and after there was a re-hearing. I believe more IAP claims were wrongfully denied for very serious sexual abuse by this Priest, when the Government reports were in breach of the IRSSA.

91. As another example, I believe the Fresh Evidence about the electric chair should be carefully reviewed, in St. Anne's IAP claims that denied compensation for that abuse. I was advised by Fay Brunning that the Government fought hard against paying compensation for the electric chair, but in 2016, the Government finally produced a 50 page memo, which summarizes thousands of pages of documents about the electric chair at St. Anne's. In 2018 and 2019, I am advised by Fay Brunning that two St. Anne's claimants were finally awarded compensation for

[39] See Exhibit C, Reasons for Decision June 23, 2015.

the electric chair abuse. I have been given one of those IAP decisions by the IAP claimant who was terrorized in that electric chair and finally got compensation for that abuse. If other St. Anne's claimants were denied payment for electric chair abuse, and/or not paid for harms arising out of being tortured in the electric chair, other St. Anne's claimants are entitled to notice of that fresh evidence and some could be owed compensation or additional compensation.

92. As another example, the Government did not disclose until St. Anne's RFD #1, that Sister Anna Wesley was criminally convicted for forcing sick children (including me) to eat our own vomit. In the transcripts of that criminal trial, the physical and psychological harms to children were proven by the provincial Crown calling two medical experts to testify to the jury. That proven evidence of harms arising from that horrific abuse, was not available to, nor considered by, IAP adjudicators until after we won St. Anne's RFD #1. The Government fought hard against paying compensation to claimants forced to eat vomit, but I am advised that in 2017 and 2018, two St. Anne's survivors were finally compensated for that abuse. For non-Indigenous Canadians, and in the IAP, Criminal convictions are supposed to eliminate needing to prove that in civil actions. I believe that more St. Anne's IAP claimants were wrongly denied compensation for being forced to eat vomit, prior to the Government revealing that Anna Wesley was criminally convicted for the harms she caused in inflicting that abuse.

93. When the OPP found the original reports from the two medical experts from the Anna Wesley trial, reports from Drs. Jaffe and Kain, I brought another RFD asking that the reports be given to the Secretariat and filed in every IAP claim in which compensation was sought for being forced to eat vomit, for possible re-opening of claims. Those St. Anne's Survivors who bravely testified in public court proceedings, to secure the conviction of a nun supervisor, were believed and her evidence was rejected by a jury. The Chief Adjudicator wanted the reports to be given to the Government, not the Secretariat, so the Court declined to order that these two expert reports be given to anyone[40].

94. Other supervisors were criminally convicted, so the conviction and abuse details in the transcripts should have been produced for IAP claimants who were abused by those same supervisors. The Government could be found liable in re-hearings to pay compensation for actions of its supervisors who were criminally convicted for similar abuse.

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[40] *Fontaine v Canada (Attorney General), 2014 ONSC 4024*

95. The previous 12 page narrative for St. Anne's falsely stated there were no documents about sexual abuse at St. Anne's. I am advised the 2015 narrative is now 900 pages, containing summaries of sexual and physical abuse of children. IAP compensation is supposed to be increased for factors such as an inability to complain, verbal abuse, racist acts, oppression, humiliation, etc. Some of the children may not have known why there was such deep fear. Those aggravating factors, contained in the 12,300 additional documents, should have been revealed to the claimant and claimant lawyer, and known by adjudicators, of St. Anne's claims.

96. It is exhausting and demoralizing, after almost 30 years of St. Anne's survivors telling our stories of child abuse to the justice system, and after winning two Court Orders in 2014 and 2015, that the burden is still placed on survivors. Vulnerable and aging survivors are expected to bring more legal proceedings to the Courts, without funding, simply to get the fresh evidence to each claimants who suffered breach of the IRSSA. St. Anne's survivors have a right to make his/her own decision.

97. I am 72 years of age. It costs me about $2,000 every time I have to fly from Fort Albany to Toronto for these Court proceedings. St. Anne's Survivors generally do not have resources to bring onerous legal proceedings, to force the Government to abide by the law and to ask the Courts to address breach of the IRSSA. We want to appear in the courtrooms, to hear matters pertaining tot our rights and to be seen by the Judges and by the media/public, so the Government knows we are prepared to stand up for our rights.

98. The Government breached the IRSSA, yet the Courts awarded us no additional funding, payable by the Government, to legally address the breach. Our Indigenous organizations and St. Anne's survivors have very limited resources, and the Government knows, when it brings preliminary objections, etc, that it is very difficult for us to attend the public court hearings in Toronto. I have requested that the Court hearings on these RFD's be held in Timmins or Cochrane, so St. Anne's survivors and supporters have the best chance to attend.

99. There is another gap. Claimant lawyers offered to act on a contingency basis for IAP hearings, but that was obviously based upon an assumption that the Government would comply with the IRSSA. For St. Anne's, there was breach of the IRSSA, so each IAP claimant should be entitled to modest additional funding, (payable from the Government to the Secretariat and through to claimant counsel), to permit each IAP claimant to retain a lawyer for independent and confidential legal advice whether to bring an RFD to the Court. It is absolutely necessary for St.

Anne's survivors to have advice from claimant lawyers (who do not have professional conflicts), to understand if there was a possible miscarriage of justice. Each claimant has a right to be informed what new details are known about the POI and about the school from the Fresh Evidence. The impact of all this fresh evidence is complex. If there are reasonable grounds to bring an RFD, legal funding should be paid by the Government, plus cost immunity guaranteed so no claimant or claimant counsel have to pay costs to the Government for bringing an RFD to address the Government's breach. The Court Protocol does not provide funding for counsel for Indigenous IRSSA class members to bring an RFD, and we can only bring forward these complex legal issues for the Court to decide, if we have legal representation. Lawyers for Indigenous Requestors should be paid under the Court Protocol.

100. The Chief Adjudicator and Secretariat have full knowledge of the identity of each St. Anne's IAP claimant, along with access to their IAP documents, transcripts and decisions. I believe the Chief Adjudicator, as Agent of the Courts, should be bringing this RFD. The Court must use its powers to compel Government officials to file the revised narrative and POI reports/documents for every claim decided without that evidence, and to mandate the Secretariat to give notice to each IAP claimant of fresh evidence and giving access to modest funding for legal advice. The Chief Adjudicator should not permit the destruction of any St. Anne's IAP claim documents, until all the claimants are notified about new evidence and any resulting legal actions.

101. Some of the St. Anne's IAP claimants have died. However, the outcome of their IAP claim might still change, on the testimony already taken under oath, after being reviewed on the revised reports/documents by an IAP adjudicator. The Estates of deceased St. Anne's claimants can still be given notice of the fresh evidence. Even if all of St. Anne's survivors die, the SCC decision confirms to me that the IAP decisions are not final until the Government has complied with the St. Anne's IRSSA Court Orders for each IAP claim.

EDMUND METATAWABIN: STANDING TO ENFORCE ST. ANNE'S IRSSA ORDERS OF JANUARY 14, 2014 AND JUNE 23, 2015

102. I want to ensure that my standing to bring this RFD to the Court is accepted.

103. I was Chief of Fort Albany First Nation from 1988 to 1996 and remained traditional Chief until 1998. I was born on October 20, 1947 and was raised in Innino (Indigenous

culture/beliefs). My father was a trapper and my mother gave birth and raised 11 children in the bush. I still reside in Fort Albany.

104. I was taken from my parents and forced to reside at St. Anne's Catholic mission, under federal law, from 1956 until 1963. I was severely physically abused by Sister Anna Wesley over many years. I was tortured in the electric chair by other supervisors. My personal experiences of child abuse at St. Anne's are recorded in a book, "Up Ghost River", which I co-authored with Alexandra Shimo, was published in 2014.

105. I realized when I was studying for my Masters in Psychology, that there were academic studies and concepts surrounding human suffering and oppression, similar to what happened to us at St. Anne's residential school. Suffering and oppression over child abuse had given rise to individual and community states of dysfunction and unrest around us.

106. I have already filed my evidence with the IRSSA Courts, in Affidavits sworn August 26, 2013, February 29, 2016 and April 26, 2016 which outline the history of St. Anne's survivors quest for justice, starting in 1992. Those affidavits were filed for review by the Court in earlier RFD's.

107. In 1992, Mary Anne Nakogee Davis and I organized the Keykawin Conference, which was attended by over 400 people and followed by many survivors on Wawatay Radio. A panel of six people heard separate testimonials from 31 survivors, which revealed serious crimes against children by adults at St. Anne's. As Chief of Fort Albany First Nation, I was directed by my Council to bring these crimes to the OPP. St. Anne's survivors had not been believed by persons in authority, because the tales of abuse were often against church officials. Don't forget that the police (RCMP) had the power to put our parents and grandparents in jail if the children were not put into the hands of these church officials.

108. I became a sponsor for individual St. Anne's survivors who agreed to speak to the police. I asked them to set aside their fear of the police, and to tell the reasons for their pain. Past attempts to tell their child abuse stories, often in the context of being criminally charged, had mostly rebounded against them.

109. Constable Delguidice of the OPP and later Crown Attorney Diana Fuller, worked with me and hundreds of St. Anne's survivors. After 5 years, the OPP investigation moved to criminal charges of 8 former supervisors in 1997. Many of the St. Anne's Priests/Bishops/Brothers/Nuns who had been the worst abusers, were already dead by 1997.

110. Mushkegowuk Council, our regional council of Chiefs and Deputy Chiefs, passed a resolution to give authority to Peetabeck Keway Keykaywin Association (PKKA) and I was made PKKA President in 1992. Now shown to me and attached hereto as **Exhibit M** are the objects of PKKA corporation, and **Exhibit N** which is my letter dated June 14, 1994 as President of PKKA to Honourable Ron Irwin, Minister of Indian and Northern Affairs Canada, asking the Government to start a process of reconciliation and healing for the abuse at St. Anne', regardless of criminal proceedings that may happen. Obviously the Government did not step forward in 1994, and their decisions during the IAP process to still violate our rights, have put matters further backwards.

111. Our stories were tested, sometimes repeatedly in many legal processes. The various forms of legal processes has made it very confusing to survivors from 1992 until today. To date the following legal processes have recorded our testimonies, sometimes the same story in more than one process:

r. OPP investigation, with statements hand recorded by OPP officers and signed by St. Anne's survivors as true

s. Criminal preliminary hearings and trials in pubic courts

t. Mediation process for 100+ St. Anne's survivors from 2000 to 2004 (no compensation paid)

u. Ontario Superior Court civil actions in Cochrane and in Toronto

v. ADR voluntary process of Government

w. IRSSA signed in May 2006 (IAP process).

112. As noted above, I was an active member of the Working Caucus Committee after the signing of the IRSSA. I made a personal choice to not file an IAP application for compensation for the child abuse that happened to me, because I did not want to be seen in any possible conflict of interest, in pursuing the larger goals of PKKA for all St. Anne's survivors. I put a lot of energy, time and knowledge, over many years, into the PKKA, in trying to ensure that St. Anne's survivors could tell his/her story about child abuse, and that each arm of the justice system would enforce our rights.

113. I have also devoted myself to help St. Anne's survivors heal. Most recently, I was involved in the land-based Healing Conference in Fort Albany in March 2019 for St. Anne's survivors and their families. There is still great distress in our communities, since we know that

the Courts have not enforced our rights against the Government despite our initial win, and that there have been no consequences for ongoing breach of the IRSSA against Government officials. The Catholic Church has not provided the funding for healing, that it promised in the IRSSA.

114. The survivors at the healing conference expressed support to appoint an Indigenous panel for a Truth Inquiry, that will investigate how the Government systems and the justice systems have worked against us, and why. I am aware that the violation of IRSSA rights of St. Anne's survivors and our treatment by the Government and rejection by the Courts, are being studied and will be studied in the future.

115. Because the Government breached the IRSSA for St. Anne's, and because Courts have never heard the merits of our RFD's to re-open, with all the fresh POI reports/documents before the Judge, I believe the IRSSA has not been enforced for St. Anne's survivors. We should be able to still sue the Government and church in the Superior Courts.

116. The truth about widespread, horrific child abuse at St. Anne's does not diminish simply because it is too painful for government and church officials to hear. I had originally expected honour and integrity from the federal government, but we are being treated the same as when we were children. We were to be seen but not heard. We were to suffer in silence and we would be punished if we stood up for ourselves.

117. The stories of survivors and church documents collected during the OPP investigation, the transcripts of criminal proceedings and the ONSC public court documents must be available and known to the St. Anne's survivors. Knowledge to IAP claimants about the perpetrators and what happened to others by that perpetrator is their right under the IAP process and is fundamental in the healing journey. Particularly in student on student abuse, knowledge as to whether the POI was abused by a supervisor is important to the possible forgiveness between survivors within our communities.

118. St. Anne's Survivors of St. Anne's have followed the law and properly sought for the justice system to address breach of the IRSSA by Government officials. During the OPP investigation, the criminal proceedings, the Cochrane civil actions, the ADR, IAP and RFD processes, we have provided our oral testimonies. The justice system is expected to fulfill its remaining duties to us.

119. Since I began compiling my affidavit in March 2020, the province of Ontario has been subject to COVID 19 restrictions and I cannot travel outside my community, nor can Ms.

Brunning travel to Fort Albany. It is also hunting season in my community so many people are on the land. It took time to locate a commissioner of oaths in our community. It is break up season for the Albany River. These delays and challenges are in addition to the significant difficulties for us to access the justice system in Southern Ontario, with two flights to go 1000 miles to Toronto, also subject to weather conditions.

120. As well, since I started to compile this affidavit, the Ontario Court of Appeal has released a decision in *IAP Claimant H-15019 v. Wallbridge and Canada (Attorney General), 2020 ONCA 270,* which is now shown to me and attached hereto as **Exhibit O**. The Court of Appeal has confirmed that the Government is not released from liability if the Government officials violated the rights of individual IAP claimants in the IAP hearing process. If the Government officials continue to violate the IRSSA Ancillary Orders of January 14, 2014 and June 23, 2015, the Courts should take steps to make the Government officials comply and to find out which officials are making these decisions and why they continue to do so.

121. I request that continuing non-disclosure of the revised POI reports/documents by Government officials for St. Anne's IAP claims heard without that evidence, be addressed by the Court in Ontario. The courts in other provinces should not be given jurisdiction over St. Anne's matters. It will also make it impossible for us to attend. I have located a letter that I sent to Justice Perell on September 19, 2017 after we were told that the IAP decisions for H-15019 and C-14114 would be challenged in British Columbia by the Government. I asked for St. Anne's matters to be heard in Ontario, and I also asked that the RFD's for St. Anne's survivors be heard in Timmins, so that St. Anne's survivors could attend and hear the public court hearings that pertain to us. Now shown to me and attached hereto as **Exhibit P** is a copy of my letter dated September 19, 2017. I never received any response. I have also been advised that after two more years passed, the British Columbia Court of Appeal[41] agreed that because the Government had breached the IAP for St. Anne's Claimants H-15019 and C-14114, the Government's position was not upheld (that St. Anne's non-disclosure was "progressive disclosure").

122. At no time has any Agent of the IRSSA Judges contacted me or St. Anne's Survivors Association or our lawyers, following the decision of the Supreme Court of Canada last year, to invite a review. St. Anne's survivors have provided our evidence, over and over again, that the

[41] *Independent Counsel v. Fontaine, 2019 BCCA 269.*

Government has, until January 14, 2014 and afterwards, violated the IRSSA and now is still violating the IRSSA Orders of January 14, 2014 Order and June 23, 2015 Order for some claims.

123. I swear this evidence in good faith, relying upon the declaration of law for fresh evidence for an IAP hearing, and the duty of the courts to enforce the IRSSA, as written in the 2019 decision of the SCC. I am complying with the colonial system of law, that is requiring St. Anne's survivors to seek a fresh hearing from IRSSA judge, even when the Chief Adjudicator has taken no action to obtain the necessary powers to enforce the Orders that we already won.

124. I respectfully request this RFD hearing take place in a courtroom in Timmins or Cochrane.

125. In terms of a hearing outside Toronto, the Government was permitted in 2010 to have a legal issue pertaining to an St. Anne's IAP hearing heard in Cochrane, Ontario by Madam Justice Macdonald. The Government disclosed this previously unreported decision for the first time to our lawyers, in the Government factum filed in March 2017, in which the Government and Wallbridge opposed the legal standing of myself and Claimant K-10106, and opposed the jurisdiction of the Court to re-open for fresh evidence. I am advised that Justice Winkler was the IRSSA Judge in Ontario in 2010, and no explanation was provided by the Government as to why this 2010 St. Anne's IAP matter was not heard by Justice Winkler. Now shown to me and attached hereto as **Exhibit Q** is a copy of *Attorney General of Canada v. J.W., Court file no. 16880/10 dated June 15, 2010.*

126. Canada's previous legal positions that we "lacked standing", "lack of jurisdiction of the Court" and there was "settlement privilege" have since been rejected by the Supreme Court of Canada or Ontario Court of Appeal. The Court's exclusive jurisdiction to decide whether to re-open any St. Anne's IAP claim has never been exercised, and the Government has never filed a response to an RFD and/or never filed the fresh POI reports and documents for that IAP claim. St. Anne's claimants have filed evidence, trying to address individual impacts of breach of the IRSSA due to Government lawyers withholding all this child abuse evidence.

127. I have attended almost every court hearing pertaining to St. Anne's IRSSA Class members rights, and since H-15019 first came forward with his profound miscarriage of justice in 2015, with the Government and Wallbridge not filing the revised disclosure for him in July 2014, we have been experiencing a wall of legal barriers argued by the Government. It feels like survivors are on trial, not the officials who violated our IAP rights.

128. I fundamentally believe that St. Anne's survivors, including myself, have a right to expose violation of our legal rights to the Courts, no matter how horrific the facts. The Supreme Court has pronounced the Courts have a duty to enforce the IAP in exchange for us forfeiting our rights to sue in the Superior Courts for child abuse. The IRSSA is not a private contract that we are supposed to enforce ourselves, but together, St. Anne's survivors want to stand up for our rights.

129. The IAP should not be wrapped up until St. Anne's Survivors each have experienced the justice we were promised under the IRSSA, and until resulting legal actions are completed.

130. I respectfully request this RFD be heard in Timmins or Cochrane by an Ontario Superior Court Judge who has full authority under the IRSSA, and access to the previous RFD pleadings and evidence filed by St. Anne's IAP claimants and IRSSA Class members.

SWORN BEFORE ME in **FORT ALBANY FIRST NATION, ONTARIO,** on May 11, 2020

NAME: Ruby Wheesk

COMMISSIONER OF OATHS

Ruby Darlene Edwards-Wheesk
a Commissioner, etc.,
Province of Ontario
for Fort Albany First Nation
Expires February 15, 2021

Edmund Metatawabin

Exhibit A

Ruby Darlene Edwards-Wheesk
a Commissioner, etc.,
Province of Ontario
for Fort Albany First Nation
Expires February 15, 2021

Peetabeck Keway Keykaywin (St. Anne's Residential Survivors) Association (PKKA)
P.O. Box 14,
Fort Albany, Ontario P0L 1H0

May 12, 2019

Prime Minister Justin Trudeau
Government of Canada
Ottawa, Ontario
PM@pm.gc.ca.

Attorney General of Canada
Hon. David Lametti
Parliament of Canada
Ottawa, Ontario
David.lametti@parl.gc.ca.

Minister of Indigenous Affairs
Hon. Carolyn Bennett
Parliament of Canada
Ottawa, Ontario
Carolyn.bennett@parl.gc.ca.

Dear Prime Minister and Ministers of the Crown

Re: St. Anne's Survivors Rights to Compensation for Child Abuse under the IRSSA

From March 25-29, 2019, Fort Albany First Nation hosted a Land-Based Healing Conference for survivors of St. Anne's residential school. The message from survivors is that there is more work to be done. Our sufferings are ongoing and the harms caused by residential school have spread to other generations. St. Anne's Survivors Association (PKKA) are carefully re-assessing the Settlement Agreement signed on our behalf. Many survivors expressed that they did not receive fair hearings, and they are still not satisfied that the benefits promised under the Agreement were honoured by the Government officials or by the Catholic Church.

On April 12, 2019, we were advised that Supreme Court of Canada has rejected legal arguments of the Federal Government, such as survivors cannot ask the Courts to intervene. The Decision confirms that in circumstances of "new evidence" coming after the original IAP hearing, the Court can re-open an IAP claim and send it back for a fair hearing on the proper evidence.

The legal theories that I read and heard being argued by the Department of Justice, that previously prevented me and other St. Anne's survivors from having the Courts intervene, were not upheld by the Supreme Court.

For St. Anne's residential school, there is a massive amount of "new evidence". You now know were over 12,000 documents containing details about child abuse at St. Anne's, that were not disclosed until June 2014. That disclosure placed "no new burden" on the Government. Those documents contain horrific details from survivors, confirming widespread sexual and physical child abuse at St. Anne's, and confirming presence of pedophiles and adults who helped those abusers. That evidence was supposed to have been given to adjudicators from the beginning of the IAP, and available to support every St. Anne's IAP claim.

If you look at the history of what we did, survivors of St. Anne's courageously stepped forward and gave their testimonies to the Ontario Provincial Police, in criminal trials and in civil claims, before the IRSSA was ever signed. We understood that all our combined testimonies were to be given to the Government of Canada. And the Government had all that evidence before the first IAP hearing.

Each survivor's confidential testimony was to be heard by adjudicators but only in context of the child abuse already known to the Government and Church.

As children, St. Anne's Survivors experienced evil beyond what you can ever imagine. There was widespread sexual and physical abuse by church officials, school officials and other employees on the premises. Pedophiles had access to the children, known to and allowed by other adults. Parents were not allowed into the school. Fear was profound. Starting as small children, we were told during confession that if we told anyone about what was happening in the school, ourselves and our families would go to hell. They raped us, the head Priest whipped us with a cat-of-nine tails whip on bare buttocks, the Nuns forced us to eat our vomit, the Priests and Brothers threatened us with beatings and being electrocuted in a homemade electric chair, and they confined anyone who complained. We had the fear of God instilled in us every day, while we were forced to reside in that evil place. The unthinkable details are true. Our individual stories, separately recorded, line up to show the truth. We are not lying.

I was part of the working group that looked at the terms of the IAP process before the Settlement Agreement was signed, and I understood there would be disclosure of what was already known about child abuse. Outside St. Anne's, there were 18,000 civil actions against the Government for child abuse, and all those documents were withheld from the IAP. Only in 2013 was I made aware that the promises had not been fulfilled and that all the evidence had been withheld about child abuse at St. Anne's.

In January 2014, the Court agreed the Government owed that disclosure. We had proven that the lawyers in the Department of Justice had all the child abuse evidence, prior to the first IAP

hearing. We were surprised and profoundly disappointed that your lawyers withheld all that evidence and pretended that the abuse never happened by allowing false reports. Who was responsible for that decision? For change to happen, the processes to come to decisions that facilitate violating our legal rights must be reviewed. I understand that the Department of Justice is now operating under a new Directive.

Even after St. Anne's survivors proved the evidence was withheld in January 2014, your officials did not file the proper evidence for every St. Anne's IAP hearing after that Order. St. Anne's survivors called by case numbers H-15019 and C-14114 and T-00178 and K-10106 and E-10290 and others came forward to the Courts, but Department of Justice fought against us having new hearings on the proper evidence.

No one has been willing to take responsibility for this violation of the Settlement Agreement. It should be acceptable that Government officials did not comply with rights owed to Indigenous survivors in the Settlement Agreement. The Supreme Court of Canada agrees that we are entitled to access to the Courts. I understand that the Supreme Court of Canada did not restrict the Government from itself bringing legal proceedings to the Courts, to re-open IAP claims on "new evidence".

Please tell us who will review the IAP decisions on behalf of St. Anne's survivors, if their disclosure rights have been violated in the IAP hearing? Will the Attorney General uphold the law, including on behalf of St. Anne's Survivors, and finally give us justice, with fair hearings on the process/evidence owed to us under the Settlement Agreement? The Government already has every St. Anne's IAP claim, and your officials know which claims were likely denied or undercompensated due to absence of all the evidence about child abuse and about the many pedophiles who were abusing children. Even if a St. Anne's survivor is now dead, their testimonies should now be re-considered with the "new" supporting evidence and their Estates paid the compensation, if awarded.

We intend to push forward and seek justice under this IAP process for all survivors of St. Anne's. In our culture, the truth must be told and promises must be honoured. We ask for your personal solemn promise to look at what evidence was owed under the settlement agreement, and the impact on every IAP hearing. Your statistics do not reveal the injustices caused through undercompensated claims, when the more serious child abuse testimonies were rejected. We are individual citizens who have been re-victimized by Government violation of our rights. You can get an independent legal opinion, as you suggested for the SNC-Lavalin situation.

