**CITATION:** Fontaine v. Canada (Attorney General), 2018 ONSC 103
**COURT FILE NO.:** 00-CV-192059
**DATE:** 20180104

**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*

**BEFORE:** PERELL J.

**COUNSEL:** *Margaret Waddell* and *Fay K. Brunning* for Angela Shisheesh and IAP Claimant C-14114

*Catherine A. Coughlan* and *Brent Thompson* for the Attorney General of Canada

*Geoffrey D.E. Adair, Q.C.* for Wallbridge, Wallbridge LLP

**HEARD:** December 13, 2017

**REASONS FOR DECISION**

## A. Introduction

[1] The Indian Residential Schools Settlement Agreement ("IRSSA") is a pan-Canadian class action settlement designed to provide redress for the harms done by what were known as Indian Residential Schools. In late 2006 and early 2007, the IRSSA was approved by nine provincial and territorial superior courts (the "Courts"). In March 2007, on consent of the parties, the Courts issued identical Implementation Orders. The Implementation Orders impose an ongoing supervisory and administrative role for the Courts largely by means of "Requests for Directions" ("RFD" in the singular, "RFDs" in the plural), the procedure for which is set out in the Court Administrative Protocol which is appended to the Implementation Orders.

[2] Over a decade after the IRSSA's approval and implementation, the Courts are still engaged in overseeing its administration. In doing so, the Courts have addressed a myriad of issues which I have tried to set out below in "Schedule 'A' – Annotations of RFD Decisions". The Courts have also formulated a test for standing to bring a RFD, which is also discussed below.

[3] IAP Claimant C-14114 and Angela Shisheesh, who were students at an Indian Residential School ("IRS") and who are Class Members under the IRSSA, submit that the Government of Canada ("Canada") has breached the IRSSA. They each bring a RFD for the enforcement of the IRSSA.

[4] Theirs are the latest of a number of RFDs brought on behalf of groups and individuals seeking redress in relation to Independent Assessment Process ("IAP") claims brought under the IRSSA arising out of the operation of St. Anne's IRS, and to a much lesser extent, Bishop Horden Indian Residential School ("Bishop Horden IRS").

[5] I directed that there be a preliminary jurisdiction motion to determine C-14114's and Ms. Shisheesh's standing to bring the RFDs and to determine whether the court has jurisdiction to grant the relief requested.

[6] For the reasons that follow, I conclude that C-14114 and Ms. Shisheesh have standing.

[7] However, for the reasons that follow, I conclude that: (a) insofar as C-14114 is seeking a re-opening of an IAP application under the IRSSA, her RFD is premature; (b) insofar as she is seeking orders with respect to the operation of the IAP, she does not have standing; and, (c) insofar as she is seeking an order compelling Canada to make "admissions," an undefined term

under the IRSSA, in an IAP application, she does not have standing and the court does not have jurisdiction to order Canada to do so. Accordingly, I dismiss C-14114's RFD in its entirety on the grounds of prematurity, want of standing and for want of jurisdiction.

[8] And, however, for the reasons that follow, I conclude that insofar as Ms. Shisheesh is seeking relief with respect to the IAP process and with respect to any claims she may have against the law firm of Wallbridge, Wallbridge LLP ("Wallbridge, Wallbridge"), she has no standing and the court does not have the jurisdiction to grant the relief requested. Accordingly, I dismiss Ms. Shisheesh's RFD in part for want of jurisdiction.

[9] Insofar as Ms. Shisheesh is seeking the court's direction about the delivery of documents to the National Centre for Truth and Reconciliation, Ms. Shisheesh has standing, and she may file a fresh as amended RFD exclusively with respect to this matter.

## B. Methodology

[10] In their written submissions on this jurisdiction motion, Ms. Shisheesh and C-14114 submit that Canada has breached the IRSSA. They contend that the legal positions taken by Canada constitute abuse of process and breach of the Department of Justice ("DOJ")'s professional obligations.[1] They also submit that the courts of Ontario and British Columbia are biased toward Canada and not doing their job in enforcing the IRSSA.

[11] In order to address these damning allegations, it is necessary to describe the factual and legal background to Ms. Shisheesh's and C-14114's RFDs in some considerable detail. In addition to the two headings set out above (Introduction and Methodology), I shall do so under the following headings:

- Factual Background
- The IRSSA
- The Infrastructure of the IRSSA
- The IAP
- Compensable Claims under the IAP
- The Role and Jurisdiction of the Court to Administer, Interpret, and Enforce the IRSSA
    - The Jurisdiction of the Supervising Judges
    - Interpreting the IRSSA
    - Requests for Directions ("RFDs")
    - Re-opening IAP Applications and *Fontaine v. Canada (AG),* [Spanish IRS]
- Standing and RFD Jurisdiction
- Ms. Shisheesh's RFD
- C14114's RFD
- Conclusion
- Schedule "A" – Annotations of RFD Decisions

[1] Requestors' Factum, para. 73.

## C. Factual Background

[12] Between the 1860s and 1990s more than 150,000 First Nations, Inuit, and Métis children were required to attend Indian Residential Schools operated by religious organizations with the funding of Canada.

[13] From the early 1900s until 1976, First Nations children in Attawapiskat, Fort Albany, Moose Factory, Moosonee, and Winisk/Peawanuck were removed from their homes and forced to reside at St. Anne's IRS, which was located at Fort Albany, Ontario on the south shore of the Albany River near James Bay. The children were required to attend the school for approximately 8 years, starting as early as age 5 or 6, living apart from their parents during most of the year.

[14] St. Anne's IRS operated from 1902 to 1970 within a Roman Catholic mission, which included a Residential School Program operated by the church.[2] From 1970 to 1976, St. Anne's was operated by the Federal government directly. It closed in 1976. St. Anne's IRS was the place of some of the most egregious incidents of abuse within the IRS system. It is known, for example, that an electric chair was used to shock students as young as six years old. It is also known that at least one of the staff at the school would force ill students to eat their own vomit.

[15] C-14114, H-15019, K-10106, Edmund Metatawabin, and Ms. Shisheesh are survivors of St. Anne's IRS.[3] Each of C-14114, H-15019, K-10106 and Ms. Shisheesh suffered abuse while at the school. C-14114 was sexually assaulted by a fellow student, in what has come to be known under the IAP as student-on-student ("SOS") abuse. H-15019 was sexually assaulted. K-10106 was sexually assaulted. Ms. Shisheesh was physically and sexually assaulted.

[16] Edmund Metatawabin ("Chief Metatawabin") is a member of the Cree Nation, an Executive Member of Peetabeck Keway Keykaywin Association (St. Anne's Survivors Association or "PKKA"). In 1992, Indigenous leaders, including Chief Metatawabin, then the Chief of the Fort Albany First Nation, organized the Keykaywin Conference in Fort Albany to disclose what had occurred at St. Anne's IRS and to begin the process of obtaining justice for the victims.

[17] After the Keykaywin Conference, Chief Metatawabin, asked the Ontario Provincial Police ("OPP") to investigate what had occurred at St. Anne's IRS.

[18] From 1992 to 1997, the OPP commenced a criminal investigation and gathered documents and met hundreds of former St. Anne's IRS students and took witness statements. In 1997, the OPP laid charges against seven former employees of St. Anne's IRS: Marcel Blais, Claude Chernier, "J.C.", Jane Kakeychewan, Claude Lambert, Anna Wesley, and John Rodrigue. There were over 12,000 OPP and related documents in the Crown brief, which took up 18 bankers' boxes. Criminal prosecutions were undertaken in Cochrane, Ontario by Ontario's Ministry of the Attorney General. All but J.C. were convicted of some charges.

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[2] Vicariate Apostolic of Keewatin Le Pas, Archdiocese of Keewatin Le Pas, the Diocese of Moosonee, Les Missionnaires Oblats de Marie Immaculee, Soeurs de la Charite d'Ottawa, Grey Sisters of the Immaculate Conception.

[3] The designations "C-14114", "H-15019" and "K-10106" were assigned to these individuals for the purposes of their IAP claims. These designations are used in this decision as a means of maintaining the privacy regime mandated by the IRSSA for claims made in the IAP.

[19] In 2000, 154 former students of St. Anne's IRS, including Ms. Shisheesh, retained Wallbridge, Wallbridge, a law firm with offices in Sudbury, North Bay, New Liskeard and Timmins, Ontario, to commence 62 civil proceedings in Cochrane against Canada and the Catholic Church Entities that operated St. Anne's IRS. The "Cochrane civil proceedings", as I will call them, were case managed by Justice Trainor of the Superior Court of Justice. In the Cochrane civil proceedings, the DOJ represented Canada and the Ottawa law firm of Nelligan, O'Brien, Payne LLP ("Nelligan") represented the three Catholic Church Entities that operated St. Anne's IRS.

[20] In 2002, after production of documents, Ms. Shisheesh was examined for discovery under oath by the defendants' lawyers.

[21] In 2003, in the Cochrane civil proceedings, Canada brought a motion in the Superior Court to obtain possession of the OPP records. Canada submitted that the records were necessary for 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.

[22] On August 1, 2003, Justice Trainor issued an order that the documents be released to the parties to the Cochrane civil proceedings. The order was based on the motion by Canada and the consent of the plaintiffs, with the church defendants not opposing and no one attending on behalf of the OPP (although it had been properly served). Justice Trainor ordered that counsel for the parties have an opportunity to inspect and copy the contents of the OPP files that related to the 154 plaintiffs in the civil actions. Justice Trainor's order stated:

> THIS COURT ORDERS that counsel for the parties may inspect and copy the contents of the Ontario Provincial Police 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.

[23] With respect to the OPP documents that related to non-plaintiffs, Justice Trainor adjourned the motion, and 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. (Non-plaintiffs were other survivors of St. Anne's IRS who had given statements to the OPP.) Justice Trainor's order stated:

> 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.

[24] It does not appear that the adjourned part of the motion with respect to the production of OPP documents about non-plaintiffs was ever brought on for a hearing. It should, however, be kept in mind for what follows that Ms. Shisheesh's lawyers had access to a large portion of the OPP's investigation material for 154 survivors of St. Anne's IRS.

[25] Around this time, across the country, approximately 18,000 individual actions by former students of the IRSs and numerous class actions were commenced against Canada[4] and the

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[4] The class action in Ontario was, in effect, nationwide. The Superior Court of Justice of Ontario had jurisdiction over the claims of residents of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador. See *Baxter v. Canada (AG)* (2006), 83 O.R. (3d) 481 (S.C.J.) at paras. 4-5.

churches that operated the schools, and in November 2003, Canada established a National Resolutions Framework, which included a compensation process called the Alternative Dispute Resolution ("ADR") Process. The ADR Process was the predecessor or the model for the IAP in the IRSSA.

[26] The Assembly of First Nations ("AFN") was largely responsible for the creation of the ADR Process. The AFN has an on-going interest in protecting the interests of all of the Indian Residential School survivors, especially to ensure that the overarching principles of healing and reconciliation are at the forefront. In November 2004, 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. A two-pronged approach would be required: (1) compensation; and (2) truth-telling, healing, and public education.

[27] After the launch of the numerous individual and class actions across the country, there were extensive negotiations to settle the individual actions and the class actions.

[28] In 2005, the parties to the Cochrane civil proceedings, including Ms. Shisheesh, negotiated a settlement, and it was a term of these individual settlements that if a plaintiff had not already been examined for discovery, then he or she would be examined for discovery for the purposes of negotiating the quantum of the compensation. All examinations for discovery were made part of the settlement process of the Cochrane civil proceedings.

[29] Ms. Shisheesh who had already been examined for discovery under oath, gave instructions to Wallbridge, Wallbridge, and she settled her claim. She was paid $20,000 in compensation and signed a release and a confidentiality agreement. Out of her settlement, she paid disbursements and a contingency fee to the law firm. In her affidavit for this RFD, Ms. Shisheesh makes numerous allegations about the quality of legal representation provided by, and the competence of, Wallbridge, Wallbridge, and in particular, she alleges that she was not advised about the alternatives of waiting for the outcome of the settlement negotiations that culminated with the IRSSA.

[30] With respect to her settlement, Ms. Shisheesh denies that she gave any settlement privilege to the defendants with respect to the use of the transcripts from her examination for discovery, a copy of which she only recently received in the summer of 2017 from Wallbridge, Wallbridge.

[31] Returning to the narrative, with the subsequent approval of the IRSSA, under its transitional provisions, Ms. Shisheesh became a "Class Member" for the purpose of a Common Experience Payment ("CEP") and for certain other purposes, but she was not entitled to make any IAP claim in respect of abuse suffered at St. Anne's IRS, having already been compensated in her settled civil action and having signed a release. What use can be made of Ms. Shisheesh's transcript and the transcripts of the other plaintiffs who settled the Cochrane civil proceedings is a controversial matter in the RFDs now before the court, and, as will appear from the discussion below, in several other RFDs.

[32] In May 2005, a political agreement was signed between Canada and the AFN that a settlement would be negotiated that would include compensation, healing, and a truth and reconciliation process. A few months later, the AFN became a plaintiff by launching a class action against Canada, and Larry Philip Fontaine, who was then the AFN's National Chief, was

named as proposed Representative Plaintiff. Negotiations continued into 2006.

[33] Thus, at the same time as the Cochrane civil proceedings were being settled, there were negotiations leading to the settlement of the national class actions and also numerous individual actions against Canada and the numerous Catholic and other Church Entities that operated the IRSs, including the Catholic Church Entities that operated St. Anne's IRS. This settlement came to be known as the IRSSA.

[34] In May 2006, the IRSSA was signed. The signatories were: (a) Canada, as represented by The Honourable Frank Iacobucci; (b) the class action Plaintiffs, as represented by the National Consortium, Merchant Law Group, and Independent Counsel; (c) the AFN and Inuit Representatives; and, (d) the General Synod of the Anglican Church of Canada, the Presbyterian Church of Canada, the United Church of Canada, and 51 Roman Catholic Entities.

[35] In late 2006 and early 2007, nine provincial and territorial superior courts certified the class action and approved the IRSSA.[5] On March 8, 2007, the nine courts also issued orders to implement the settlement.

[36] In 2011, H-15019 retained Wallbridge, Wallbridge to make a claim for him for IAP compensation, and K-10106 retained Nelligan to make a claim for her for IAP compensation.

[37] In February 2011, K-10106's IAP claim that she had been sexually assaulted was denied. She sought a Review Hearing. In 2012, a Review Adjudicator granted her IAP claim. She received $175,000 plus $26,250 towards her legal fees plus reimbursement for reasonable disbursements.

[38] In 2012, C-14114 made an IAP claim for compensation for SOS sexual abuse at St. Anne's IRS. In 2013, C-14114's IAP claim was denied.

