Court File No. 00-CV-192059CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

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 ATHBASKA, 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 ARCHIEPISCOPALE 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,OMILACOMBE CANADA INC. and MT. ANGEL ABBEY INC.

Defendants

FACTUM OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA
(Re: IAP Documents)

PART I: OVERVIEW

1. The Truth and Reconciliation Commission of Canada (the "**Commission**") seeks this Honourable Court's direction with respect to the fate of documents created in the course of the Independent Assessment Process ("**IAP**").

2. The documents (the "**IAP documents**") at issue were either submitted by residential school survivors and other parties to IAP proceedings or were generated by the IAP in the course of adjudicating claims. The IAP documents are in the possession or control of Canada both in its capacity as a continuing litigant in the IAP process, and in its administrative capacity supporting the IAP process through the Indian Residential Schools Adjudication Secretariat.

3. The Commission's interest in these documents stems from its mandate to "identify sources and create as complete an historical record as possible of the IRS system and legacy". The IAP documents represent the most complete and detailed set of documents in existence that describe the IRS system and legacy.

4. The Commission, in consideration of the important privacy interests at stake in the documents, has narrowed its interest to a subset of the IAP documents. The Commission's interest is restricted to the IAP applications, decisions, and hearing transcripts and/or recordings. The Commission respectfully submits that this Honourable Court should order that this subset of the IAP documents be produced to the Commission, and thereafter archived with the National Research Centre (the "**NRC**"). The Commission proposes that the IAP documents be subject to

inter alia a lengthy closed period in order to ensure that the claimants' legitimate interest in privacy and confidentiality is protected. The NRC is well-positioned to protect the privacy interests of all affected parties, and to ensure that the perspectives of Aboriginal people are brought to bear on the preservation of the documents.

5. There will come a time in the life of our nation when there will no longer be a living memory of residential schools. It will be then that the threat to truth and memory will become most acute. The IAP documents are a vital and necessary resource to ensure that such challenges to truth and memory can be met, and that the experiences of residential school survivors can never be denied or forgotten. It is only by preserving this history that we can ensure that the tragedy of residential schools will never be repeated.

PART II: FACTS

A. Indian Residential Schools

6. Between the 1860s and 1990s more than 150,000 First Nations, Inuit and Métis children were required to attend Indian Residential Schools, institutions largely operated by religious organizations under the funding of the federal government.

7. Numerous allegations of sexual and physical abuse led to thousands of former students taking legal action in the mid-1990s. The former students sought compensation for injuries and for loss of language and culture. Several large class action suits were brought forward in the hopes of seeking redress for the former students and judicial recognition for the harms they

suffered. These class actions culminated in the historic Indian Residential Schools Settlement Agreement (the "**Settlement Agreement**") on May 8, 2006.

B. The Settlement Agreement

8. The Settlement Agreement resulted in the formation of two distinct means of providing financial compensation to individual residential school survivors: the Common Experience Payment (the "**CEP**") fund and the IAP. The CEP fund provides a fixed amount to residential school survivors based on the number of years during which they resided at residential schools.

9. While the CEP provides financial compensation to all residential school survivors, supplemental compensation by virtue of the IAP is reserved for those who have suffered the most egregious harms.

C. The IAP

10. The IAP is a distinct non-adversarial out of court process that provides financial compensation for sexual abuse, serious physical abuse and other wrongful acts suffered by residential school survivors.

11. As provided in Schedule D of the Settlement Agreement, the IAP "uses a uniform inquisitorial process for all claims to assess credibility, to determine which allegations are proven

and result in compensation, to set compensation according to the Compensation Rules, and to determine actual income loss claims".[1]

12. The Indian Residential Schools Adjudication Secretariat (the "**IRSAS**") provides administrative support to the work of the IAP Chief Adjudicator. The IRSAS receives claims; assesses claims for eligibility; works with claimants/lawyers to prepare claims for hearing; and provides all other necessary administrative support to the IAP.[2] The IRSAS is an autonomous branch of the Government of Canada, within Aboriginal Affairs and Northern Development Canada ("**AANDC**").[3]

13. The deadline to submit an IAP application was September 19, 2012. The IRSAS received 37,716 applications and has held 16,700 hearings as of March 31, 2013.[4] As of this writing, the IRSAS website indicates that 25,800 claims have been resolved.