St. Anne's Survivors do not intend to give up enforcing this Agreement. We can find more lawyers willing to represent us. The Supreme Court of Canada has given us hope, because they agree that the terms of the Agreement can be enforced through the Courts and that new evidence is a reason for judicial intervention. But more court hearings will not be necessary if

St. Anne's survivors and the Government agree to appoint a neutral judge or retired judge, to review and identify all St. Anne's claims that may have been adversely impacted by the absence of all the mandatory evidence and reports.

Please agree to do the right thing.

With respect,

Edmund Metatawabin
Former Chief of Fort Albany First Nation
Spokesperson for PKKA
Edmund@edmundmetatawabin.ca.

c. Chief Adjudicator Daniel Shapiro: Russell.Vallee@irsad-sapi.gc.ca.
Charlie Angus, MP Timmins-James Bay: charlieangus1@gmail.com.
NAN Grand Chief Alvin Fiddler: afiddler@nan.on.ca.
National Chief Perry Bellegarde: pbellegarde@afn.ca.
Mushkegowuk Grand Chief Jonathon Solomon: grandchief@mushkegowuk.ca.
Senator Murray Sinclair: Senator.Sinclair@sen.parl.gc.ca.

Exhibit B

Ruby Darlene Edwards-Wheesk
a Commissioner, etc.,
Province of Ontario
for Fort Albany First Nation
Expires February 15, 2021

Court File No. 00-CV-192059CP

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE JUSTICE PERELL	TUESDAY, THE 14TH DAY OF JANUARY, 2014

BETWEEN:

LARRY PHILIP FONTAINE in his personal capacity and in his capacity as the Executor of the estate of Agnes Mary Fontaine, deceased, MICHELLINE AMMAQ, PERCY ARCHIE, CHARLES BAXTER SR., ELIJAH BAXTER, EVELYN BAXTER, DONALD BELCOURT, NORA BERNARD, JOHN BOSUM, JANET BREWSTER, RHONDA BUFFALO, ERNESTINE CAIBAIOSAI-GIDMARK, MICHAEL CAIPAN, BRENDA CYR, DEANNA CYR, MALCOLM DAWSON, ANN DENE, BENNY DOCTOR, LUCY DOCTOR, JAMES FONTAINE in his personal capacity and in his capacity as the Executor of the Estate of Agnes Mary Fontaine, deceased, VINCENT BRADLEY FONTAINE, DANA EVA MARIE FRANCEY, PEGGY GOOD, FRED KELLY, ROSEMARIE KUPTANA, ELIZABETH KUSIAK, THERESA LAROCQUE, JANE McCULLUM, CORNELIUS McCOMBER, VERONICA MARTEN, STANLEY THOMAS NEPETAYPO, FLORA NORTHWEST, NORMAN PAUCHEY, CAMBLE QUATELL, ALVIN BARNEY SAULTEAUX, CHRISTINE SEMPLE, DENNIS SMOKEYDAY, KENNETH SPARVIER, EDWARD TAPIATIC, HELEN WINDERMAN and ADRIAN YELLOWKNEE

Plaintiffs

-and-

THE ATTORNEY GENERAL OF CANADA, THE PRESBYTERIAN CHURCH IN CANADA, THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH, THE BAPTIST CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN BAY, THE CANADA IMPACT NORTH MINISTRIES OF THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE DIOCESE OF SASKATCHEWAN, THE DIOCESE OF THE SYNOD OF CARIBOO, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (ALSO KNOWN AS THE METHODIST MISSIONARY SOCIETY OF CANADA), THE INCORPORATED SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE ANGLICAN CHURCH OF THE DIOCESE OF QUEBEC, THE SYNOD OF THE DIOCESE OF ATHBASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE ANGLICAN SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE SYNOD OF THE DIOCESE OF NEW WESTMINISTER, THE 2 SYNOD OF THE DIOCESE OF YUKON, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE BOARD OF HOME MISSIONS AND SOCIAL SERVICE OF THE PRESBYTERIAN CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, SISTERS OF CHARITY, A BODY CORPORATE ALSO KNOWN AS SISTERS OF CHARITY OF ST. VINCENT DE PAUL, HALIFAX, ALSO KNOWN AS SISTERS OF CHARITY HALIFAX, ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX, LES SOEURS DE NOTRE DAME-AUXILIATRICE, LES SOEURS DE ST. FRANCOIS D'ASSISE, INSITUT DES SOEURS DU BON CONSEIL, LES SOEURS DE SAINT-JOSEPH DE SAINT-HYANCITHE, LES SOEURS DE JESUSMARIE, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE, LES SOEURS DE L'ASSOMPTION DE LA SAINT VIERGE DE L'ALBERTA, LES SOEURS DE LA CHARITE DE ST.-HYACINTHE, LES OEUVRES OBLATES DE L'ONTARIO, LES RESIDENCES OBLATES DU QUEBEC, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE JAMES (THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY), THE CATHOLIC DIOCESE OF MOOSONEE, SOEURS GRISES DE MONTRÉAL/GREY NUNS OF MONTREAL, SISTERS OF CHARITY (GREY NUNS) OF ALBERTA, LES SOEURS DE LA CHARITÉ DES T.N.O., HOTEL-DIEU DE NICOLET, THE GREY NUNS OF MANITOBA INC.-LES SOEURS GRISES DU MANITOUA INC., LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE D'HUDSON – THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY, MISSIONARY OBLATES – GRANDIN PROVINCE, LES OBLATS DE MARIE IMMACULEE DU MANITOBA, THE ARCHIEPISCOPAL CORPORATION OF REGINA, THE SISTERS OF THE PRESENTATION, THE SISTERS OF ST. JOSEPH OF SAULT ST. MARIE, SISTERS OF CHARITY OF OTTAWA, OBLATES OF MARY IMMACULATE –ST. PETER'S PROVINCE, THE SISTERS OF SAINT ANN, SISTERS OF INSTRUCTION OF THE CHILD JESUS, THE BENEDICTINE SISTERS OF MT. ANGEL OREGON, LES PERES MONTFORTAINS, THE ROMAN CATHOLIC BISHOP OF KAMLOOPS CORPORATION SOLE, THE BISHOP OF VICTORIA, CORPORATION SOLE, THE ROMAN CATHOLIC BISHOP OF NELSON, CORPORATION SOLE, ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD, ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, LA CORPORATION ARCHIÉPISCOPALE CATHOLIQUE ROMAINE DE ST. BONIFACE, LES MISSIONNAIRES OBLATES SISTERS DE ST. BONIFACE-THE MISSIONARY OBLATES SISTERS OF ST. BONIFACE, ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT, THE ROMAN CATHOLIC BISHOP OF THUNDER BAY, IMMACULATE HEART COMMUNITY OF LOS ANGELES CA, ARCHDIOCESE OF VANCOUVER – THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER, ROMAN CATHOLIC DIOCESE OF WHITEHORSE, THE CATHOLIC EPISCOPALE CORPORATION OF MACKENZIEFORT SMITH, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, EPISCOPAL CORPORATION OF SASKATOON, OMI LACOMBE CANADA INC. and MT. ANGEL ABBEY INC.

Defendants

Proceedings under the *Class Proceedings Act*, 1992, S.O. 1992, C.6

ORDER

THESE REQUESTS FOR DIRECTIONS, made by

a. the Applicants, who are 60 IAP claimants as former students of St. Anne's Indian Residential School ("St. Anne's IRS"), for a direction from the Court that the Government of Canada

("Canada") shall produce all documents currently in the possession of Canada that are relevant to sexual or physical abuse at St. Anne's IRS, shall seek and produce the documents of the non-party Ontario Provincial Police ("OPP"), shall amend the narrative and other heads of relief, in the Independent Assessment Process ("IAP") of the Indian Residential Schools Settlement Agreement ("IRSSA");

b. the Truth and Reconciliation Commission of Canada ("TRC") for a direction from the Court as to whether Canada is required to produce to the TRC records of an OPP criminal investigation concerning St. Anne's IRS, pursuant to Schedule N of the IRSSA; and,

c. the Defendant Attorney General of Canada for a direction from the Court as to whether under the IAP, Canada must seek to have the non-party OPP provide OPP documents about its investigation concerning St. Anne's Indian Residential School to the Applicants, and as to whether Canada is under a deemed undertaking with respect to OPP documents already in the possession of Canada;

were heard December 17 and 18, 2013, at Osgoode Hall, 130 Queen St. W, Toronto, ON, M5H 4G1,

ON READING the Amended Amended Request for Directions of the Applicants dated November 28, 2013, the Request for Directions of the TRC dated October 18, 2013, the Request for Directions of the Defendant Attorney General of Canada dated September 5, 2013, and the materials filed by the Applicants, the TRC, the Attorney General of Canada, the Chief Adjudicator of the Indian Residential Schools Adjudication Secretariat, the Assembly of First Nations, the OPP and Les Soeurs de la Charité d'Ottawa and on hearing the submissions of the lawyer(s) for the Applicants, the TRC, the Attorney General of Canada, the Chief Adjudicator of the Indian Residential Schools Adjudication Secretariat, the Assembly of First Nations, the OPP and Les Soeurs de la Charité d'Ottawa:

1. THIS COURT ORDERS that by April 30, 2014, the OPP produce to the TRC the documents from the criminal investigation of abuse at St. Anne's IRS (the "OPP documents"), including documents for which the OPP makes claims for privilege and/or for the privacy interests of individuals, in the same manner that Canada is obliged to produce documents to the TRC under the Indian Residential Schools Settlement Agreement ("IRSSA");

2. THIS COURT ORDERS that by April 30, 2014, Canada produce to the TRC the OPP documents, including documents for which the OPP makes claims for privilege and/or for the privacy interests of individuals, in the same manner that it is obliged to produce documents to the TRC under the IRSSA;

3. THIS COURT ORDERS that by April 30, 2014 and subject to the procedure described below, the OPP produce to Canada, for the IAP, the OPP documents in its possession or control, excluding documents protected under solicitor and client privilege and/or investigation privilege, and the OPP also provide a list of documents for which it makes claims of privilege or immunity from production;

4. THIS COURT ORDERS that Canada or an Applicant can request that the court's lawyer appointed under the IRSSA, which lawyer shall have the powers of a Master under the Ontario *Rules of Civil Procedure*, review the OPP documents, and rule as to production for the IAP, with such decision subject to an appeal to an administrative judge under the IRSSA;

5. THIS COURT ORDERS that Canada shall produce all transcripts of criminal or civil proceedings in its possession or control about incidents of abuse at St. Anne's IRS and deliver such transcripts to the TRC within 20 days of the date hereof;

6. THIS COURT ORDERS that Canada shall by June 30, 2014, produce for the IAP:

(a) the OPP documents in its possession and/or received from the OPP about the sexual and/or physical abuse at St. Anne's IRS;

(b) the transcripts of criminal or civil proceedings in its possession about the sexual and/or physical abuse at St. Anne's IRS; and

(c) any other relevant and non-privileged documents in the possession of Canada to comply with the proper reading and interpretation of Canada's disclosure obligations under Appendix VIII;

7. THIS COURT ORDERS that that Canada shall by August 1, 2014 revise its Narrative and POI Reports for St. Anne's IRS;

8. THIS COURT ORDERS THAT the courts under the IRSSA have the exclusive jurisdiction to re-open settled IAP claims on a case-by-case basis;

9. THIS COURT ORDERS THAT the adjudicators of the IAP have the exclusive jurisdiction with respect to the admission of and use to be made of evidence for the IAP;

10. THIS COURT ORDERS that the Applicants and the TRC are entitled to claim costs for the legal services that identified that there was a problem associated with the operation of the IRSSA and also for the legal services associated with the RFDs designed to find a solution for the problem; and

11. THIS COURT ORDERS that if the parties cannot agree with respect to costs, including the scale of costs, they may make submissions in writing by March 31, 2014.

Powell, J

LARRY PHILIP FONTAINE et al.	and THE ATTORNEY GENERAL OF CANADA et al.	Court File No: 00-CV-192059CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

ORDER

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Lawyer for the Applicants

CITATION: *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283
COURT FILE NO.: 00-CV-129059
DATE: January 14, 2014

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

LARRY PHILIP FONTAINE in his personal capacity and in his capacity as the Executor of the estate of Agnes Mary Fontaine, deceased, MICHELLINE AMMAQ, PERCY ARCHIE, CHARLES BAXTER SR., ELIJAH BAXTER, EVELYN BAXTER, DONALD BELCOURT, NORA BERNARD, JOHN BOSUM, JANET BREWSTER, RHONDA BUFFALO, ERNESTINE CAIBAIOSAI-GIDMARK, MICHAEL CARPAN, BRENDA CYR, DEANNA CYR, MALCOLM DAWSON, ANN DENE, BENNY DOCTOR, LUCY DOCTOR, JAMES FONTAINE in his personal capacity and in his capacity as the Executor of the Estate of Agnes Mary Fontaine, deceased, VINCENT BRADLEY FONTAINE, DANA EVA MARIE FRANCEY, PEGGY GOOD, FRED KELLY, ROSEMARIE KUPTANA, ELIZABETH KUSIAK, THERESA LAROCQUE, JANE McCULLUM, CORNELIUS McCOMBER, VERONICA MARTEN, STANLEY THOMAS NEPETAYPO, FLORA NORTHWEST, NORMAN PAUCHEY, CAMBLE QUATELL, ALVIN BARNEY SAULTEAUX, CHRISTINE SEMPLE, DENNIS SMOKEYDAY, KENNETH SPARVIER, EDWARD TAPIATIC, HELEN WINDERMAN and ADRIAN YELLOWKNEE

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA, THE PRESBYTERIAN CHURCH IN CANADA, THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH, THE BAPTIST CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN BAY, THE CANADA IMPACT NORTH MINISTRIES OF THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE DIOCESE OF SASKATCHEWAN, THE DIOCESE OF THE SYNOD OF CARIBOO, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (ALSO KNOWN AS THE METHODIST MISSIONARY SOCIETY OF CANADA), THE INCORPORATED SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE ANGLICAN CHURCH OF THE DIOCESE OF QUEBEC, THE SYNOD OF THE DIOCESE OF ATHBASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE ANGLICAN SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE SYNOD OF THE DIOCESE OF

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QU'APPELLE, THE SYNOD OF THE DIOCESE OF NEW WESTMINISTER, THE SYNOD OF THE DIOCESE OF YUKON, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE BOARD OF HOME MISSIONS AND SOCIAL SERVICE OF THE PRESBYTERIAN CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, SISTERS OF CHARITY, A BODY CORPORATE ALSO KNOWN AS SISTERS OF CHARITY OF ST. VINCENT DE PAUL, HALIFAX, ALSO KNOWN AS SISTERS OF CHARITY HALIFAX, ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX, LES SOEURS DE NOTRE DAME-AUXILIATRICE, LES SOEURS DE ST. FRANCOIS D'ASSISE, INSITUT DES SOEURS DU BON CONSEIL, LES SOEURS DE SAINT-JOSEPH DE SAINT-HYANCITHE, LES SOEURS DE JESUS-MARIE, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE, LES SOEURS DE L'ASSOMPTION DE LA SAINT VIERGE DE L'ALBERTA, LES SOEURS DE LA CHARITE DE ST.-HYACINTHE, LES OEUVRES OBLATES DE L'ONTARIO, LES RESIDENCES OBLATES DU QUEBEC, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE JAMES (THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY), THE CATHOLIC DIOCESE OF MOOSONEE, SOEURS GRISES DE MONTREAL/GREY NUNS OF MONTREAL, SISTERS OF CHARITY (GREY NUNS) OF ALBERTA, LES SOEURS DE LA CHARITE DES T.N.O., HOTEL-DIEU DE NICOLET, THE GREY NUNS OF MANITOBA INC.-LES SOEURS GRISES DU MANITOBA INC., LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE D'HUDSON – THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY, MISSIONARY OBLATES – GRANDIN PROVINCE, LES OBLATS DE MARIE IMMACULEE DU MANITOBA, THE ARCHIEPISCOPAL CORPORATION OF REGINA, THE SISTERS OF THE PRESENTATION, THE SISTERS OF ST. JOSEPH OF SAULT ST. MARIE, SISTERS OF CHARITY OF OTTAWA, OBLATES OF MARY IMMACULATE –ST. PETER'S PROVINCE, THE SISTERS OF SAINT ANN, SISTERS OF INSTRUCTION OF THE CHILD JESUS, THE BENEDICTINE SISTERS OF MT. ANGEL OREGON, LES PERES MONTFORTAINS, THE ROMAN CATHOLIC BISHOP OF KAMLOOPS CORPORATION SOLE, THE BISHOP OF VICTORIA, CORPORATION SOLE, THE ROMAN CATHOLIC BISHOP OF NELSON, CORPORATION SOLE, ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD, ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, LA CORPORATION ARCHIÉPISCOPALE CATHOLIQUE ROMAINE DE ST. BONIFACE, LES MISSIONNAIRES OBLATES SISTERS DE ST. BONIFACE-THE MISSIONARY OBLATES SISTERS OF ST. BONIFACE, ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT, THE ROMAN CATHOLIC BISHOP OF THUNDER BAY, IMMACULATE HEART COMMUNITY OF LOS ANGELES CA, ARCHDIOCESE OF VANCOUVER – THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER, ROMAN CATHOLIC DIOCESE OF WHITEHORSE, THE CATHOLIC EPISCOPALE CORPORATION OF MACKENZIE-FORT SMITH, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, EPISCOPAL

2014 ONSC 283 (CanLII)

CORPORATION OF SASKATOON, OMI LACOMBE CANADA INC. and MT. ANGEL ABBEY INC

Defendants

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

- *Fay Brunning* for the Applicants
- *Catherine Coughlan* for the Attorney General of Canada
- *Norman W. Feaver* for the Ontario Provincial Police
- *Tina Hobday* for the Chief Adjudicator of the Indian Residential Schools Adjudication Secretariat (Canada)
- *Julian N. Falconer, Julian K. Roy,* and *Junaid K. Subhan* for the Truth and Reconciliation Commission of Canada
- *Stuart Wuttke* and *Valerie Richer* for the Assembly of First Nations
- *Pierre Champagne* and *Michael Sabet* for Les Soeurs de la Charité d'Ottawa

HEARING DATE: December 17 and 18, 2013

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION AND OVERVIEW

1. Introduction

[1] The Truth and Reconciliation Commission of Canada, which was constituted by The Indian Residential Schools Settlement Agreement ("the IRSSA"), brings a Request for Direction ("RFD") to require the Government of Canada ("Canada") to produce records of a 1992-96 criminal investigation by the Ontario Provincial Police ("the OPP") of assaults and other crimes perpetrated on students at St. Anne's Indian Residential School in Fort Albany, Ontario ("St. Anne's").

[2] Canada, which was a defendant in the litigation leading up to the IRSSA, brings a RFD as to whether under the Independent Assessment Process ("the IAP") of the IRSSA, it must seek to have the OPP, which is a non-party, provide its documents about the 1992-96 criminal investigation of what happened at St. Anne's to the Applicants, who are IAP Claimants.

[3] The Applicants, who are 60 St. Anne's Claimants for compensation under the IAP, bring a Request for Direction with a variety of heads of relief.

[4] The Applicants, by their RFD, seek a direction: (a) requiring Canada to provide an affidavit listing all documents currently in Canada's possession or control that are relevant to abuse at St. Anne's and to make the affiant available for cross-examination; (b) requiring Canada to produce the listed documents; (c) requiring Canada to obtain and produce the OPP documents about the St Anne's Criminal Investigation; (d) requiring Canada to amend the historical Narrative (a disclosure obligation under the IRSSA) for St. Anne's; (e) declaring the manner in

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which transcripts, expert medical evidence, signed witness statements, etc. may be used in evidence in the IAP; and (f) ordering costs on a substantial indemnity basis to the Applicants' Counsel and also costs paid to Mushkegowuk Council and to the affiants who delivered affidavits for this Request for Directions.

[5] It should be noted that the pursuant to their RFD, the Applicants' request for disclosure goes beyond the OPP documents and reaches to other documents about what occurred at St. Anne's, such as transcripts of criminal and civil proceedings.

[6] The Assembly of First Nations ("AFN") seeks to intervene in both Canada's and the Applicants' RFPs. The intervention requests were unopposed, and they are granted. The Assembly supports the RFDs of the Commission and of the Applicants.

[7] The OPP appeared as a responding party to the various RFDs.

[8] The Chief Adjudicator of the Indian Residential Schools Adjudication appeared at the hearing of the various RFDs to protect the jurisdictional integrity of the IAP from some of the requests for relief sought by the Applicants.

[9] Les Soeurs de la Charité d'Ottawa, a religious and charitable organization that was one of three Catholic entities that administered St. Anne's, appeared to oppose any RFD that requires Canada to produce information beyond what is required by the IRSSA.

2. Overview

[10] By way of overview, I shall consider the Commission's RFD separately from the RFDs of Canada and the Applicants.

[11] Although the factual background for the various RFDs arise out of the same circumstances, and although there is an overlap in the law about the court's jurisdiction to respond to the various RFDs, and although the oral and written argument of the parties seemed to be aimed at fashioning a single response for all the RFDs, as I will explain below, it is helpful to analyze the Commission's RFD, which does not affect the IAP, separately from the RFDs of Canada and the Applicants, which do affect the IAP.

[12] With respect to the Commission's RFD, the court has the jurisdiction to order Canada to produce the copies of any OPP documents that Canada has in its possession to the Commission. I shall exercise this jurisdiction to order Canada to produce its copies of OPP documents to the Commission. Below, I shall explain that the deemed undertaking does not apply with respect to the OPP documents, but, in any event, the court has the jurisdiction to abrogate the deemed undertaking, and, thus, there is no impediment to Canada producing these documents to the Commission.

[13] Still dealing with the Commission's RFD, as I will explain below, notwithstanding that the OPP is not a party to the IRSSA, the court has the jurisdiction to order the OPP to produce its documents directly to the Commission in the same manner that Canada is obliged to produce documents to the Commission under the IRSSA. I will exercise this jurisdiction to order the OPP to produce its documents to the Commission.

[14] Turning to Canada's and the Applicant's RFDs, as I will explain below, the court has the jurisdiction to supervise and implement the disclosure process of the IAP and to make remedial orders against Canada for non-disclosure, but the court does not have the jurisdiction to direct the

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evidentiary, or substantive decisions of the IAP adjudicators as to what use may be made of the evidence presented in the IAP. I, therefore, shall not being making any orders or directions that interfere with the adjudicative autonomy of the adjudicators under the IAP.

[15] Rather, pursuant to the Applicants' RFD, I shall exercise the court's jurisdiction to order Canada to produce its copies of OPP documents and transcripts in its possession as part of the IAP. I will also exercise the court's jurisdiction to implement the disclosure process of the IAP and I shall order Canada to revise its Narratives and Person of Interest ("POI") Reports for St. Anne's.

[16] By way of a RFD, I direct that if Canada breaches its disclosure obligations under the IAP, the court has the jurisdiction to re-open decided cases of the IAP and to remit them to the adjudicator for re-adjudication. Apart from deciding that the court has the jurisdiction to re-open decided cases, I will not exercise that jurisdiction, which must be exercised on a case-by-case basis.

[17] Still dealing with Canada's and the Applicants' RFD, as I will explain below, notwithstanding that the OPP is not a party to the IRSSA, the court has the jurisdiction to order the OPP to produce its documents for the purposes of the IAP. Subject to a procedure to protect privacy rights and claims for privilege, I will exercise this jurisdiction to order the OPP to produce its documents to Canada for use in the IAP.

[18] Further, as I will explain below, the court also has the jurisdiction to order Canada to pay costs if it breaches its disclosure obligations under the IRSSA, and in the circumstances of the case at bar, it is appropriate to exercise that jurisdiction in favour of the Commission and the Applicants.

[19] The court also has jurisdiction to order costs with respect to a RFD, and I shall ask for the parties for their submissions in writing about any costs award.

B. POSITION OF THE PARTIES TO THE REQUESTS FOR DIRECTIONS

1. The Position of the Ontario Provincial Police ("the OPP")

[20] The Ontario Provincial Police ("OPP") states that it cannot produce its St. Anne's documents without a court order. The OPP, however, does not oppose an order that it produce its documents provided that: (a) the court is satisfied that it has the jurisdiction to make an order that the OPP produce its records to the Commission or for the IAP; (b) the OPP's own claims for privilege are protected; (c) the claims of others for privilege or privacy are protected; and (d) it does not have to bear the costs associated with protecting any privacy and privilege claims.

[21] The OPP's main concern seems to be that if ordered to produce its records, there needs to be a process to redact the documents to protect legitimate public interests, including evidentiary privilege, third party privacy, and law enforcement interests. The OPP says that it may have claims of privilege including: (1) investigative privilege; (2) solicitor and client privilege; and (3) Crown work product privilege. It submits that any court order should address the process for redactions and who should bear the expense of producing the documents.

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2. The Position of the Truth and Reconciliation Commission

[22] The Truth and Reconciliation Commission submits that the OPP investigation documents are relevant to the Commission's mandate of identifying sources and creating as complete a record as possible of the IRS system and legacy and the OPP documents should be obtained and produced by Canada.