[39] C-14114 proved that she had been sexually assaulted (at a SL3 level of severity) by a younger male resident student. She proved that while she and the boy sat at the back of the classroom and the teacher was at the front of the classroom not looking, the boy assaulted her. C-14114, however, did not prove that an adult employee of the school; *i.e.,* the teacher had, or should reasonably have had, knowledge that abuse of the kind proven was occurring at the school at the relevant time period.

[40] These elements of proof are required under the IAP's Compensable Compensation Criteria. The IAP Model stipulates that to prove SOS abuse, claimants bear the onus of proving that an adult employee at the IRS had knowledge or ought reasonably to have knowledge of the kind of abuse proven, and that the adult employees failed to take reasonable steps.[6] C-14114 was

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[5] In Ontario, see *Baxter v. Canada (A.G)* (2006), 83 O.R. (3d) 481 (S.C.J.). On December 15, 2006, seven of the nine courts (including the ONSC) issued decisions approving the IRSSA. The NUCJ issued its decision on December 19, 2006, followed by the NWTSC on January 15, 2007. From these decisions resulted what below are termed the "Approval Orders".

[6] In connection with SOS abuse, IRSSA Schedule "D", Appendix IX requires that the following three-part test be met:

In all other instances where a defined sexual assault (including those at the SL4 or SL5 level which are not predatory or exploitative) or a defined physical assault was proven to have been committed by another student, the following tests must be met:

a) Did the assault take place on school premises?

unable to establish this element of her IAP claim. C-14114 did not seek a Review or Re-Review of the Adjudicator's decision.

[41] Pausing here, it should be noted that C-14114 submits that at the time of her IAP hearing, Canada had made no admissions about SOS abuse at St. Anne's IRS, and C-14114 submits that the Narrative prepared by Canada for the St. Anne's IRS IAP hearings was false in not reporting widespread sexual and physical abuse at the school, which was subsequently disclosed in Canada's 2015 version of the Narrative.[7] It is also to be noted that at the time of C-14114's original IAP hearing, the court had not yet adjudicated the matter of the production of the documents from the Cochrane civil proceedings in IAP proceedings.

[42] Having reviewed the original decision in C-14114's IAP application, I note that her submission about SOS admissions must be qualified to say that Canada had made no "relevant" admissions about SOS abuse at St. Anne's IRS. The adjudicator in his decision noted that the admission produced in C-14114's application was not relevant because it predated the material time of C-14114's case and did not involve incidents inside a classroom.

[43] Returning to the narrative, between 2014 and 2017, after the dismissal of C-14114's application, the matter of the disclosure of the documents gathered for the criminal and civil proceedings in Cochrane came before the court in a series of RFDs; namely: (a) *St. Anne's IRS RFD #1*[8]; (b) *St. Anne's IRS RFD #2*[9]; (c) *H-15019 (K-10106, and Metatawabin) #1*;[10] and (d) *H-15019, K-10106, and Metatawabin #2.*[11]

[44] In those RFDs about St. Anne's IRS, and in an associated RFD about Bishop Horden IRS, *Fontaine v. Canada (AG)*, [Bishop Horden IRS],[12] the court determined that Canada had breached its disclosure obligations under the IRSSA. Canada was ordered to produce some – but not all – of the Cochrane documents.

[45] Between 2014 and 2017, there was also a RFD that culminated in a decision by the Supreme Court of Canada about the retention and destruction of IAP documents. See: *Fontaine v. Canada (AG),* [*In rem* Order].[13] This RFD is relevant to Ms. Shisheesh's RFD. She requests direction and the court's advice about the retention of her documents at the National Centre for

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b) Did an adult employee of the IRS have, or should they reasonably have had, knowledge that abuse (i) of the kind proven was occurring at the IRS (ii) at the relevant time period?

c) Did an adult employee at the IRS fail to take reasonable steps to prevent the assault?

[7] IRSSA Schedule "D", Appendix VIII ("Government Document Disclosure") requires that Canada prepare what have become known as a "Narrative" in relation to each IRS ("The government will also gather documents about the residential school the Claimant attended, and will write a report summarizing those documents.") This obligation is discussed, below. The same appendix required Canada to prepare what have become known as "Person of Interest (or "POI") Reports" ("The government will also search for, collect and provide a report about the persons named in the Application Form as having abused the Claimant, including information about those persons' jobs at the IRS 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.").

[8] *Fontaine v. Canada (AG)*, 2014 ONSC 283 [*St. Anne's IRS RFD #1*].

[9] *Fontaine v. Canada (AG)* 2015 ONSC 4061 [*St. Anne's IRS RFD #2*].

[10] *Fontaine v. Canada (AG)*, 2016 ONSC 4328 [*H15019 (K10106, and Metatawabin) #1*].

[11] *Fontaine v. Canada (AG)*, 2017 ONSC 2487 [*H15019, K10106, and Metatawabin #2*].

[12] *Fontaine v. Canada (AG)*, 2015 ONSC 3611 and 2015 ONSC 5177 [Bishop Horden IRS].

[13] *Fontaine v. Canada (AG)*, 2014 ONSC 4585, var'd 2016 ONCA 241, aff'd 2017 SCC 47 [*In rem* Order].

Truth and Reconciliation.

[46] In December 2013, *St. Anne's IRS RFD #1* came before the court. In fact, there were three RFDs; one brought by Canada, one by the Truth and Reconciliation Commission and one by 60 St. Anne's IRS survivors. Broadly put, the issue was whether Canada had complied with its disclosure obligations for the IAP and for the Truth and Reconciliation Commission. Canada took the position that the deemed undertaking rule foreclosed Canada from disclosing any materials in the IAP that were obtained pursuant to Rule 30. I released a decision for *St. Anne's IRS RFD #1* on January 14, 2014, and in my decision, I ordered that the OPP and Canada produce documents. I concluded that notwithstanding that the OPP was not a party to the IRSSA, the court had jurisdiction to order the OPP to produce its documents for the purposes of the IAP and exercised this jurisdiction to order the OPP to produce its documents to Canada for use in the IAP. In *St. Anne's IRS RFD #1,* I decided that Canada's failure to disclose the documents that had been prepared for the criminal and civil proceedings in Cochrane was a breach of the IRSSA.

[47] The thrust of my order in *St. Anne's IRS RFD #1* was that the OPP produce its documents with respect to its investigations that led to the criminal charges about events at St. Anne's IRS. The documents were to be produced for use in the IAP and they were to be delivered to the Truth and Reconciliation Commission in accordance with the IRSSA. The documents were to be produced by Canada by June 30, 2014. The order provided in part:

> 6. THIS COURT ORDERS that Canada shall by June 30, 2014, produce for the IAP: ...
>
> (b) the transcripts of criminal or civil proceedings in its possession about the sexual and/or physical abuse at St. Anne's IRS; and
>
> (c) any other relevant and non-privileged documents in the possession of Canada to comply with the proper reading and interpretation of Canada's disclosure obligations under Appendix VIII.

[48] It should be noted that the order speaks of transcripts of civil proceedings without differentiating between discovery transcripts and trial transcripts. This was to prove problematic because Canada interpreted the order in *St. Anne's IRS RFD #1* to apply only to trial transcripts. And, Canada took the position that discovery transcripts were privileged settlement communications or subject to the deemed undertaking. Claimants, however, later took the position that the discovery transcripts were within the ambit of the order made in *St. Anne's IRS RFD #1* and that the transcripts should have been produced by Canada and incorporated in the Narratives that Canada prepared for IAP proceedings.

[49] It also should be noted that while *St. Anne's IRS RFD #1* was before the court, the pending hearings by St. Anne's IRS claimants, including H-15019, were not adjourned, and the Chief Adjudicator has never ordered any review of completed IAP claims in light of subsequent changes to a school Narrative.

[50] In my Reasons for Decision in *St. Anne's IRS RFD #1*, I indicated that the IRSSA does not preclude a claimant from producing documents in support of his or her IAP claim beyond those articulated as mandatory in the application process. I also stated that the relevance and admissibility of documents is exclusively determined by the adjudicator on a case-by-case basis.

[51] In my Reasons for Decision in *St. Anne's IRS RFD #1*, I also ruled that the court has jurisdiction to re-open IAP claims affected by the non-disclosure, but that this jurisdiction had to

be exercised on a case-by-case basis. However, much of what I said about re-opening IAP claims was overruled three years later in *Fontaine v. Canada (AG),* [Spanish IRS],[14] which is discussed below. Suffice for present purposes to say that the view expressed in *St. Anne's IRS RFD #1* that Schedule "D" to the IRSSA is "not a complete code"[15] has been expressly overruled by the Court of Appeal.[16]

[52] On June 30, 2014, Canada produced documents purportedly in compliance with my order in *St. Anne's IRS RFD #1*. Counsel for the RFD Requestors received an external hard drive from the Secretariat containing approximately 12,300 electronic documents in .pdf format, including a 313-page index.

[53] However, - transparently and conspicuously - Canada did not produce examination for discovery transcripts of those parties in the Cochrane civil proceedings who had settled with Canada before the IRSSA was signed. Canada noted in its covering letter delivering the documents that these transcripts were subject to settlement privilege and undertakings of confidentiality given to the plaintiffs in the pre-IRSSA Cochrane settlements. Later Canada was to submit that the deemed undertaking also applied. At the time, counsel for the RFD Requestors did nothing in response to this express indication.

[54] In its covering letter, Canada indicated that it would not produce two types of transcripts, one of which was the examination for discovery transcripts; the letter stated:

> Also, as contemplated by Perell J.'s order, Canada will not produce documents that are subject to solicitor client, litigation or settlement privileges. In this regard, Canada is of the view that there are two types of transcripts that contain extremely personal and painful stories that are not being produced because of settlement privilege and/or undertakings of confidentiality given to the plaintiffs in the context of pre-IRSSA settlements. These are transcripts that were part of an ADR process that led to settlements with Canada and discovery transcripts with other parties who settled prior to the IRSSA. In any event, these documents would have been severely redacted in accordance with the privacy provisions of Appendix VIII. Finally, there are a small number of plaintiffs who did not settle with Canada through the ADR process and later went into the IAP process. Their transcripts are being produced for the IAP hearings of these plaintiffs, according to Appendix XI of the IAP model.

[55] On July 25, 2014, H-15019's IAP hearing went forward without the benefit of the Cochrane documents that had recently been produced by Canada, and on September 23, 2014, H-15019's IAP claim was dismissed. H-15019 sought a Review Hearing.

[56] On April 2, 2015, the Review Adjudicator upheld the original decision dismissing H-15019's claim. H-15019 did not seek a Re-Review Hearing. He was so distraught that he attempted suicide.

[57] In June 2015, two more RFDs about Canada's production obligations came before the court in Ontario. In the first RFD, *Fontaine v. Canada (AG)*, [Bishop Horden IRS][17] (filed November 2014, amended April 2015), nine students from Bishop Horden IRS, some of whom had settled their IAP claims, brought a RFD seeking the court's advice about whether Canada had complied with its disclosure obligations under the IRSSA. The survivors alleged that Canada

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[14] 2017 ONCA 26.
[15] *Fontaine v. Canada (AG)*, 2014 ONSC 283 [*St. Anne's IRS RFD #1*] at para. 204.
[16] *Fontaine v. Canada (AG),* 2017 ONCA 26 [Spanish IRS] at paras. 51-53.
[17] *Fontaine v. Canada (AG)*, 2015 ONSC 3611 and 2015 ONSC 5177 [Bishop Horden IRS].

had breached its disclosure obligations with respect to the Narrative for Bishop Horden IRS, an IRS that had operated in Moose Factory, Ontario.

[58] In the second RFD, in June 2015, former students of St. Anne's IRS, along with students from Bishop Horden IRS, who had made or were making claims for compensation under the IAP, filed *St. Anne's IRS RFD #2*. This RFD was supported by the AFN and PKKA, whose spokesman, Chief Metatawabin, made oral submissions at the hearing of the RFD. In this RFD, the Requestors asserted that Canada had not complied with its report writing obligations under the IRSSA, including its obligation to update reports following the order made in *St. Anne's IRS RFD #1*. The Requestors submitted that Canada had not provided an adequate school Narrative or POI (person of interest) Reports.

[59] On June 4, 2015, I released my decision in *Fontaine v. Canada* [Bishop Horden IRS].[18] I concluded that Canada had breached the IRSSA, but I also concluded that both the RFD Requestors and Canada misunderstood Canada's obligations under the IRSSA. I also pointed out that the IAP was an adversarial process in which Canada and the IAP claimants were adversaries and that the IAP was not the reconciliation part of the IRSSA, which itself was an arm's-length hard-bargained settlement contract. In my Reasons for Decision, I stated:

> 11. I agree with the [Requestors] that Canada has breached its document collection obligations under the IRSSA - but not for the reasons advanced by the [Requestors]. Whether or not Canada has breached its contractual obligations is a matter of contract interpretation, and my own conclusion is that there has been a breach. My conclusion is mainly, but not exclusively, based on the interpretative arguments of the AFN, whose counsel made the most helpful of the arguments at the hearing of the RFD.
>
> 12. I do not agree with Canada's interpretation of its disclosure obligations, but I do not agree with the [Requestor's] version either. It is to oversimplify, but Canada's version of how the IAP operates understates Canada's production and disclosure obligations and the [Requestors'] version much overstates Canada's obligations, which are much narrower than the [Requestors] would have them to be.
>
> 13. As I shall discuss below, the IRSSA is about doing justice, but it is a settlement agreement, and settlements are by their nature compromises. A settlement never achieves perfect justice. While reconciliation is an ultimate purpose of the IRSSA, the IAP portion of it is a *sui generis* adjudication program that is the product of adversarial arms-length contract negotiations in the context of adversarial class actions and numerous individual proceedings and a court approved settlement. The IAP is not the truth and reconciliation portion of the IRSSA.
>
> 14. Unfortunately, the parties' non-mutual mistakes about the meaning of the IRSSA has been a festering sore of suspicion, animosity, distrust, and shared resentment. The [Requestors] expressly accuse Canada of acting in breach of the IRSSA and of acting in bad faith. Canada does not bite its tongue in arguing that the [Requestors] are overreaching, and it seems that it resents and is indignant about the [Requestors'] accusations.
>
> 15. I do foreclose the possibility that some trust and respect can be restored, but I shall be so bold as to explain to both parties that for different reasons, they both misinterpret the IRSSA. The AFN comes closest to the true interpretation, but it too overstates Canada's contractual obligations.
>
> ....
>
> 17. Under the IRSSA, Canada is entitled to resist being asked to do more that it bargained for, but it is not entitled to resist to do less than it bargained for, which is my conclusion for this RFD. That said,

[18] *Fontaine v. Canada (AG)*, 2015 ONSC 3611 and 2015 ONSC 5177 [Bishop Horden IRS].

