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

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:

- *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

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

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.

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.

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.

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

> 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

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,

> 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.

> 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]

[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]

[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.

[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.

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

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.

> 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.

(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.

[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.

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,

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").

[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

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

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 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

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

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.

[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*

& 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

> 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

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

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.

[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

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.

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?

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,

> 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.

[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

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.

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.

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.

[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.

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

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

January 14, 2014
Order to go in accordance with
Reasons for Decision released today
Perell, J.

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

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