D. The IAP Documents

14. Documents in the possession of the IRSAS fall into six categories: (i) claimants' IAP applications; (ii) witness statements; (iii) documentary evidence produced by the parties; (iv) transcripts and/or audio recordings of IAP hearings; (v) expert and medical reports generated in relation to the Claimants; and (vi) the decisions of the Adjudicators.

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[1] Schedule D, Indian Residential Schools Settlement Agreement dated May 8, 2006, Exhibit B to Affidavit of Daniel Ish sworn September 27, 2013.
[2] Affidavit of Daniel Ish sworn September 27, 2013 at para. 16.
[3] Affidavit of Daniel Ish sworn September 27, 2013 at para. 18.
[4] Affidavit of Tom McMahon sworn November 12, 2013 at para 69.

15. In order to initiate a hearing before an IAP adjudicator, a claimant must submit an application form to the IRSAS. Once the completed application form has been accepted by the IAP, claimants are required to produce the following documentary evidence to the IRSAS: (i) treatment records relevant to the harms claimed (including clinical, hospital, medical or other treatment records); (ii) workers' compensation records; (iii) corrections records (insofar as they relate to injuries or harms); (iv) income tax records; (v) secondary and post-secondary school records; and (vi) treatment plans for future care.

16. These documents are referred to as "claimant mandatory documents" or "mandatory documents".

17. Given the significant privacy interests at stake, the Commission's interest is limited to a subset of the IAP documents, namely: (i) IAP applications; (ii) transcripts and/or audio recordings of hearings; and (iii) decisions of the IAP adjudicators. The Commission is <u>not</u> seeking the production of the mandatory documents, but is of the view that this Honourable Court should give direction with respect to the disposition of this material.

E. <u>IAP Documents in Canada's Possession or Control</u>

18. Canada has possession or control over the IAP documents in both its capacity as defendant (i.e. continuing litigant) in the IAP process, and as administrator of the IAP aspect of the Settlement Agreement through the IRSAS.

19. The Settlement Agreement Operations branch (the "**SAO**") is the entity within AANDC that has possession or control of the IAP documents on behalf of Canada as defendant. SAO maintains copies of the following IAP documents: (i) IAP applications; (ii) witness statements; (iii) documentary evidence produced by the parties (including mandatory documents); (iv) audio recordings and transcripts of IAP hearings; (v) expert medical reports; (vi) adjudicators' decisions.[5] The SAO branch of AANDC is "responsible for representing Canada at IAP hearings, performing and providing Canada's document disclosure obligations in respect to individual IAP claims, and paying out compensation for settlements reached under the IAP".[6] Copies of these documents are maintained by SAO in respect of each IAP claim admitted by the IRSAS.[7]

20. The IRSAS was constituted as an autonomous branch of AANDC. The IRSAS supports the Chief Adjudicator, "including by identifying claimants, monitoring document production for IAP hearings, scheduling IAP hearings and providing administrative support for IAP adjudicators" and reports to the Chief Adjudicator. The IRSAS is also responsible for determining the eligibility of IAP applications. The IRSAS maintains its own copies of the IAP documents in a variety of databases.

F. Promises of Confidentiality

21. IAP claimants were given various promises of confidentiality respecting the documents they submitted and the IAP proceedings themselves. These promises of confidentiality can be

[5] Affidavit of David Russell sworn May 5, 2014 at para 16.
[6] Affidavit of David Russell sworn May 5, 2014 at para 54.
[7] Affidavit of David Russell sworn May 5, 2014 at para 17.

grouped into three categories: confidentiality provisions of the Settlement Agreement; confidentiality clauses in various documents outside of the Settlement Agreement; and verbal assurances of confidentiality given at hearings by IAP adjudicators.

i. Confidentiality provisions in the Settlement Agreement

22. The parties to the Settlement Agreement provided for certain protections for confidentiality within the IAP process.

23. The confidentiality provisions are present in two schedules to the Settlement Agreement: Scheduled D, which sets out the obligations of the IAP; and, Schedule N, which establishes the mandate of the Commission.