> what Canada is obligated to do is less than the [Requestors] contend, and while I conclude that Canada has breached its disclosure obligations and while I shall fashion a remedy for that breach, I do not conclude that Canada's breach was a manifestation of bad faith.
>
> ....
>
> 96. It is the Court's responsibility to hold the parties to their negotiated bargain, no more, no less.

[60] In *Fontaine v. Canada* [Bishop Horden IRS], I ordered Canada to conduct additional searches with the RCMP (Royal Canadian Mounted Police) for documents relevant to an alleged assault in the girls' dorm of the school. I, however, dismissed the requests that: (1) Canada be compelled to answer certain refused questions on a cross-examination; (2) Canada produce any additional documents relevant to the IAP process that it may have in its possession; and (3) the Secretariat establish a witness-matching program.

[61] Two weeks later, on June 23, 2015, I released my decision in *St. Anne's IRS RFD #2.* In *St. Anne's IRS RFD #2,* I agreed with the arguments of the Requestors and AFN that the Narratives for St. Anne's IRS and the POI Reports for St. Anne's IRS did not comply with the requirements of the IRSSA. The draft order that I attached to my Reasons for Decision was designed to make it clear what was required to comply with the IRSSA. I ordered Canada: (a) to revise its School Narrative and POI Reports for St. Anne's IRS; and (b) to provide to the Indian Residential Schools Adjudication Secretariat unredacted copies of any court records, including transcripts and pleadings, that were at any time publicly available and, upon request, to claimants or their lawyers for IAP hearings about St. Anne's IRS or Bishop Horden IRS.

[62] In *St. Anne's IRS RFD #2*, I dismissed the request for an order that Canada provide the Secretariat, claimants, and claimants' counsel with unredacted copies of other documents gathered for the School Narrative and POI Reports. I also dismissed the Requestors' request that Canada update its reports for Bishop Horden IRS.

[63] In November 2015, now represented by new counsel, H-15019 filed a RFD seeking court intervention in his IAP claim. As noted above, H-15019's IAP had been dismissed, and he submitted that important information had not been disclosed to adjudicators because Canada failed to comply with the order made in *St. Anne's IRS RFD #1.* In his RFD, H-15019 alleged that Wallbridge, Wallbridge and Nelligan were implicated by professional negligence and or breaches of fiduciary duty in Canada's non-disclosure of the OPP documents. In his RFD, H-15019 also sought an investigation and that the claims of other IAP applicants be re-opened.

[64] About four months later, in March 2016, K-10106, who, although a successful IAP claimant, brought a RFD to join company with H-15019 in pursuit of the re-opening of resolved IAP claims. K-10106's complaints were similar to H-15019's, and she requested similar relief to the relief requested in his RFD. K-10106 was aggrieved that her lawyers, Nelligan, had an alleged conflict of interest and had not used the Cochrane documents for her successful IAP claim, and she felt that she had been deceived and that there had been a miscarriage of justice. H-15019's RFD, which was to become a companion to K-10106's RFD, was supported by Mushkegowuk Council, which was represented by Chief Metatawabin. Both RFDs sought orders to rectify disclosure problems associated with St. Anne's IRS and to re-open already resolved IAP claims.

[65] In May 2016, H-15019 brought a motion for preliminary relief for his RFD; *i.e.,* (1) confidentiality orders; (2) the disqualification of the DOJ lawyer acting for Canada; (3)

summonses to compel evidence from two DOJ lawyers, other representatives of Canada, the Chief Adjudicator, an IAP Adjudicator, an IAP Review Adjudicator, and representatives of the Catholic Church Entities; and (4) an advance costs order.

[66] Save and except for the confidentiality orders, Canada submitted that H-15019's motion for preliminary relief and indeed his RFD were premature, because he had not exhausted the review process for his IAP claim. Canada, therefore, requested that the motion for preliminary relief be dismissed and that the RFD be adjourned *sine die*. I agreed with Canada's submission and granted the confidentiality order and adjourned the preliminary motion and the RFD to be brought on for a hearing, if necessary, after H-15019's Re-Review Hearing.[19]

[67] In the months following the release of the decision on the preliminary issues, by letter dated October 3, 2016, counsel for the Mushkegowuk Council advised that his client was discontinuing its RFD for K-10106, citing concerns about costs exposure, but within days, the court was advised that Chief Metatawabin, the PKKA, and K-10106 would pursue the RFD (referred to below as "Chief Metatawabin's RFD"). They also brought on a motion requesting an order that they be immune from any adverse costs awards in prosecuting this RFD, which was scheduled to be heard in December 2016.

[68] In Chief Metatawabin's RFD it was alleged that Nelligan had a conflict of interest, had breached its fiduciary duties and was professionally negligent because it represented the Church Entities that operated St. Anne's IRS during the Cochrane civil proceedings and during the ADR program, but subsequently it represented IAP claimants from St. Anne's IRS without informing them it had previously represented the church. Further, the Requestors allege that Nelligan knew about the Cochrane documents, but failed to file them in the IAP or request them from Canada during the IAP; or bring a RFD about the documents.

[69] Around the same time as Chief Metatawabin's RFD, C-14114, who earlier in 2016 had learned about the decision in *St. Anne's IRS RFD #1* and about the disclosure of some but not all of the Cochrane documents, decided to bring a RFD to apply for a re-opening of her IAP application.

[70] On November 11, 2016, relying on the order in *St. Anne's IRS RFD #1*, C-14114 commenced a RFD to re-open her concluded IAP claim based on concealment of 12,300 documents by the Crown about abuse at St. Anne's IRS. She also sought: (a) revised disclosure from the Crown under *St. Anne's IRS RFD #1*; (b) granting the Chief Adjudicator authority and powers to compel the Crown to make admissions for SOS abuse claims based on (i) pre-IRSSA examinations for discovery, (ii) OPP witness interviews, and (iii) ADR decisions; and (c) for the court to adjudicate whether civil pleadings and OPP signed statements were admissible evidence in IAP adjudications.

[71] Part of C-14114's RFD appeared moot because the Chief Adjudicator responded by allowing a Review and a Re-Review Hearing for C-14114, with the result that C-14114's IAP application was remitted back to a hearing pending further SOS admissions.

[72] Meanwhile, in December 2016, H-15019 sought to file Ms. Shisheesh's pleadings in his IAP claim, but Canada objected, and the Adjudicator refused to admit the evidence from Ms.

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[19] *Fontaine v. Canada (AG)*, 2016 ONSC 4328 [*H15019 (K10106, and Metatawabin) #1*].

Shisheesh's Cochrane civil action because it was hearsay untested by cross-examination. Canada also opposed production of Ms. Shisheesh's transcripts, claiming settlement privilege.

[73] Similarly, for C-14114's rehearing before an adjudicator, she demanded but Canada refused to produce certain Cochrane documents including the transcript of Ms. Shisheesh's examination for discovery from her settled Cochrane civil action. On December 7, 2016, because Canada would not make admissions about the use of the material from her Cochrane civil pleadings, Ms. Shisheesh agreed to testify in C-14114's IAP re-hearing.

[74] While all these developments in the various IAP applications were happening, C-14114's RFD remained outstanding. (It was scheduled for March 2016 hearing.) And, in December 2016, the jurisdiction of Supervising Judges to reopen IAP applications was in a state of flux and uncertainty because of the pending release of the decision in *Fontaine v. Canada (AG),* [Spanish IRS].[20] As noted above, the Requestors in Chief Metatawabin's RFD by preliminary motion requested an order that they be immune from any adverse costs awards in the RFD. At the same time, Wallbridge, Wallbridge and Nelligan sought intervenor status, which was not opposed.

[75] In these circumstances, on December 14, 2016, and with the consent of the parties, I decided to adjourn C-14114's RFD and H-15019's RFD but not Chief Metatawabin's RFD, which would proceed depending upon a release of the Court of Appeal's reasons for decision. I made the following order:[21]

> On consent of the parties, I grant the motion for a costs immunity order, in part, and subject to the following terms:
>
> (1) The RFDs for IAP Claimants H15019 and C14114 scheduled for March 24, 2017 are adjourned *sine die*;
>
> (2) There shall be a standing and jurisdiction motion in the Metatawabin and others RFD now before the court to be heard on March 24, 2017 provided that the Court of Appeal releases its decision in the recently heard RFD appeal by February 15, 2017;
>
> (3) If the Court of Appeal does not release its decision by February 15, 2017, the March 24, 2017 hearing will be adjourned and rescheduled;
>
> ...
>
> (6) The issue to be determined on the jurisdiction motion is whether the court under the Indian Residential Schools Settlement Agreement has the jurisdiction in whole or in part to grant the relief requested in the fresh amended RFD;
>
> ....

[76] On January 16, 2017, the Court of Appeal released its Reasons for Decision in *Fontaine v. Canada (AG),* [Spanish IRS].[22] The decision set out the circumstances in which a Supervising Judge can intervene in the IAP. The Court of Appeal held that for intervention to be warranted, a Re-Review Adjudicator's decision must be shown to be "so unreasonable or exceptionally wrong that it amounted to a failure to enforce the IRSSA or the IAP model".

[77] On January 24, 2017, H-15019's counsel wrote Court Counsel and alleged that Canada

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[20] The appeal was granted on December 6, 2016 with reasons to follow.
[21] *Fontaine v. Canada* (AG), 2016 ONSC 7913.
[22] 2017 ONCA 26, rev'g 2016 ONSC 4326 [Spanish IRS].

was still not complying with the order in *St. Anne's IRS RFD #1* because of its failure to file the transcripts from the Cochrane civil proceedings. As a result of this correspondence, I convened a case management conference in court on February 7, 2017. Counsel for H-15019, Canada, and Nelligan attended.

[78] On February 17, 2017, as a result of the submissions made for the case management conference, I issued a direction for H-15019's RFD that the issue of Canada's compliance with *St. Anne's IRS RFD #1* be dealt with by way of written submissions, and I set a timetable for the exchange of the parties' submissions.[23] The hearing of Chief Metatawabin's RFD was to proceed on March 24, 2017 as originally planned.

[79] The March hearing proceeded, and by that time, I had also received the written submissions from H-15019 and from the other parties to his RFD and also factums for Chief Metatawabin's RFD. I reserved judgment with respect to both RFD jurisdiction motions.

[80] On April 24, 2017, I released my decision in *Fontaine v. Canada (AG)*, [*H15019, K10106, and Metatawabin #2*][24]. In that decision, I recounted the history leading up to the making of the January 14, 2014 order in *St. Anne's IRS RFD #1*, and I pointed out that the comments in that decision about the re-opening of resolved IAP claims must now be read and interpreted in the light of the Ontario Court of Appeal's decision in *Fontaine v. Canada (AG)*, [Spanish IRS].

[81] In *Fontaine v. Canada (AG)*, [*H15019, K10106, and Metatawabin #2*], I summarized my analysis in paragraphs 10-15, 18 of my Reasons for Decision as follows:

> 10. In the first RFD, IAP Claimant H15019 makes a request for a variety of different forms of relief with respect to his pending IAP adjudication hearing and generally with respect to the operation of the IAP. His RFD asserts, among other things, that Canada has failed to disclose certain Ontario Provincial Police ("OPP") records that have information about the abuse suffered by former students at St. Anne's IRS. This RFD suggests that IAP claims have been compromised. The RFD alleges that two law firms, Nelligan O'Brien Payne LLP ("Nelligan") and Wallbridge, Wallbridge ("Wallbridge") were implicated in Canada's non-disclosure of the OPP documents.
>
> 11. In the second RFD, Edmund Metatawabin and Peetabeck Keway Keykaywin Association (St. Anne's Survivors Association or "PKKA"), an association of former students of St. Anne's IRS who speak for claimants but are not claimants themselves, and K-10106, (the "Requestors"), make a similar request for relief. They seek extensive remedies, including a judicial investigation and an order extending the IAP deadline for former students of St. Anne's IRS who did not file an IAP claim, and an order reopening IAP claims.
>
> 12. As will be seen, the claims for relief in the two RFDs are extraordinary, and because the relief was so extraordinary, in the second RFD, I ordered that there should be a preliminary motion to determine whether the Requestors had legal standing to bring the RFD, and if they did have standing, whether the Court had the jurisdiction, in whole or in part, to grant the relief requested.
>
> 13. The first RFD involves an allegation that Canada breached an order to produce what I shall call the "Cochrane documents". I ordered a hearing in writing to determine whether Canada had indeed breached its disclosure obligations under the IRSSA with respect to the Cochrane documents. If there was a breach, then the Court could consider, in a subsequent hearing, whether the various extraordinary requests for relief should be granted.

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[23] *Fontaine v. Canada (AG)*, 2017 ONSC 1149.
[24] *Fontaine v. Canada (AG)*, 2017 ONSC 2487 [*H15019, K10106, and Metatawabin #2*].

> 14. For the reasons that follow, for the first RFD, I conclude that H15019's RFD should be dismissed because Canada did not breach the IRSSA.
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> 15. For the reasons that follow, for the second RFD, I conclude that the Requestors do not have standing and that, in any event, the Court does not have the jurisdiction to grant the relief that they request.
>
> ....
>
> 18. In the first RFD now before the Court, I conclude that Canada did not breach the IRSSA and it has provided a transparent explanation for why the balance of the Cochrane documents have not been produced. The documents are confidential and privileged.

[82] In *Fontaine v. Canada (AG)*, [*H15019, K10106, and Metatawabin #2*], I concluded that Canada did not breach the IRSSA agreement or the IAP model in conspicuously refusing to produce the discovery transcripts of the Cochrane civil proceedings, and I dismissed the RFD.[25] In doing so, I agreed with Canada's argument that the reference to transcripts of civil and criminal proceedings in *St. Anne's IRS RFD #1* was not meant to include any transcripts of discovery evidence from previous civil proceedings, especially discoveries designed for settlement purposes. I also addressed the deemed undertaking attaching to documentary discovery[26] and examinations for discovery in the following terms:

> 116. I agree with Canada's argument that the reference to transcripts of civil and criminal proceedings in my January 2014 order in St. Anne's-RFD1 was not meant to include any and all transcripts of discovery evidence from previous civil proceedings, especially discoveries designed for settlement purposes. The January 2014 order specifically provides that Canada is required to produce only relevant, non-privileged documents, which suggests that the reference to transcripts of "civil proceedings" is meant to refer to proceedings where privilege and confidentiality issues do not apply. Transcripts from examinations for discovery are protected by the deemed undertaking rule and can only be used in subsequent proceedings in very limited circumstances. My January 2014 order should not be read as creating a general exception to that well-established rule.
>
> 117. This interpretation of the January 14, 2014 order is consistent with the IAP Model, which, as noted above, the Court of Appeal in *Fontaine v. Canada (AG)*, 2017 ONCA 26 at para. 53, characterized as a complete code. The IAP Model created an express obligation to disclose examination for discovery transcripts in limited circumstances involving the direct participant in the IAP process. It provides that if a claimant gave evidence at discovery in a prior civil proceeding and now wishes to enter the IAP, he or she must disclose his or her transcript. In essence, a claimant must consent to certain uses of the discovery transcript, if the claimant makes an IAP claim. (It is worth noting that consenting to the use of one's own examination for discovery evidence is one of the recognized exceptions to the deemed undertaking rule set out in rule 30.1.01(4) of the *Rules of Civil Procedure*.)
>
> 118. Although, as Claimant H15019 notes, Canada is obligated under Appendix VIII of the IAP Model to produce documents containing allegations of abuse, that obligation must be read in context and in a manner that is consistent with the IAP Model as a whole. Appendix XI of the IAP Model addresses the limited circumstances in which discovery transcripts can be used in IAP proceedings. To find that Appendix VIII imposes a general obligation on Canada to produce examination for discovery transcripts would be inconsistent with Appendix XI.
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> ....
>
> 121. Although the issues in Claimant H15019's IAP proceeding are similar to those at issue in the St.