[23] The Commission disputes that Canada is bound by the deemed undertaking rule not to produce the OPP documents, and, in any event, the Commission submits that the court can abrogate the undertaking in the interests of justice. The Commission submits that the privacy interests of the former students or of the OPP are protected because the Commission is subject to federal privacy legislation and the National Research Centre, which would be the repository for the documents, is subject to provincial privacy legislation.

3. Canada's Position

[24] Canada submits that it has been and continues to be in full compliance with its obligations under the IRSSA in respect of document disclosure to the Commission and for the IAP. Canada submits that its disclosure obligations do not extend beyond disclosing documents in its possession and control; i.e. it says that it has no obligation to obtain documents from third parties, like the OPP. Further, Canada resists the production of the OPP records in its possession on the grounds that to do so would violate the deemed undertaking rule. Canada takes a more or less neutral position as to whether the OPP can or should be directly ordered to produce its investigative records, but Canada requests that its right to argue issues of relevance and admissibility at each IAP hearing be protected.

[25] In response to the Applicant's RFD, Canada submits that this court does not have the jurisdiction: (a) to impose upon Canada an obligation to seek and disclose third party documents; (b) to make a determination in respect of evidentiary matters in the IAP; (c) to appoint an individual to review settled St. Anne's IAP claims to determine if previous Claimants have been prejudiced by the alleged non-disclosure of documents; and (d) to set aside the fees structure for Claimants' counsel under the IRSSA and make an additional award of costs or fees to the Applicants.

4. The Position of Les Soeurs de la Charité d'Ottawa

[26] Les Soeurs de la Charité d'Ottawa submits that production requests being made by the Applicants and the Commission cannot be read into the IRSSA. Les Soeurs de la Charité d'Ottawa opposes the disclosure of the OPP documents on the grounds that the test for production from a third party has not been satisfied and to the extent the documents are already in the possession of Canada, the documents are subject to the deemed undertaking. It says that notwithstanding the privacy safeguards built into the IRSSA, the production of documents that refer to Les Soeurs de la Charité d'Ottawa are not sufficient to make the production of the OPP documents harmless.

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5. The Applicants' Position

[27] The Applicants (and the AFN) submit that it is Canada's obligation to produce all documents it has in its possession in relation to the criminal investigation and proceedings, and that Canada should amend the Narrative for St. Anne's and the POIs for St. Anne's to provide more details and documentation. The Applicants seek what amounts to a further and better affidavit of documents from Canada. They seek orders as to how the OPP documents may be used at the IAP and they seek costs or fee awards against Canada for breaching its disclosure obligations under the IRSSA.

[28] The Applicants submit that the OPP documents are relevant to the fulfilment of the IAP and that Canada has breached its production obligations. The Applicants dispute that Canada is bound by the deemed undertaking rule not to produce the OPP documents, and, in any event, the Applicants submit that the court can abrogate the undertaking in the interests of justice. They submit that Canada's failure to produce the OPP documents about St. Anne's has compromised the IAP and denied the Claimants access to justice.

6. The Position of the Assembly of First Nations

[29] The Assembly of First Nations requests that this court grant an order that Canada be ordered to disclose all relevant material, which would include police reports, signed statements by former students, expert evidence reports, and transcripts for any criminal or civil trials concerning alleged abuse at all Indian Residential Schools that are a party to the IRSSA. The AFN submits that Canada should be updating all Narratives at all Indian Residential Schools and that Canada has an obligation to add documents that mention sexual abuse whether a conviction was attained or not.

[30] The AFN submits that the deemed undertaking rule does not prevent Canada from producing the records to either potential IAP claimants or the Truth and Reconciliation Commission because the IAP process and record compilation mandate are all components of the IRSSA and in any event the court can abrogate the undertaking in the interests of justice.

7. The Position of the Chief Adjudicator for the IAP

[31] The Chief Adjudicator takes no position with respect to the various RFDs about the production of the records of the OPP criminal investigative other than it requests that if the court orders the production of documents it does so in a way that protects the confidentiality of the IAP and privacy interests.

[32] The Chief Adjudicator opposes any direction as requested by the Applicants that would purport to direct how evidence is obtained, admitted, or used in the IAP. It also opposes the Applicants' requested directions with respect to the legal fees and costs.

[33] The Chief Adjudicator submits that the Applicants' RFD would be tantamount to amending the IRSSA without the approval of its signatories, would fundamentally alter the IAP and create a special system just for the Applicants, and would, if applied generally, disturb settled matters, mire thousands of unresolved cases in procedural disputes and have the potential of overwhelming the courts across the country and significantly delay access to justice for the remaining claimants.

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C. FACTUAL, PROCEDURAL, AND JURISDICTIONAL BACKGROUND

1. The Indian Residential Schools Settlement Agreement ("IRSSA")

[34] Between the 1860s and 1990s more than 150,000 First Nations, Inuit, and Métis children were required to attend Indian Residential Schools, institutions operated by religious organizations under the funding of the Federal Government. It is to the disgrace and shame of the religious organizations and Canada that the children who attended the Indian Residential Schools were the victims of brutal mistreatment.

[35] Canada has acknowledged that its policy in supporting the residential schools was misguided. On June 11, 2008, the Prime Minister made an apology in Parliament (www.aadnc-aandc.gc.ca/eng). He stated:

> For more than a century, Indian Residential Schools separated over 150,000 Aboriginal children from their families and communities. In the 1870's, the federal government, partly in order to meet its obligation to educate Aboriginal children, began to play a role in the development and administration of these schools. Two primary objectives of the Residential Schools system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture. These objectives were based on the assumption Aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as it was infamously said, "to kill the Indian in the child". Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country.
>
> One hundred and thirty-two federally-supported schools were located in every province and territory, except Newfoundland, New Brunswick and Prince Edward Island. Most schools were operated as "joint ventures" with Anglican, Catholic, Presbyterian or United Churches. The Government of Canada built an educational system in which very young children were often forcibly removed from their homes, often taken far from their communities. Many were inadequately fed, clothed and housed. All were deprived of the care and nurturing of their parents, grandparents and communities. First Nations, Inuit and Métis languages and cultural practices were prohibited in these schools. Tragically, some of these children died while attending residential schools and others never returned home.
>
> The government now recognizes that the consequences of the Indian Residential Schools policy were profoundly negative and that this policy has had a lasting and damaging impact on Aboriginal culture, heritage and language. While some former students have spoken positively about their experiences at residential schools, these stories are far overshadowed by tragic accounts of the emotional, physical and sexual abuse and neglect of helpless children, and their separation from powerless families and communities.
>
> The legacy of Indian Residential Schools has contributed to social problems that continue to exist in many communities today.
>
> It has taken extraordinary courage for the thousands of survivors that have come forward to speak publicly about the abuse they suffered. It is a testament to their resilience as individuals and to the strength of their cultures. Regrettably, many former students are not with us today and died never having received a full apology from the Government of Canada.
>
> The government recognizes that the absence of an apology has been an impediment to healing and reconciliation. Therefore, on behalf of the Government of Canada and all Canadians, I stand before you, in this Chamber so central to our life as a country, to apologize to Aboriginal peoples for Canada's role in the Indian Residential Schools system.
>
> To the approximately 80,000 living former students, and all family members and communities, the Government of Canada now recognizes that it was wrong to forcibly remove children from their homes and we apologize for having done this. We now recognize that it was wrong to separate

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children from rich and vibrant cultures and traditions that it created a void in many lives and communities, and we apologize for having done this. We now recognize that, in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow, and we apologize for having done this. We now recognize that, far too often, these institutions gave rise to abuse or neglect and were inadequately controlled, and we apologize for failing to protect you. Not only did you suffer these abuses as children, but as you became parents, you were powerless to protect your own children from suffering the same experience, and for this we are sorry.

The burden of this experience has been on your shoulders for far too long. The burden is properly ours as a Government, and as a country. There is no place in Canada for the attitudes that inspired the Indian Residential Schools system to ever prevail again. You have been working on recovering from this experience for a long time and in a very real sense, we are now joining you on this journey. The Government of Canada sincerely apologizes and asks the forgiveness of the Aboriginal peoples of this country for failing them so profoundly.

Nous le regrettons
We are sorry
Nimitataynan
Niminchinowesamin
Mamiattugut

Beginning in the mid-1990s, former students of Indian Residential Schools operated by Canada and various religious organizations brought individual and class actions seeking compensation for injuries suffered while at the schools, including loss of language and culture.

In moving towards healing, reconciliation and resolution of the sad legacy of Indian Residential Schools, implementation of the Indian Residential Schools Settlement Agreement began on September 19, 2007. Years of work by survivors, communities, and Aboriginal organizations culminated in an agreement that gives us a new beginning and an opportunity to move forward together in partnership.

A cornerstone of the Settlement Agreement is the Indian Residential Schools Truth and Reconciliation Commission. This Commission presents a unique opportunity to educate all Canadians on the Indian Residential Schools system. It will be a positive step in forging a new relationship between Aboriginal peoples and other Canadians, a relationship based on the knowledge of our shared history, a respect for each other and a desire to move forward together with a renewed understanding that strong families, strong communities and vibrant cultures and traditions will contribute to a stronger Canada for all of us.

On behalf of the Government of Canada

The Right Honourable Stephen Harper, Prime Minister of Canada

[36] In 2000, eight years before this apology, about 154 former students represented by one law firm filed civil claims in connection with their mistreatment at St. Anne's. The actions were defended by Canada. None of these claims ever proceeded to trial. It will be important to note that under Article 11.01 of the IRSSA, actions not otherwise dismissed were deemed to be dismissed pursuant to the IRSSA. The plaintiffs in the dismissed actions were allowed to make claims under the IRSSA. This is important to note because it supports the argument that the deemed undertaking does not apply to the OPP documents because the IAP is the same proceeding as the 154 actions in which the OPP documents were used.

[37] Following the launch of the 154 actions and other individual and class actions across the country by former students of the residential schools, in November 2003, Canada established a National Resolutions Framework, which included a compensation process called the Alternative Dispute Resolution ("ADR") Process. (The ADR Process is the predecessor of the IAP in the

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IRSSA, discussed below.) As part of this ADR process, Canada prepared Narratives or histories about what had occurred at the various residential schools.

[38] In November 2004, the Assembly of First Nations ("the AFN") published a report entitled, *Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools*. In this report, it was stressed that compensation, alone, would not achieve the goals of reconciliation and healing. Rather, a two-pronged approach would be required: (1) compensation; and (2) truth-telling, healing, and public education.

[39] After the launch of the numerous court proceedings, there were extensive negotiations to settle the individual actions and the class actions. These negotiations ultimately led to the multiple-court approved settlement of the individual and class actions known as the Indian Residential Schools Settlement ("IRSSA).

[40] The IRSSA was signed on May 8, 2006. The parties to the IRSSA included: Canada, as represented by the Honourable Frank Iacobucci; various Plaintiffs, as represented by a National Consortium of lawyers, the Merchant Law Group, and Independent Counsel; the Assembly of First Nations; Inuit Representatives; the General Synod of the Anglican Church of Canada; the Presbyterian Church of Canada; the United Church of Canada; and Roman Catholic Church entities.

[41] Under the IRSSA, Canada and the other defendants obtained releases. In their practical effect, the releases re-directed plaintiffs and class members in actions against Canada to the IAP as a legal recourse for their claims. The IRSSA provides at Article 4.06 (g) as follows:

> [...] that the obligations assumed by the defendants under this Agreement are in full and final satisfaction of all claims arising from or in relation to an Indian Residential School or the operation of Indian Residential Schools of the Class Members and that the Approval Orders are the sole recourse on account of any and all claims referred to therein.

[42] Between December 2006 and January 2007, each of nine courts, representing Class Members from across Canada issued judgments certifying the class actions and approving the terms of settlement as being fair, reasonable, and in the best interests of the Class Members. Justice Winkler as he then was, certified the action in Ontario in reasons reported as *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.), of which I will have more to say below.

[43] In *Fontaine v. Canada (Attorney General)*, 2006 YKSC 63, in approving the settlement for the Yukon Territory Supreme Court, Justice Veale stated at paras. 6-8 of his judgment:

> *Have You Ever Heard a Whole Village Cry?*
>
> 6. This question was asked by a First Nation woman who spoke in court. It captures in one sentence the horror and pain experienced by the parents and children in aboriginal communities when government and church representatives appeared in cars, trucks, vans and planes, to take the children away to institutions. It is not possible to do justice to the stories of 79,000 aboriginal people in this judgment. Suffice it to say that although there were some benefits, the majority of the survivors found it to be a devastating experience. It was all the more so for those who suffered physical assaults, sexual assaults and psychological harm.
>
> 7. The Royal Commission of Aboriginal Peoples concluded that the Residential School system was a blatant attempt to re-socialize aboriginal children with the values of European culture and obliterate aboriginal languages, traditions and beliefs. The inferior education, mistreatment,

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> neglect and abuse that resulted are a concern to all Canadians. The Assembly of First Nations and National Chief Phil Fontaine have pursued a Canada wide settlement since 1990.
>
> 8. The settlement provides compensation for individual survivors as well as healing programs and benefits for their families and communities. It is a compensation package that is beyond the jurisdiction of any court to create. It is much more than the settlement of a tort-based class action; it is a Political Agreement.

[44] It is to be noted that the approval judgments incorporate by reference all the terms of the IRSSA, and the judgments provide that the applicable class proceedings laws shall apply in their entirety to the supervision, operation, and implementation of the IRSSA. For present purposes, the following terms of the Approval Orders should be noted:

> 12. THIS COURT ORDERS that the Agreement, which is attached hereto as Schedule "A", and which is expressly incorporated by reference into this judgment, including the definitions included therein, is hereby approved and shall be implemented, in accordance with this judgment and any further order of this Court.
>
> 13. THIS COURT ORDERS AND DECLARES that 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.
>
> 31. THIS COURTS DECLARES that the Representative Plaintiffs, Defendants, Released Church Organizations, Class Counsel, the National Administration Committee, or the Trustee, or such other person or entity as this Court may allow, after fully exhausting the dispute resolution mechanisms contemplated in the Agreement, may apply to the Court for directions in respect of the implementation, administration or amendment of the Agreement or the implementation of this judgment on notice to all affected parties, all in conformity with the terms of the Agreement.
>
> 36. THIS COURT DECLARES that the provisions of the applicable class proceedings law shall apply in their entirety to the supervision, operation and implementation of the Agreement and this judgment.

[45] In March 2007, on consent of the parties, the nine courts issued identical Approval Orders and Implementation Orders. Both the judgments of the courts and the Approval Orders provide that that the respective courts shall supervise the implementation of the IRSSA and the judgment and may issue such orders as are necessary to implement and enforce the provisions of the agreement and the judgment. For present purposes, the following terms of the Implementation Order should be noted:

> *Chief Adjudicator*
>
> 7. THIS COURT ORDERS that in addition to any other reporting requirements, the Chief Adjudicator shall report directly to the Courts through the Monitor not less than quarterly on all aspects of the implementation and operation of the IAP. The Courts may provide the Chief Adjudicator with directions regarding the form and content of such reports.
>
> *Court Counsel*
>
> 12. THIS COURT ORDERS that Randy Bennett of Rueter Scargall Bennett LLP [now Brian Gover of Stockwoods LLP] ("Court Counsel") is hereby appointed legal counsel to and for the Courts to assist the Courts in their supervision over the implementation and administration of the Agreement.
>
> 13. THIS COURT ORDERS that Court Counsel's duties shall be as determined by the Courts. Communications between Court Counsel and the Courts shall be privileged.

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> 23. THIS COURT ORDERS that the Courts shall supervise the implementation of the Agreement and this order and, without limiting the generality of the foregoing, may issue such further and ancillary orders, from time to time, as are necessary to implement and enforce the provisions of the Agreement, the judgment dated December 15, 2006 and this order.

[46] Under the IRSSA, the judges of the nine courts that approved the settlement are designated as "Supervising Judges". Two of the Supervising Judges are the "Administrative Judges." The Administrative Judges receive and evaluate "Requests for Direction" in relation to the administration of the IRSSA. The Administrative Judges decide whether a hearing is necessary, and if so, in which jurisdiction, in accordance with guidelines set out in the Court Administration Protocol.

[47] At this time, I and Justice Brown of the British Columbia Supreme Court are the designated Supervising Judges. Until recently, Chief Justice Winkler was a Supervising Judge.

[48] Under the IRSSA, Crawford Class Action Services is the "Monitor." On behalf of the Supervising Courts, the Monitor receives information about the implementation or administration of the Common Experience Payment ("CEP") and the Independent Assessment Process ("IAP"). The Monitor reports to the courts and takes directions from them about the implementation and administration of the IRSSA.

[49] The courts are also assisted by "Court Counsel" with whom the Supervising Judges have a lawyer-and-client confidential relationship.

[50] There is an elaborate supervisory structure for the IRSSA, which for present purposes I need not describe, involving the the National Administration Committee, and the Indian Residential School Adjudication Secretariat, the Chief Adjudicator, and the Oversight Committee.

2. Interpretation of the IRSSA

[51] The IRSSA is a contract and as a contract its interpretation is subject to the norms of the law of contract interpretation.

[52] The IRSSA contains two principles of construction and interpretation. Article 1.04 states that the *contra proferentem* rule does not apply, and Article 18.06 provides that the Settlement Agreement is the entire agreement between the parties. These articles provide as follows:

> *1.04 No Contra Proferentem*
>
> The parties acknowledge that they have reviewed and participated in settling the terms of this Agreement and they agree that any rule of construction to the effect that any ambiguity is to be resolved against the drafting parties is not applicable in interpreting this Agreement.
>
> *18.06 Entire Agreement*
>
> This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof and cancels and supersedes any prior or other understandings and agreements between the Parties with respect thereto. There are no representations, warranties, terms, conditions, undertakings, covenants or collateral agreements, express, implied or statutory between the Parties with respect to the subject matter hereof other than as expressly set forth or referred to in this Agreement. [emphasis added]

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[53] In *Fontaine v. The Attorney General of Canada*., 2013 ONSC 684, Justice Goudge discussed the principles of interpretation applicable to the IRSSA. He stated at para. 68:

> The principles of interpretation applicable to the Settlement Agreement are straightforward. The text of the agreement must be read as a whole. The plain meaning of the words used will be important as will the context provided by the circumstances existing at the time the Settlement Agreement was created. A consideration of both is necessary to reach a proper conclusion about the meaning of the contested provisions.

3. The IRSSA and the Mandate of the Truth and Reconciliation Commission

(a) The Mandate of the Truth and Reconciliation Commission

[54] An important aspect of the IRSSA was the establishment of a Truth and Reconciliation Commission.

[55] Article 7.01 of the IRSSA provided for the establishment of the Commission and specified that its process and mandate was set out in Schedule "N". The Commission is subject to federal and provincial privacy and access to information legislation.

[56] Schedule "N" establishes the mandate of the Commission of contributing "to truth, healing and reconciliation." The Commission is directed to identify sources and create as complete a historical record as possible of the Indian Residential School system and legacy for the purposes of future study and use by the public.

[57] The Commission is also mandated to produce a report as well as recommendations to Canada concerning the Indian Residential School system and, in particular "the history, purpose, operation and supervision of the IRS system, the effect and consequences of IRS (including systemic harms, intergenerational consequences and the impact on human dignity) and the ongoing legacy of the residential schools."

[58] Under the IRSSA, the National Research Centre will hold the documents collected by the Commission. The Centre is subject to provincial privacy legislation.

(b) Canada's Disclosure Obligations to the Truth and Reconciliation Commission

[59] Schedule "N" of the IRSSA imposes obligations on Canada and the Church defendants to provide all relevant documents in their possession or control to the Truth and Reconciliation Commission.

[60] With emphasis added, Schedule "N" provides as follows:

> In order to ensure the efficacy of the truth and reconciliation process, Canada and the churches will provide all relevant documents in their possession or control to and for the use of the Truth and Reconciliation Commission, subject to the privacy interests of an individual as provided by applicable privacy legislation, and subject to and in compliance with applicable privacy and access to information legislation, and except for those documents for which solicitor-client privilege applies and is asserted.
>
> In cases where privacy interests of an individual exist, and subject to and in compliance with applicable privacy legislation and access to information legislation, researchers for the Commission shall have access to the documents, provided privacy is protected. In cases where solicitor-client privilege is asserted, the asserting party will provide a list of all documents for which the privilege is claimed. [emphasis added]

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[61] I pause here to foreshadow that I shall be ordering Canada to honour the above disclosure obligation to the Commission. I shall also be ordering the OPP to produce its St. Anne's documents in the same manner as Canada is obliged to do so.

4. Compensation under the IRSSA

[62] The IRSSA prescribes two forms of compensation. The first is the Common Experience Payment ("CEP"), which is available pursuant to Article 5 of the Agreement to all eligible former students who resided at Indian Residential Schools. Canada funded a trust for the payment of CEP. Canada's liability, however, is uncapped and the IRSSA provides for the trust fund to be augmented if it is deficient. Eligible recipients receive $10,000.00 for at least part of a school year, and $3,000.00 for each subsequent year or part year. Article 5.09 of the IRSSA provides that unsatisfied CEP Claimants may first appeal to the National Administration Committee, which is charged with oversight of the IRSSA, and then to the courts.

[63] The second type of compensation is a product of the Independent Assessment Process ("the IAP"), which pursuant to Article 6 of the IRSSA allows Claimants to seek compensation from a panel of adjudicators lead by the Chief Adjudicator.

[64] Although there is a deadline for making IAP claims and there are ranges for categories of compensation, Canada's ultimate liability under the IAP is not capped. The Claimants may apply for defined categories of compensable serious physical and sexual abuse, or other wrongful acts, through an inquisitorial process designed to adjudicate claims and to award compensation.

[65] In *Baxter v. Canada (Attorney General)*, *supra* at para. 7 Justice Winkler described the compensatory elements and the other benefits of the IRSSA as follows:

> 7. Under the proposed settlement, all members of the Survivor class will receive a cash payment, with the amount varying according to the length of time each individual spent as a student in the residential schools system. This class-wide compensatory payment, which is referred to as the Common Experience Payment ("CEP"), is one of five key elements of the settlement before the court. In addition, there is an Independent Assessment Process ("IAP"), which will facilitate the expedited resolution of claims for serious physical abuse, sexual assaults and other abuse resulting in serious psychological injury. The foregoing elements are aimed at personal compensation for the students who attended the schools. The other three elements of the settlement are designed to provide more general, indirect benefits to the former students and their families. These elements are the establishment of a Truth and Reconciliation Commission, with a mandate to make a public and permanent record of the legacy of the schools, in conjunction with the earmarking of a significant portion of the settlement fund for healing and commemoration programs.

[66] The IAP, which it is to be noted Justice Winkler felt would facilitate the expedited resolution of claims for serious claims, is administered by the Indian Residential Schools Adjudication Secretariat under the supervision of the Chief Adjudicator.

[67] In an inquisitorial system, adjudicators determine the appropriate level of compensation, if any, to be awarded. The IAP provides for compensation to a maximum of $275,000.00 plus actual income loss, if proved, of another $250,000.00. An unsatisfied IAP claimant may appeal to the Chief Adjudicator or his designate. There is no express right of appeal to the courts from an IAP hearing decision. However, I foreshadow to say that in the analysis later in these Reasons for Decision, I point out that there is access to the courts through Requests for Directions and through the court's jurisdiction to administer and implement the IRSSA.

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[68] Under the express terms of the IRSSA, the only instances where the court would have a right to make a determination in respect of the IAP arises where an IAP Claimant has sought the approval of the Chief Adjudicator to resolve an exceptional matter with the court, such as in instances where a claim for actual income loss may exceed the maximum quantum of the IAP. These exceptional matters are addressed by the courts according to their own standards, rules and processes.

[69] Over 17,000 IAP claims with compensation in excess of $2 billion have been resolved to date with thousands more to be resolved in the coming years. Of the resolved claims, 1,578 claimants received no award, which is approximately 9 percent of the total number of claims.

[70] A total of 166 IAP claims alleging compensable abuse at St. Anne's IRS have been resolved. Of those, 151 St. Anne's Claimants have been compensated, 3 Claimants received no compensation, and 12 Claimants withdrew from the IAP.

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5. The Procedure for the Independent Assessment Process ("the IAP")

(a) A Claims and Inquisitorial Adjudicative Process

[71] In the various arguments made in the RFDs before the court, there was considerable debate about the nature of the IAP and whether it was a continuation of litigation or a non-litigious compensation distribution system. The outcome of this debate was thought to bear on such issues as the application of the deemed undertaking and the question of the court's jurisdiction to impose and enforce disclosure obligations on Canada in accordance with normative rules of natural justice and for civil procedure.

[72] As the discussion that follows will indicate, there are many elements of the procedure for the IAP that denote or connote litigation and civil procedure. The procedure contains directions with respect to what amounts to pleadings of a case, the production of evidence, onus of proof, standard of proof, hearings, testimony, credibility, examinations, cross-examinations, etc. While there are also elements that are unique so that the IAP might be regarded as *sui generis,* it is undoubtedly a form of litigation.