24. Schedule D to the Settlement Agreement provides that parties, alleged perpetrators and other witnesses are required to sign agreements to keep information disclosed at a hearing confidential.[8]

25. Schedule D further imposes an obligation on the IRSAS to provide all IAP claimants the option of having the transcript of their respective hearings deposited in an archive developed for the purpose. In practice, no IAP claimants have actually been given the option of having the transcripts of their hearings archived. In June 2010, after some 7,000 hearings had been completed, the Commission was approached for the first time by the IRSAS to provide assistance to it in developing its consent form. IRSAS's efforts to secure the Commission's

[8] Section O of Schedule D to the Settlement Agreement

approval of its form were ultimately unsuccessful. The IRSAS undertook no further efforts to implement a consent program.

26. Appendix II to Schedule D to the Settlement Agreement specifically addresses the retention of IAP applications. It provides that "all copies [of the IAP applications] other than those held by the Government will be destroyed on conclusion of the matter, unless the claimant asks that others retain a copy…".[9] This provision specifically contemplates that IAP materials are to be retained by Canada. The only reference to the destruction of IAP documents in the Settlement Agreement is in relation to copies of IAP applications held by parties and/or participants other than Canada.

27. Schedule N to the Settlement Agreement also addresses confidentiality concerns pertaining to IAP documents. Section 11 of Schedule N provides that "[i]nsofar as agreed to by the individuals affected and as permitted by process requirements, information from the Independent Assessment Process (IAP), existing litigation and Dispute Resolution processes may be transferred to the Commission for research and archiving purposes".[10]

ii. Written confidentiality provisions outside of the Settlement Agreement

28. Privacy and confidentiality assurances were provided to claimants in the IAP application period via: (a) the application form; (b) the Guide to the Independent Assessment Process

[9] Appendix II to Schedule D to the Settlement Agreement, s. iv.
[10] Section 11 of Schedule N to the Settlement Agreement.

Application (the "**Guide**"); and (c) the Confidentiality Agreements that parties, the alleged perpetrators and witnesses were required to sign.

29. A declaration in the application form alerts IAP claimants to the private nature of the IAP proceedings:

> I agree to respect the private nature of any hearing I may have in this process. I will not disclose any witness statement I receive or anything said at the hearing by any participant, except what I say myself.[11]

30. The declaration also includes the following statement related to the disclosure of personal information to others:

> I understand that my personal information, including details of any claim of abuse, may be shared with others, including the government, the adjudicator, participating church organizations, those who I identify as having abused me, and witnesses.

31. Notably, the application form is silent on whether IAP documents will be destroyed after the claimant's hearing or at some other future date. More generally, the application form does not address whether the IAP documents will be archived.

32. The Guide provides explicit reference to the question of how the IRSAS will deal with confidential information. Schedule "B" of the Guide informs claimants that their personal information will be dealt with in accordance with the federal *Privacy Act* and the *Access to Information Act*. It states that the records are subject to this legislation but not to any other form of confidentiality:

> The *Privacy Act* requires the government to keep your personal information for at least two years. Currently, the government keeps this information in the National Archives for 30 years, but this practice can change at any time. Only the National Archivist can destroy government records.[12] (emphasis added)

[11] Affidavit of Daniel Ish sworn September 27, 2013 at para 34.
[12] Affidavit of Daniel Ish sworn September 27, 2013 at Exhibit D (page 229).