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[25] *Ibid.*, at para. 129.
[26] Rule 30.1.01.

> Anne's civil litigation, Claimant H15019 is a non-party to the St. Anne's litigation and to the undertakings given in that case. Thus, Claimant H15019 has a heavy burden to demonstrate that the deemed undertaking should be lifted in this case. (I pause here to note parenthetically that it is worth recalling that Justice Trainor was very careful not to order the production of the Cochrane OPP documents of non-plaintiffs to the plaintiffs of the Cochrane civil proceedings.)
>
> 122. As Canada argues, the discovery transcripts in the St. Anne's litigation are akin to IAP hearing transcripts and contain extremely sensitive and personal information. The discovery evidence was given with the understanding that it would not be used for purposes other than the proceeding in which it was given, and consent to disclosure of this information has not been obtained from the plaintiffs in the Cochrane civil proceedings. Further, protection of confidentiality is consistent with the goal of reconciliation underlying the IRSSA process. Canada is right to be reluctant to agree to disclosure of this information, as doing so could undermine the goals of the IRSSA process. As such, the decision to order disclosure of this information should only be made where the interests of justice clearly outweigh the harm to the individual who provided the evidence.
>
> 123. In my opinion, this is not a case where the undertaking should be lifted. At his new hearing, Claimant H15019 will have the benefit of the additional information about St. Anne's IRS produced pursuant to the January 2014 order. He will have the benefit of all of the non-privileged, relevant documents in the St. Anne's civil litigation including pleadings, demands for particulars, and responses to those demands. He will also have the OPP reports with respect to the police investigation of activities at St. Anne's IRS.
>
> 124. I also agree with Canada that the discovery documents from the Cochrane civil litigation are covered by settlement privilege, and I disagree with Claimant H15019's submission that Canada has not met the evidentiary burden of showing that the discoveries were communications made with a view to reconciliation or settlement.

[83] In *Fontaine v. Canada (AG)*, [*H-15019, K-10106, and Metatawabin #2*], I concluded that Canada did not breach the IRSSA and had provided a transparent explanation as to why the balance of the Cochrane documents has not been produced. The documents were confidential and privileged.

[84] In *Fontaine v. Canada (AG)*, [*H-15019, K-10106, and Metatawabin #2*], with respect to Chief Metatawabin's RFD, I addressed whether K-10106 and Chief Metatawabin, who was representing PKKA, had the legal standing to bring the RFD and whether the court had the jurisdiction to provide the relief requested by these Requestors. I decided both issues in the negative and summarized my reasons at paragraph 132 of my decision as follows:

> 132. Outside of the IRSSA, the court obviously has the jurisdiction to litigate professional negligence and breach of fiduciary duty claims by a client against his or her lawyer, but within the IRSSA, the court's jurisdiction is circumscribed by its role supervising and administering what is a settlement of a class action. As I mentioned above and shall explain below, the IRSSA does supervise, in a circumscribed way, the relationship between IAP claimants and their lawyers, but that supervision is largely assigned to the Monitor and not the courts. In the circumstances of the immediate case of Mr. Metatawabin's, PKKA's and Claimant K-10106's RFD, complaints about the lawyers are outside the boundaries of the administration of the IRSSA.

[85] My decision in *Fontaine v. Canada (AG)*, [*H-15019, K-10106, and Metatawabin #2*], which is being appealed, did not resolve matters.

[86] In June 2017, H-15019 asked Ms. Shisheesh to testify at his IAP hearing, which was scheduled for July 10, 2017, and on July 7, 2017, he made an urgent request for court intervention because Canada was taking the position that transcripts and pleadings from the Cochrane civil proceedings were inadmissible because they were hearsay untested by cross-examination, and he wished an order that Canada produce the transcripts to Ms. Shisheesh and

another witness who proposed to testify for him but did not have copies of their own transcripts.

[87] I dismissed H-15019's request for urgent relief.[27] I concluded that the IAP process had to be completed before the court could intervene. I concluded that his request for court intervention was premature. In addition, I noted that the Court of Appeal in *Fontaine v. Canada (AG)*, [Spanish IRS] had restated that the circumstances in which a Supervising Judge can intervene in the IAP and indicated that intervention must be truly exceptional.

[88] H-15019's re-hearing proceeded on July 12, 2017. In a decision dated July 18, 2017, H-15019 was awarded $183,556.00, including $10,000.00 toward a future care plan, plus 15% towards his legal fees. Ms. Shisheesh did not testify because Canada supported H-15019's claim and, concluding that the claim had been proven. The adjudicator cancelled the hearing day on which she was to testify. Whether her transcript evidence could be filed for other IAP claimants remained an outstanding issue.

[89] An oral hearing of these RFDs was scheduled for September 22, 2017. In a direction dated August 30, 2017,[28] I directed that at the hearing, the Requestors were required to establish that they have standing to bring their respective RFDs, Canada was not required to file evidence in connection with either RFD, nor to respond to Ms. Brunning's Request to Admit, and reserved the matter of costs in connection with the hearing. I declined to grant the Requestors' costs immunity (which had been granted in connection with *Fontaine v. Canada (AG)*, [*H-15019, K-10106, and Metatawabin #2*]) because the issue as to the scope of the court's remedial jurisdiction was no longer so novel as to justify an order of that exceptional kind.[29] However, I pointed out that it was unlikely that costs would be awarded against either Requestor, referring to the fact that costs had not been awarded against a single IRSSA class member in the over 100 RFDs determined as of that date. I also point out here that I am unaware of Canada ever seeking costs against an IRSSA class member in connection with a RFD.

[90] Meanwhile, on September 8, 2017, Canada delivered a RFD seeking interpretive guidance on the jurisdiction of re-review adjudicators to re-open IAP applications on the grounds of procedural fairness. In effect, Canada's RFD challenges the re-review decisions in a number of cases (including C-14114's), without seeking to disturb the outcomes of those IAP applications; the relief sought is prospective only in that it would only impact on future re-review decisions. This RFD was heard by Justice Brown in Vancouver on December 1, 2016, together with several similar RFDs about the authority of the Chief Adjudicator. In its RFD, Canada seeks directions that it is an excess of the jurisdiction of the Chief Adjudicator or his designate, in the course of conducting a re-review, and an excess of the jurisdiction of Adjudicators on review, to: (a) import procedural fairness as an implied term of the IAP; (b) consider procedural fairness as an independent, free-standing ground for re-review or review; and, (c) grant a remedy on the basis of an alleged breach of procedural fairness, including remitting IAP claims to new hearings or to re-opened hearings to consider subsequent admissions.

[91] It can be seen that Canada's RFD about C-14114's IAP application was surgical. The RFD does not challenge C-14114's application being reheard, but rather it objected that the

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[27] *Fontaine v. Canada (AG)*, 2017 ONSC 4275 [15019 RFD].
[28] *Fontaine v. Canada (Attorney General)*, 2017 ONSC 5174.
[29] *Ibid.*, paras. 66-67.

Chief Adjudicator lacked the unilateral authority to order a re-opening of IAP claims as a part of the Review, Re-Review process on so-called grounds of procedural fairness. Thus, whatever the outcome of the RFD in British Columbia, C-14114's IAP claim has been re-opened and will proceed.

[92] Also on September 8, 2017, counsel for the Requestors sought an adjournment of the hearing in connection with the standing and jurisdiction issues then scheduled for September 22, 2017. A case conference was convened on that day, and the hearing of the jurisdiction motion was rescheduled for December 13, 2017. A timetable was established for filing materials that took into account the prospect of the AFN's participation and I directed that the materials for the hearing on December 13 would be the RFDs and the parties' facta; no other materials were to be filed for the hearing. As it happened, the AFN did not participate in the hearing and the Requestors ignored the direction that no other materials beyond the RFDs and their facta were to be filed. The Requestors filed amended RFDs and additional evidence and also relied on an affidavit of Mr. Fontaine that was sworn on November 8, 2017.

[93] In all these circumstances, C-14114 nevertheless seeks to prosecute her own RFD, and she seeks, among other things: (a) an order directing that the IAP application be returned to an adjudicator to revisit only the two missing elements pertaining to knowledge or lack of reasonable steps by persons in authority issues of her SOS claim; (b) ordering Canada to file a revised narrative, POI report, and source documents about abuse at St. Anne's IRS including transcripts from civil proceedings; (c) interpretative guidance from the court about the meaning of the words: "an adult employee of the IRS have, or should reasonably have had, knowledge that abuse of the kind proven was occurring at the IRS"; (d) granting the Chief Adjudicator authority and powers to compel Canada to make SOS admissions from the evidence recorded from St. Anne IRS students' completed examinations for discovery, signed witness statements to the OPP, and, or ADR decisions; (e) directing Canada to pay reasonable costs of the RFD and to direct that if C-14114 is successful in proving her IAP claim, that Canada shall increase its contribution towards legal fees to an amount equal to 30% of the final award; and (f) granting the Chief Adjudicator the authority and powers to compel Canada to comply with all these St. Anne's IRS disclosure orders for the IAP, and powers to penalize Canada for failure to do so.

[94] Ms. Shisheesh also wishes to proceed with her RFD. She seeks an order, among other things: (a) ordering Canada to the deliver to the National Centre for Truth and Reconciliation a copy of every document in the possession of Canada pertaining to her civil claim, except those documents over which solicitor and client privilege are claimed and except the transcripts of the examinations for discovery and granting to her or her estate executor an exclusive right to consent to her transcripts of examinations for discovery to be archived with the Centre; (b) ordering that the details of abuse and knowledge of abuse and/or lack of reasonable steps by adult supervisors contained in the transcripts of her examination for discovery be filed with the Secretariat for the IAP process, redacted of her name and identifying/personal details, and that the transcripts shall be disclosed in the narrative and POI reports; (c) ordering Canada to admit the truth of the allegations in the Cochrane civil pleadings and/or in the evidence contained in transcripts of examinations for discovery and admissions regarding the knowledge of adult supervisors at St. Anne's about the sexual abuse and lack of reasonable steps by adult employees; and (d) ordering that the rights granted to her apply to all former students of St. Anne's IRS, who were plaintiffs in the Cochrane civil actions and whose civil action was

concluded before the IRSSA was signed and to every other IRSSA class member, who has issued a civil action anywhere in Canada against Canada and or against the church entity or entities that operated an IRS in Canada.

[95] Analytically, Ms. Shisheesh's RFD raises two general issues; namely: (a) how does the IRSSA treat, if at all, the documents from the Cochrane civil proceedings, including the examination for discovery transcripts for the purposes of the *Fontaine v. Canada (AG),* [*In rem* Order]; and (b) how should the discovery transcripts from the Cochrane civil proceedings and transcripts from the ADR process be used for the purposes of Canada's obligations, if any, to make admissions for IAP claims.

[96] Here, it should be noted that in *Fontaine v. Canada (AG),* [*In rem* Order],[30] I ordered that that IAP documents are to be destroyed after a 15-year period in which IRS survivors may volunteer to submit their documents to the National Centre for Truth and Reconciliation. The Ontario Court of Appeal varied my order to add ADR documents and to have the Chief Adjudicator and not the Commission or the National Centre of Truth and Reconciliation supervise a notice program. The details of the scheme envisioned by the *in rem* Order are to be finalized in 2018.

[97] I also note that Ms. Shisheesh has a copy of her discovery transcript, and that during argument of the standing and jurisdiction issues on December 13, 2017, Canada indicated that it has no objection to Ms. Shisheesh providing a copy of it to the National Centre for Truth and Reconciliation, something that was reiterated by the Prime Minister in Question Period that day.

[98] With this factual background, I now turn to describing the legal background to resolve this standing and jurisdiction motion.

## D. The IRSSA

[99] There are four major components to the IRSSA: (1) Canada placed $1.9 billion into a trust fund to fund payments of the CEP to Class Members who resided at an IRS during the class period, who were to receive $10,000 for one school year or part thereof and an additional $3,000 for every additional year or part thereof; (2) Canada established the uncapped but time-limited IAP,[31] under which Class Members who suffered physical or sexual abuse at an IRS could claim compensation in a process administered by Canada but adjudicated by independent adjudicators; (3) a Truth and Reconciliation Commission was established with a mandate to create an historical record of the IRS system to be preserved and made accessible to the public for future study; and (4) Class Members released their legal claims in exchange for the benefits of the IRSSA. The releases extended to Canada and the Catholic Church Entities who were the named Defendants.

[100] Schedule "D," to the IRSSA, which contains numerous appendices, describes the IAP, and Schedule "N", describes the mandate for the Truth and Reconciliation Commission and the

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[30] *Fontaine v. Canada (AG)*, 2014 ONSC 4585, var'd 2016 ONCA 241, aff'd 2017 SCC 47 [*In rem* Order].

[31] From September 19, 2007 to November 20, 2017, 37,415 (98%) of 38,098 IAP claims have been resolved. There are 683 claims that are still in progress (68 in Ontario). Eighty-nine (89%) of the claims have been successful. The average award is $91,696 for total awards of $3.149 billion. http://iap-pei.ca/stats-eng.php

National Centre for Truth and Reconciliation.

[101] As discussed further below, under the IRSSA, to facilitate the work of the Truth and Reconciliation Commission and to implement the IAP, very substantial obligations were imposed on the Defendants, most particularly Canada, to produce documents, many of which contained extraordinarily sensitive personal information about the causes and effects of the abomination that was Canada's IRS system.

[102] The IRSSA contained numerous provisions to protect the confidentiality and privacy of the survivors of the IRSs and to respect that their stories were their stories to tell or to keep private.

## E. The Infrastructure of the IRSSA

[103] The judges of the nine courts that approved the IRSSA are designated as Supervising Judges. Both the judgments of the courts certifying the class actions and the Approval Orders provide that the respective courts shall supervise the implementation of the IRSSA and may issue such orders as are necessary to implement and enforce the provisions of the agreement and the judgment.