[73] That the IAP is a type of litigation was clear to Justice Winkler in his judgment in *Baxter v. Canada*, *supra* where he addressed the deficiency of the IRSSA as it was originally proposed. Justice Winkler noted "the potential for conflict for Canada between its proposed role as administrator and its role as a continuing litigant" (para. 38). Earlier in his judgement (at para. 29), he described the IAP as "an opportunity to litigate their claims in an extra-judicial process." Justice Winkler stated that "the administrative function must be completely isolated from the litigation function."

[74] Justice Winkler's answer to Canada's conflict of interest in the administration of the IRSSA was to require that authority over the administrative side of the settlement ultimately rest with persons who would report and take direction from the court. At para. 39 of his judgment, he stated:

> The administration of the settlement will be under the direction of the courts and they will be the final authority. Otherwise, the neutrality and independence of the administrator will be suspect and the supervisory authority of the courts compromised.

[75] The procedure for the IAP is set out in Schedule D of the IRSSA. In *Fontaine v. Canada (Attorney General)*, 2012 BCSC 839 at paras. 29-30, Justice Brown described the IAP as follows:

> 29. The purpose of the IAP is to provide a modified adjudicative proceeding for the resolution of claims of serious physical or sexual abuse suffered while at a residential school. The hearings are to be inquisitorial in nature and the process is designed to minimize further harm to claimants. The adjudicator presiding over the hearing is charged with asking questions to elicit the testimony of claimants. Counsel for the parties may suggest questions or areas to explore to the adjudicator but they do not question claimants directly.
>
> 30. The hearings are meant to be considerate of the claimant's comfort and well-being but they also serve an adjudicative purpose where evidence and credibility are tested to ensure that legitimate claims are compensated and false claims are weeded out. It is strongly recommended that claimants retain legal counsel to advance their claims within the IAP.

[76] The IAP begins with an application that appears to serve functions similar to a statement of claim. In the application form, the Claimant provides details of the wrongdoing with dates, places, times, and the Claimant provides information to identify the alleged perpetrator. In the application, the Claimant provides a Narrative in the first person and outlines his or her request for compensation in accordance with the IRSSA. Depending on the nature of the claim for compensation, certain documents must be provided by a Claimant with the application.

[77] If the Claimant's claim is not settled, there is a hearing before an adjudicator supervised by the Chief Adjudicator of the Indian Residential Schools Independent Assessment Process.

[78] The parties to an IAP hearing are the Claimant, Canada, and any Church entity affiliated with the particular Residential School where the assault occurred. The parties may have counsel. The IAP hearing serves two purposes: testing the credibility of the claimant, and assessing the harm suffered by him or her: *Fontaine v. Canada (Attorney General)*, 2012 BCSC 1671 at para. 38.

[79] The IRSSA does not preclude a Claimant from producing documents in support of his or her claim beyond those articulated as mandatory in the application process. The relevance and admissibility of documents is determined by the adjudicator on a case-by-case basis.

[80] In the IAP, Canada or the defendant Church entity must attempt to locate the alleged perpetrator and invite him or her to the hearing, but the alleged perpetrator is not a party and has no right of confrontation. The alleged perpetrator is not compelled to attend an IAP hearing, but he or she may give evidence as of right. Notably, the alleged perpetrator bears no financial risk or liability in the IAP. The liability to pay compensation rests with Canada

[81] An alleged perpetrator may provide a witness statement should he or she elect to participate in the hearing. If the alleged perpetrator refuses to provide such a statement, counsel for any party may interview the alleged perpetrator, but the alleged perpetrator will not be permitted to participate in the hearing if there is no witness statement or interview provided in advance.

[82] The IAP is private and confidential. Hearings are closed to the public and participants are required to agree to keep information confidential or as required by law. The adjudicator prepares a decision with reasons. Decisions are redacted to remove identifying information about Claimants and perpetrators. While the documentation and information provided to Claimants and

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adjudicators may include allegations of abuse by individuals other than those named in the complaint at issue, names of other students or persons are redacted.

[83] At an IAP hearing, the adjudicator manages the hearing, questions the witnesses other than experts retained by the adjudicator. The parties may suggest questions for the adjudicator to ask. The parties question experts, who may include psychologists or psychiatrists.

[84] Only the adjudicator may order that an expert conduct an assessment of the Claimant. Unless the parties consent, the assessment may only be conducted after the adjudicator has heard the evidence of the other witnesses and made findings of credibility.

[85] In order to receive compensation in the IAP, the onus is on the Claimant to prove on a balance of probabilities the alleged compensable abuse, any loss of opportunity, aggravating factors, and the need for future care. Schedule D of the IRSSA states:

> Except as otherwise provided in this IAP, the standard of proof is the standard used by the civil courts for matters of like seriousness. Although this means that as the alleged acts become more serious, adjudicators may require more cogent evidence before being satisfied that the Claimant has met their burden of proof, the standard of proof remains the balance of probabilities in all matters.

[86] For standard track claims, such as physical abuse, once compensable abuse and harms have been proven on a balance of probabilities, the Claimant must also establish a "plausible link" ("PL") between the abuse and the harms. A plausible link is the surrogate for proof of causation.

[87] In the complex track, "the standard for proof of causation and the assessment of compensation within the Compensation Rules is the standard applied by the courts in like matters. For example, in order to advance a claim for serious physical abuse by a former IRS employee, a Claimant would be required to provide credible and reliable evidence that the alleged assault met the "PL" threshold; namely:

> One or more physical assaults causing a physical injury that led to or should have led to hospitalization or serious medical treatment by a physician; permanent or demonstrated long-term physical injury, impairment or disfigurement; loss of consciousness; broken bones; or a serious but temporary incapacitation such that bed rest or infirmary care of several days duration was required. Examples include severe beating,, whipping, and second-degree burning.

[88] Assaults as recognized in civil or criminal litigation are not synonymous with the plausible link between the abuse and the harm under the IAP. Under the IAP standards proof of physical injury is required and not all forms of physical assault may be compensable. Schedule D provides adjudicators with special instructions for physical assaults as follows:

> *C. Additional Instructions re Physical Assaults*
>
> 1. Since a physical injury is required to establish a compensable physical assault in this IAP, a need for medical attention or hospitalization to determine whether there was an injury does not establish that the threshold had been met.
>
> 2. "Serious medical treatment by a physician" does not include the application of salves or ointment or bandages or other similar non-invasive interventions.
>
> 3. Loss of consciousness must have been directly caused by a blow or blows and does not include momentary blackouts or fainting.

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> 4. Compensation for physical abuse may be awarded in this IAP only where physical force is applied to the person of the Claimant. This test may be deemed to have been met where: the Claimant is required by an employee to strike a hard object such as a wall or post, such that the effect of the force to the Claimant's person is the same as if they had been struck by a staff member; provided that the remaining standards for compensation within this IAP have been met.

[89] With regard to claims of one student being abused by another, the Claimant bears the onus of proving that:

> an adult employee of the government or church entity which operated the IRS in question had or should reasonably have had knowledge that abuse of the kind alleged was occurring at the IRS in question during the time period of the alleged abuse, and did not take reasonable steps to prevent such abuse.

(b) Legal Fees under the IRSSA and the IAP

[90] There are no awards of costs for Claimants' counsel in an IAP proceeding. Rather, Canada makes a contribution towards fees and disbursements.

[91] The IRSSA provides that where compensation is awarded, Canada makes a contribution of 15 percent of a Claimant's IAP award towards the Claimant's legal fees plus legal disbursements. With respect to those fees, claimants may also pay their counsel for services rendered, on the terms of their retainer, but paragraph 17 of the Implementation Order caps counsel fees at 30 percent of the award inclusive of Canada's 15 percent contribution.

[92] Paragraph 17 provides for a review of the legal fees. It states:

> *Review of IAP Legal Fees*
>
> 17. THIS COURT ORDERS that all legal fees charged by legal counsel to claimants pursuing claims through the IAP shall not exceed 30% of compensation awarded to the client. This 30% cap shall be inclusive of and not in addition to Canada's 15% contribution to legal fees, but exclusive of GST and any other applicable taxes. The 30% cap shall also be exclusive of Canada's contribution to disbursements. Upon the conclusion of an IAP hearing legal counsel shall provide the presiding Adjudicator (the "Adjudicator") with a copy of their retainer agreement and the Adjudicator shall make such order or direction as may be required to ensure compliance with the said limit on legal fees.

[93] Paragraph 18 of the Implementation Orders sets out the procedure for a review of the fairness and reasonableness of Claimant counsel's fees at the request of the Claimant or on the Adjudicator's own motion. Paragraph 18 sets out the principles for the assessment of accounts. The factors for determining the reasonableness of the fees are similar to the factors commonly used in the assessment of fees under a *Solicitors Act* assessment.

[94] Paragraph 19 provides that Claimants or their legal counsel may request the Chief Adjudicator or his designate review a ruling by an Adjudicator on the fairness and reasonableness of legal fees. No other review or appeal is provided for in either the IRSSA or the approval and implementation Orders.

[95] Outside of the IAP and its treatment of lawyer's fees, in *Fontaine v. Canada (Attorney General)*, 2012 BCSC 313 at para. 40, Justice Brown stated that the costs incurred in a Request for Directions may be dealt with under the regular costs rules applicable to court proceedings.

[96] I shall have more to say about the court's jurisdiction to award costs later in these Reasons for Decision.

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(c) Canada's IAP Disclosure Obligations

[97] Canada's document disclosure obligations under the IRSSA with respect to the IAP are set out in Schedule D, Appendix VIII "Government Document Disclosure." Canada has detailed disclosure obligations with respect to providing information about: IAP Claimants, the residential school attended by the Claimant; documents mentioning sexual abuse at the school; and alleged perpetrators of assaults (Persons of Interest or POIs).

[98] As will be seen these obligations include the preparation of reports about POIs and also reports known as Narratives. These are histories about the residential schools. The Narratives and the POIs are prepared by Aboriginal Affairs and Northern Development Canada ("AANDC"), the department of Canada with responsibility for policies relating to Aboriginal peoples in Canada.

[99] In particular, Appendix VIII provides (with my emphasis added):

> The government will search for, collect and provide a report setting out the dates a Claimant attended a residential school. ....
>
> The government [Canada] will also search for, collect and provide a report about the persons named in the Application Form as having abused the Claimant, including information about those persons' jobs at the residential school and the dates they worked or were there, as well as any allegations of physical or sexual abuse committed by such persons, where such allegations were made while the person was an employee or student. ["Person of Interest Report" or "POI Report"]
>
> Upon request, the Claimant or their lawyer will receive copies of the documents located by the government, but information about other students or other persons named in the documents (other than alleged perpetrators of abuse) will be blacked out to protect each person's personal information, as required by the *Privacy Act*.
>
> The government will also gather documents about the residential school the Claimant attended, and will write a report summarizing those documents. The report and, upon request, the documents will be available for the Claimant or their lawyer to review. ["IRS School Narrative"]
>
> In researching various residential schools to date, some documents have been, and may continue to be, found that mention sexual abuse by individuals other than those named in an application as having abused the Claimant. The information from these documents will be added to the residential school report. Again, the names of other students or persons at the school (other than alleged perpetrators of abuse) will be blacked out to protect their personal information. [emphasis added]
>
> The following documents will be given to the adjudicator who will assess a claim:
>
> - documents confirming the Claimant's attendance at the school(s);
> - documents about the person(s) named as abusers, including the persons' jobs at the residential school, the dates that worked or were there, and any sexual or physical abuse allegations concerning them;
> - the report about the residential school(s) [the Narrative] in question and the background documents; and,
> - any documents mentioning sexual abuse at the residential schools in question.
>
> With respect to student-on-student abuse obligations, the governments will work with the parties to develop admissions from completed examinations for discovery, witness or alleged perpetrator interviews, or previous DR [dispute resolution] or IAP decisions relevant to the Claimant's allegations.

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[100] It is necessary to note that Under Appendix VIII, in addition to preparing POI reports, Canada must gather documents about the residential school the Claimant attended and write a report summarizing those documents; i.e. Canada must prepare a Narrative for each school. This is a continuing obligation as documents are found that mention sexual abuse by individuals other than those named in an application.

[101] Under the IRSSA Adjudicators, Claimants and their counsel are provided with Canada's document collection for each IRS named on a given IAP claim, and an Adjudicator may use this disclosure as a basis for a finding of fact or credibility.

[102] The IRSSA also states that once a document has been identified that the Claimant or their lawyer can request the document and Canada is obliged to provide a copy, however, ensuring that the privacy rights of others will be protected through redacting. Section D, Appendix VIII, of the IRSSA states:

> Upon request, the Claimant or their lawyer will receive copies of the documents located by the government, but information about other students or other persons named in the documents (other than alleged perpetrators of abuse) will be blacked out to protect each person's personal information, as required by the Privacy Act.

[103] Section D, at pg. 13, allows Adjudicators to take into consideration previous criminal or civil trials. It states that "Relevant findings in previous criminal or civil trials, where not subject to appeal, may be accepted without further proof."

[104] As described below, Canada has prepared several Narratives for St. Anne's.

6. Abuse at St. Anne's Residential School and the Ontario Provincial Police Investigation

[105] St Anne's Indian Residential School is located in Fort Albany, Ontario on James Bay. St. Anne's was the site of some of the most egregious incidents of abuse within the Indian Residential School system. It is known, for example, that an electric chair was used to shock students as young as six years old. It is known that the staff at St Anne's residential school would force ill students to eat their own vomit.

[106] St. Anne's operated from 1902 to 1970 within a Roman Catholic mission, which included a Residential School Program from 1904. From 1970 to 1976, St. Anne's was operated by the Federal government. It closed in 1976.

[107] The students who attended St. Anne's were drawn from the Fort Albany, Attawapiskat, Weenusk, Constance Lake, Moose Fort, and Fort Severn reserves. Children were required to attend residential schools for approximately 8 years, starting as early as age 5 or 6, living apart from their parents during most of the year.

[108] The process for justice for the children who were abused at St. Anne's started with the 1992 Keykaywin Conference, which sought to bring the abuse to light and promote healing among St. Anne's survivors. The Conference triggered an investigation by the OPP.

[109] The Ontario Provincial Police began its investigation of St. Anne's residential school in 1992 and completed it in 1996. The OPP were given approximately 992 signed statements from about 700-750 people. In 1997, the OPP laid charges against seven former employees of St.

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Anne's: Marcel Blais, Claude Chernier, J.C., Jane Kakeychewan, Claude Lambert, Anna Wesley, and John Rodrigue. All but J.C. were convicted of some charges.

[110] Over the course of its investigation, the OPP obtained and created a voluminous collection of documents regarding St. Anne's and the abuses that took place there. The records include statements of former residential school students, and over 7,000 documents seized from several church organizations. The OPP provided the following categorization of its documents:

- Civilian Statements (approximately 1,000)
- Police statements
- Correspondence
- Crown Briefs (18)
- Exhibit Reports
- Judicial authorizations, search warrants, search plans
- Information to Obtain
- Police statements
- Police summaries of civilian statements
- Forensic summaries/reports
- Press releases and media reports
- Tip Register (for police tips)
- Victim backgrounds
- Victim Impact Statements
- Persons of interest
- Accused background/statements
- Civil litigation materials in Shisheesh claim
- Details of Ste. Anne's Residential School (maps, school staff register, architectural drawings, and other historical school documents)
- Indian Affairs quarterly returns
- Ste. Anne's Residential School reunion and conference materials
- Miscellaneous documents representing the fruits of the OPP investigation
- Crown/Police legal advice (solicitor-client privilege)
- Police work product (investigative privilege)

7. Canada's Possession of OPP Documents of the St. Anne's Investigation and Other Records of the Events at St. Anne's

[111] As mentioned above, in the 2000s, Canada defended the numerous civil actions brought by the students of St. Anne's. Included among those actions were the collection of 156 actions, mentioned above, brought by one law firm against Canada and others. Although the Applicants and the Assembly of First Nations did not know about it until 2013, in 2003, Canada brought a motion to the Superior Court to obtain possession of the OPP records for those 156 actions on the basis that the records were "relevant and necessary" to the adjudication of the pending civil trials and that it would be "unfair" to require Canada to proceed to trial without production of the records.

[112] On August 1, 2003, Justice Trainor issued an order regarding the production of the OPP records to Canada. The Order was based on the motion by Canada, the consent of the plaintiffs,

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the church defendants not opposing, and counsel for the OPP not attending. A schedule to the Order indicates that it applied for 154 actions.

[113] Justice Trainor ordered that counsel for the parties have an opportunity to inspect and copy the contents of the OPP files. With respect to the OPP files that relate to non-plaintiffs, he ordered that a mutually convenient date and means of obtaining copies of the documentation relating to non-plaintiffs was to be arranged between Canada and the OPP.

[114] Justice Trainor's Order stated:

> THIS COURT ORDERS that counsel for the parties may inspect and copy the contents of the Ontario Provincial file of the investigation of St. Anne's Residential School, relating to the Plaintiffs set out in Exhibit "A" of the motion record, any perpetrators, and to any further plaintiffs added to the action or any further perpetrators which become known.
>
> THIS COURT ORDERS the remainder of the Defendant's motion as it relates to information in the Ontario Provincial Police file, of non-plaintiffs, is hereby adjourned sine die". ... This order pertains to all of the actions listed in the Motion Record and to any further actions which may be heretofore brought by Plaintiffs' counsel.

[115] Pursuant to Justice Trainor's order, Canada came to be in the possession of copies of some, but perhaps not all of the OPP documents.

[116] Independent of Justice Trainor's order, in the context of defending civil cases and or by participating in the ADR pilot project, Canada purchased transcripts of some (if not all) of the criminal proceedings against former employees of St. Anne's.

[117] The OPP Documents and the transcripts have been stored at Canada's offices, more precisely at the offices of the Department of Justice in Toronto.

[118] The OPP documents and the transcripts have not been provided to the persons at Aboriginal Affairs and Northern Development Canada ("AANDC") who prepare the Narratives for the IAP.

8. Canada's Disclosure for St. Anne's IAP Claims and Non-Production of the OPP Documents

[119] Although there is a serious question about whether Canada has adequately honoured its disclosure obligations under the IRSSA, Canada did produce documents to the Truth and Reconciliation Commission. And Canada did produce documents for the St. Anne's IAP Claimants. Canada has produced several versions of the factual Narrative that it is required to prepare under the IRSSA. Canada, however, did not produce its copies of the OPP documents, and until recently, Canada did not reveal that it had OPP documents in its possession.

[120] Subject to its own assessment of relevancy, which I foreshadow to say, in my opinion has been inadequate, Canada has disclosed information for each St. Anne's IRS claimant file. The information will be different for each school and Canada may provide the following types of information: (a) a report about the Claimant's attendance at the residential school; (b) report(s) with respect to Persons of Interest named as having abused the Claimant ("POI Report"); (c) transcript(s) from previous civil litigation or the ADR Program in which Canada was named as a Defendant; (d) documentation with respect to criminal convictions; and (e) report(s) on the residential school named by the Claimant ("IRS Narrative").

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[121] Although, as noted above, Canada has had copies of some OPP Documents and copies of some of the transcripts of proceedings against Persons of Interest, these documents have not been provided to the persons at Aboriginal Affairs and Northern Development Canada ("AANDC") who prepare Narrative and POI Reports.

[122] It is Canada's position that it is not obliged to provide documents about Persons of Interest that were created after the POI left a residential school. However, on an *ex gratis* basis it will disclose known criminal convictions that post-date the POI's term at a residential school where such information has come to Canada's attention and it is available in the public domain. It is Canada's position that this information may be relevant if a particular IAP claimant was the complainant in the criminal proceeding. Thus, Canada has disclosed conviction information on a majority of claims where an IAP Claimant has named a former employee of St. Anne's IRS with a known conviction.

[123] Three versions of the St. Anne's Narratives have been disclosed through the course of the IAP to date, and in the first and the third (and most recent) version criminal charges and convictions of former employees of St. Anne's were referenced.

[124] Canada acknowledges that it obtained the transcripts of some criminal proceedings and remains in possession of these transcripts in respect of former employees of St. Anne's. However, it states that these transcripts have not been disclosed as they are both irrelevant and inadmissible to the individual assessment of claims and outside of the scope of Canada's disclosure obligations under the IRSSA. Thus, the Narrative for St. Anne's does not include the transcripts of the criminal proceedings involving the former employees of St. Anne's.

[125] Canada first completed a Narrative for St. Anne's on November 12, 2008. This Narrative was a revision of the Narrative that Canada had prepared for the ADR project in 2004, but unlike the 2004 Narrative, which referred to criminal charges and convictions, the 2008 Narrative makes no mention of the charges and convictions.

[126] Under the heading "Documents Referring to School Incidents", the 2008 Narrative incorrect states that four incidents of physical abuse comprise all known identifiable complaints and/or allegations received by government officials and all available information regarding the follow-up and outcome. The four incidents do not relate to the OPP investigation or the criminal prosecutions. Having regard to what is now known to be OPP documents in the possession of Canada, the 2008 Narrative also incorrectly states that there were no known incidents found in documents regarding sexual abuse.

[127] Canada now concedes that these are mistakes in the 2008 Narrative, which it says it has corrected, but it has no explanation as to why mistakes were made in the 2008 Narrative. Canada does not concede that the omissions from the 2008 were of any moment or consequence.

[128] On August 20, 2012, Canada produced a list of documents in connection with its document production obligations. In this document, Canada indicated that it possessed documents relating to ongoing litigation regarding St. Anne's and asserted privilege with respect to these documents without identifying the particular documents. Canada did not identify and disclose that it was in possession of and was asserting privilege over the OPP documents.

[129] On October 1, 2013, a new Narrative report for St. Anne's was produced at a hearing. Canada submits that this Narrative satisfies its disclosure obligations under the IRSSA for the IAP. The 2013 Narrative includes references to the OPP investigation and the criminal charges

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and convictions that stemmed from it, but does not rely upon the transcripts from the criminal trials and does not refer to any documents from the OPP investigation.

[130] The transcripts in the possession of Canada have never been reviewed for the purpose of preparing the Narrative or the POI reports. The transcripts among other things disclose evidence of the abuse that occurred at the school and include expert medical evidence led by the Crown that assaulting a child for becoming ill or forcing a child to eat vomit caused physical and psychological harm. Not all criminal proceedings are listed in the 2013 Narrative.

[131] None of the POI Reports for St. Anne's disclose the existence of the OPP Documents or to transcripts of criminal or civil proceedings that are in the possession of Canada. The POI Reports only contain records of conviction. For example, the POI for Anna Wesley contains no reference to the evidence about physical abuse of children at St. Anne's presented at the trial or of her practice of forcing students to eat their own vomit in the dining room at the school, in front of their peers.

[132] For another example, IAP claimants who name John Rodrique as a perpetrator have been given a POI report with records of convictions for a number of sexual assaults, but no transcripts. Had the transcripts been referred to they would have disclosed that Mr. Rodrique plead guilty plea for sexually abusing 6 boys at St. Anne's. The transcripts contain details of the nature of the assaults. Canada has had this transcript since 2003.

[133] For yet another example of a transcript available since 2003, IAP Claimants who identify J.C. as a perpetrator were given a POI report that made no reference to any allegations of sexual abuse against J.C., although he was subject to a preliminary hearing and trial on allegations of sexual abuse of a student at St. Anne's. J.C. was acquitted, but the transcripts available to Canada include "allegations" of abuse and the trial judge's reasons indicate that the acquittal was based on the prosecution's failure to meet the criminal standard of proof.

[134] Here, it may be recalled that Appendix VIII provides that Canada "search for, collect and provide a report about the persons named in the Application Form as having abused the Claimant … as well as any allegations of physical or sexual abuse committed by such persons, where such allegations were made while the person was an employee or student."

9. The Discovery of the Alleged Non-Disclosure of OPP Documents and Transcripts

[135] Starting in January 2012, Fay Brunning, who is Applicants lawyer, and Suzanne Desrosiers, a lawyer from Timmins, traveled to communities along the James Bay coast to provide independent legal advice to former residential school students in the region.

[136] By May 2012, some former students who became clients advised they had testified in court against Anna Wesley and John Rodrigue.

[137] Ms. Brunning contacted Detective Constable Delguidice of the Cochrane OPP, and after that contact, on June 3, 2012, Norm Feaver, counsel for the OPP, wrote that the OPP could not legally disclose investigation records without the consent of the people whose information may be found in the records. He suggested a motion or a Freedom of Information (FOI) request was possible for individuals who spoke to the police for disclosure of their own statements.

[138] On July 30, 2012, Ms. Brunning sent an email to Canada (the Department of Justice) and advised that there had been an OPP investigation into abuse at St. Anne's, which investigation

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had involved around 1,000 interviews. She asked Canada to gather and view all this evidence now known to exist, for the purpose of relevance to IAP claimants.