33. The Guide sets out unequivocally that the records generated in the IAP process are not subject to an absolute guarantee of confidentiality. It states that, at minimum, Canada can be expected to retain the documents for a period of at least 30 years, and that the documents can only be destroyed at the behest of the National Archivist.

34. Each IAP claimant was also required to sign a confidentiality agreement.[13] The confidentiality agreement requires that IAP claimants "keep confidential and not disclose to any person or entity, whether in writing or orally, any information that is presented in [the IAP hearing], except [the IAP claimant's] own evidence or as required within the IAP or otherwise by law".

35. The one-page confidentiality agreement only addresses the obligations of the IAP claimants. It does not address the obligations of the IRSAS in respect of IAP documents.

36. A second confidentiality agreement is signed by all other attendees at the IAP hearing.[14] Signatories (including Canada) agree that:

> [they] will keep confidential and not disclose to anyone, whether in writing or orally, any information that is presented in this hearing or disclosed in relation to this hearing, except my own evidence or as required within IAP **or otherwise by law**. [emphasis added]

[13] Affidavit of Daniel Ish sworn September 27, 2013 at para 58.
[14] Affidavit of Daniel Ish sworn September 27, 2013 at para 58.

iii. Verbal Assurances

37. Until April 2012, some IAP adjudicators made broad verbal assurances to some IAP claimants and alleged perpetrators about the confidentiality of their evidence. The assurances were given for the purposes of facilitating the full participation of claimants at their hearings. The difficulty with this approach, however, is that these assurances departed from the terms of the Settlement Agreement, the Guide and legal requirements.

38. The verbal assurances were that only those in the IAP hearing room would be privy to the testimony of a claimant or an alleged perpetrator.[15] In other cases, it had been practice to reassure claimants "that their testimony and records would remain confidential within [IAP] processes".[16]

39. On April 5, 2012, Daniel Ish, the Chief Adjudicator of the IAP, sent a direction to all IAP adjudicators advising them that verbal assurances of confidentiality to IAP claimants must be revised. The direction stated:

> I think the best that can be done is rely on Paragraph III, o, I (at page 15) of the IAP [Schedule D to the Settlement Agreement] which essentially says that information will be kept confidential except "as required within this process or otherwise by law" … In short, I ask adjudicators not to give iron-clad assurances about confidentiality but to advise claimants and other participants that the information is protected by law, will be handled securely and seen by those who have a legitimate need to see it.[17]

[15] Affidavit of Daniel Ish sworn September 27, 2013 at para 59.
[16] Affidavit of Daniel Shapiro sworn September 26, 2013 at para 5.
[17] Affidavit of Daniel Ish sworn September 27, 2013 at para 59.

G. Significance of the IAP Documents

i. The Nature of the Records in issue

40. The IAP documents represent the single-most comprehensive collection of documents that evidence the harms suffered by residential school survivors.

41. As of November 6, 2013, the Commission had gathered approximately 6,200 oral statements from residential school survivors at various statement gathering events organized by the Commission.[18] By contrast, 37,847 IAP applications have been received by the IRSAS. In addition, unlike the Commission's statements, the claimant's IAP testimony is given under oath and subjected to questioning by the adjudicator to ascertain its reliability.

42. As a collection, the IAP records contain a unique aggregation of items, which taken as a whole provide the most comprehensive understanding of the abuses that took place in the Indian Residential School system. As such, the IAP documents are essential to the creation of "as complete an historical record as possible of the IRS system and legacy".

ii. Library and Archives Canada's appraisals of the IAP documents

43. The *Library and Archives of Canada Act* sets out a regulatory framework for the preservation of government documents that are of enduring historical value. One of the objects of Library and Archives of Canada ("**LAC**") is:

[18] Affidavit of Tom McMahon sworn November 12, 2013 at para 36.

> to be the permanent repository of publications of the Government of Canada and of government and ministerial records that are of historical or archival value[19]

44. Prior to the disposition of government records, the LAC appraises documents in the possession of a governmental institution to determine which documents may be of historical and archival value. LAC then issues a Records Disposition Authority ("**RDA**") which permits the subject governmental institution to dispose of all records within the scope of the RDA that are not deemed to be of enduring historical or archival value.