[104] Supervising Judges can hear applications to add institutions to the list of IRSs for the purpose of CEP and IAP claims. Among other things, Supervising Judges hear appeals from decisions of the National Administration Committee ("NAC") with respect to eligibility for the CEP. Supervising Judges have administrative and supervisory jurisdiction over the IRSSA. Supervising Judges hear RFDs.

[105] Two of the Supervising Judges are Administrative Judges. Under the Court Administration Protocol, these two judges receive and evaluate RFDs and determine whether a hearing is necessary, and if so, before which Supervising Judge. I am currently one of the Administrative Judges. Justice Brenda Brown of the British Columbia Supreme Court is the other.

[106] The Approval Orders incorporate by reference all the terms of the IRSSA, and the orders 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.
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> ...
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> 30. THIS COURT ORDERS AND DECLARES that no person may bring any action or take any proceedings against the Trustee, the Chief Adjudicator, the IAP Oversight Committee, the National Certification Committee, the National Administration Committee, the Chief Adjudicator's Reference Group, the Regional Administration Committees, as defined in the Agreement, or the

> members of such bodies, the adjudicators, or any employees, agents, partners, associates, representatives, successors or assigns, of any of the aforementioned, for any matter in any way relating to the Agreement, the administration of the Agreement or the implementation of this judgment, except with leave of this court on notice to all affected parties.
>
> 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.[32]
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> ...
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> 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.

[107] Guidance is also derived from the Courts' orders implementing the IRSSA, issued on March 8, 2007 ("Implementation Orders"), and in particular, paragraphs 20 (which provides that "applications to the Courts shall be carried out in accordance with" the Court Administration Protocol ("CAP") and 23 (which mandates the Courts to "supervise the implementation of the Agreement and (the Implementation Orders)" and empowers the Courts to make such further and ancillary orders as may become necessary from time to time. In setting out the manner in which applications relating to the implementation of the IRSSA will be dealt with by the Courts, the CAP created the procedures for bringing RFDs and their assignment to one of the Courts (referred to in the CAP as "supervising courts") for determination. The preface to the CAP notes that in order to ensure "the efficient and expeditious administration of the Agreement", the Courts determined that a "streamlined process" for applications dealing with directions would be desirable.[33]

[108] Pursuant to the Implementation Orders, Court Counsel was appointed as legal counsel to assist the Supervising Judges in their administration of the IRSSA. Court Counsel's duties are determined by the courts. A solicitor-client relationship exists between the Supervising Judges and Court Counsel. Brian Gover is the current Court Counsel.

[109] The Chief Adjudicator, who is appointed pursuant to court order under the IRSSA, supervises the IAP and the adjudicators that decide IAP claims.

[110] Subject to the direction of the Chief Adjudicator, the IAP is administered by the Secretariat. The Secretariat provides secretarial and administrative support to the Chief Adjudicator. The Secretariat is a branch of a department of Canada's civil service. However, save for specific financial, funding, auditing, and human resource matters, the Secretariat is

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[32] As my colleague in the IRSSA's administration, Justice Brown observed in *Fontaine v. Canada (Attorney General)*, 2015 BCSC 1386 [Cachagee], this language in the Approval Orders is similar to that found in s. 18.04 of the IRSSA, which requires the "parties" to fully exhaust the dispute resolution mechanisms in the IRSSA before making any application to the Courts.

[33] The CAP does not set out a test for standing but requires that "the Request ... identify the party, counsel or other entity with standing in respect of the Agreement who is bringing the matter forward" and creates the expectation that "parties, counsel and entities with standing" will cooperate by fairly, accurately and concisely stating the issues for determination and their respective positions.

under the direction of the Chief Adjudicator and is an independent body.

[111] Pursuant to the IRSSA Implementation Orders, Crawford Class Action Services was appointed Monitor of the IRSSA. The role of the Monitor, who reports to and is directed by the Courts, is to receive, on behalf of the supervising courts, all information relating to the implementation or administration of the CEP and the IAP.

[112] By order dated June 23, 2014, The Honourable Ian Pitfield was appointed Independent Special Advisor ("ISA") to the Monitor to review complaints relating to the conduct of lawyers and others purporting to act on behalf of claimants under the IAP and to report to the Monitor. Where the ISA determines that a complaint cannot be addressed outside the IRSSA, he or she is required to report to the Monitor and recommend that the Monitor bring a RFD.

[113] Under the IRSSA, the NAC supervises the implementation of the IRSSA. The NAC is comprised of seven representative members, including Canada, the AFN, Inuit Entities, Church Entities, and three representatives of plaintiffs' counsel. The NAC prepares policy protocols and standard operating procedures. The NAC also hears appeals with respect to CEP eligibility.[34]

[114] Under the IRSSA, Independent Counsel are plaintiffs' lawyers who signed the IRSSA, excluding legal counsel who signed in their capacity as counsel for the AFN or for the Inuit Representatives or Counsel and excluding members of the Merchant Law Group or members of any of the firms of the National Consortium. In effect, Independent Counsel comprise one of the three groups of lawyers who acted for the plaintiffs (the other two being the National Consortium and the Merchant Law Group).

[115] The IAP Oversight Committee ("OC") is responsible for supervising the IAP. It is comprised of an independent Chair and eight other members consisting of: two former students, two Class Counsel representatives, two Church representatives, and two representatives for Canada. The OC is responsible for the recruitment and oversight of the Chief Adjudicator, recruitment and appointment of adjudicators, recruitment and appointment of experts for psychological assessments, monitoring the implementation of the IAP, and making recommendations to the NAC on changes to the IAP as necessary to ensure its effectiveness.

[116] The Truth and Reconciliation Commission's role included identifying sources and creating as complete an historical record as possible of the IRS system and legacy.[35] The Commission was entitled to collect from Canada and the Church Entities all relevant documents in their possession or control subject to privacy, privilege, and confidentiality considerations.[36]

[117] Pursuant to the IRSSA, the historical record was to be preserved and made accessible to the public for future study and use at the National Centre for Truth and Reconciliation, which was constituted pursuant to Article 12 of Schedule "N" to the IRSSA. The Centre is mandated to archive and store all records collected by the Truth and Reconciliation Committee and other records relating to the IRSs. The collections are to be accessible to former students, their families

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[34] A further appeal (a "CEP Court Appeal") lies to the Supervising Judges. To promote consistency in adjudication, all CEP Court Appeals (almost 750 to date) have been heard and determined by Justice Brown.
[35] Schedule "N" to the IRSSA at para. 1(e).
[36] Schedule "N" to the IRSSA at para. 11.

and communities, the general public, researchers, and educators.

[118] The Commission for Truth and Reconciliation completed its mandate in 2015 and is no longer operational, but the National Centre for Truth and Reconciliation continues with its work.

[119] Canada, which is defined in the IRSSA to mean the Government of Canada, was a party Defendant to the class actions and individual actions that were settled by the IRSSA. Canada signed the IRSSA. Canada has an obligation to provide documents for the Truth and Reconciliation Commission, but it has a right to challenge the scope of that obligation. Canada administers the CEP, and it is the first level of appeals for CEP claimants. Canada is a member of the NAC that hears the second level of appeals of CEP claims. Canada is a member of the OC. Canada is a party to applications to add to the list of IRSs for which there may be CEP and IAP claims, and Canada can oppose applications to have a school added to the list. Canada is the responding party to challenge the claims of IAP claimants. DOJ lawyers are sometimes engaged as legal counsel for Canada's various roles under the IRSSA.

## F. The IAP

[120] The IAP is established by the IRSSA through Article 6. The details of the IAP are set out in Schedule "D" to the IRSSA. The IAP provides a customized adjudicative procedure for the resolution of claims of serious physical abuse, sexual abuse or other wrongful acts suffered while attending an IRS. The IAP is designed for the advancement of individual claims that must be proven by the individual survivors. The IAP is a post-settlement claims adjudication process; there is no automatic entitlement to compensation.

[121] Schedule "D" to the IRSSA sets out what is known as the "IAP Model". Under the IAP, an IAP claimant may receive compensation of up to $525,000; a maximum of $275,000 in relation to sexual and physical assaults and other wrongful acts and up to a further $250,000 for proven actual income loss.

[122] The Compensation rules set out an ascending scale of "Acts Proven" (SL1, SL2, PL, SL3, SL4, SL5), where for example, SL1 includes "one or more incidents of fondling or kissing," SL3 includes "one or more incidents of oral intercourse," and SL5 includes "repeated, persistent incidents of anal/vaginal penetration with an object."

[123] The Compensation Rules for the IAP set out an ascending scale of levels of "Consequential Harm" (HL1, HL2, HL3, HL4, HL5), where HL1 (Modest Detrimental Impact) is evidenced by "occasional short-term, one of: anxiety, nightmares, bed-wetting, aggression, panic states, hyper-vigilance, retaliatory rage, depression, humiliation, loss of self-esteem," and where HL5 (Continued Harm Resulting in Serious Dysfunction) is evidenced by "psychotic disorganization, loss of ego boundaries, personality disorders, pregnancy resulting from a defined sexual assault or the forced termination of such pregnancy or being required to place for adoption a child resulting therefrom, self-injury, suicidal tendencies, inability to form or maintain personal relationships, chronic post-traumatic state, sexual dysfunction, or eating disorders."

[124] The Compensation Rules for the IAP provide a list of aggravating factors that may increase the compensation including: "verbal abuse; racist acts; threats; intimidation/inability to complain, oppression; humiliation, degradation; sexual abuse accompanied by violence; age of

the victim or abuse of a particularly vulnerable child; failure to provide care or emotional support following abuse requiring such care; witnessing another student being subjected ["acts proven"]; use of religious doctrine, paraphernalia or authority during, or in order to facilitate, the abuse; and being abused by an adult who had built a particular relationship of trust and caring with the victim (betrayal)."

[125] The amount of compensation depends on the number of "Compensation Points" applicable to Acts Proven and the Resulting Harm.

[126] The IAP is a specialized form of litigation. The IAP Model includes procedural requirements, including 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, etc. Appendix X of Schedule "D" provides directions with respect to the ability of adjudicators to make use of information beyond that provided by the parties in each individual case.

[127] Justice Brown has described the IAP as follows:[37]

> 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.
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> 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. ....

[128] The IAP hearing serves two purposes: (1) testing the credibility of the claimant; and (2) assessing the harm suffered by him or her.[38] Credibility is the main issue in respect to any IAP claim.[39] The parties to an IAP hearing are the Claimant, Canada, and any Church Entity affiliated with the school where the assault occurred. The parties may have counsel.

[129] Schedule "D" to the IRSSA lists the mandatory documents that must be submitted by claimants if they are claiming certain levels of consequential harm, loss of opportunity, or need for future care. Claimants may be required to submit records related to their treatment and health (medical), Workers' Compensation, correctional history, education, income tax, Canada Pension Plan, and employment insurance.

[130] By Appendix VIII to Schedule "D", Canada is required to search for and report the dates that the claimant attended an IRS. Canada must also search for documents relating to the alleged perpetrators named in the Application Form, and is required to provide the Secretariat with the following documents: (a) documents confirming the claimant's attendance at the IRS(s); (b) documents about the person(s) named as abusers, including their jobs at the IRS(s), the dates they worked or were there, and any sexual or physical abuse allegations concerning them; (c) a

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[37] *Fontaine v. Canada (A.G)*, 2012 BCSC 839 at paras. 29-30 [Blott].
[38] *Fontaine v. Canada (AG)*, 2012 BCSC 1671 at para. 38 [Blott #2].
[39] *Fontaine v. Canada (AG)*, 2012 BCSC 839 at para. 131 [Blott]; *Fontaine v. Canada (AG)*, 2017 BCSC 946 at para. 13 [T00178].

report about the IRS(s) in question and the background documents, *i.e.*, what is known as a "Narrative"; and (d) any documents mentioning sexual abuse at the IRS(s) in question.

[131] 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. Under the IAP Model, claimants and their counsel bear the responsibility of putting together a claim sufficient to obtain compensation.[40]

[132] The relevance and admissibility of documents is determined by the adjudicator on a case-by-case basis.

[133] The adjudicator is required to produce a decision outlining the key factual findings, and, except in cases resulting in a Short-Form Decision, the adjudicator must outline the rationale for finding or not finding that the claimant is entitled to compensation.

[134] A dissatisfied IAP claimant may appeal to the Chief Adjudicator or his designate. The IAP procedure provides for a Review Hearing and a Re-Review Hearing. There is no right of appeal to the courts from an IAP hearing decision. The Review and Re-Review of Adjudicators' decisions are governed by s. III (l) of Schedule "D" of the IRSSA which provides the standard of review.

[135] There are five types of Review; *i.e.,* (1) on Review, the claimant may seek a corrected decision or a new hearing, if the original decision reflects an overriding and palpable error; (2) on Review, the claimant may seek a corrected decision or a new hearing, if the original decision reflects a misapplication of the IAP Model to the facts as found by the hearing adjudicator; (3) on Review, Canada may seek a corrected decision or a new hearing, if the original decision reflects a misapplication of the IAP Model to the facts as found by the hearing adjudicator; (4) on Re-Review the claimant may have the decision below corrected where it reflects a misapplication of the IAP Model to the facts as found by the hearing adjudicator; and, (5) on Re-Review Canada may have the decision below corrected where it reflects a misapplication of the IAP Model to the facts as found by the hearing adjudicator.

[136] There are no appeals to the court, nor any judicial review of IAP decisions. As discussed below, there is a rare and extraordinary jurisdiction for courts to re-open resolved IAP claims.

## G. Compensable Claims under the IAP

[137] Section I of Schedule "D" sets out three categories of compensable claims. The first category is claims regarding sexual or physical assaults arising from the operation of the IRS and committed by employees of a government or church entity or other adults lawfully on the premises. The second category is claims regarding sexual or physical assaults committed by one student on another student ("SOS" or student-on-student abuse). The third category involves other wrongful acts committed by adult employees of the government or church entity of other adults lawfully on the premises.

[138] There are two subcategories of SOS abuse claims.

[139] For the first subcategory, section I(2)(a) of Schedule "D" read with Appendix 1X(I)(2)(B)

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[40] *Fontaine v. Canada (AG),* 2017 BCSC 946 at para. 81 [T00178].

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

[140] For the second subcategory of SOS claims, section I(2)(b) of Schedule "D" read together with Appendix IX(I)(2)(B) provides that where a claimant proves a predatory or exploitive sexual assault by a student involving actions in the SL4 or SL5 category of "Acts Proven", the claim will be compensable if Canada does not establish on balance of probabilities that reasonable supervision was in place. Thus, if the claimant proves predatory or exploitive acts at the SL4 or SL5 level, Canada bears the burden of proving that reasonable supervision was in place.