[139] On August 7, 2012, the Department of Justice replied and referred to Appendices VII and VIII as setting out the production obligations of Claimants and Canada.

[140] The same day, Ms. Brunning sent an email and asked Canada government to obtain the OPP documentation at its own expense.

[141] Also on August 7, 2012, Canada' counsel replied that Canada adheres to Appendix VIII of Schedule 'D' to the IRSSA. The email stated: "[A]s as you advise that some of your clients made allegations to the OPP in the 1990s (well after St. Anne's closure in 1976), then these allegations are not captured by the IAP's government disclosure requirements."

[142] Around December 2012, at IAP hearings, counsel for the Applicants took the position that the Narrative for St. Anne's was incomplete. The Applicants' Counsel argued that the Narrative was missing crucial information about the OPP investigation and criminal proceedings.

[143] In February 2013, the Claimant in W-10876 sought to introduce some documents that confirmed criminal convictions of Anna Wesley pertaining to St. Anne's students being forced to eat vomit or being assaulted by her. Canada objected to the admissibility of any statements given to the OPP or any evidence about the OPP investigation, on the basis that this evidence could only be admitted through live testimony and, in any event, the evidence was not relevant to credibility, liability, or compensation, including aggravating factors. The Claimant persisted and asked that Canada obtain and produce transcripts of the criminal trials of Anna Wesley to see the details of those convictions and her *modus operandi*. This request was refused and the hearing went ahead without the transcripts.

[144] In June 2013, Canada acknowledged for the first time that it was in possession of the OPP records in an email to counsel for the Applicants. On June 25, 2013, Canada's counsel wrote to "clarify that [she had] not state[d] that Canada has 'not previously sought' the transcripts of criminal proceedings". Rather, she wrote:

> In the course of the litigation in about 2003, transcripts were purchased of some of the criminal proceedings relating to St. Anne's former employees, including [Anna Wesley]. In the IAP, these transcripts are not referred to by Canada as they are not probative of issues in this process. It should be noted that [Anna Wesley] is deceased.

[145] In correspondence dated August 27, 2013, counsel to the Commission, requested that Canada produce the OPP records or advise the Commission as to the basis upon which Canada refused to produce the records.

[146] In correspondence dated September 12, 2013, Canada's counsel advised that Canada would not produce the OPP records because they were subject to an implied undertaking not to use the documents for any purpose other than the litigation or pursuant to the express terms of the third party production order of the Ontario Superior Court of Justice.

[147] On September 27, 2013, the Applicants counsel brought a motion for four claimants, who had pending IAP claims, for an order that Canada produce transcripts of the proceedings in *R. v. Wesley* and *R. v. Rodrique.*

[148] I granted the order without prejudice to Canada's right to argue at the hearing of this Request for Directions whether it is is obligated to provide a copy of the transcripts in the IAP

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and without deciding whether there was an obligation to pay for the copies of the transcripts. This was the first time that a transcript was produced by Canada in the St. Anne's IAPs.

10. The Truth and Reconciliation Commission's Attempts to Obtain the OPP Documents

[149] As noted above, in correspondence dated August 27, 2013, counsel to the Truth and Reconciliation Commission, requested Canada produce the OPP records or advise why it refused to produce the records.

[150] The Truth and Reconciliation Commission attempted to obtain the OPP records directly from the OPP. In correspondence dated October 31, 2013, The Honourable Justice Murray Sinclair, Chair of the Commission, wrote to Chris D. Lewis, the Commissioner of the OPP, requesting that the records be provided to the Commission in the spirit of reconciliation.

[151] As noted above, the OPP has taken the position that provided that there is a court order and provided that appropriate protections of privilege and privacy claims, it does not oppose producing its documents about the St. Anne's investigation to the Truth and Reconciliation Commission or in the IAP.

D. DISCUSSION AND ANALYSIS OF THE REQUEST FOR DIRECTIONS BY THE TRUTH AND RECONCILIATION COMMISSION

1. Introduction

[152] The RFD by the Truth and Reconciliation Commission raises six issues. The first issue is: Does this court have the jurisdiction to order Canada to produce the OPP documents in its possession to the Commission? The second issue is: If the court has jurisdiction to order Canada to produce the OPP documents to the Commission, ought the court exercise that jurisdiction? The third issue is: Does the deemed undertaking apply to preclude Canada from producing the OPP documents in its possession to the Commission? The fourth issue is: If the deemed undertaking applies, ought the court abrogate the undertaking? The fifth issue is: Does the court have the jurisdiction to order directly the OPP to produce its St. Anne's documents to the Commission? The sixth issue is: How should the court order the production of the OPP documents to the Commission?

2. Does this Court Have the Jurisdiction to Order Canada to Produce the OPP Documents in its Possession to the Truth and Reconciliation Committee?

[153] Under the IRSSA, Canada and the churches are obliged to provide all relevant documents in their possession or control to and for the use of the Commission. In cases where solicitor-client privilege is asserted, Canada is obliged to provide a list of all documents for which the privilege is claimed.

[154] Although some sources of jurisdiction are perhaps more pertinent to the IAP process discussed in the next major section of these Reasons for Decision, the court has several sources of jurisdiction over the performance of the terms of the the IRSSA, and this jurisdiction extends to the governance of Canada's disclosure obligations to the Truth and Reconciliation

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Commission. Indeed, the court has at least three sources of jurisdiction over the performance of the IRSSA. First, there is the court's jurisdiction over the administration of a class action settlement. Second, there is the court's plenary jurisdiction from s. 12 of the *Class Proceedings Act, 1992*; S.O. 1992, c. 6. Third, there is the court's jurisdiction derived from the IRSSA, which includes its jurisdiction to interpret and enforce contracts and its own orders, including its approval and implementation orders of the IRSSA.

[155] The first source of jurisdiction to order Canada to produce the OPP documents for the Commission is the court's power over the administration of class action settlements. The court's inherent jurisdiction, the applicable class proceedings law, and the approval and implementation order provide the court with the powers to make orders and impose such terms as necessary to ensure that the conduct of the IAP, which implements the settlement, is fair and expeditious: *Fontaine v. Canada (Attorney General)*, 2013 BCSC 1955 at para. 21.

[156] The court has an ongoing obligation to oversee the implementation of the settlement and to ensure that the interests of the class members are protected. Where there are vulnerable claimants, the court's supervisory jurisdiction will permit the court to fashion such terms as are necessary to protect the interests of that group: *Fontaine v. Attorney General (Canada)*, 2012 BCSC 839 at para. 120. In *Baxter v. Canada (Attorney General)*, *supra*, Justice Winkler stated at para. 12:

> 12. .... The court has an obligation under the *Class Proceedings Act* ("CPA") to protect the interests of the absent class members, both in determining whether the settlement meets the test for approval and in ensuring that the administration and implementation of the settlement are done in a manner that delivers the promised benefits to the class members. In seeking the approval of the court, the plaintiffs and defendants essentially seek the benefits of having the court sanction the settlement. Such approval cannot be divorced from the obligation it entails. Once the court is engaged, it cannot abdicate its responsibilities under the CPA.

[157] The supervisory jurisdiction of the Court is to be exercised to ensure that claimants obtain the intended benefits of the IRSSA and to ensure that the integrity of the implementation and administration of the agreement and related processes are maintained: *Fontaine v. Attorney General (Canada)*, 2012 BCSC 1671 at para. 50. In *Fontaine v. Canada (Attorney General)*, 2006 YKSC 63 at para. 54, Justice Veale stated that any deficiencies in the administration of the IAP can be remedied under the court's supervisory jurisdiction. The court's supervisory jurisdiction over class action settlements includes the jurisdiction to remedy any mechanical or administrative problems with the settlement: *Bodnar v Cash Store Inc., supra* at paras. 117-130.

[158] The court has administrative jurisdiction over a class action settlement independent of any conferral of jurisdiction by the settlement agreement: *Fantl v Transamerica Life Canada*, 2009 ONCA 377 at para. 39; *Spavier v Canada (Attorney General)*, 2006 SKQB 4999 at para. 13; *Lavier v MyTravel Canada Holidays Inc.*, 2011 ONSC 3149; *Bodnar v Cash Store Inc.*, 2011 BCSC 667 at paras. 96-130. Under the IRSSA, the parties agreed to involve the court in the administration of the settlement, but in any event, the court retains jurisdiction over the implementation of a settlement it has approved: *Kelman v Goodyear Tire and Rubber Co.* (2005), 5 CPC (6th) 161 at para. 25 (Ont. SCJ).

[159] There are, however, limits to the court's administrative jurisdiction. After the settlement has been approved, the court's administrative and implementation jurisdiction does not include power to vary the settlement reached by the parties: *Lavier v. MyTravel Canada Holidays Inc.*, supra.

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[160] The court does not have the jurisdiction to impose burdens on the defendant that the defendant did not agree to assume: *Lavier v. MyTravel Canada Holidays Inc., supra; Stewart v. General Motors*, (SCJ) unreported, September 15, 2009, per Justice Cullity at pp. 8-9. For example, recently in *Fontaine v. Canada (Attorney General),* unreported November 20, 2013 (BCSC), Justice Brown ruled that the administrative power of the courts did not extend so far as to allow an extension of time for IAP claims that under the IRSSA have a firm deadline of September 19, 2012 without any provision in the agreement for extension or for relief from the deadline.

[161] I foreshadow to say that in my opinion the directions that I shall make later in this judgment, like the changes suggested by Justice Winkler in *Baxter v. Canada (Attorney General)*, *supra,* are not amendments to the IRSSA and do not impose burdens on Canada that Canada did not agree to assume.

[162] The second source of jurisdiction to order Canada to produce the OPP documents for the Commission is the plenary jurisdiction provided by s. 12 of the *Class Proceedings Act, 1992* and comparable provisions in the class actions statutes from across the country. Section 12 states:

> 12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

[163] The court has broad powers under s. 12 of the *Class Proceedings Act, 1992* to ensure that a class action proceeds in both an efficient and fair manner: *Guglietti v. Toronto Area Transit Operating Authority (c.o.b. Go Transit)*, [2000] O.J. No. 2144 (S.C.J.) at para. 6; *Peter v. Medtronic Inc.*, [2008] O.J. No. 4378 (S.C.J.) at paras. 21-23.

[164] In a class proceeding, the court is empowered to make any order it considers necessary to ensure the fair and expeditious determination of the proceedings on such terms as it considers appropriate: *Vitapharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.* (2000), 48 O.R. (3d) 21 (S.C.J.) at para. 50; *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (S.C.J.) at pp. 141 and 148, paras. 41 and 73. *Fenn v. Ontario*, [2004] O.J. No. 2736 (S.C.J.) at paras. 13-17; *Vitelli v. Villa Giardino Homes Ltd.* (2001), 54 O.R. (3d) 334 (S.C.J.); *Lewis v. Shell Canada Ltd.* (2000), 48 O.R. (3d) 612 (S.C.J.); *Fantl v. Transamerica Life Canada* 2009 ONCA 377.

[165] The third source of jurisdiction to order Canada to produce the OPP documents for the Commission is the authority derived from the IRSSA, the approval order and the court's implementation order. It is to be recalled that under the approval orders, the courts are authorized "to issue such orders as are necessary to implement and enforce the provisions of the Agreement and this [approval] judgment."

[166] It should be noted that the power to implement and enforce an agreement would include the court's normal jurisdiction under the law of contract and the law of civil procedure to interpret documents and to enforce contracts and court orders.

[167] Pausing here in the discussion of the court's three sources of jurisdiction, it is necessary to return to Justice Goudge's decision in *Fontaine v. The Attorney General of Canada*, 2013 ONSC 684, which alluded to a public law basis for the court jurisdiction over the IRSSA. And, it is necessary to discuss the Court of Appeal's decision in in *Fontaine v. Duboff, Edwards Haight*

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& Schacter, 2012 ONCA 471 that holds that the decisions made pursuant to IRSSA are not amenable to public law judicial review. This is necessary because but for the Court of Appeal decision in *Fontaine v. Duboff, Edwards Haight & Schacter,* discussed below, there is an argument that there is a fourth source of jurisdiction to order Canada (or the OPP) to produce documents under the IRSSA.

[168] This public law source of jurisdiction was alluded to by Justice Goudge in *Fontaine v. The Attorney General of Canada*, 2013 ONSC 684 where Canada made the argument that since the Truth and Reconciliation Commission was not a party under the IRSSA with privity of contract, the Commission did not have the standing to make a RFD for an interpretation of the agreement. Justice Goudge did not have to answer this objection to the Commissions' standing, because genuine parties to the IRSSA were also seeking an interpretation of the agreement (which is also the situation in the case at bar), but he observed that the IRSSA was not just a contract but was a matter of public law as well as private law. He stated at para. 56:

> While I do not therefore propose to address that question, were I to do so, I do have some concern about the applicability of the doctrine of privity of contract to the TRC's standing to seek [page276] direction on the meaning of the Settlement Agreement. I am not sure that the Settlement Agreement can be said to be simply a private contract that should be governed only by private law concepts like privity. There are arguably aspects of the Settlement Agreement that seek to structure relationships between Canada and Aboriginal people. The preamble of Sch. N says as much. Moreover, the TRC itself, while a product of the Settlement Agreement is established by an Order-in-Council which sets out its mandate. These two considerations raise the possibility that the Settlement Agreement can be viewed through the lens of public law as well as private law.

[169] But for *Fontaine v. Duboff, Edwards Haight & Schacter,* I would have agreed with Justice Goudge's *obiter* observations that there is a public law aspect to the IRSSA. This notion, however, was rebuffed by the Court of Appeal in *Fontaine v. Duboff, Edwards Haight & Schacter*. Nevertheless, as will be seen below, the Court's decision in that case also demonstrates that, practically speaking, a judicial review power would be superfluous having regard to the three existing sources of jurisdiction discussed above.

[170] The facts of *Fontaine v. Duboff, Edwards Haight & Schacter* were that the Duboff law firm represented IAP claimants, and pursuant to the IRSSA, an adjudicator reviewed and reduced their fees. The law firm appealed the adjudicator's decision to the Chief Adjudicator, who upheld the original decision. The law firm and the Chief Adjudicator then jointly brought a RFD to Chief Justice Winkler in his capacity as an Administrative Judge under the IRSSA. Chief Justice Winkler ruled that there was no right of appeal from the Chief Adjudicator's decision and no right to seek judicial review of the decision. He noted that the fee review process was part of the IRSSA and that the agreement did not provide for further appeals. As for judicial review, the Chief Justice explained that the adjudicator and the Chief Adjudicator were acting pursuant to the IRSSA and they were not exercising a statutory power of decision subject to judicial review.

[171] The Court of Appeal affirmed the Chief Justice's decision. Justice Rouleau, writing for the Court explained at paras. 52-57 that although judicial review was not available, there were, nevertheless, means to review the decisions of the Chief Adjudicator. He stated:

> 52. ... The office of the Chief Adjudicator was created by order of the courts in approving the negotiated terms of settlement of class action litigation. The authority of that office is exercised in relation to those class members who have elected to advance claims through the IAP and their counsel. The terms of the S.A. and the implementation orders set out the process for reviewing

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> decisions of the IAP Adjudicators. Recourse to the courts is only available if it is provided for in the S.A. or the implementation orders.
>
> 53. I turn now to whether a process, other than an appeal or judicial review, is available to review a decision by the Chief Adjudicator. The Administrative Judge properly confirmed that the IAP Adjudicators "cannot ignore" the provisions of the implementation orders and that "it remains necessary for Adjudicators to apply the required factors" when conducting a legal fee review at first instance. In the perhaps unlikely event that the final decision of the Chief Adjudicator reflects a failure to consider the terms of the S.A. and implementation orders, including the factors set out in para.18 of the implementation orders, then, in my view, the parties to the S.A. intended that there be some judicial recourse. Having said that, I emphasize my agreement with the Administrative Judge's comment, at para. 22 of his reasons, that "there is no implicit right to appeal each determination made within the context of the claims administration or assessment process as an incident of the judicial oversight function." As I will go on to explain, the right to seek judicial recourse is limited to very exceptional circumstances.
>
> 54. The parties intended that implementation of the S.A. be expeditious and not mired in delay and procedural disputes. As noted by the Chief Adjudicator, there are already many checks and balances in place to ensure that the process is administered fairly and in accordance with the terms of the S.A. The Chief Adjudicator is granted broad discretion by the terms of the S.A.
>
> 55. The implementation orders speak to the principles that are to be applied by the Adjudicator in carrying out a fee review at first instance. The parties provided for an ongoing right to seek the assistance of the courts to require compliance with the terms of the implementation orders. As noted, the implementation orders provide, at para. 23:
>
> > [T]he Courts shall supervise the implementation of the Agreement and this order and, without limiting the generality of the foregoing, may issue such further and ancillary orders, from time to time, as are necessary to implement and enforce the provisions of the Agreement, the judgment dated December 15, 2006 and this or-der.
>
> 56. The CAP specifies that recourse to the courts may be obtained by way of a Request for Direction that is to be brought to one of the two Administrative Judges, as designated by the courts.
>
> 57. Thus, in the very limited circumstances where the final decision of the Chief Adjudicator reflects a failure to comply with the terms of the S.A. or the implementation orders, the aggrieved party may apply to the Administrative Judges for directions. .... By providing for recourse to an Administrative Judge in these limited circumstances, the parties will be able to ensure that the bar-gain to which they consented is respected.

[172] Thus, Justice Rouleau confirmed that where there is failure to comply with the terms of the IRSSA or the implementation orders, the aggrieved party may apply to the court by an RFD to ensure that the terms of the IRSSA are respected. That is precisely what has occurred in the case at bar in defining the court's authority to order Canada (or the OPP) to produce documents.

[173] Returning to the three sources of jurisdiction, the court's administrative authority and its authority to interpret the IRSSA has been exercised in a variety of cases; visualize:

- In *Fontaine v. Canada (Attorney General)*, 2007 BCSC 1841, affd. 2008 BCCA 329, the court ruled that a direction by a claimant to pay his or her compensation from the IRSSA was unenforceable as barred by the IRSSA and by s. 68 of the *Financial Administration Act*, R.S.C. 1985, c. F-11.
- In *Fontaine v. Canada (Attorney General)*, 2010 BCSC 1208, the court interpreted how the provisions in the Implementation Order about how the Chief Adjudicator's authority

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to review legal fees applied to fees that were subject to Articles 13.06 to 13.09 of the IRSSA.

- In *Fontaine v. Canada (Attorney General)*, 2012 BCSC 839 certain lawyers and other parties were prohibited from acting for or assisting claimants in IAP proceedings.
- In *Fontaine v. Canada (Attorney General),* 2012 BCSC 1671, the court declared that the Chief Adjudicator had the jurisdiction to formulate rules of professional conduct for lawyers acting in IAP proceedings and to provide for penalties or other disciplinary measures where there is non-compliance but the Chief Adjudicator did not have the authority to remove or suspend lawyers from participation in the IAP. The court stated that the Chief Adjudicator could adjourn any hearings involving counsel in respect of whom a Request for Direction has been brought seeking suspension or removal from the IAP by court order.
- In *Fontaine v. Canada (Attorney General),* 2012 BCSC 1671, the court stated that it had the jurisdiction to order costs against a lawyer who had undermined the proper administration of the IRSSA.
- In *Fontaine v. Canada (Attorney General)*, 2013 MBQB 272, where a claimant was granted leave by an adjudicator to have a lost income claim of over $250,000 determined by a regular action, the court interpreted the IRSSA to allow the balance of the IAP claim to proceed before an adjudicator.
- In *Fontaine v. Canada (Attorney General)*, 2013 ONSC 684, the court interpreted Canada's obligation to provide documents to the Truth and Reconciliation Commission to include relevant documents at Library and Archives Canada. The court defined relevant documents as those that are reasonably necessary for the Commission to discharge its mandate. Relevant documents, however, did not include documents about Canada's remedial response to the aftermath of the residential schools experience and to the adequacy of that response.
- In *Fontaine v. Canada (Attorney General)*, 2013 BCSC 757, the court interpreted the list of residential schools included in the IRSSA by a schedule to not include certain schools that were successor schools with names that differed slightly from the schools listed in the schedule.
- In *Fontaine v. Canada (Attorney General),* 2013 BCSC 1888, the court ordered a lawyer and law firm to produce certain documents in an investigation by the monitor into the activities of the lawyer and his law firm in providing services and to extending loans to IAP clients.
- In *Fontaine v. Canada (Attorney General),* 2013 BCSC 1955, the court ordered a publication ban in IAP proceedings.

[174] In *Fontaine v. Canada (Attorney General),* 2012 BCSC 313, the court was asked to exercise its jurisdiction over the production of documents. In this case, an individual claimant brought a Request for Directions for, among other things, an interpretation of the IRSSA as to whether students of the school who were billeted and did not live in residence were eligible to CEP compensation under the IRSSA. It was Canada's position that the IRSSA could not be interpreted to make billeted students eligible for compensation and that compensation would

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only be possible if the billeted students place of residence was designated a residential school pursuant to Article 12 of the IRSSA or if the IRSSA was amended. In support of its request for an interpretation, the individual claimant sought the production of certain documents in the possession of Canada relating to its role in billeting students in private homes.

[175] Canada resisted the production request in In *Fontaine v. Canada (Attorney General)*, 2012 BCSC 313. Justice Brown stated that she was not - at present - prepared to order Canada to produce documents, apparently because a procedure had been agreed to obtain documents from other sources. However, and this is the point that is important for present purposes, she stated at paras. 35 and 36 that she was not foreclosing an order for production if an Article 12 application were properly made and that she would revisit the request for production and disclosure after the actual application for interpretation was filed. She stated that there may be at that time, depending on the position taken and the grounds relied upon in support, a basis for ordering additional documentary production.

[176] To conclude this section, put shortly, provided that the court does not amend the IRSSA, it has ample powers to require Canada to honour its disclosure and production obligations to the Commission.

3. If the Court Has Jurisdiction to Order Canada to Produce the OPP Documents to the Commission, Ought the Court to Exercise that Jurisdiction?

[177] As just discussed, in my opinion, the court does have the jurisdiction to order Canada to produce the OPP documents in its possession to the Commission. It is further my opinion that the court ought to exercise this jurisdiction to order Canada to produce the OPP documents. (In the next section of these reasons, I shall conclude that the deemed undertaking does not prevent the production of the documents to the Commission, and, in any event, if the deemed undertaking applies, then the court should abrogate the deemed undertaking in the circumstances of this case.)

[178] The court's jurisdiction to enforce performance of the IRSSA ought to be exercised in the circumstances of this case. Canada has OPP documents in its possession, and it was not disputed that those documents are relevant to the mandate of the Commission.

[179] Indeed, the relevance of the documents to the work of the Commission was not seriously challenged. The OPP documents relate to "the effect and consequences of residential schools (including systemic harms, intergenerational consequences and the impact on human dignity)." In particular, the documents speak to the sexual and physical abuse suffered by students at St Anne's Residential School. The documents shed light on an important aspect of the history of residential schools in Canada.

[180] Therefore, I order Canada to produce the OPP documents in its possession to the Truth and Reconciliation Commission in accordance with the provisions of the IRSSA.

4. Does the Deemed Undertaking Apply to Preclude Canada from Producing the OPP Documents in its Possession to the Commission?

[181] I turn now to the matter of the application of the deemed undertaking rule and to explain why, in my opinion, the Rule does not interfere with the order to produce just made.

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[182] Rule 30.1 is the deemed undertaking rule. It states:

RULE 30.1 DEEMED UNDERTAKING

Application

30.1.01 (1) This Rule applies to,

(a) evidence obtained under,

(i) Rule 30 (documentary discovery),

(ii) Rule 31 (examination for discovery),

(iii) Rule 32 (inspection of property),

(iv) Rule 33 (medical examination),

(v) Rule 35 (examination for discovery by written questions); and

(b) information obtained from evidence referred to in clause (a).

(2) This Rule does not apply to evidence or information obtained otherwise than under the rules referred to in subrule (1).

Deemed Undertaking

(3) All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained

Exceptions ....

Order that Undertaking does not Apply

(8) If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that subrule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.

[183] The Commission argues that by its express language, the deemed undertaking rule only applies to proceedings other than the proceeding in which the evidence was obtained. It argues that the undertaking does not preclude the use of evidence obtained in a proceeding being used in that same proceeding. Then, relying on Article 11.01 of the IRSSA, the Commission submits that the proceedings that culminated in the IRSSA include or are the same as the 156 proceedings associated with Justice Trainor's order, and, therefore, the Commission argues that the production of the OPP documents to the Commission is not precluded by the deemed undertaking.

[184] I agree with the Commission's argument. Unless they opted out of the class action, of which there is no evidence, and which is unlikely, the purposes of the plaintiffs in the 156 actions in which the OPP documents were obtained, were overtaken by the purposes of their participating in the IRSSA as IAP Claimants.