45. Documents that no longer have any operational value may be disposed of by a governmental institution in accordance with a RDA issued by LAC. According to section 12 of the Library and Archives of Canada Act, this is the only way government documents may be destroyed.

46. LAC's determination that portions of the IAP documents are of "enduring historical value" demonstrates the importance of this material. LAC's appraisal process proceeded on two parallel tracks, reflecting Canada's possession or control of the IAP documents as both defendant (SAO) and as administrator of the IAP process (IRSAS).

a. Canada as defendant (AANDC - SAO)

47. As a department of the Government of Canada, AANDC is subject to the *Library and Archives of Canada Act* and is subject to having its documents, including the IAP documents held by the SAO branch, archived at LAC.

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[19] *Library and Archives of Canada Act*, SC 2004, c 11 at s. 7(c).

48. In 2012, LAC issued a RDA dated February 26, 2013 following a multi-year appraisal in respect of IAP documents housed within the SAO branch of AANDC. RDA No. 2011/010 "covers all information resources created by Aboriginal Affairs and Northern Development in support of Residential Schools Resolution, regardless of the administrative body administering it".[20]

49. An *Agreement for the Transfer of Archival Records between the Aboriginal Affairs and Northern Development Canada and Library and Archives Canada pertaining to Records Disposition Authority No. 2011/010* (the "**AANDC-LAC Agreement**") was executed on August 7, 2012.

50. A substantive appendix to the AANDC-LAC Agreement provides that "[a]ll electronic copies of the Notice of Decision document and Settlement Package for each IAP and ADR case" must be transferred to LAC when they are no longer required by AANDC.

b. Canada as IAP Administrator

51. LAC also conducted a separate appraisal of the IAP documents held by the IRSAS (and within AANDC). The IRSAS agreed to participate in the LAC appraisal process on a without prejudice basis given the pending RFD.[21]

[20] Affidavit of Tim Eryou sworn May 5, 2014 at para 31.
[21] Affidavit of John Trueman sworn April 8, 2014 at para 78. See also Exhibit J1.

52. On July 18, 2012, LAC released the results of its appraisal of IAP documents held by IRSAS. Among other documents, LAC determined that "copies of each decision of the IAP" (excluding "resources related to review of legal fees") were of enduring historical value.[22]

53. On February 19, 2014, LAC representatives advised IRSAS that it determined that IAP testimony derived from audio recordings and transcripts of hearings were of enduring historical value and could not be disposed of by IRSAS. On February 28, 2014, LAC representatives advised IRSAS that it would re-open its appraisal of IAP documents to include audio recordings and transcripts of hearings.[23]

PART III: ISSUES

54. The Commission submits that the following issues are raised by the RFD herein:

A. Does the Commission have standing to initiate the Request for Direction herein?

B. Is the Request for Direction herein "premature"?

C. Are the IAP documents relevant to the mandate of the Commission?

D. Are the IAP documents in the "possession or control" of Canada?

E. If the IAP documents are in the "possession or control" of Canada, should they be produced to the Commission for archiving with the NRC, and under what conditions?

[22] Affidavit of John Trueman sworn April 8, 2014 at para 81.
[23] Affidavit of John Trueman sworn April 8, 2014 at para 84 - 85.

F. If the IAP documents are in the possession of the Court, should they be preserved, and under what conditions?

PART IV: LAW AND ANALYSIS

Introduction

55. The Commission submits that it enjoys standing to bring the RFD herein, and that its RFD is not premature. The Commission submits that the IAP documents are relevant to its document collection mandate as set out in Schedule N of the Settlement Agreement. Further, the Commission submits that the IAP documents are in the "possession or control" of Canada, such as to trigger Canada's obligation to produce "all relevant documents" to the Commission (and thereafter the NRC), subject to strict conditions to protect the privacy of claimants and affected persons. Finally and in the alternative, the Commission submits that if the IAP records are found to be exclusively in the possession of the Court (and not Canada), they should still be preserved, and archived with the NRC.