[141] The IAP's treatment of SOS claims is different than the treatment of such claims under the ADR Model that was in place before the IRSSA was finalized. Under the ADR Model, physical assaults were not covered and for sexual assaults, the claimant was required to show: (i) a pattern of sexual assaults; (ii) that school staff had actual knowledge of the pattern; and (iii) that the pattern continued after the school staff had actual knowledge.

[142] The IRSSA permitted certain SOS claims at the SL4 or SL5 category of "Acts Proven" that had been rejected in the ADR to be re-opened for IAP claims.

[143] Under the terms of Appendix VIII of Schedule "D," Canada agreed to develop admissions with respect to SOS abuse allegations. The Appendix states:

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

[144] SOS admissions contain Canada's admissions about staff awareness of SOS abuse at a school at various times. As of June 30, 2017, Canada had made 4,527 admissions. These admissions may assist claimants in meeting the burden for the first subcategory of SOS claims. As of October 2016, Canada had made 67 SOS admissions for St. Anne's IRS.

[145] In 2013, the Chief Adjudicator advised adjudicators that they should consider adjourning hearings in some cases where the evidence had been completed to see if additional admissions could be collected.

[146] To date, none of Canada's admissions about the knowledge or failure to take reasonable steps by adult employees at St. Anne's IRS have been made from evidence obtained by Canada in completed examinations for discovery, the OPP witness interviews and, or ADR decisions from the Cochrane civil proceedings. Canada takes the position that these examinations and interviews are not admissible for the basis for making admissions because they are hearsay not tested by cross-examination.

[147] I pause here to note that on December 21, 2017, after this jurisdiction motion was argued, the NAC delivered a RFD to address the issue of whether SOS claims that were dismissed due to lack of proof of staff awareness of SOS abuse at the school can be re-opened when a later SOS admission would have allowed the claim to succeed. This RFD will be heard by Justice Brown. I

note that it raises a different issue than the issue now before the court, which concerns whether Canada can be compelled to make SOS admissions.

## 1. The Role and Jurisdiction of the Court to Administer, Interpret, and Enforce the IRSSA

### (a) The Jurisdiction of the Supervising Judges

[148] As noted above, in December 2006 and January 2007, pursuant to class action statutes and applicable rules of court, nine superior courts across Canada certified the underlying class actions and approved the IRSSA as a fair and reasonable settlement in the best interests of the class.[41]

[149] With the approval of the IRSSA came a change in the role of the courts. The courts' role changed from one of adjudicating the class actions to that of supervising and administering the settlement that the parties had negotiated.

[150] As noted above, in March 2007, on consent of the parties, the nine courts issued identical Implementation Orders. The Supervising Judges have the jurisdiction to administer the IRSSA including interpreting its provisions. The IRSSA is a contract and Supervising Judges, however, cannot amend or vary the IRSSA in the guise of administrating it.[42]

[151] The court has four sources of jurisdiction over the performance of the IRSSA.[43] 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*. Third, there is the court's jurisdiction derived from the IRSSA. Fourth, there is a very narrow and restricted curial review or "judicial recourse" jurisdiction, the limits of which were elucidated by the Ontario Court of Appeal in *Fontaine v. Canada (AG)*, [Spanish IRS], mentioned above and again below.[44]

[152] The first source of jurisdiction 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,

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[41] These were the Alberta Court of Queen's Bench, British Columbia Supreme Court, Manitoba Court of Queen's Bench, Nunavut Court of Justice, Ontario Superior Court of Justice, Québec Superior Court, Saskatchewan Court of Queen's Bench and Yukon Supreme Court. Actions brought in the Nova Scotia Supreme Court were continued in the Ontario Superior Court of Justice for the purposes of achieving the IRSSA's approval. The IRSSA is a pan-Canadian class action settlement.

[42] *Fontaine v. Canada (AG)*, 2016 BCSC 2218 at para. 165 [Bundled RFDs]; *Fontaine v. Canada (AG)*, 2014 ONSC 283; *Fontaine v. Canada (AG)*, 2017 BCSC 946 [T00178]; *Lavier v. MyTravel Canada Holidays Inc.*, 2011 ONSC 3149.

[43] *Fontaine v. Canada (AG)*, 2014 ONSC 283 [*St. Anne's IRS RFD #1*]; *Fontaine v. Canada (AG)*, 2014 ONSC 3781.

[44] *Fontaine v. Canada (AG)*, 2017 ONCA 26, rev'g 2016 ONSC 4326 [Spanish IRS].

is fair and expeditious.[45] The court has administrative jurisdiction over a class action settlement independent of any conferral of jurisdiction by the settlement agreement.[46]

[153] 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.[47] 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.[48] The court's supervisory jurisdiction over class action settlements includes the jurisdiction to remedy any mechanical or administrative problems with the settlement.[49]

[154] 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.[50] The court does not have the jurisdiction to impose burdens on the defendant that the defendant did not agree to assume.[51]The courts never had the power to make an agreement for the parties, and the courts do not have the power to change what the parties themselves agreed. As the Court of Appeal noted in *Fontaine v. Canada (AG),* [Spanish IRS],[52]:

> 53. *Fontaine v. Duboff Edwards Haight & Schachter*, 2012 ONCA 471 imposed strict limits on the scope for judicial intervention. It did so to respect the IRSSA, the contract the parties negotiated, of which the IAP is a fundamental part. As this court recognized in *Fontaine v. Canada (AG)*, 2016 ONCA 241 at para. 48: "[a]djudicators are specially trained to conduct the hearing in a way that is respectful to the claimant and conducive to obtaining a full description of his or her experience". The IAP has been aptly described as "a complete code" that limits access to the courts, preserves the finality of the IAP process, and respects the expertise of IAP adjudicators: see *Fontaine v. Canada (AG)*, 2016 BCSC 2218, at para. 178.

[155] In their written submissions, the Requestors contended that where the IRSSA is silent about a matter, the court can remedy the gap, citing the holding in *St. Anne's IRS RFD #1* that Schedule "D" is not a complete code. In view of the Court of Appeal's decision in *Fontaine v. Canada (AG),* [Spanish IRS], that submission is untenable.

[156] The second source of jurisdiction 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:

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[45] *Fontaine v. Canada (AG)*, 2013 BCSC 1955 at para. 21.
[46] *Fantl v. Transamerica Life Canada*, 2009 ONCA 377 at para. 39; *Spavier v. Canada (AG)*, 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; *Kelman v. Goodyear Tire and Rubber Co.* (2005), 5 C.P.C. (6th) 161 (Ont. S.C.J.) at para. 25.
[47] *Baxter v. Canada (A.G)* (2006), 83 O.R. (3d) 481 at para. 12; *Fontaine v. Canada (AG)*, 2012 BCSC 839 at para. 120 [Blott].
[48] *Fontaine v. Canada (AG)*, 2006 YKSC 63 at para. 54; *Fontaine v. Canada (AG)*, 2012 BCSC 1671 at para. 50 [Blott #2].
[49] *Bodnar v. Cash Store Inc.*, 2011 BCSC 667 at paras. 117-130.
[50] *Lavier v. MyTravel Canada Holidays Inc.*, 2011 ONSC 3149.
[51] *Fontaine v. Canada (AG)*, 2014 ONSC 283 [*St. Anne's IRS RFD #1*]; *Lavier v. MyTravel Canada Holidays Inc.*, 2011 ONSC 3149; *Fontaine v. Canada (AG),* unreported November 20, 2013 (BCSC).
[52] 2017 ONCA 26 at para. 53.

> 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.

[157] 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.[53] 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.[54]

[158] The third source of jurisdiction is the authority derived from the IRSSA, the Approval Orders and the Implementation Orders. 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 the approval judgment. 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.

[159] The fourth source of jurisdiction, the judicial recourse jurisdiction is a rare and extraordinary jurisdiction. In *Fontaine v. Canada (AG),* [Spanish IRS] and in the earlier case of *Fontaine v. Duboff Edwards Haight & Schachter*,[55] the Ontario Court of Appeal made it clear that judicial recourse to challenge IAP decisions is limited to very exceptional circumstances.

[160] In *Fontaine v. Canada Fontaine v. Canada (AG),* [Spanish IRS], the Court of Appeal stated at para. 51:

> I see no merit in M.F.'s argument that *Schachter* should be read narrowly as applying only to legal fee determinations. That argument was properly rejected in *Fontaine v. Canada (AG),* 2016 BCSC 2218 at para. 176. While *Schachter* involved a dispute concerning IAP legal fees, the principles upon which the decision rests apply with equal force to IAP compensation decisions. The IAP represents a comprehensive, tailor-made scheme for the resolution of claims by trained and experienced adjudicators, selected according to specified criteria and working under the direction of the Chief Adjudicator. Allowing appeals or judicial review to the courts from IAP decisions is not contemplated by the IAP, the IRSSA or the Implementation Orders. Allowing appeals or judicial review would seriously compromise the finality of the IAP and fail to pay appropriate heed to the distinctive nature of the IAP and the expertise of IAP adjudicators.

[161] In *Fontaine v. Canada Fontaine v. Canada (AG),* [Spanish IRS], the Ontario Court of Appeal endorsed the views of Justice Edmond of the Manitoba Court of Queen's Bench that judicial recourse was limited to ensuring that the Review Adjudicator did not endorse a legal interpretation that was so unreasonable that it amounted to a failure to apply the IAP Model.[56] The Court of Appeal also endorsed the views of Justice Brown that judicial recourse was limited to situations where an IAP decision reflects a patent disregard for the IAP Model's compensation rules, such as a failure to award compensation on the basis of the rubric it provides or was so

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[53] *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 at paras. 21-23 (S.C.J.).

[54] *Vitapharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.* (2000), 48 O.R. (3d) 21 at para. 50 (S.C.J.); *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (S.C.J.); *Fenn v. Ontario*, [2004] O.J. No. 2736 at paras. 13-17 (S.C.J.); *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.

[55] 2012 ONCA 471.

[56] *Fontaine v. Canada (AG)*, 2016 MBQB 159.

exceptionally wrong as to amount to a failure to apply the IAP Model.[57] The Ontario Court of Appeal explained the rationale for the narrowness of the court's judicial recourse jurisdiction at paras. 56 and 63 of its decision as follows:

> 56. In *Fontaine v. Canada (AG)*, 2016 BCSC 2218, at para. 180, Brown J., who has many years of experience administering the IRSSA, explained the rationale for a judicial "hands-off" approach to IAP fact-finding: "Despite my years of administering the IRSSA, it would be impossible for me to know better than those who have been immersed in the IAP...The Courts are simply not well-placed to make findings of fact." See also *Fontaine v Canada (AG)*, 2016 MBQB 159, at para. 59, confirming the exclusive jurisdiction of independent adjudicators to make findings of fact, upholding "the parties' clear intention as reflected in the IRSSA that IAP adjudicators, and not judges, should find facts and determine amounts of compensation in accordance with the IAP.
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> ....
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> 63. I have no doubt that the administrative judge was motivated by a genuine and sincere desire to see that justice was done in this particular case, and to ensure that M.F. received compensation without further delay. Doing justice, however, involves more than going straight to what the judge thinks is the right result. Justice requires that procedural rules and jurisdictional boundaries designed to protect the rights of all parties be respected. The IRSSA provides that claims for compensation are to be resolved not by courts, but by trained and specialized adjudicators operating under the carefully designed IAP model. In my view, justice in this case can more fully and completely be achieved for all parties by respecting the IAP, following the law as laid down in *Schacher*, and remitting M.F.'s claim for proper reconsideration by the Chief Adjudicator under the terms of the IAP, in accordance with the agreement of all parties to the IRSSA.

[162] It should be noted that an appeal by Canada to the Manitoba Court of Appeal resulted in Justice Edmond's decision being set aside and the adjudicator's decision reinstated. Writing for the Court, Beard J.A. arguably took the deferential approach articulated by the Court of Appeal for Ontario a step further, concluding as follows:

> 72. ... I would find that [Justice Edmond] erred in his interpretation of his jurisdiction to hear and determine the RFD. In my view, his jurisdiction was limited to determining whether the adjudicator implemented the provisions of the IAP in the narrow sense of determining whether she considered the correct terms. Once it was determined that she considered the correct terms, being category SL1.4, his jurisdiction ended and he should have dismissed the RFD. Instead, he considered whether she erred by not properly interpreting that category, which was outside his jurisdiction.[58]

### (b) Interpreting the IRSSA

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

[164] The IRSSA itself 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:

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[57] *Fontaine v. Canada (AG)*, 2016 BCSC 2218 at paras. 183, 199 [Bundled RFDs].

[58] *Attorney General of Canada v. JW and Reo Law Corporation et al*, 2017 MBCA 54 at para. 72. An application for leave to appeal to the SCC is outstanding; for current status, see: http://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=37725.

*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.

[165] In *Fontaine v. Canada (AG)*,[59] 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.

[166] The honour of the Crown is an interpretative principle in interpreting the IRSSA.[60] It is not, however, operative as a source of obligations independent of the IRSSA. Where both an honourable interpretation and a dishonourable interpretation are both available, an interpretation of the IRSSA in a way that brings honour to Canada should be selected.[61] The honour of the Crown principle is helpful in interpreting the IRSSA, but it cannot add or subtract or change the promises made by the parties as expressed by the IRSSA. The honour of the Crown is a general principle that underlies all of the Crown's dealings with Aboriginal peoples, but it cannot be used to call into existence undertakings that were never given.[62]

[167] It is a canon of contract interpretation that while evidence of negotiations and of the parties' subjective intent is not admissible to interpret the contract, in interpreting a contract, the court may have regard to the surrounding circumstances; that is, the factual background and the purpose of the contract.[63] The factual nexus of the IRSSA involves understanding the circumstances that led to the signing of the IRSSA, and this includes the purposes of the negotiations, the subjective aspirations and needs of the negotiating parties, and what they respectively had to sacrifice in order to achieve a settlement.[64]

## (c) Requests for Directions ("RFDs")

[168] One of the ways that the Courts supervise, administer, and enforce the IRSSA is by

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[59] 2013 ONSC 684.

[60] *Fontaine v. Canada (AG)*, 2014 ONSC 4585 at paras. 83-90, var'd 2016 ONCA 241, aff'd 2017 SCC 47 [*In rem* Order]

[61] *Fontaine v. Canada (AG)*, 2014 ONSC 4585 at paras. 89-90, var'd 2016 ONCA 241, aff'd 2017 SCC 47 [*In rem* Order].

[62] *Lax Kw'alaams Indian Band v. Canada (AG)*, 2011 SCC 56 at para. 13.

[63] *Canada Square Corp. v. VS Services Ltd.* (1981), 34 O.R. (2d) 250 (C.A.); *Prenn v. Simmonds*, [1971] 3 All E.R. 240 (H.L.); *Reardon Smith Line v. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.).