[185] Those purposes of participating in the IAP include the IAP being the means to provide access to justice and compensation and those purposes include facilitating the project of the Truth and Reconciliation Commission, which provides a different but equally important route to access to justice. From the perspective of the 156 individual plaintiffs, the documents obtained

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for the 156 actions are being used for what does appear to be the same proceeding or a transformation of it.

[186] I, therefore, conclude that Canada was wrong in thinking that the deemed undertaking applied to the use of the documents it had obtained pursuant to Justice Trainor's order.

[187] I conclude that the deemed undertaking is no obstacle to Canada producing the OPP documents to the Truth and Reconciliation Commission.

5. If the Deemed Undertaking Applies, Ought the Court to Abrogate the Undertaking?

[188] If I am wrong and Canada was correct in taking the position that its possession of copies of the OPP documents was subject to the deemed undertaking, then, pursuant to rule 30.1, I would, in any event, and I do rule that the undertaking does not apply to the OPP documents.

[189] The court is empowered to order that the deemed undertaking does not apply if the court is satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed the evidence: Rule 30.1.01(8); *Browne v. McNeilly*, [1999] O.J. No. 1919 (Ont. S.C.J.), affd [2000] O.J. No. 1805 (Ont. C.A.).

[190] An application to modify or relieve against the deemed undertaking requires the applicant to show on a balance of probabilities the existence of a public interest of greater weight than the values the implied undertaking is designed to protect, namely, privacy and the efficient conduct of civil litigation; *Juman v. Doucette*, [2008] S.C.J. No. 8.

[191] In my opinion, the public interest in disclosing the OPP documents to facilitate the important mission of the Commission and the fulfillment of its mandate outweighs the public interest in the efficient conduct of civil litigation and any privacy interest of the parties to the litigation.

6. Does the Court have the Jurisdiction to Order the OPP to Produce its St. Anne's Documents to the Commission?

[192] In my opinion, notwithstanding that the OPP is a non-party to the IRSSA, the court has the jurisdiction to order the OPP to produce its St. Anne's documents to the Truth and Reconciliation Commission.

[193] The sources of jurisdiction are discussed above. In my opinion, the court's jurisdiction over the administration of a class action settlement, the court's plenary jurisdiction from s. 12 of the *Class Proceedings Act, 1992*, and the court's jurisdiction derived from the IRSSA and from the court's approval and implementation orders, all support the court's authority to make a direct order that the OPP produce the documents listed above.

[194] For the purposes of the case at bar, it is not necessary to discuss what tests should be used to determine when the court should make an order against a non-party to the IRSSA, because the OPP does not oppose the order being made. It is necessary to discuss only how privilege and privacy concerns should be addressed.

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7. How Should the Court Order the Production of the OPP Documents to the Commission?

[195] As will be discussed below, for the production of the OPP documents for the IAP, a procedure must be designed to protect privilege claims and privacy claims. In my opinion, however, it is not necessary to design a procedure for the production of documents to the Truth and Reconciliation Commission because a procedure is already in place under the IRSSA and associated federal and provincial privacy statutes that govern the documents collected by the Commission. In other words, the IRSSA already provides the means to address these concerns.

[196] For convenience, I set out again that Schedule "N" provides as follows:

> In order to ensure the efficacy of the truth and reconciliation process, Canada and the churches will provide all relevant documents in their possession or control to and for the use of the Truth and Reconciliation Commission, subject to the privacy interests of an individual as provided by applicable privacy legislation, and subject to and in compliance with applicable privacy and access to information legislation, and except for those documents for which solicitor-client privilege applies and is asserted.
>
> In cases where privacy interests of an individual exist, and subject to and in compliance with applicable privacy legislation and access to information legislation, researchers for the Commission shall have access to the documents, provided privacy is protected. In cases where solicitor-client privilege is asserted, the asserting party will provide a list of all documents for which the privilege is claimed.

[197] Under the IRSSA, Canada collects documents and delivers them to the Commission in accordance with the terms and conditions set out in the agreement. The OPP should deliver its St. Anne's documents to the Commission in the same manner that Canada does.

[198] Having considered the Commission's RFD, I turn now to the matter of the RFDs of Canada and of the Applicants.

E. DISCUSSION AND ANALYSIS OF THE REQUESTS FOR DIRECTION BY CANADA AND BY THE APPLICANTS

1. Introduction

[199] The RFDs by Canada and by the Applicants raise seven issues. The first issue is: Does the court have jurisdiction to order Canada to produce the OPP Documents and other documents for the IAP? The second issue is: Has Canada breached its disclosure obligations in the IAP with respect to St. Anne's? The third issue is: If the court has jurisdiction to order Canada to produce the OPP Documents for the IAP, how, if at all, should that jurisdiction be exercised? The fourth issue is: May the court direct the re-opening of settled IAP claims on the grounds of Canada's breach of its disclosure obligations? The fifth issue is: Does the court have jurisdiction to order the OPP directly to produce its St. Anne's documents for the IAP? The fifth issue is: If the court has jurisdiction to order the OPP to produce its St. Anne's documents for the IAP, how, if at all, should that jurisdiction be exercised? The seventh issue is: May the court give directions as to how documentary evidence and transcripts from criminal and civil proceedings should be utilized in the IAP?

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2. Does the Court have Jurisdiction to Order Canada to Produce the OPP Documents and other Documents for the IAP?

[200] My discussion of whether the court has jurisdiction to order Canada to produce the OPP Documents and other Documents for the IAP can be relatively brief because, in my opinion, the three sources of jurisdiction, discussed above, with respect to the Commission's RFD, apply not only to Canada's disclosure obligations to the Commission but also to its disclosure obligations for the IAP. I need only add that there is a fourth source of jurisdiction to order the production of documents; namely, the court's jurisdiction from the *Rules of Civil Procedure* also provides authority to order the production of the documents in the possession of Canada.

[201] The IAP is part of a settlement agreement in a class action, and s. 35 of the *Class Proceedings Act, 1992* provides that the rules of court; i.e. *the Rules of Civil Procedure* apply to class proceedings. *The Rules of Civil Procedure* apply to class proceedings, but the court has a discretion to limit, vary, or alter the operation of them: *Segnitz v. Royal & Sun Alliance Insurance Co. of Canada,* [2003] O.J. No. 78 (S.C.J.) at para. 28; *Wilson v. Servier Canada Inc.*, [2003] O.J. No. 156 (S.C.J.) at para. 11. Thus, I, disagree with Canada's argument that the *Rules of Civil Procedure* of Ontario are not engaged with respect to the IAP.

[202] I further disagree with Canada's arguments that Schedule D is a complete code of all procedural rights and that the procedural rights that might be available in regular litigation are not available under the IRSSA for the IAP.

[203] In this last regard, I also disagree with any argument that resort to the *Rules of Civil Procedure* is not available because the IAP is non-litigious. I share Justice Winkler's view noted in *Baxter v. Canada (Attorney General)*, *supra* that the IAP is designed to be expedient litigation to resolve what may be significant claims for compensation.

[204] I do agree that resort to the *Rules of Civil Procedure* cannot override to expand or diminish the procedures of the IAP to the extent of amending the IRSSA, which is to say that any resort to the rules of court will have to fit with the IRSSA and this tailoring may be more or less difficult. Nevertheless, in my opinion, Schedule D is not the complete code of procedural rights under the IRSSA, and Schedule D also must fit with the court's administrative jurisdiction, its jurisdiction under the approval order and the implementation order, and its general jurisdiction to enforce contracts and its own orders.

[205] It is interesting to note that consistent with the Court of Appeal's views expressed in *Fontaine v. Duboff, Edwards Haight & Schacter,* discussed in the previous section of these Reasons, the Chief Adjudicator is also of the view that the court has the jurisdiction to oversee Canada's disclosure obligations under the IAP. In *Re-Review Decision E5442-10-A-12390* (August 27, 2012) then Chief Adjudicator Ish stated at para. 46:

> Schedule "D" of the Settlement Agreement (the IAP) in Appendix VIII sets out Canada's obligations with respect to document disclosure. Noticeably absent in Appendix VIII is any vesting of authority to adjudicators, including the Chief Adjudicator, to order production of documents in a way that meaningfully ensures natural justice. There is little doubt that the drafters of the IAP did not want to provide the parties with access to the full panoply of substantive and procedural safeguards provided by the judicial system, such as examination for discovery, affidavit evidence, cross-examination on affidavits and certified document production. Presumably the fear was that this would be a significant drag on the IAP since it would likely result in numerous applications to adjudicators for an order for document production. Of course,

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> the issue goes well beyond the "years of operation" cases and if, as submitted by the Claimant in the present case, an order for production was granted the implications would be significant and have the potential for fundamentally changing the IAP and the nature of the working responsibilities of adjudicators. Even though the issue is very significant and potentially impacts the rights of numerous claimants, I do not believe the IAP contemplates that orders for the production of documents by Canada are part of the authority of adjudicators and as such I cannot grant the relief or remedy requested by the Claimant in this case. While adjudicators do not have this authority, there is no doubt that the obligation on Canada to produce all relevant documents, and not be selective, was intended to be carried out in good faith. Canada would be running a very significant risk in being selective or less than completely forthcoming in disclosing all potentially relevant documents, whether supportive of its position or otherwise. Decisions based on incomplete or inadequate disclosure are not apt to withstand judicial scrutiny and would lend themselves to very serious consequences, not only for that particular case but for others decided before it, if so found by the courts. Indeed, one can easily envisage a possible referral to the courts in cases where the parties are unable to agree on the extent of Canada's duty of disclosure since the ability to deal with the situation is not within the purview of adjudicators.

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[206] The case at bar shows that Chief Adjudicator Ish was prescient. In my opinion, the Chief Adjudicator was also correct. Under the IAP, adjudicators do not have the authority to make orders for the production of the documents because the parties to the IRSSA did not wish a discovery procedure to delay an expedient litigation.

[207] However, the court through its RFD jurisdiction can scrutinize whether Canada has honoured its obligations under the IRSSA to disclose relevant documents and whether the IAP is advancing in accordance with the requirements of the IRSSA. I agree that by a RFD procedure, Canada runs a risk in being selective or less than completely forthcoming in performing its disclosure obligations under the IRSSA because of the possibility of court scrutiny.

3. Has Canada Breached its Obligations in the IAP with respect to St. Anne's?

[208] It is Canada's position that in the IAP it has produced all relevant documents in its possession and control to claimants as required by the IRSSA. It submits that Appendix VIII of the IRSSA purposefully do not reference or encompass disclosure obligations imposed in civil litigation. Canada submits that there is no obligation to search for and disclose information regarding allegations and criminal convictions of alleged POIs where the allegations were made after the POI's term at the residential school was completed. Canada states that the IRSSA does not make Canada responsible for seeking out and obtaining third party documents. It submits that statements to police and any transcript of testimony at criminal trials are not mandatory documents but if claimants wish to produce these documents they are free to do so if tendered through a witness.

[209] Canada submits that its document disclosure obligations under the Appendix VIII of the IRSSA are clear and unambiguous, and that Canada has honoured those obligations. It submits that no basis for this court to add new and ongoing obligations to disclose third party documents in the IAP process and that the imposition of such an obligation would amount to a material amendment to the terms of the IRSSA that would be both unnecessary and also onerous. Canada submits that by seeking to impose upon Canada the obligations of procuring and disclosing transcripts of criminal proceedings and third party documents, including documents arising from criminal investigations of former IRS employees, the Applicants seek to unilaterally impose upon Canada new, ongoing and unnecessary disclosure obligations. It imputes the motive that

the Applicants by seeking these documents are seeking to modify the nature of the harms compensable under the IAP.

[210] In my opinion, Canada's arguments are all misdirected because the Applicants are not seeking to impose new obligations into the IRSSA and for the purpose of deciding their RFD, it is not necessary for Canada to seek out and obtain third party documents. It already has the documents and transcripts that the Applicants are seeking. It is false to suggest that the Applicants are seeking to make Canada become an investigator to locate relevant documents from third parties who might have information about former residential school employees who may have been the subject of a criminal investigation. It happens that Canada has material from third parties but based on its own narrow interpretation of the IAP, it has decided that it need not produce those documents and transcripts.

[211] As I see it, for the purpose of the RFDs, the court need only concern itself with the OPP documents and the transcripts already in Canada's possession and information about convictions that should be available from civil and criminal courts that are public courts of record.

[212] As I see the matter, Canada has already gone down the road of compliance with its IAP disclosure obligations, but it has not gone far enough to reach the destination prescribed by the IRSSA. I do not see the request that Canada honour its disclosure obligations as a means to change the harms compensable under the IAP; rather it is a means of ensuring that the IAP facilitates the expeditious resolution of serious claims in the manner agreed to by the signatories of the IRSSA.

[213] Canada has too narrowly interpreted its disclosure obligations. I do not need to decide whether Canada did this in bad faith, and I rather assume that its officials mistakenly misconstrued their obligations and misread the scope of their obligations. That said, in my opinion, there has been non-compliance, and Canada can and must do more in producing documents about the events at St. Anne's.

[214] It appears to me that the major problem has been Canada's misinterpretation of its obligation under the following provision from Appendix VIII:

> The government [Canada] will also search for, collect and provide a report about the persons named in the Application Form as having abused the Claimant, including information about those persons' jobs at the residential school and the dates they worked or were there, as well as any allegations of physical or sexual abuse committed by such persons, where such allegations were made while the person was an employee or student. ["Person of Interest Report" or "POI Report"]

[215] Unfortunately, this provision is not well written. For example, the opening phrase, "The government [Canada] will also search for, collect and provide a report," reads grammatically as if Canada must search for and collect a report. The phrase obviously should be read to say that Canada will search for and collect information and then provide a report.

[216] In particular, the phrase "where such allegations were made while the person was an employee or student" is a misplaced and maladroit attempt to convey the meaning that the investigation is to focus on the perpetrator's acts of abuse while an employee or student is at the school. Canada has interpreted this provision to exclude information about misconduct after the perpetrator was no longer associated with the school, which is fine, however, Canada has also interpreted this provision to exclude information of abuse that occurred while the perpetrator was at the school but the allegation of abuse was made after the perpetrator left the school. To quote from its factum, Canada says that: "Canada is under no current or ongoing obligation to search

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for and disclose information regarding allegations and criminal convictions of alleged POIs where the allegations were made after the POI's term at the IRS concluded."

[217] That narrow interpretation makes little sense and is contrary to the reading of the letter and spirit of the IAP provisions of the IRSSA read all together. In particular, it is inconsistent with the provision in Appendix VIII that states that the Adjudicator will be given "any documents mentioning sexual abuse at the residential school in question." The awkward phrase "where such allegations were made while the person was an employee or student" should be read as saying "where the alleged abuse occurred while the person was an employee or student," and Canada should produce documents accordingly.

[218] The above interpretation of Canada's disclosure obligation imposes no new burden. Indeed, the records that Canada has already produced are unlikely to have been based just on allegations made while either the perpetrator or the victim was at the school. In other words, Canada has likely already produced documents that it says that it is not obliged to provide by its narrow and incorrect reading of Appendix VIII. And there is obviously little burden on Canada to produce its copies of the OPP documents and the transcripts already in its possession. In its factum, Canada notes that it where it had notice of a criminal conviction in respect of a former employee of St. Anne's it has searched for information about the criminal conviction and has disclosed conviction information on many (it says a majority) of claims.

[219] In my opinion, the factual record for this RFD shows that based on its unduly narrow interpretation of its obligations, Canada has not adequately complied with its disclosure obligations with respect to the St. Anne's Narrative and with respect to the POI Reports for St. Anne's.

4. If the Court has Jurisdiction to Order Canada to Produce the OPP Documents and other Documents for the IAP, How, if at all, Should that Jurisdiction be Exercised?

[220] As explained above, the court has the jurisdiction to remedy Canada's non-compliance with the IRSSA. There are four sources of jurisdiction and all are ample to enforce the IRSSA without amending the agreement or imposing new burdens on the parties.

[221] The court should exercise its jurisdiction to fix the problems raised by the Applicants RFD.

[222] I, therefore, order Canada to produce the OPP documents in its possession, the transcripts concerning incidents of abuse at St. Anne's and such other documents that do comply with the proper reading and interpretation of Canada's disclosure obligations under Appendix VIII to those preparing the Narratives and the POI Reports.

[223] To be clear, the order of the court is to produce documents, including transcripts, already in the possession of Canada and to continue to produce other documents in the same manner as it has in the past; i.e., it should continue to provide records of convictions, etc. as it has in the past. The documents may then be disclosed to Claimants at no expense to them in accordance with the directives of the IAP.

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5. May the Court Direct the Re-opening of Settled IAP Claims on the Grounds of Canada's Breach of its Disclosure Obligations?

[224] The above orders should resolve any problems associated with Canada's failure to comply with its disclosure obligations concerning the Narratives and POI Reports for St. Anne's, but the Applicants' RFD raises the question of whether the court may direct the re-opening of settled IAP claims on the grounds of Canada's breach of its disclosure obligations.

[225] In my opinion, the answer to this question is yes. The court does have the jurisdiction to re-open settled claims but that jurisdiction must be exercised on a case-by-case basis.

[226] If truth and reconciliation is to be achieved and if nous le regrettons, we are sorry, nimitataynan, niminchinowesamin, mamiattugut, is to be a genuine expression of Canada's request for forgiveness for failing our Aboriginal peoples so profoundly, the justness of the system for the compensation for the victims must be protected. The substantive and procedural access to justice of the IRSSA, like any class action, must also be protected and vouched safe. The court has the jurisdiction to ensure that the IRSSA provides both procedural and substantive access to justice.

[227] This is not to say that Canada is not entitled to put the Claimants to the proof of their claims under the IAP, it is rather to say that Canada must comply with the requirements of the IAP and if it does not do so, the court has the jurisdiction to have the IAP done right both procedurally and substantively.

[228] This is also not to say that any breach of Canada's disclosure obligations will necessarily lead to a re-opening of a settled claim. Each case will have to be decided on its own merits and a variety of factors may have to be considered in any given case including some demonstration that the prejudice from non-disclosure was more than a theoretical miscarriage of justice. The court's jurisdiction to re-open a claim will be a rare or extraordinary jurisdiction.

[229] For all the parties and participants in the IAP, there obviously was a great deal of angst associated with the Applicants' asking whether settled claims can be re-opened with the threat of setting back the progress made and being made to complete the IAP.

[230] I think the fears are likely overblown because the Narratives and the POI Reports as they have already been produced may have been adequate for the purposes of the particular Claimant or the Claimant may have been properly compensated in any event. Better Narratives and better POI Reports may have made it easier for Claimants to prove their claims, but the Claimants may have persuaded the adjudicator to the correct result in any event. It needs to be recalled that the IAP was never intended to have the amount of disclosure of court proceedings and was designed to be an inquisitorial system to facilitate the expedited resolution of the claims. It is to be noted that the court's jurisdiction to re-open claims will be an extraordinary jurisdiction.

[231] However, be that as it may be, as Justice Winkler noted at para. 12 in *Baxter v. Canada (Attorney General) supra,* that once the court is engaged it cannot abdicate its responsibilities to ensure that the IRSSA operates in the way it was intended by the parties to operate. The parties to the IRSSA intended the IAP to provide genuine access to justice for the Claimants.

[232] Thus, I conclude that the court does have the jurisdiction to re-open a settled IAP claim but whether a claim should be re-opened will depend upon the circumstances of each particular case.

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6. Does the Court have Jurisdiction to Order the OPP to Produce its St. Anne's Documents for the IAP?

[233] The production order made above was an order only against Canada. The next question is does the court also have the jurisdiction to make an order directly against the OPP.

[234] Although the OPP is not a party to the IRSSA, in my opinion, the court has the same four sources of jurisdiction to order the OPP to produce its St. Anne's documents for the IAP.

[235] Outside of the context of the IRSSA, in Ontario, when the OPP is a non-party to a proceeding and a party to the action or application wishes production of documents from the OPP, the normal course for the party is to bring a motion under rule 30.10, which rule specifically addresses production from a non-party. In addition, where Crown Briefs are part of the documents in the possession of the OPP, the procedure out in *D.P. v. Wagg* (2002), 61 O.R. (3d) 746 (Div. Ct.) at 753-4; aff'd (2004), 71 O.R. (3d) 229 (C.A.) must be followed. Under the *Wagg* procedure, in order to preserve Crown privilege or public interest immunity, the documents in the Crown brief are not produced unless the prosecutor and police investigators consent or the court determines when and whether any or all of the contents of the brief should be produced: *P. (D.) v. Wagg*; *G. (N.) v. Upper Canada College,* supra; *College of Physicians and Surgeons of Ontario v. Peel Regional Police* (2009), 98 O.R. (3d) 301 (Div. Ct.).

[236] Thus, in the context of the IRSSA, with the above four sources of jurisdiction, in my opinion, the court has the jurisdiction to make an order directly against the OPP to produce the documents in its possession.

7. If the Court has Jurisdiction to Order the OPP to Produce its St. Anne's Documents for the IAP, How, if at all, Should that Jurisdiction Be Exercised?

[237] Since I have already ordered Canada to produce the OPP documents in its possession for the purpose of preparing Narratives and POI Reports, it may seem redundant to ask whether the court should exercise its jurisdiction against the OPP, a non-party. However, the question is not redundant because it seems that Canada does not have all of the OPP's documents that would be relevant to the preparation of the IAP Narratives and POI Reports.

[238] Thus, the court's jurisdiction should be exercised to obtain these relevant documents and the question becomes how should the court's jurisdiction be exercised?

[239] For the purposes of the RFDs before the court, it is not necessary to describe what test should be applied to determine whether the court should exercise its jurisdiction to make an order against a non-party. As noted earlier in this decision, describing a test is not necessary, because there is no doubt about the relevance of the documents, and, in any event, the OPP does not oppose the production of the documents in its possession provided that its privilege and privacy concerns are addressed.

[240] Therefore, subject to the procedure that I shall describe next, I order the OPP to produce its St. Anne's documents to Canada as part of Canada's obligation to search for and collect documents and to prepare POI reports and narratives. It will then be for Canada to disclose the documents to Claimants in accordance with the directives of the IAP.

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[241] As for a procedure to protect privacy and privilege, any concerns can be addressed by the OPP providing a list of the documents for which it makes claims or privilege or immunity from production. Canada or an Applicant can then request that the court - or to be more precise, the court's lawyer under the IRSSA – to review the documents and determine the merits of the claim of privilege or immunity from production. In this last regard, it should be recalled that under the Implementation Orders, the Court Counsel's duties shall be as determined by the Courts.

[242] In other words, if they arise, the court's lawyer will assume the role of a master of the court and determine the claims of privilege in accordance with the established jurisprudence. The court lawyer's decision may be appealed to an administrative judge under the IRSSA.

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8. May the Court Give Directions as to How Documentary Evidence and Transcripts from Criminal and Civil Proceedings Should Be Utilized in the IAP?

[243] As described above, the Applicants' Request for Directions asks that the court give directions as to how the documentary evidence and transcripts from criminal and civil proceedings should be utilized in the IAP.

[244] In my opinion, these parts of the Applicants' RFD go too far, and the court does not have the jurisdiction to, in effect, interfere with or appropriate how the adjudicators carry out their adjudicative assignment under the IRSSA.

[245] What the Applicants are seeking is for the court to take back and claim as its own the role of the adjudicators. What the Applicants seek goes beyond administering or implementing the IAP and amounts to rewriting the agreement to have the court and not the adjudicator determine what can be done with the evidence presented to the adjudicator.

[246] As I explain earlier in these Reasons for Decision, the court's jurisdiction is constrained and has its limits. I agree with Canada's and the Chief Adjudicator's arguments that the Applicants' RFD requests would disrupt and impede the IAP and replace it with something that the parties did not bargain for. I conclude that the Applicants' requests for evidentiary rulings go far beyond what the court has the jurisdiction to do.

[247] Accordingly, I shall not make the requested evidentiary directions.

F. THE APPLICANTS' REQUEST FOR COSTS FOR LEGAL FEES

[248] The last matter to consider is the Applicants' request for costs on a substantial indemnity basis to the Applicants' Counsel and also costs paid to Mushkegowuk Council and to the affiants who delivered affidavits for this Request for Directions.

[249] In my opinion, the court's jurisdiction to award costs in a RFD proceeding is a plenary discretion and includes awarding costs on a substantial indemnity basis. I say that the court's costs jurisdiction under the IRSSA is a plenary jurisdiction because, in my opinion, in administering the IRSSA, the court would be guided but not governed by the jurisprudence that regards a partial indemnity as normative and a substantial indemnity award as punitive. In other words, under the IRSSA, there may be other reasons to justify an award of substantial or full indemnity costs.

[250] The court's jurisdiction to award costs in a RFD is separate and apart from the provisions of the IRSSA that govern legal fees for the IAP and is not a way to circumvent those provisions.

[251] In the case at bar, the Commission and the Applicants properly resorted to the RFD procedure to ensure compliance with the IRSSA. Subject to the details of the services provided and disbursements incurred, I conclude that the court has the jurisdiction to award the Commission and the RFD costs as part of the RFD procedure and this jurisdiction can and should be exercised in the circumstances of this case to indemnify the Applicants and the Commission for the legal expenses and disbursements associated with bringing forward their RFDs.