56. Prior to embarking on an analysis of the issues outlined above, the Commission's factum will address the mandates of the Commission and the NRC, as well as the jurisdiction of this Honourable Court to provide the directions sought.

The Mandate of the Commission

57. The Commission's mandate must be considered in light of the intention and focus of the negotiating parties to address both the history and legacy of residential schools in the Settlement Agreement.

58. The Settlement Agreement imposes on the Commission the primary task of truth-telling. Consistent with its mandate of telling the truth about the harms and injustices experienced by Aboriginal peoples, the Commission has several goals, duties and powers as is set out in Schedule N.

59. The Commission's mandate is vast and without precedent in Canadian history. The Commission is mandated to:

a. guide a process of reconciliation, which includes the conduct of national events, the support of community events and commemoration projects;

b. create a legacy, which includes the collection of all relevant records and the conduct of statement taking, and other truth sharing activities, the classification of such documentation, and the preservation of these records;

> "the Commissioners are authorized and required in the public interest to archive all such documents, materials, and transcripts or recordings of statements received, in a manner that will ensure their preservation and accessibility to the public and in accordance with access and privacy legislation, and any other applicable legislation" (see Settlement Agreement, s. 2(a));
>
> "the Commission shall recognize: (c) that it will build upon the work of past and existing processes, archival records, resources and documentation, including the work and records of the Royal Commission on Aboriginal Peoples of 1996;…(g) that there shall be an emphasis on both information collection/storage and information analysis" [emphasis added] (see Settlement Agreement s. 4(c) and (g));

> "the goals of the Commission shall be to: (e) **Identify sources and create as complete an historical record as possible of the IRS system and legacy**. The record shall be preserved and made accessible to the public for future study and use" (see Settlement Agreement s. 1(e)).

c. establish a National Research Centre; and

> "the Commission shall have the following responsibilities: (d) to establish a research centre and ensure the **preservation of its archives**" [emphasis added] (see Settlement Agreement, s. 4(d));
>
> "A research centre shall be established, in a manner and to the extent that the Commission's budget makes possible. It shall be accessible to former students, their families and communities, the general public, researchers and educators who wish to include this historic material in curricula" (see Settlement Agreement, s. 12);
>
> "For the duration of the term of its mandate, the Commission shall ensure that all materials created or received pursuant to this mandate shall be preserved and archived with a purpose and tradition in keeping with the objectives and spirit of the Commission's work" (see Settlement Agreement, s.12).

d. conduct research and to produce a report to the Parties of the Settlement Agreement.[24]

> "Produce and submit to the Parties of the Agreement a report including recommendations to the Government of Canada concerning the IRS system and experience including: the history, purpose, operation and supervision of the IRS system**, the effect and consequences of IRS (including systemic harms, intergenerational consequences and the impact on human dignity) and the ongoing legacy of the residential schools**;" [citations omitted, emphasis added] (see Settlement Agreement s. 1(f)).

60. Schedule N of the Settlement Agreement also authorizes the Commission to "make recommendations for such further measures as it considers necessary for the fulfillment of the Truth and Reconciliation Mandate and goals."[25] The settling parties intended that the

[24] Affidavit of Tom McMahon, sworn November 12, 2013, Exhibit 4.
[25] Affidavit of Tom McMahon, sworn November 12, 2013, Exhibit 4 s. 1(f).

Commission be given broad scope to inquire into and make recommendations concerning all aspects of the complex legacy of residential schools.