[64] *Fontaine v. Canada (AG)*, 2014 ONSC 4585, var'd 2016 ONCA 241, aff'd 2017 SCC 47 [*In rem* Order].

RFDs. The RFDs that have been decided to date reveal both the scope and also the limits of the Supervising Judges' jurisdiction to administer, supervise, interpret, and enforce the IRSSA. Schedule "A" to these Reasons for Decision are annotations of what RFDs have revealed about the operation of the IRSSA and about the jurisdiction of the Supervising Judges.

## (d) Re-opening IAP Applications and *Fontaine v. Canada (AG)*, [Spanish IRS]

[169] In *Fontaine v. Canada (AG),* [Spanish IRS], a RFD about an IAP claim where a priest raped a young boy who was a regular visitor to Spanish Boys' Indian Residential School in Spanish, Ontario, I discussed the jurisdiction of Supervising Judges to correct factual errors and other errors made by Adjudicators, Review Adjudicators, and Re-Review Adjudicators in applying the IAP Model.[65] I set a liberal standard, but I was overruled by the Ontario Court of Appeal, which, as described above, set a stricter standard for curial invention in IAP hearings.[66]

[170] As noted several times above, the Supervising Judges do have an extraordinary jurisdiction to re-open or to intervene in IAP applications, but judicial recourse is available only where a decision of the Chief Adjudicator or his designate reflects a patent failure to apply the IAP Model.[67] Supervising Judges do not have jurisdiction to perform an appellate or error correcting function in respect of IAP decisions.[68]

[171] The Supervising Judges will not intervene before the exhaustion of the Review and Re-Review process.[69]

[172] In *Fontaine v. Canada (AG.),* [T00178],[70] Justice Brown held that while the IAP Model requires on-going disclosure from Canada, this did not entail that claims should be re-opened in light of new evidence; she stated at para. 77 of her decision:

> .... However, there is nothing to suggest that this progressive disclosure should undermine the finality of the IAP, which as discussed earlier in these reasons, was also a clear intention of the parties. In fact, the IAP Model precludes re-opening determined cases. Similarly, the IAP Model is clear that no new evidence is to be admitted on Review or Re-Review. Further, despite the progressive disclosure obligation, nothing in the IAP Model suggests that new disclosure is a ground for finding a misapplication of the IAP Model or an overriding or palpable error.

[173] Also in *Fontaine v. Canada (AG),* [T00178],[71] Justice Brown explained the rationale and policy factors that govern the court's jurisdiction to entertain a judicial recourse RFD; she stated:

> 67. The principles governing RFDs seeking judicial recourse from IAP decisions have been coalesced in a number of recent court decisions. These decisions are the progeny of the Ontario Court of Appeal's decision in *Fontaine v. Duboff Edwards Haight and Schachter*, 2012 ONCA 471. They all

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[65] 2017 ONCA 26, rev'g 2016 ONSC 4326 [Spanish IRS].
[66] 2017 ONCA 26, rev'g 2016 ONSC 4326 [Spanish IRS].
[67] *Fontaine v. Canada (AG)*, 2016 BCSC 2218 [Bundled RFDs]; *Fontaine v. Canada (AG)*, 2017 ONCA 26, rev'g 2016 ONSC 4326 [Spanish IRS]; *Fontaine v. Canada (AG)*, 2017 BCSC 1633 [B-12357 and P-15871]; *Fontaine v. Canada (AG)*, 2017 MBCA 54, rev'g 2016 MBQB 159 ["Reo"]; *Fontaine v. Canada (AG),* 2017 ONSC 2487 [*H15019, K10106, and Metatawabin #2*]; *Fontaine v. Canada (A.G.)*, 2017 BCSC 946 [T0018].
[68] *Fontaine v. Canada (AG)*, 2017 ONCA 26, rev'g 2016 ONSC 4326 [Spanish IRS]; *Fontaine v. Duboff Edwards Haight & Schachter*, 2012 ONCA 471.
[69] *Fontaine v. Canada (AG)*, 2016 ONSC 4328 at paras. 13 and 18–19 [*H15019 (K10106, and Metatawabin) #1*].
[70] *Fontaine v. Canada (AG.)*, 2017 BCSC 946 at paras. 67-69 [T00178].
[71] *Fontaine v. Canada (AG),* 2017 BCSC 946 at para. 68 [T00178].

> reinforce the view that the IAP was intended by the parties to be a "complete code". Allowing ready access to the courts for appeal or judicial review would seriously compromise the finality of the IAP and fail to pay appropriate heed to the expertise of IAP adjudicators. As such, judicial recourse is restricted to "very exceptional" cases, where the IAP decision in question reflects a "patent disregard" of the IAP Model.
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> 68. At the risk of stating the obvious, this is a very onerous standard. This high threshold reflects at least two factors. The first is a realization of the jurisdictional limitations of the court when dealing with an IAP decision. As I noted in the so-called "Bundled RFD" decision, fundamentally, the IRSSA is a contract. It is outside of the purview of the court to create another level of review of these decisions that is not captured by the language of that agreement. The court must respect the parties' intention to create an adjudicative process with a sense of finality.
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> 69. The second factor is a policy preference (that was formalized into the terms of the IRSSA and the IAP process itself) for granting deference to the IAP Adjudicators. This policy is the same as that which encourages deference to trial judges and administrative tribunals. Simply put, these bodies which make decisions at first instance are best positioned to make certain determinations and have an expertise that a reviewing court may lack. ....
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> ...
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> 180. ... Despite my years of administering the IRSSA, it would be impossible for me to know better than those who have been immersed in the IAP since the IRSSA and with it, the IAP Model were implemented. This is plainly a setting where a deferential approach is both warranted and essential. The Courts are simply not well-placed to make findings of fact.

[174] Earlier, in *Fontaine v. Canada (AG)*, [Bundled RFDs][72], Justice Brown explained the rationale behind the limited recourse of claimants to the courts to re-open IAP claims as follows:

> 177. .... The preferable phrase - and concept - is judicial recourse. The [Ontario] Court of Appeal has explained that "the right to seek judicial recourse is limited to very exceptional circumstances".
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> 178. There is good reason for this. Fundamentally, the IRSSA is a contract. The IAP is a negotiated process, and a complete code. To put it plainly, when the IAP Model was negotiated, the parties called "Done!" at re-review by the Chief Adjudicator or his or her delegate. The court must honour the parties' intentions. By limiting access to the courts, finality is preserved and the expertise of the Chief Adjudicator and those under his supervision is recognized.

## H. Standing and RFD Jurisdiction

[175] The right to bring a RFD is contemplated by paragraph 31 of the Courts' Approval Orders:

> THIS COURT ORDERS 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.

[176] For RFDs, the Approval Order for the IRSSA provides standing to "the Representative Plaintiffs, Defendants, Released Church Organizations, Class Counsel, the National Administration Committee ("NAC"), or the Trustee, or such other person or entity as this Court

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[72] *Fontaine v. Canada (AG)*, 2016 BCSC 2218 at paras. 177-178 [Bundled RFDs].

may allow." Under the Protocol for the IRSSA, RFDs may be brought only by "a party, counsel or other entity with standing in respect of the Agreement."

[177] The IRSSA defines "Parties" as meaning "collectively and individually the signatories to the agreement." As a matter of contract law, Class Members are third party beneficiaries to a contract. The normative legal principle is that they do not have privity of contract and the general rule is that a third-party beneficiary does not have the right to enforce the contract.[73]

[178] The terms of the IRSSA also set out discrete circumstances where a non-party may proceed before the courts, such as on Article 12 applications and CEP appeals. The case law has established that IAP claimants may bring what have come to be called judicial recourse RFDs, which have already been discussed above.

[179] The law of standing determines who is entitled to bring a case to court for a decision and screens out busybody litigants to ensure that courts have the benefit of contending points of view of those most directly affected and that courts play their proper role within the democratic system of government.[74]

[180] In *Fontaine v. Canada (AG)*, [Cachagee],[75] Justice Brown, acting in her capacity as an Administrative Judge under the IRSSA, formulated the test for standing to bring a RFD. She said that there were three elements to the test; namely: (1) there is a serious issue to be tried; (2) the entity is directly affected or has a genuine interest in the issues raised; and (3) there is no other reasonable and effective manner by which the issue can be brought before the court. That is the test for standing adopted in *Fontaine v. Canada (AG)*, [*H15019, K10106, and Metatawabin #2*] and which I apply now.

## I. Ms. Shisheesh's RFD

[181] Ms. Shisheesh is not among those that pursuant to the terms of the IRSSA is conferred with a standing to bring a RFD. Class Members with full rights or with attenuated rights because they settled their IAP claims before the IAP came into existence must establish their standing to bring a RFD.

[182] So is Ms. Shisheesh "such other person ... as this Court may allow"? As noted above, there are three branches to the test for standing to participate in a RFD. The first branch is whether the RFD raises a serious issue to be tried.

[183] As noted above, Ms. Shisheesh's RFD raises two general issues; (a) how does the IRSSA treat, if at all, the documents from the Cochrane civil proceedings, including the examination for discovery transcripts for the purposes of the *Fontaine v. Canada (AG)*, [*In rem* Order]; and (b) how should the discovery transcripts from the Cochrane civil proceedings and transcripts from the ADR process be used for the purposes of Canada's obligations, if any, to make admissions for IAP claims.

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[73] *Fenrich v. Wawanesa*, 2005 ABCA 199 at para. 26; *Benzie v. Hania*, 2012 ONCA 766.
[74] *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, at p. 631; *Canada (AG) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45.
[75] *Fontaine v. Canada (AG)*, 2015 BCSC 1386 [Cachagee]. See also *Fontaine v. Canada (AG)*, 2017 ONSC 2487 [*H15019, K10106, and Metatawabin #2*].

[184] But for the decision in *Fontaine v. Canada (AG)*, [*H15019, K10106, and Metatawabin #2*],[76] Ms. Shisheesh's second general issue would be a serious issue to be tried. However, subject to the appeal, the issue of the use of the Cochrane civil proceedings discovery transcripts is *res judicata* or a matter of *stare decisis*.[77] The same, however, cannot be said for Ms. Shisheesh's first general issue. This is a serious issue to be tried about the interpretation and application of the IRSSA. Thus, Ms. Shisheesh satisfies the first branch of the test for standing in part.

[185] I will not fully reprise it here because it goes to the merits of Ms. Shisheesh's RFD and Canada has not had an opportunity to respond to it, but during the argument of the jurisdiction motion, Ms. Shisheesh's lawyer expounded an interpretative argument that would bring the discovery transcripts from the Cochrane civil proceedings within the ambit of *Fontaine v. Canada (AG)*, [*In rem* Order],[78] the decision about the destruction and retention of IAP documents. At the risk of oversimplification, the argument was that transcripts from cases that were settled before the IRSSA was finalized (such as Ms. Shisheesh's) are still transcripts of IRSSA class members, and as such, they should have reciprocal rights to a person whose records were gathered for or created in the IAP.

[186] The second branch of the test for standing is whether the requestor is directly affected or has a genuine interest in the issues raised. In my opinion, Ms. Shisheesh satisfies the second element of the test with respect to her first general issue.

[187] In my opinion, for her first general issue, Ms. Shisheesh also satisfies the third branch of the test for standing, which is that there is no other reasonable and effective manner by which the issue can be brought before the court. Here, the proof of the third element of the test is that nobody else has yet brought forward the issue about the destruction or retention of documents in civil actions that settled before the IRSSA was signed and approved by the nine courts across the country.

[188] It is propitious to deal with this serious issue now because the details of the scheme envisioned by *Fontaine v. Canada (AG)*, [*In rem* Order] are to be worked out in 2018. It is also propitious because the Supreme Court of Canada in its decision in *Fontaine v. Canada (AG)*, [*In rem* Order] noted that because the intent of the IRSSA was to consolidate existing litigation into the IAP, consistency and fairness required that the ADR records should be treated in the same manner as the IAP documents. Ms. Shisheesh's RFD raises the issue of whether other documents associated with the IAP process should also be treated in the same way.

[189] Therefore, I order that Ms. Shisheesh may deliver within 30 days a fresh as amended RFD with respect to her first general issue and that she may participate in the process to settle the details of the notice plan.

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[76] *Fontaine v. Canada (AG)*, 2017 ONSC 2487 [*H15019, K10106, and Metatawabin #2*].

[77] *Ibid.*, at para. 124: "I … agree with Canada that the discovery documents from the Cochrane civil litigation are covered by settlement privilege, and I disagree with Claimant H-15019's submission that Canada has not met the evidentiary burden of showing that the discoveries were communications made with a view to reconciliation or settlement."

[78] *Fontaine v. Canada (AG)*, 2014 ONSC 4585, var'd 2016 ONCA 241, aff'd 2017 SCC 47 [*In rem* Order].

## J. C-14114's RFD

[190] Turning to C-14114's RFD, she has standing to bring a judicial recourse RFD. I conclude that: (a) insofar as C-14114 is seeking a re-opening of an IAP application under the IRSSA, her RFD is premature; (b) insofar as she is seeking orders with respect to the operation of the IAP, she does not have standing; and, (c) insofar as she is seeking an order compelling Canada to make "admissions," in an IAP application, she does not have standing and the court does not have jurisdiction to order Canada to do so. Accordingly, I dismiss C-14114's RFD on the grounds of prematurity, want of standing, and for want of jurisdiction.

[191] As the above discussion of the history of the several RFDs about St. Anne's IRS and also about Bishop Horden IRS reveals, but for the matter of admissions in SOS claims, C-14114's issues have already been dealt with by this court on other RFDs, most of which, as it happens involve the same opposing counsel and the same contested issues.

[192] But for the matter of the admissions in SOS claims, C-14114's RFD raises the same issues that were at the centre of the several St. Anne's RFDs that, subject to what the Court of Appeal may do, have already been decided.

[193] I have already decided these issues and I see no reason to change my decisions, which stand as *res judicata* and *stare decisis* unless overruled by the Court of Appeal. The result is that insofar as C-14114 is seeking a re-opening of an IAP application under the IRSSA, her RFD is premature; (b) insofar as she is seeking orders with respect to the operation of the IAP, she does not have standing for the reasons set out in the earlier St. Anne's IRS RFDs and the Bishop Horden IRS RFD.

[194] That leaves the matter of Canada's admissions for SOS claims. For this matter, I conclude that C-14114 does not have standing. She satisfies the second and third branches of the test for standing but not the first branch. She is directly affected by the issues, and there is now no other reasonable and effective manner by which the issue can be brought before the court. For the first branch of the test, however, there is no serious issue; it is plain and obvious that under the IRSSA Canada cannot be compelled to make admissions.