[252] To be more precise, the Applicants and the Commission are entitled to claim costs for the legal services that identified that there was a problem associated with the operation of the IRSSA and also for the legal services associated with the RFD designed to find a solution for the problem. This award of costs is not a way to circumvent the regime for costs for the IAP; rather, it is an award made to implement and to enforce the IRSSA.

G. CONCLUSION

[253] My conclusions about the Requests for Directions are set out above. Orders should be issued accordingly.

[254] As noted above, there is jurisdiction to award costs for the RFDs and I shall be awarding costs to at least the Commission and the Applicants. I will consider making awards with respect to the others who participated in the RFDs.

[255] If the parties cannot agree with respect to costs, they may make submissions in writing all of which are to be exchanged and delivered within 60 days of the release of these Reasons for Decision.

Perell, J.

Released: January 14, 2014

2014 ONSC 283 (CanLII)

CITATION: *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283
COURT FILE NO.: 00-CV-129059

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

LARRY PHILIP FONTAINE in his personal capacity and in his capacity as the Executor of the estate of Agnes Mary Fontaine, deceased, et al.

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA, et al.

Defendants

REASONS FOR DECISION

Perell, J.

Released: January 14, 2014

2014 ONSC 283 (CanLII)

Exhibit C

Ruby Darlene Edwards-Wheesk
a Commissioner, etc.,
Province of Ontario
for Fort Albany First Nation
Expires February 15, 2021

Court File No. 00-CV-192059

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	TUESDAY, THE 23rd
	)	
JUSTICE PERELL	)	DAY OF JUNE, 2015

BETWEEN:

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

LARRY PHILIP FONTAINE in his personal capacity and in his capacity as the Executor of the estate of Agnes Mary Fontaine, deceased, MICHELLINE AMMAQ, PERCY ARCHIE, CHARLES BAXTER SR., ELIJAH BAXTER, EVELYN BAXTER, DONALD BELCOURT, NORA BERNARD, JOHN BOSUM, JANET BREWSTER, RHONDA BUFFALO, ERNESTINE CAIBAIOSAI-GIDMARK, MICHAEL CARPAN, BRENDA CYR, DEANNA CYR, MALCOLM DAWSON, ANN DENE, BENNY DOCTOR, LUCY DOCTOR, JAMES FONTAINE in his personal capacity and in his capacity as the Executor of the Estate of Agnes Mary Fontaine, deceased, VINCENT BRADLEY FONTAINE, DANA EVA MARIE FRANCEY, PEGGY GOOD, FRED KELLY, ROSEMARIE KUPTANA, ELIZABETH KUSIAK, THERESA LAROCQUE, JANE McCULLUM, CORNELIUS McCOMBER, VERONICA MARTEN, STANLEY THOMAS NEPETAYPO, FLORA NORTHWEST, NORMAN PAUCHEY, CAMBLE QUATELL, ALVIN BARNEY SAULTEAUX, CHRISTINE SEMPLE, DENNIS SMOKEYDAY, KENNETH SPARVIER, EDWARD TAPIATIC, HELEN WINDERMAN and ADRIAN YELLOWKNEE

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA, THE PRESBYTERIAN CHURCH IN CANADA, THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH, THE BAPTIST CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN BAY, THE CANADA IMPACT NORTH MINISTRIES OF THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE DIOCESE OF SASKATCHEWAN, THE DIOCESE OF THE SYNOD OF CARIBOO, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (ALSO KNOWN AS THE METHODIST MISSIONARY SOCIETY OF CANADA), THE INCORPORATED SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE

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Defendants

Proceeding under the *Class Proceedings Act, 1992*

ORDER

ON THE REQUEST FOR DIRECTIONS, ALSO KNOWN AS THE RETURN OF THE REQUEST FOR DIRECTIONS REGARDING ST. ANNE'S INDIAN RESIDENTIAL SCHOOL, made by approximately 50 Independent Assessment Process ("IAP") claimants who are former students of St. Anne's Indian Residential School ("St. Anne's IRS") or Bishop Horden Hall Indian Residential School ("Bishop Horden IRS") (the "Applicants"), heard on June 9, 2015, at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

ON READING the records (including "Questions on Written Cross-Examination on Affidavit" and the transcript of the cross-examination of Neil Shamsuzzoha) and factums filed by the Applicants, the respondent the Attorney General of Canada ("Canada") and the Assembly of First Nations ("AFN").

AND ON HEARING the submissions of counsel for the Applicants, Canada and the AFN, and of Edmund Metatawabin on behalf of the St. Anne's Survivors' Association.

1. THIS COURT ORDERS that Canada shall revise each of the following reports required by the Indian Residential Schools Settlement Agreement ("IRSSA"), Schedule "D", Appendix VIII, namely, the reports summarizing documents about St. Anne's IRS (the "**School Narrative**"), and the reports about the persons named in claimants' IAP application forms for St. Anne's IRS as having abused a claimant (the "**POI Reports**"), by including in each report a chart comprised of the following two columns:

a) a column, organized in chronological order with relevant dates indicated, that summarizes all available information as to alleged physical or sexual assaults or other wrongful acts (including available information as to who was involved, what occurred, and when and where it occurred), that

   i. in the case of a School Narrative, were alleged to have occurred at St. Anne's IRS, or

   ii. in the case of a POI Report, were allegedly committed by a person identified in that POI Report while the person was an employee or student of St. Anne's IRS; and

b) a corresponding column that lists in chronological order with relevant dates indicated, all documents identifying, describing or otherwise relating to sexual or physical assaults or other wrongful acts that,

   i. in the case of the School Narrative, were alleged to have occurred at St. Anne's IRS, or

   ii. in the case of a POI Report, were allegedly committed by a person identified in that POI Report while the person was an employee or student of St. Anne's IRS.

2. THIS COURT FURTHER ORDERS that for inclusion in the evidentiary packages or supplemental evidentiary packages or the IAP Decisions Database for IAP claims not yet resolved, Canada shall provide to the Indian Residential Schools Adjudication Secretariat (the "Secretariat") unredacted copies of court records (including, but not limited to transcripts and pleadings) that

a) relate to criminal offences that were alleged to have occurred at either St. Anne's IRS or Bishop Horden IRS, and

b) were previously made available to the Secretariat in redacted form.

3. THIS COURT FURTHER ORDERS that the Applicants' request for an order that Canada provide the Secretariat with unredacted copies of all source documents for hearings involving St. Anne's IRS or Bishop Horden IRS is dismissed.

4. THIS COURT FURTHER ORDERS that Canada shall pay costs to the Applicants and the AFN in the sum that is fixed by the Court following receipt of submissions from the parties beginning with the submissions of the Applicants and AFN within 20 days of today's date followed by Canada's submissions within a further 20 days.

Perell, J.

JUSTICE PERELL

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUL 20 2015

AS DOCUMENT NO.:
À TITRE DE DOCUMENT NO.:
PER / PAR:

LARRY PHILIP FONTAINE in his personal capacity and in his capacity as the Executor of the estate of Agnes Mary Fontaine, deceased, et al.	and	**THE ATTORNEY GENERAL OF CANADA et al.**

Court File No: 00-CV-192059CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

ORDER

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HCR

CITATION: Fontaine v. Canada (Attorney General), 2015 ONSC 4061
COURT FILE NO.: 00-CV-192059
DATE: 20150623

ONTARIO
SUPERIOR COURT OF JUSTICE

2015 ONSC 4061 (CanLII)

BETWEEN:

LARRY PHILIP FONTAINE in his personal capacity and in his capacity as the Executor of the estate of Agnes Mary Fontaine, deceased, MICHELLINE AMMAQ, PERCY ARCHIE, CHARLES BAXTER SR., ELIJAH BAXTER, EVELYN BAXTER, DONALD BELCOURT, NORA BERNARD, JOHN BOSUM, JANET BREWSTER, RHONDA BUFFALO, ERNESTINE CAIBAIOSAI-GIDMARK, MICHAEL CARPAN, BRENDA CYR, DEANNA CYR, MALCOLM DAWSON, ANN DENE, BENNY DOCTOR, LUCY DOCTOR, JAMES FONTAINE in his personal capacity and in his capacity as the Executor of the Estate of Agnes Mary Fontaine, deceased, VINCENT BRADLEY FONTAINE, DANA EVA MARIE FRANCEY, PEGGY GOOD, FRED KELLY, ROSEMARIE KUPTANA, ELIZABETH KUSIAK, THERESA LAROCQUE, JANE McCULLUM, CORNELIUS McCOMBER, VERONICA MARTEN, STANLEY THOMAS NEPETAYPO, FLORA NORTHWEST, NORMAN PAUCHEY, CAMBLE QUATELL, ALVIN BARNEY SAULTEAUX, CHRISTINE SEMPLE, DENNIS SMOKEYDAY, KENNETH SPARVIER, EDWARD TAPIATIC, HELEN WINDERMAN and ADRIAN YELLOWKNEE

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- and -

THE ATTORNEY GENERAL OF CANADA, THE PRESBYTERIAN CHURCH IN CANADA, THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH, THE BAPTIST CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN BAY, THE CANADA IMPACT NORTH MINISTRIES OF THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE DIOCESE OF SASKATCHEWAN, THE DIOCESE OF THE SYNOD OF CARIBOO, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (ALSO KNOWN AS THE METHODIST MISSIONARY SOCIETY OF CANADA), THE INCORPORATED SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE ANGLICAN CHURCH OF THE DIOCESE OF QUEBEC, THE SYNOD OF THE DIOCESE OF ATHBASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE ANGLICAN SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE SYNOD OF THE DIOCESE OF NEW WESTMINISTER, THE SYNOD OF THE DIOCESE OF YUKON, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE BOARD OF HOME MISSIONS AND SOCIAL SERVICE OF THE PRESBYTERIAN CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF

CANADA, SISTERS OF CHARITY, A BODY CORPORATE ALSO KNOWN AS SISTERS OF CHARITY OF ST. VINCENT DE PAUL, HALIFAX, ALSO KNOWN AS SISTERS OF CHARITY HALIFAX, ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX, LES SOEURS DE NOTRE DAME-AUXILIATRICE, LES SOEURS DE ST. FRANCOIS D'ASSISE, INSITUT DES SOEURS DU BON CONSEIL, LES SOEURS DE SAINT-JOSEPH DE SAINT-HYANCITHE, LES SOEURS DE JESUS-MARIE, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE, LES SOEURS DE L'ASSOMPTION DE LA SAINT VIERGE DE L'ALBERTA, LES SOEURS DE LA CHARITE DE ST.-HYACINTHE, LES OEUVRES OBLATES DE L'ONTARIO, LES RESIDENCES OBLATES DU QUEBEC, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE JAMES (THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY), THE CATHOLIC DIOCESE OF MOOSONEE, SOEURS GRISES DE MONTREAL/GREY NUNS OF MONTREAL, SISTERS OF CHARITY (GREY NUNS) OF ALBERTA, LES SOEURS DE LA CHARITE DES T.N.O., HOTEL-DIEU DE NICOLET, THE GREY NUNS OF MANITOBA INC.-LES SOEURS GRISES DU MANITOBA INC., LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE D'HUDSON – THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY, MISSIONARY OBLATES – GRANDIN PROVINCE, LES OBLATS DE MARIE IMMACULEE DU MANITOBA, THE ARCHIEPISCOPAL CORPORATION OF REGINA, THE SISTERS OF THE PRESENTATION, THE SISTERS OF ST. JOSEPH OF SAULT ST. MARIE, SISTERS OF CHARITY OF OTTAWA, OBLATES OF MARY IMMACULATE –ST. PETER'S PROVINCE, THE SISTERS OF SAINT ANN, SISTERS OF INSTRUCTION OF THE CHILD JESUS, THE BENEDICTINE SISTERS OF MT. ANGEL OREGON, LES PERES MONTFORTAINS, THE ROMAN CATHOLIC BISHOP OF KAMLOOPS CORPORATION SOLE, THE BISHOP OF VICTORIA, CORPORATION SOLE, THE ROMAN CATHOLIC BISHOP OF NELSON, CORPORATION SOLE, ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD, ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, LA CORPORATION ARCHIÉPISCOPALE CATHOLIQUE ROMAINE DE ST. BONIFACE, LES MISSIONNAIRES OBLATES SISTERS DE ST. BONIFACE-THE MISSIONARY OBLATES SISTERS OF ST. BONIFACE, ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT, THE ROMAN CATHOLIC BISHOP OF THUNDER BAY, IMMACULATE HEART COMMUNITY OF LOS ANGELES CA, ARCHDIOCESE OF VANCOUVER – THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER, ROMAN CATHOLIC DIOCESE OF WHITEHORSE, THE CATHOLIC EPISCOPALE CORPORATION OF MACKENZIE-FORT SMITH, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, EPISCOPAL CORPORATION OF SASKATOON, OMI LACOMBE CANADA INC. and MT. ANGEL ABBEY INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

- *Fiona Campbell* and *Ben Piper* for the Applicants
- *Stuart Wuttke* for the Assembly of First Nations
- *Catherine A. Coughlan* and *Brent Thompson* for the Attorney General of Canada

HEARING DATE: June 9, 2015

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PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION AND OVERVIEW

[1] The Applicants are former students of St. Anne's IRS (Indian Residential School) and Bishop Horden IRS, who have made or are making claims for compensation under the Independent Assessment Process ("IAP") of the Indian Residential Schools Settlement Agreement ("IRSSA"). They have filed a Request for Directions ("RFD"). In their RFD, they assert that Canada has not complied with its report writing obligations under the IRSSA, including its obligation to update reports following this court's January 14, 2014 order for the production of documents about a criminal investigation of activities at St. Anne's IRS: see *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283. More particularly, the Applicants submit that having regard to the thousands of documents disclosed, Canada has not provided an adequate School Narrative or Person of Interest Reports ("POI Reports") for claims involving St. Anne's IRS. The Applicants also assert that publically available documents should not be redacted and that IAP adjudicators should receive unredacted documents.

[2] The Applicants request Orders that: (1) Canada revise the School Narrative and POI Reports for St. Anne's IRS and for Bishop Horden IRS in a manner that makes the source documents useable by Claimants and adjudicators in IAP hearings; and (2) Canada provide an unredacted copy of source documents for St. Anne's IRS and for Bishop Horden IRS to the Indian Residential Schools Adjudication Secretariat ("Secretariat") for use by IAP adjudicators and, upon request, to Applicants or their Counsel.

[3] The Applicants' RFD was supported by the Assembly of First Nations ("AFN") and the St. Anne's Survivors' Association, whose spokesman, Edmund Metatawabin, made oral submissions at the hearing of the RFD.

[4] For the reasons that follow, I grant the RFD - in part. I order Canada to:

- (1) revise its School Narrative and POI Reports for St. Anne's IRS to provide a two-column chart that lists in one column those documents that report an incident or allegation of physical or sexual abuse at St. Anne's IRS and that describe in the second column the allegation or incident of physical or sexual abuse.
- (2) provide unredacted copies of any court records, including transcripts and pleadings, that were at any time publicly available to the Secretariat and, upon request, to Claimants or their lawyers for IAP hearings about St. Anne's IRS or Bishop Horden IRS.

[5] At the hearing Canada consented to the second part of the Order.

[6] I set out a draft of the Order as Schedule "A" to these Reasons for Decision.

[7] I dismiss the Applicants' request for an order that Canada provide the Secretariat, Claimants, and Claimants' Counsel with unredacted copies of other documents gathered for the School Narrative and POI Reports. I also dismiss the Applicants' request that Canada update its reports for Bishop Horden IRS.

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[8] To foreshadow the discussion below, the determination of this RFD is a matter of contract interpretation. In my opinion, as a matter of interpretation, under the IRSSA Canada is obliged to: (1) provide updated Narratives for St. Anne's IRS; (2) provide unredacted copies of any court records, including transcripts and pleadings that were at any time publicly available; and (3) provide redacted copies of other documents gathered for the IAP.

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B. FACTUAL BACKGROUND

1. The IRSSA and the IAP

[9] The IRSSA is a settlement of numerous individual and class actions against Canada, which established the Indian Residential Schools policy, and against the numerous Anglican, Baptist, Episcopal, Methodist Presbyterian, Roman Catholic, and United churches, charities, and missionary societies that operated the schools and whose teachers, sisters, and brothers committed the atrocities that occurred at the schools.

[10] The judges charged with administering the IRSSA have described its background in numerous decisions, including some of my own.

[11] See: *Baxter v. Canada (Attorney General)*, 83 O.R. (3d) 481; *Fontaine v. Canada (Attorney General)*, 2012 BCSC 839; *Fontaine v. Canada (Attorney General)*, 2012 BCSC 1671; *Fontaine v. Canada (Attorney General)*, 2013 BCSC 1955; *Fontaine v. Canada (Attorney General)*, 2013 ONSC 684; *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283; *Fontaine v. Canada (Attorney General)*, 2014 ONSC 4585; *Fontaine v. Canada (Attorney General)*, 2015 ONSC 3611.

[12] Without repeating what was said in those decisions, I rely on them for a more fulsome account of the factual background that recounts the history of events that led to the negotiation, signing, and court approval of the IRSSA. I also rely on those judgments as a resource for explaining the operation of the various elements of the IRSSA and the roles played by the numerous participants to the administration of the IRSSA. For the present purposes of explaining my Reasons for Decision, it is sufficient to emphasize from the historical background (contractual nexus) that one major component of the IRSSA was the IAP, under which Class Members who suffered physical or sexual abuse at an IRS may claim compensation commensurate with the seriousness of their injuries. The IAP is unique and complex. It was designed to be something uniquely different from the adversarial system. The IAP Claimants, who had been Class Members and Plaintiffs in individual actions under the adversarial system, became Applicants in a different dispute resolution system in which their claims would be adjudicated.

[13] I also rely on certain of those decisionsfor the principles of contractual interpretation that have informed my analysis in this case.

[14] Schedule "D" to the IRSSA provides that an individual IAP Claimant may receive compensation of up to $525,000.00; a maximum of $275,000.00 in relation to sexual and physical assaults and other wrongful acts and up to a further $250,000.00 for "proven actual income loss". Canada's liability to fund the IAP is uncapped.

[15] The IAP is described as inquisitorial in nature and is expressly different than the adversarial system of dispute resolution, but the IAP is a *sui generis* type of litigation. At the

IAP hearing, there is no questioning by counsel for Canada. The lawyers for Claimants and for Canada caucus with the adjudicator to propose questions or lines or inquiry and make brief oral submissions but counsel do not control the questioning, which is left to the adjudicator.

[16] Canada's role in respect of the IAP is multifarious and apparently conflicted, unless it is understood that the IRSSA built in safeguards, including elements of independence and autonomy for the adjudicators and a separation of functions for different manifestations of Canada's legal personality through various ministries and departments.

[17] To oversimplify:

- Canada, through its Department of Justice, is entitled to participate directly in the IAP to test the legitimacy of the Applicants' claims for compensation for sexual and physical assaults.
- The Secretariat for the adjudicators is a separate manifestation of Canada's role. The Secretariat provides secretarial and administrative support for the Chief Adjudicator. Its mandate is to implement and administer the IAP under the direction of the Chief Adjudicator.
- Although independent and autonomous, the adjudicators are a different and separate manifestation of Canada's role.
- The Secretariat is a branch of Aboriginal Affairs and Northern Development Canada ("AANDC"), the department of Canada with responsibility for policies relating to Aboriginal peoples in Canada; however, save for specific financial, funding, auditing and human resource matters, the Secretariat is under the direction of the Chief Adjudicator and independent from the AANDC.
- AANDC has been assigned the task of providing several different types of reports for the purposes of facilitating the work of the IAP adjudicators in deciding claims.

[18] The tasks assigned to AANDC are at the heart of this RFD.

[19] For present purposes, the parts of the IRSSA that are most significant to resolving this RFD are Appendicies VIII and X of Schedule "D" of the IRSSA.

[20] Appendix VIII of Schedule "D" states that:

> The government will search for, collect and provide a report setting out the dates a Claimant attended a residential school. There are several kinds of documents that can confirm attendance at a residential school, and as soon as one or more are found which deal with the entire relevant period, further searches will not be undertaken.
>
> The government will also search for, collect and provide a report about the persons named in the Application Form as having abused the Claimant, including information about those persons' jobs at the residential school and the dates they worked or were there, as well as any allegations of physical or sexual abuse committed by such persons, where such allegations were made while the person was an employee or student. Upon request, the Claimant or their lawyer will receive copies of the documents located by the government, but information about other students or other persons named in the documents (other than alleged perpetrators of abuse) will be blacked out to protect each person's personal information, as required by the *Privacy Act*.
>
> The government will also gather documents about the residential school the Claimant attended, and will write a report summarizing those documents. The report and, upon request, the documents will be available for the Claimant or their lawyer to review.

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In researching various residential schools to date, some documents have been, and may continue to be, found that mention sexual abuse by individuals other than those named in an application as having abused the Claimant. The information from these documents will be added to the residential school report. Again, the names of other students or persons at the school (other than alleged perpetrators of abuse) will be blacked out to protect their personal information.

The following documents will be given to the adjudicator who will assess a claim:

- documents confirming the Claimant's attendance at the school(s);
- documents about the person(s) named as abusers, including those persons' jobs at the residential school, the dates they worked or were there, and any sexual or physical abuse allegations concerning them;
- the report about the residential school(s) in question and the background documents; and,
- any documents mentioning sexual abuse at the residential school(s) in question.

With respect to student-on-student abuse allegations, the government will work with the parties to develop admissions from completed examinations for discovery, witness or alleged perpetrator interviews, or previous DR or IAP decisions relevant to the Claimant's allegations.

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[21] In *Fontaine v. Canada*, 2014 ONSC 283 at para. 217, I clarified that the paragraph concerning POI Reports should in fact be read as follows:

> The government will also search for and collect information and then provide a report about the persons named in the Application Form as having abused the Claimant, including information about those persons' jobs at the residential school and the dates they worked or were there, as well as any allegations of physical or sexual abuse committed by such persons, where the alleged abuse occurred while the person was an employee or student.

[22] Here it may be noted that although the part of Schedule "D" that deals with Narratives refers only to "sexual abuse", it was common ground between the Applicants and Canada that School Narratives are intended also to include information about historical allegations of physical abuse perpetrated by staff or students.

[23] Appendix X of Schedule "D" of the IRSSA requires Canada to disclose documents to adjudicators for their review. Appendix X provides as follows:

> APPENDIX X: THE USE OF EXTRA-CURIAL KNOWLEDGE BY ADJUDICATORS
>
> INTRODUCTION
>
> A number of issues will arise concerning the ability of adjudicators to make use of information obtained or known beyond that provided by the parties in each individual case. There are several aspects to this matter:
>
> -use of background information and/or personal knowledge, for example on
> -schools
> -child abuse and its impacts
> -the residential school system
> -carry-forward of information from hearing to hearing, for example on
> -alleged perpetrators and the modus operandi of proven perpetrators
> -conditions at a school
> -credibility findings
> -use of precedents from other adjudicators
> -ability of adjudicators to confer
>
> The approach to be taken to these issues is set out below, by reference to the source of the information in question.

1. Orientation Materials Provided to Adjudicators

Adjudicators will be supplied with orientation materials on the residential school system and its operations, as well as on child abuse and its impacts. If any of the orientation materials are specifically identified as containing uncontested facts or opinions, they may be used as follows:

> Adjudicators are expected to inform themselves from this material. They may use it to question witnesses, but also to make findings of fact and to support inferences from evidence they find credible, for example to conclude that trauma of a certain kind can be expected to flow from a sexual assault on a child. These latter uses of this information are justified by the fact that representatives of all interests have agreed to its inclusion in the orientation materials for this use, and all participants in a hearing will have access to the orientation materials.
>
> Wherever possible the adjudicator should use the information at the hearing to formulate questions to any witnesses who may be able to comment on it, or whose testimony it may contradict, support, or help explain. Where this is not possible, the proposed use in reaching a decision should be identified to the parties at the hearing to give them a chance to comment on it in their submissions, but so doing is not a condition precedent to the proposed use.
>
> Where the material is used in coming to a finding of fact, or drawing an inference, it should be cited and its relevance and the rationale for its use set out in the decision. Where orientation information provided to adjudicators does not represent uncontested facts or opinions, it may be used by adjudicators as follows:
>
> > Adjudicators may use this category of orientation materials as a basis for questioning witnesses, or testing the evidence, but may not rely on it as an independent basis for their conclusions of fact or their assessment of the actual impact of abuse on an individual.

....

3. Document Collections

Adjudicators will be provided with Canada's, and potentially a church's, document collection on each school for which they are holding hearings. This material will also be available to Claimants and their counsel.