61. In order to allow the Commission to complete its mandate, the defendants committed that they would provide all relevant documents in their possession or control to the Commission. This term of the Settlement Agreement is set out in s. 11 of Schedule N entitled, "Access to Relevant Information":

> In order to ensure the efficacy of the truth and reconciliation process, Canada and the churches will provide all relevant documents in their possession or control to and for the use of the Truth and Reconciliation Commission, subject to the privacy interests of an individual as provided by applicable privacy legislation, and subject to and in compliance with applicable privacy and access to information legislation, and except for those documents for which solicitor-client privilege applies and is asserted.
>
> In cases where privacy interests of an individual exist, and subject to and in compliance with applicable privacy legislation and access to information legislation, researchers for the Commission shall have access to the documents, provided privacy is protected. In cases where solicitor-client privilege is asserted, the asserting party will provide a list of all documents for which the privilege is claimed.
>
> Canada and the churches are not required to give up possession of their original documents to the commission. They are required to compile all relevant documents in an organized manner for review by the Commission and to provide access to their archives for the Commission to carry out its mandate. Provision of documents does not require provision of original documents. Originals or true copies may be provided or originals may be provided temporarily for copying purposes if the original documents are not to be housed with the Commission.
>
> Insofar as agreed to by the individuals affected and as permitted by process requirements, information from the Independent Assessment Process (IAP), existing litigation and Dispute Resolution processes may be transferred to the Commission for research and archiving purposes [emphasis added].[26]

[26] Affidavit of Tom McMahon, sworn November 12, 2013, Exhibit 4 at s. 11.

62. Privacy legislation is central to the work of the Commission. Schedule "N" provides that:

> The Commission shall respect privacy laws, and the confidentiality concerns of participants. For greater certainty:
>
> …
>
> (e) documents shall be archived in accordance with legislation.

63. Indeed, Schedule "N" specifically refers to privacy considerations in respect of the NRC's archiving function:

> The Commission shall use such methods and engage in such partnerships with experts, such as Library and Archives Canada, as are necessary to preserve and maintain the materials and documents. To the extent feasible and taking into account the relevant law and any recommendations by the Commission concerning the continued confidentiality or records, all materials collected through this process should be accessible to the public.

The Mandate of the National Research Centre

64. The NRC, like the Commission, is created by Schedule N to the Settlement Agreement. The NRC serves as an archive for relevant documents collected by the Commission pursuant to its document collection mandate.

65. The idea of a national research centre arose in Recommendations in the Royal Commission on Aboriginal Peoples Report, and in the Law Commission of Canada's report, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* where it was stated:

> Aboriginal peoples, as a whole, also have needs that come out of the residential school experience. As the Royal Commission on Aboriginal Peoples noted, acknowledgement, apologies and the creation of memorials are important

> elements of healing. A memorial could be achieved through the institution of a national repository that would act as a clearinghouse of information for researchers and educators. Ideally, it would have the power to conduct independent research, collect an oral history of the experiences of former residents, and to conduct public education programs on the history and effects of residential schools. This repository would also document cases of physical and sexual abuse, both at residential and day schools. The more Canadians learn of the full range of abuse Aboriginal children suffered, the more they will understand the destructive influence of the residential school system. This, in turn, will lead to a better appreciation of why significant steps must now be taken to help survivors and their communities.[27]

66. Pursuant to section 3(d) of Schedule N, the Commission is responsible for establishing the NRC and for ensuring the preservation of its archives.

67. Section 12 of Schedule N provides that "[a] research centre shall be established, in a manner and to the extent that the Commission's budget makes possible". Section 12 further provides that the NRC's purpose is "[F]or the duration of the term of its mandate, the Commission shall ensure that all materials created or received pursuant to this mandate shall be preserved and archived with a purpose and tradition in keeping with the objectives of the Commission's work."

68. The NRC's mandate contemplates that the sensitive personal information contained in records relating to residential schools will require privacy protection. Section 12 of Schedule "N" provides that "[t]o the extent feasible and taking into account the relevant law and any recommendations by the Commission concerning the continued confidentiality of records, all materials collected through this process should be accessible to the public".

[27] Restoring Dignity: Responding to Child Abuse in Canadian Institutions, Law Commission of Canada at p. 99.