[195] Canada could have included this issue in its pending RFDs before Justice Brown but because its position is that there is no merit to C-14114's argument that Canada can and should be compelled to make SOS admissions, it did not include this issue in the matters to be resolved by Justice Brown.

[196] The matter of C-14114's standing thus turns on whether there is a serious issue about her interpretation of Canada's obligations under the IAP Model to make admissions. This issue also encompasses the issue of the jurisdiction of Supervising Judges to make orders on RFDs that intervene, intercede, or intrude on the IAP Model.

[197] C-14114's RFD narrows to an interpretation of the following language found in Appendix VIII of Schedule "D":

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

[198] C-14114's interpretation would oblige Canada to make admissions. Her interpretation

would make admissions mandatory and subject to an adjudicator's or court's determination that transcripts, witness statements, and ADR decisions, all of which are hearsay, were sufficiently reliable that they should be taken as the truth of their assertions. It seems that it would fall on the court to extract the substantive content of the admission.

[199] C-14114's interpretation, however, is an incongruous, self-contradictory, oxymoronic interpretation of the word "admissions" in the factual nexus of the negotiation of the IRSSA and the IAP. An admission is a statement acknowledging the truth of something. Its synonyms include an acknowledgement, a concession and a confession. Admissions, acknowledgements, concessions, and most particularly confessions, are voluntary acts of the free will and are not mandatory, compulsory or coerced statements. Admissions are made by a party, they are not mandated by an adjudicator or judge.

[200] Under the IRSSA, Canada has an obligation to develop admissions and if this can be taken as something more than an unenforceable agreement to agree, the evidence shows that Canada has kept its promise and continues to keep its promise. But a promise to develop admissions is not a promise to make any particular admission about what the school staff did or did not do at IRSs over their deplorable 130-year history.

[201] It needs to be kept in mind, that the IAP Model is a *sui generis* creation of hard bargaining adversaries negotiating at arm's length and that Canada is under no general obligation to surrender; *i.e.*, to make an admission of defeat. As the Ontario Court of Appeal and the Supervising Judges have pointed out in connection with previous RFDs, the IRSSA, of which the IAP is a part, is a compromise and a negotiated contract. The fact-finding powers of the IAP adjudicators is specialized, exclusive, and meant to be the final say on an IAP application. As I have pointed out in previous St. Anne's IRS RFDs, the compensation part of the IRSSA is not subsumed by the truth and reconciliation part of the settlement and Canada is contractually entitled to oppose IAP claims.

[202] It is both painful to watch and painfully obvious to the Supervising Judges that it is painful and a revictimization for survivor claimants and survivor witnesses to have to testify about what occurred at the IRSs in order for a survivor to obtain IAP compensation for physical and sexual assaults. However, that is what the parties to the IRSSA negotiations achieved from their negotiations. The testimonial requirement imposing a burden on the survivors is what the parties to the IRSSA agreed to for the uncapped IAP compensation but not for capped CEP payments.

[203] Comparing the ADR to the IAP, it appears that the parties bargained about the burden imposed on claimants making SOS claims, but what emerged for the IAP, while slightly less demanding, nevertheless, imposed a significant burden on claimants alleging SOS abuse. This was the result of hard bargaining. The parties also bargained for several elements to ease but not remove the burden of survivors having to recount and relive their awful experiences at the schools.

[204] I recognize that this outcome was unfortunate for a small group of survivors and I feel sorry for them. I understand the anger and disappointment of C-14114, H-15019, K-10106, Chief Metatawabin, and Ms. Shisheesh and consider as admirable their sympathy and advocacy for the few SOS claimants whose claims arguably might have succeeded.

[205] That said, the court's job is to enforce the contract that the parties made; it is not for the

court to make a better bargain for the parties. However, sympathetic the Supervising Judges may be for the plight of the survivors in having to prove their claims, and most particularly with respect to the SOS claims, the Supervising Judges cannot remake the agreement of the contracting parties to compel Canada to make admissions about what occurred at St. Anne's IRS with respect to SOS abuse.

[206] It is plain and obvious to me that C-14114's interpretation of the word "admissions" is wrong, and that if it were the correct interpretation, then the Supervising Judges would not have the jurisdiction to adjudicate whether or not Canada should make an admission and whether Canada should be compelled to do so. It is not for the court to determine the how, when, and what of admissions. That is not what the parties bargained for.

[207] Because of the atrocities and the notoriety of them, it may be that the St. Anne's IRS survivors in particular may have good reason to feel that they are being revictimized in the IAP process, but the IAP Model was not designed to simply take survivors at their word; rather they must prove that they were assaulted and they must prove the intensity of the assaults, and the aggravating circumstances of their assaults and the harmful consequences they suffered individually. And the survivors of SOS abuse must prove additional facts if they are to succeed with a SOS claim. The IAP Model modestly lightens the evidentiary burden placed on survivors, but it does not remove that burden, nor compel Canada to make admissions or admit IAP claims.

[208] I, therefore, conclude that as a matter of contract interpretation, there is not a serious issue to be tried in C-14114's RFD about SOS admissions and, therefore, she fails the first branch of the test for standing. Insofar as she makes a judicial recourse RFD, her RFD is premature. Insofar as she is seeking orders with respect to the operation of the IAP, she does not have standing and the court does not have the jurisdiction to vary or amend the operation of the IAP, most particularly with respect to the exclusive fact-finding jurisdiction of the adjudicators.

## K. Conclusion

[209] For the above reasons, I dismiss C-14114's RFD in its entirety and 1 dismiss Ms. Shisheesh's RFD in part.

[210] As for costs, I note that Canada has been largely successful and has requested costs against the Requestors' counsel. Both Requestors have raised issues that have already been determined, and both have ignored the court's direction that the standing and jurisdiction issues would be determined on the basis of their RFDs and facta, with no additional materials to be filed. C-14114 has expressly claimed that Canada has been given preferential treatment by the Courts, a contention that cannot be reconciled with the history set out in the "Factual Background" section of these reasons. Ms. Brunning has also baselessly claimed that Canada's legal positions constitute an abuse of process and breach of the DOJ's professional obligations. On the other hand, the jurisdiction motion was argued as one motion and C-14114 and Ms. Shisheesh were successful in establishing standing (although C-14114's RFD was dismissed) and Ms. Shisheesh was successful in part on the jurisdictional aspects of the motion. Both Requestors have sought costs.

[211] I doubt that a costs award in their favour will impact on either Requestor and expect that the matter of costs is really a settling of scores between Canada and Ms. Brunning.

[212] If Canada and Ms. Brunning cannot agree with respect to the matter of costs, they may make submissions in writing, beginning with Canada's submissions within 20 days of the release of these Reasons for Decision followed by C-14114's and Ms. Shisheesh's submissions within a further 20 days.

Perell, J.

Released: January 4, 2018

## Schedule "A" – Annotations of RFD Decisions

- Where a claimant is granted leave by an adjudicator to have a lost income claim of over $250,000 determined by a regular action, the balance of the IAP claim may proceed before the adjudicator.[1]
- Identifying an institution as an IRS is a threshold to determining whether an individual is eligible for compensation under the IRSSA.[2]
- The question of whether an institution should be added to Schedule "F" of the IRSSA is a question of fact in the specific circumstances of the particular institution.[3]
- The list of residential schools included in the IRSSA by a schedule does not include certain schools that were successor schools with names that differed slightly from the schools listed in the schedule.[4]
- A direction by a claimant to pay his or her compensation from the IRSSA is unenforceable.[5]
- The Supervising Judges may disqualify lawyers and others from acting for or assisting claimants in IAP proceedings.[6]
- The Chief Adjudicator has 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 does not have the authority to remove or suspend lawyers from participation in the IAP.[7]
- The Supervising Judges have the jurisdiction to order a lawyer and law firm to produce documents in an investigation by the Monitor into its activities in providing services and to extending loans to IAP clients.[8]
- The Supervising Judges have the jurisdiction to assess the Monitor's expenses for an investigation.[9]
- The Monitor is an officer of the court and the court has the responsibility to determine the reasonableness of the expenses charged by the Monitor to Canada and the discretion to reduce the Monitor's fees when the court concludes that the Monitor has not exercised

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[1] *Fontaine v. Canada (AG)*, 2013 MBQB 272.
[2] *Fontaine v. Canada (AG)*, 2011 ONSC 4938.
[3] *Fontaine v. Canada (AG)*, 2011 ONSC 4938; *Fontaine v. Canada (AG)*, 2014 ABQB 7, aff'd, 2015 ABCA 132 [Grouard Vocational School/Moosehorn Lodge and Drumheller Vocational High School]; *Fontaine v. Canada (AG)*, 2014 MBQB 209 [Teulon Residence].
[4] *Fontaine v. Canada (AG)*, 2013 BCSC 757.
[5] *Fontaine v. Canada (AG)*, 2007 BCSC 1841, affd. 2008 BCCA 329 [Levesque].
[6] *Fontaine v. Canada (AG)*, 2012 BCSC 839 [Blott].
[7] *Fontaine v. Canada (AG)*, 2012 BCSC 1671 [Blott #2].
[8] *Fontaine v. Canada (AG)*, 2013 BCSC 1888.
[9] *Fontaine v. Canada (AG)*, 2015 BCSC 717 [Bronstein] *Fontaine v. Canada (AG)*, 2016 ONSC 5359 [Keshen].

reasonable prudence in performing its duties.[1]

- The Supervising Judges have the jurisdiction to determine whether IAP claimants' lawyers have misappropriated their client's entitlements under the IRSSA.[2]
- The Supervising Judges have the jurisdiction to order costs against a lawyer who had undermined the proper administration of the IRSSA.[3]
- A Review Adjudicator has the jurisdiction to assess the original decision for factual errors on a palpable and overriding standard but a Re-Review Adjudicator has no such authority to conduct such a review.[4]
- The Chief Adjudicator's authority to review legal fees is governed by Articles 13.06 to 13.09 of the IRSSA.[5]
- The Supervising Judges have the jurisdiction to order Canada to produce documents to the Truth and Reconciliation Commission and to the Secretariat for the IAP.[6]
- The Supervising Judges have the jurisdiction to making directions regarding the retention and destruction of IAP and ADR documents at the conclusion of the IAP.[7]
- Canada's obligation to provide documents to the Truth and Reconciliation Commission includes documents at Library and Archives Canada. Relevant documents, however, do not include documents about Canada's remedial response to the aftermath of the IRS experience and to the adequacy of that response.[8]
- The Supervising Judges have the jurisdiction to order Canada to produce documents for a determination under Article 12 of the IRSSA about whether a school should be designated an IRS.[9]
- A party who succeeds on an Article 12 RFD to designate a school as an IRS will be reimbursed in full for his or her reasonably necessary legal costs.[10]
- Costs incurred in a RFD may be dealt with under the regular costs rules applicable to court proceedings.[11]
- The Supervising Judges have the jurisdiction to make an advance costs award.[12]

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[1] *Fontaine v. Canada (AG)*, 2015 BCSC 1968 [Bronstein Costs Decision]; *Fontaine v. Canada (AG)*, 2016 BCSC 609 [Reimbursement Decision] *Fontaine v. Canada (AG)*, 2016 BCSC 1969 [Settlement Authority Decision]; *Fontaine v. Canada (AG)*, 2017 ONSC 1202 [Keshen Investigation Costs].
[2] *Fontaine v. Canada (AG)*, 2012 BCSC 839 [Blott]; *Fontaine v. Canada (AG)*, 2013 BCSC 1888 [Bronstein]; and *Fontaine v. Canada (AG)*, 2016 ONSC 5359 [Keshen].
[3] *Fontaine v. Canada (AG)*, 2012 BCSC 1671 [Blott #2].
[4] *Fontaine v. Canada (AG)*, 2017 BCSC 946 at para. 74 [T00178].
[5] *Fontaine v. Canada (AG)*, 2010 BCSC 1208.
[6] *Fontaine v. Canada (AG)*, 2014 ONSC 283 [*St. Anne's IRS RFD #1*].
[7] *Fontaine v. Canada (AG)*, 2014 ONSC 4585, var'd 2016 ONCA 241, aff'd 2017 SCC 47 [*In rem* Order].
[8] *Fontaine v. Canada (AG)*, 2013 ONSC 684.
[9] *Fontaine v. Canada (AG)*, 2012 BCSC 313.
[10] *Fontaine v. Canada (AG)*, 2012 ONSC 3552.
[11] *Fontaine v. Canada (AG)*, 2012 BCSC 313.
[12] *Fontaine v. Canada (AG)*, 2014 BCSC 2531 [Bronstein advance costs]; *Fontaine v. Canada (AG)*, 2015 ONSC 7007.

- The Supervising Judges have the jurisdiction to grant an immunity from costs in a RFD.[1]
- The Supervising Judges do not have the jurisdiction to create a witness-matching program for the IAP.[2]
- The Supervising Judges do not have the jurisdiction to require that examination for discovery transcripts be circulated at large in the IAP.[3]
- The Supervising Judges do not have the jurisdiction to make evidentiary rulings for IAP hearings, the jurisdiction to make evidentiary rulings is an exclusive jurisdiction of the adjudicators on a case-by-case basis.[4]
- The Supervising Judges do not have the jurisdiction to extend the deadline for IAP applications.[5]
- The Supervising Judges do not have the jurisdiction to augment an alleged perpetrator's participatory rights.[6]
- The Supervising Judges will not intervene to re-assess counsel's legal fees.[7]

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[1] *Fontaine v. Canada (AG)*, 2016 ONSC 7913.
[2] *Fontaine v. Canada (AG)*, 2015 ONSC 3611 and 2015 ONSC 5177 [Bishop Horden IRS]; *Fontaine v. Canada (AG)*, 2015 ONSC 5431.
[3] *Fontaine v. Canada (AG)*, 2017 ONSC 2487 [*H15019, K10106, and Metatawabin #2*].
[4] *Fontaine v. Canada (AG)*, 2014 ONSC 283 [*St. Anne's IRS RFD #1*]; *Fontaine v. Canada (AG)*, 2014 ONSC 4024 [Kain and Jaffe RFD]; *Fontaine v. Canada (AG)*, 2017 ONSC 2487 [*H15019, K10106, and Metatawabin #2*]; *Fontaine v. Canada (AG)*, 2017 BCSC 946 at para. 20 [T00178].
[5] *Myers v. Canada (AG)*, 2015 BCCA 95.
[6] *Fontaine c. Canada (Procureur général)*, 2013 QCCS 553.
[7] *Fontaine v. Duboff Edwards Haight & Schachter*, 2012 ONCA 471.

**CITATION:** Fontaine v. Canada (Attorney General), 2018 ONSC 103
**COURT FILE NO.:** 00-CV-192059
**DATE:** 20180104

**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

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**REASONS FOR DECISION**

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Perell, J.

Released: January 4, 2018