The approach to the use of this kind of information is as follows:

> Adjudicators are expected to inform themselves from this material, which may be used as a basis for findings of fact or credibility. Where any of it is so used by adjudicators, it must be cited and its relevance and the rationale for use set out in the report. Because this information is specific to the school in question and is provided in advance, it is expected that adjudicators will be familiar with it before starting a hearing to which it is relevant. Given this, before relying on specific documents to help decide a given case, the adjudicator should seek the consent of the parties, or put the relevant extracts to any witnesses who may be able to comment on them, or whose testimony they may contradict or support. Where there are no such witnesses, or where one or more parties contest the use of the documents, the adjudicator may still use them in his or her decision, but wherever possible should advise the parties of the proposed use of the document so that they may address it in their submissions.

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2. The 1st and 2nd RFDs Regarding Documents for the IAP Hearings for St. Anne's IRS

[24] In September 2013, 60 IAP Claimants delivered what may be labelled the 1st St. Anne's RFD. In this RFD, the Applicants sought disclosure from Canada of documents associated with an Ontario Provincial Police ("OPP") criminal investigation of offences committed at St. Anne's IRS. The RFD now before the court may be labelled the 2nd St. Anne's RFD, but it also involves Bishop Horden IRS.

[25] On January 14, 2014, I released my Reasons for Decision for the 1st St. Anne's RFD. See *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283. I ordered that by June 30, 2014, Canada was to produce: (a) the OPP documents about the sexual and physical assaults at St. Anne's IRS; (b) the transcripts of criminal or civil proceedings in its possession about the sexual and/or physical assaults at St. Anne's IRS; and (c) any other relevant and non-privileged documents in the possession of Canada to comply with the proper reading and interpretation of Canada's disclosure obligations under Appendix VIII of the IRSSA. Further, I ordered Canada to revise its Narrative and POI Reports for St. Anne's IRS by August 1, 2014.

[26] On March 6, 2014, before the release of the documents from the 1st St. Anne's RFD, the Chief Adjudicator issued a Notice to Counsel entitled "Court Direction Regarding St. Anne's IRS". The Notice to Counsel commented as follows:

> Once all documents (including any additional OPP documents, the revised narrative and alleged perpetrator reports) are provided, counsel will be asked to advise the adjudicator and other parties in advance of the hearing as to which specific documents, including document and page numbers, they intend to rely on, and the purpose for which they intend to rely on such documents. This will likely be done through pre- or post-hearing teleconferences.

[27] On June 30, 2014, the documents from the 1st St. Anne's RFD were produced. Counsel for the Applicants received an external hard drive from the Secretariat containing approximately 12,300 electronic documents in .pdf format, including a 313-page index. The documents were Canada's productions in response to my January 14, 2014 Order in the 1st St. Anne's RFD. The documents contained redactions.

[28] On July 2, 2014, the Chief Adjudicator released a Notice to Counsel entitled: "Handling of Documents Relating to St. Anne's IRS". The Notice stated that Claimants should identify any documents in the new disclosure that they considered relevant. It added that "Canada's representatives and claimant's counsel are asked to play a proactive role in putting forward particular documents that may have relevance to a claim."

[29] Also on July 2, 2014, the Chief Adjudicator released a Notice to Self-Represented Claimants entitled: "Handling of documents related to St. Anne's Indian Residential School", in which he wrote with respect to the new document disclosure:

> You will be expected to identify the documents and tell how you think they will make a difference to your claim. In the same way, Canada's representative will be expected to assist the adjudicator by identifying documents that might be relevant. This information will be exchanged in a telephone conference either before or after the hearing.

[30] In July 2014, Applicants' counsel, Fay Brunning, inquired why documents in the public record, such as transcripts and pleadings had been redacted, and why the Secretariat was only provided with a redacted version of the documents.

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[31] Ms. Brunning stated that in her opinion, the revised Narrative and POI Reports did not organize or summarize the documents in a manner that was helpful to IAP Claimants, their counsel, or adjudicators. She asserted that it was difficult, if not impossible, for adjudicators and Claimants to use the new information in any meaningful way in the context of individual IAP claims.

[32] Catherine Coughlin, counsel for Canada, responded to Ms. Brunning's inquiries, and stated that Canada had complied with the IRSSA and the court's January 14, 2014 Order in the 1st St. Anne's RFD. Canada's position is that the Narrative for St. Anne's IRS has been adequately and properly updated in light of the disclosure of documents.

[33] On December 8, 2014, Canada reversed its position with respect to a subset of the transcripts of criminal proceedings having determined that they were publicly available, which Canada self-defined as "currently accessible by and available to the general public." For this subset only, Canada provided transcripts to the Secretariat in unredacted form. Canada's position was that only these currently accessible court records could be produced in unredacted form to the Secretariat. Canada reversed this position at the hearing of the RFD and has consented to the production of any documents that were or had been available to the general public.

[34] Canada's concession narrowed the dispute to two issues: (1) whether Canada should update the Narratives and POI Reports; and (2) whether, in respect of documents other than court records, Canada should provide unredacted versions to the Secretariat while providing redacted versions to Claimants and their lawyers.

3. The St. Anne's IRS Narrative and POI Reports

(a) The Updated Narrative and POI Reports

[35] For the 2nd St. Anne's RFD, Canada provided an affidavit from Eric Guimond. He is the Director of the National Research and Analysis Directorate ("NRA") within the Settlement Agreement Operations Branch of AANDC. Mr. Guimond was cross-examined.

[36] The evidence for the 2nd St. Anne's RFD revealed how Canada dealt with the OPP documents from the 1st St. Anne's RFD and how the AANDC went about preparing School Narratives and POI Reports. He advised that the task of updating the Narrative for St. Anne's IRS was done by a single consultant who would determine the document's relevance, completeness and reliability for inclusion in a school narrative.

[37] Mr. Guimond revealed that Canada manually coded the 12,213 OPP documents and entered the information into a database. The coding allowed Canada to search the database and retrieve documents about claimants, persons of interest, and alleged perpetrators. Mr. Guimond stated that POI Reports should show information about allegations against the person of interest or alleged perpetrator based on source documents available in NRA's document collection. When asked how specifically the types of allegations would be summarized in a POI Report, Mr. Guimond stated that a POI Report would simply indicate if there were allegations of physical or sexual assault. For details about the type of physical or sexual assault, it was necessary to consult the documents.

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[38] Mr. Guimond refused to provide the complete list of fields or codes that were applied to source documents in the IAP, or to produce the instructions given to the consultants who coded the source documents.

[39] Mr. Guimond accepted that not all of the events referred to in the source documents are included in the Narrative. He stated that the summary of allegations of abuse in a POI Report does not pinpoint a specific incident but refers to the types of allegations that are found in the documentation, and then it points to documents in which these allegations are further detailed.

[40] The evidentiary record for the 2nd St. Anne's RFD included the updated School Narrative for St. Anne's IRS and three updated POI Reports following the disclosure of OPP documents; namely: (1) POI Report for Sister Anna Wesley; (2) POI Report for Reverend Father Jules Leguerrier; and (3) POI Report for Reverend Father Arthur Lavoie.

[41] Applicant's counsel undertook the task of reviewing the documents associated with each POI Report.

[42] The updated Narrative for St. Anne's IRS mentions the extensive OPP investigation into St. Anne's IRS, and the Narrative states that the investigation lasted over four years and involved 900 interviews with approximately 700 people. The Narrative mentions various convictions for assault by former staff at St. Anne's IRS with the convictions being registered between 1997 and 1999. The Narrative references as source documents the Certificates of Conviction and the Transcripts of Proceedings. It lists some incidents of sexual and physical assaults with reference to source documents from the OPP investigation, but without naming the criminally convicted persons.

[43] The updated St. Anne's IRS School Narrative notes that an unnamed IRS staff member was convicted of common assault and administering a noxious substance. The Narrative states that:

> Documents from the OPP investigation indicate that additional allegations against this former IRS staff member were reviewed, but did not result in criminal charges. The allegations included the following: common assault, assault causing bodily harm, intimidation, forcible confinement, and sexual assault.

[44] The School Narrative for St. Anne's does not state that children were forced to eat vomit, nor does it indicate or categorize the source documents that relate to the convictions for administering a noxious substance.

[45] The School Narrative for St. Anne's includes a list of the referenced source documents. The list is 10-pages in length. The Narrative includes an Appendix "A" that lists other documents that "pertain to criminal proceedings, civil litigation, and the OPP investigation." The list of documents in Appendix "A" extends for 300 pages and includes 12,213 documents.

[46] Applicants' counsel's review of the documents revealed that they contain, in graphic and horrific detail, descriptions of numerous incidents in which students were forced by Sister Anna Wesley to eat their own vomit.

[47] The School Narrative for St. Anne's IRS does not mention the use of a whip, strap, or cat of nine tails on children at the school. Applicants' counsel's review of the documents revealed that they contain in graphic and horrific detail descriptions of numerous incidents in which students were whipped by Sister Wesley and Father Leguerrier.

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[48] The Narrative mentions the allegation at the Keykaywin Conference in 1992, that some participants spoke of being forced to sit in an electric chair for punishment. The Narrative, however, does not indicate or compile the source documents that relate to that allegation. The POI Reports for Anna Wesley, Father Jules Leguerrier and Father Lavoie do not mention the use of this electric chair or the source documents that would relate to that allegation.

[49] Applicants' counsel's review of the documents about Father Leguerrier revealed that they contain, in graphic and horrific detail, descriptions of numerous incidents involving the electric chair.

(b) The POI Report for Sister Anna Wesley

[50] In the POI Report for Sister Anna Wesley, the summary portion of the Report is two pages long. The summary indicates her biographical information and the dates of her employment at St. Anne's IRS. It notes that she was convicted of various offences, as follows:

> On April 26, 1999, the Staff Member was convicted of three counts of administering a noxious substance and five counts of common assault on students of St. Anne's IRS which took place during the years 1951 to 1962, and was given a conditional sentence of 11 and a half months in prison, to be served in the community.

[51] The Wesley POI Report notes that "additional allegations of physical and sexual abuse against the Staff Member were reviewed, but did not result in criminal charges." The summary does not indicate the nature of the allegations against her that did not lead to convictions.

[52] As source documents, the Wesley POI Report lists the Certificates of Conviction, a Sentencing Document and Proceedings at Trial. The list of documents in Appendix "A" to the Report extends for 60 pages and the source document collection accompanying the Wesley POI Report numbers 6,804 pages.

(c) The POI Report for Reverend Father Jules Leguerrier

[53] In the POI Report for Reverend Father Jules Leguerrier, the summary portion of the Report is one page long. It indicates Father Leguerrier's biographical information, the dates during which he was employed at St. Anne's IRS, and some additional information concerning his subsequent employment.

[54] The Leguerrier POI Report does not mention any allegations of physical or sexual abuse. Appendix "A" to the Report provides a list of documents extending for 46 pages and the document collection accompanying the Leguerrier POI Report has 3,191 pages.

(d) The POI Report for Reverend Father Arthur Lavoie

[55] In the POI Report for Reverend Father Arthur Lavoie, the summary portion of the Report is two pages long. It lists his biographical information, the dates during which he was employed at St. Anne's IRS and various "additional information", which includes brief notes about his residency and a note to "See Appendix A".

[56] The Lavoie POI Report does not mention any allegations of physical or sexual abuse. Appendix "A" to the Lavoie POI Report, listing the source documents produced from the OPP investigation, extends for 36 pages. The documents in the list have 2,472 pages.

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[57] The Lavoie POI Report does not mention any allegations of abuse. A review of the source documents indicates that Father Lavoie was a serial sexual abuser of children at St. Anne's IRS.

C. DISCUSSION AND ANALYSIS

1. The Applicants' and AFN's Position and Submissions

[58] The Applicants submit that the St. Anne's IRS Narrative summarizes a selection of the allegations of physical and sexual abuse made against former staff and students but it is far from being a comprehensive representation of the allegations found in the attached source documents. The Applicants submit that it is unclear from the summary which POIs are responsible for any of the allegations found in the summary.

[59] The Applicants plead that the updated Narrative and POI Reports do not comply with the terms or spirit of the IAP nor the expedited and expediency goals of advance disclosure to adjudicators for an inquisitory hearing process because: (a) the Narrative does not provide an adequate or useful summary for adjudicators or Claimants of the thousands of documents that have been added to the source documents, nor does it categorize the source documents in a manner that would be useable by adjudicators, Claimants or Claimants' Counsel in each IAP hearing; (b) source documents for the Narrative and for the POI Reports, including documents that are in the public record, are heavily redacted; and (c) the POI Reports do not provide an adequate or useful summary of the contents of each source document, leaving thousands of pages of new source documents to be reviewed by the adjudicators and by Claimants and their counsel to determine if the document is relevant to the IAP hearing.

[60] The AFN's position and submissions are similar to those made by the Applicants.

2. Canada's Position

[61] Canada disputes the submission that it's Narrative and POI Reports for St. Anne's IRS are inadequate. It submits that Appendix VIII provides general guidance, but does not lay out any specific criteria for the organization of the information. It submits that the IRSSA allows Canada significant discretion in how it structures and compiles the Reports. It argues that for School Narratives, Canada need not summarize every document relating to St. Anne's or create an inventory of allegations categorized by alleged perpetrator. Canada points to privacy concerns that prevent it from naming in School Narratives alleged perpetrators who were not convicted.

[62] Regarding POI Reports, Canada argues that the IAP does not set out which details of allegations ought to be included in the POI Reports, but speaks only of sexual and physical abuse allegations. It submits that in the absence of information about convictions or charges against a POI who is referred to in the OPP documents, the index to the POI Report is intended to provide information about other allegations of sexual and physical abuse, particularly by reference to the relevant source documents.

[63] Canada explains that it used legal language to categorize the basic content of allegations (e.g. "administration of a noxious substance", rather than "force to eat vomit") in order to take a "neutral" rather than an "editorial" approach. Replying on privacy concerns,

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Canada says it has reasonably opted not to "decontextualize" or "speculate" on allegations, "which would have the effect of distorting the personal information of former students and staff." According to Canada, the source documents can speak for themselves.

[64] Canada emphasizes the role of Claimants' Counsel under the IAP and argues that the Applicants' complaints about the Narrative and POI Reports stem from their misunderstanding of the role of Claimants' Counsel in the IAP. According to Canada, the increased volume of documents for St. Anne's creates a special context requiring additional efforts from all parties. Canada asserts that to the extent that any document (source or otherwise) benefits a Claimant's case, it is the Claimant and their counsel that bears the onus of producing that document.

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3. Analysis – The School Narratives and the POI Reports

[65] The language of Appendices VIII and X to Schedule "D" and the factual nexus at the time of the signing of the IRSSA support the Applicants' and AFN's interpretation that both the Narratives and the POI Reports must identify all of the allegations or incidents of physical or sexual abuse at the school in a meaningful way that facilitates and makes it easier for Claimants, not all of whom will be represented by lawyers, to advance their claims and that makes it more efficient for the adjudicators to decide claims.

[66] Making it easier for Claimants, who are not relieved of the burden of proving their claims, and making it more efficient for the adjudicators to decide their claims, and putting a burden on Canada to prepare School Narratives and POI Reports was not an act of generosity or a magnanimous gesture by the Defendants settling the class actions and the numerous individual actions; it was a bargained-for term of the IRSSA.

[67] The bargained-for-term reflected the facts that: (a) Canada had already done a great deal of work in collecting historical material; (b) there was little doubt that atrocities had occurred; (c) the events had happened over many years; (d) the survivors were aging with memories that would be diminishing; and (e) in any event, the survivors' memories would be extremely painful for them to revive.

[68] Canada is not doing a favour in providing School Narratives and POI Reports; it is a performing a hard-bargained contractual promise.

[69] Canada's obligations are not affected or shifted when a survivor retains a lawyer to assist in the prosecution of his or her claim. While the IAP is litigious, it is a *sui generis* system of adjudication, and under it, Canada has an obligation to produce meaningful reports summarizing documents that speak about incidents of physical or sexual abuse by persons named in an Application Form as abusers and by persons other than those named in an Application as having abused a Claimant. The information from these documents is to be added to the Narrative. In the documents, the names of persons other than alleged perpetrators of abuse (i.e. other students or persons at the school) are to be blacked out to protect their personal information.

[70] Appendix VIII requires Canada to write a Narrative summarizing documents about each residential school. Appendix VIII requires Canada to add to that Narrative information from documents that mention sexual abuse by individuals other than those named in an Application. In respect of POI Reports, Appendix VIII contemplates that the Reports will include any allegations of physical or sexual abuse by such persons. There is nothing in Appendix VIII that draws a distinction between allegations that led to a conviction and

allegations that did not lead to a conviction.

[71] The purpose of the Narrative and POI Reports is to assist adjudicators and the parties, particularly Claimants, to prepare for a hearing involving a particular school and POI to facilitate an expeditious process. In my opinion, providing specific references to the source documents is consistent with this objective, whereas simply listing all source documents together in an appendix is not, particularly when those documents number in the thousands.

[72] The release of thousands of documents for St. Anne's IRS required the updating of the Narrative and the POI Reports.

[73] I agree with the arguments of the Applicants and AFN that the Narratives for St. Anne's IRS and the POI Reports for St. Anne's IRS do not comply with the requirements of the IRSSA.

[74] The Order that is attached as Schedule "A" to these Reasons for Decision is designed to make it clear what is required to comply with the IRSSA.

[75] It may be noted that the Order is silent about the Narratives and POI Reports for Bishop Horden IRS. These Reports were not in the record on this RFD, and therefore it was not proven that there are any problems with these Reports.

4. The Redaction of Documents for School Narratives and for POI Reports

(a) Introduction and Canada's Preliminary Objection to the RFD

[76] As noted above, there is a dispute between the parties about the extent to which Canada must provide copies of documents without redactions to the Secretariat and to IAP Applicants.

[77] The AFN and the Applicants submit that for the purposes of the IAP, Canada must produce unredacted documents to the Secretariat for use by adjudicators. Canada disagrees and it also raises a preliminary objection to the Applicants' standing to raise this issue.

[78] Canada submits that this RFD is essentially a request made for the benefit of the Secretariat, a separate entity that administers the IAP. Canada submits that the Applicants should raise the matter of redactions on evidentiary motions before the independent adjudicators.

[79] Canada's preliminary submission is without merit. The Applicants are not bringing their RFD on behalf of adjudicators or the Secretariat. They obviously have an interest in the proper function of the IAP and they are obviously affected by the redacted or unredacted information in the documents made available to the adjudicators.

(b) Canada's Position

[80] Canada has provided redacted versions of all of the documents referred to in the Narratives and the POI Reports to the Secretariat. It submits that this is what the IRSSA expressly mandates and is consistent with the IRSSA's intense privacy safeguards.

[81] Canada rejects the Applicants' and AFN's reading of the IRSSA that would support providing unredacted documents, at least, to the adjudicators. Canada argues that the proposal is unfeasible and would raise a host of fairness issues in the adjudication of IAP claims, particularly the prospect that the Claimants would not know what information the adjudicator

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might rely on to make an IAP determination.

[82] Canada's only exceptions to the delivery of redacted documents are pleadings and transcripts of court proceedings where documents are "publicly available," which Canada self-defined as "currently accessible by and available to the general public."

[83] As noted above, this exception has, on consent, been extended to documents that are or were publically available.

(c) The AFN's and the Applicants' Position

[84] The AFN supports the Applicants' position.

[85] The AFN and the Applicants submit that the Secretariat (and through it, the adjudicators) should receive unredacted documents. (Presumably, this would leave it to the Secretariat to decide whether to produce unredacted documents to the Applicants and their lawyers.) They argue that while Schedule "D" contemplates redactions in documents provided to Claimants and their Counsel, there is no similar language for the Secretariat or adjudicators. They submit that providing an unredacted set of documents to the Secretariat and to adjudicators is consistent with their role as neutral parties within the IAP.

(d) Analysis

[86] Once again, the resolution of this issue is a matter of contract interpretation. This time, I agree with the arguments of Canada, and I do not agree with the arguments of the Applicants and the AFN.

[87] The redaction of documents was another major item in the negotiations and required a balancing of disclosure necessary for the adjudication of claims and sensitivity to the privacy of Claimants and also POIs.

[88] In regard to the redaction of documents, it must be noted that many physical and sexual assaults that will result in compensation under the IAP did not lead to investigations and criminal charges. Sadly, it must also be recalled that in the toxic environment of the Indian Residential Schools, there were incidents of student-on-student assaults. These incidents, too, may result in compensation under the IAP. Protection of privacy and the redaction of documents were matters of serious and substantial negotiation, and the language of the provisions of the IRSSA dealing with the IAP procedure does not make an exception for the adjudicators to receive unredacted documents.

[89] For the purposes of deciding the 2nd St. Anne's RFD, it is not necessary to join the debate among the parties about whether allowing the adjudicators but not the Claimants to have unredacted documents would yield a fairer or less fair or truer or less true adjudication of the claims. As a matter of interpretation, there simply is no basis for the interpretation advanced by the Applicants and the AFN.

D. CONCLUSION

[90] For the above reasons, the parties should take out the Order found in Schedule "A" to these Reasons for Decision.

[91] Canada shall pay costs to the Applicants and the AFN. If the parties cannot agree about

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the matter of costs, they may make submissions in writing beginning with the submissions of the Applicants and AFN within 20 days of the release of these Reasons for Decision followed by Canada's submissions within a further 20 days.

Perell, J.

Released: June 23 2015

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Schedule "A"

Court File No. 00-CV-192059

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	_____, THE _____
	)	
JUSTICE PERELL	)	DAY OF JUNE, 2015

BETWEEN:

[style of cause]

Proceedings under the *Class Proceedings Act, 1992*, S.O. 1992, c.6

ORDER

ON THE REQUEST FOR DIRECTIONS, ALSO KNOWN AS THE RETURN OF THE REQUEST FOR DIRECTIONS REGARDING ST. ANNE'S INDIAN RESIDENTIAL SCHOOL, made by approximately 50 Independent Assessment Process ("IAP") claimants who are former students of St. Anne's Indian Residential School ("St. Anne's IRS") or Bishop Horden Hall Indian Residential School ("Bishop Horden IRS") (the "Applicants"), heard on June 9, 2015, at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

ON READING the records (including "Questions on Written Cross-Examination on Affidavit" and the transcript of the cross-examination of Neil Shamsuzzoha) and factums filed by the Applicants, the respondent the Attorney General of Canada ("Canada") and the Assembly of First Nations ("AFN").

AND ON HEARING the submissions of counsel for the Applicants, Canada and the AFN, and of Edmund Metatawabin on behalf of the St. Anne's Survivors' Association.

1. THIS COURT ORDERS that Canada shall revise each of the following reports required by the Indian Residential Schools Settlement Agreement ("IRSSA"), Schedule "D", Appendix VIII, namely, the reports summarizing documents about St. Anne's IRS (the "**School Narrative**"), and the reports about the persons named in claimants' IAP application forms for St. Anne's IRS as having abused a claimant (the "**POI Reports**"), by including in each report a chart comprised of the following two columns:

a) a column, organized in chronological order with relevant dates indicated, that summarizes all available information as to alleged physical or sexual assaults or other wrongful acts (including available information as to who was involved, what occurred, and when and where it occurred), that

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i. in the case of a School Narrative, were alleged to have occurred at St. Anne's IRS, or

ii. in the case of a POI Report, were allegedly committed by a person identified in that POI Report while the person was an employee or student of St. Anne's IRS; and

b) a corresponding column that lists in chronological order with relevant dates indicated, all documents identifying, describing or otherwise relating to sexual or physical assaults or other wrongful acts that,

i. in the case of the School Narrative, were alleged to have occurred at St. Anne's IRS, or

ii. in the case of a POI Report, were allegedly committed by a person identified in that POI Report while the person was an employee or student of St. Anne's IRS.

2. THIS COURT FURTHER ORDERS that for inclusion in the evidentiary packages or supplemental evidentiary packages for IAP claims not yet resolved, Canada shall provide to the Indian Residential Schools Adjudication Secretariat (the "Secretariat") unredacted copies of court records (including, but not limited to transcripts and pleadings) that

a) relate to criminal offences that were alleged to have occurred at either St. Anne's IRS or Bishop Horden IRS, and

b) were previously made available to the Secretariat in redacted form.

3. THIS COURT FURTHER ORDERS that the Applicants' request for an order that Canada provide the Secretariat with unredacted copies of all source documents for hearings involving St. Anne's IRS or Bishop Horden IRS is dismissed.

4. THIS COURT FURTHER ORDERS that Canada shall pay costs to the Applicants and the AFN in the sum that is fixed by the Court following receipt of submissions from the parties beginning with the submissions of the Applicants and AFN within 20 days of today's date followed by Canada's submissions within a further 20 days.

JUSTICE PERELL

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CITATION: Fontaine v. Canada (Attorney General), 2015 ONSC 4061
COURT FILE NO.: 00-CV-192059
DATE: 20150623

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

LARRY PHILIP FONTAINE in his personal capacity and in his capacity as the Executor of the estate of Agnes Mary Fontaine, deceased, et al.

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA et al.

Defendants

REASONS FOR DECISION

Perell, J.

Released: June 23, 2015

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