69. Section 13 of Schedule N provides that "documents shall be archived in accordance with legislation", and as such that privacy legislation is applicable.

70. Consistent with the mandate of the Commission and the purposes of the Settlement Agreement, the NRC has been constituted in a manner that ensures that Aboriginal people are directly and continuously involved in its operation. The Administrative Agreement provides for the creation of a Governing Circle that will have a majority of Aboriginal members. The Administrative Agreement sets out the areas where the Governing Circle will give advice and make decisions with respect to the NRC, "as long as such advice is not inconsistent with applicable laws, the terms of the Trust Deed, the terms of this Agreement [the Administrative Agreement], and the University's policies".[28]

71. In addition, the Administrative Agreement provides for the creation of a Survivors Circle.[29] The Survivors Circle is a further means through which the perspectives of Aboriginal people may be brought to bear on the management of the NRC's collection.

The Court's jurisdiction to determine the RFD's herein

72. The Commission respectfully submits that this Honourable Court has jurisdiction to entertain the RFD's herein. In particular, this Honourable Court has jurisdiction to make orders concerning the production, preservation, and restrictions on access in respect of the IAP documents.

[28] Affidavit of Tom McMahon, at paragraph 54; see also Exhibit "39" at article 11.
[29] Affidavit of Tom McMahon, at paragraph 55; see also Exhibit "39" at article 13.

73. The Commission submits that there are three sources of the Court's jurisdiction to make orders in respect of this matter:

> [154] Although some sources of jurisdiction are perhaps more pertinent to the IAP process discussed in the next major section of these Reasons for Decision, the court has several sources of jurisdiction over the performance of the terms of the the IRSSA, and this jurisdiction extends to the governance of Canada's disclosure obligations to the Truth and Reconciliation Commission. Indeed, the court has at least three sources of jurisdiction over the performance of the IRSSA. First, there is the court's jurisdiction over the administration of a class action settlement. Second, there is the court's plenary jurisdiction from s. 12 of the *Class Proceedings Act*, 1992; S.O. 1992, c. 6. Third, there is the court's jurisdiction derived from the IRSSA, which includes its jurisdiction to interpret and enforce contracts and its own orders, including its approval and implementation orders of the IRSSA.[30]

74. While it is not permitted to rewrite the Settlement Agreement, or to impose burdens on the defendants that they did not agree to assume, 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". The Implementation Order specifically authorizes the Court to make "further and ancillary orders" in respect of the implementation of the Settlement Agreement:

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

75. The Commission submits that the Directions sought in the RFD herein do not amount to rewriting the Settlement Agreement, or imposing additional obligations on the defendants. Rather, the Directions constitute "further and ancillary orders" which are necessary to implement

[30] *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283 at para.154

the provisions of the Settlement Agreement. This Honourable Court has broad discretion to craft orders to ensure the fulfilment of the Settlement Agreement in a manner that protects the privacy of affected persons.

ISSUE A: The Commission has standing to bring the RFD herein

76. By way of notice of motion dated May 8, 2014, the Sisters of St. Joseph of Sault Ste. Marie ("**SSJSM**") seek an order that the Commission's and the Chief Adjudicator's RFD's in relation to IAP documents be struck on basis of standing and prematurity. In particular, SSJSM takes the position that neither the Commission nor the Chief Adjudicator have standing to seek an interpretation from the Honourable Court by way of a RFD because they are creations of the parties to the IRSSA and were created "to assist the [p]arties to carry out the terms of the IRSSA".[31]

77. The Commission respectfully submits that both it and the Chief Adjudicator enjoy standing to bring their respective RFD's. In this regard, the Commission relies on the Court Administration Protocol (the "**CAP**") issued by the Approving Court in its Implementation Order dated March 8, 2007.

78. Under the CAP it is evident that the parties to the Settlement Agreement did not intend to bar access to this Honourable Court by the Commission to address matters arising out of its court-ordered mandate.

[31] Notice of Motion of SSJSM dated May 8, 2014 at para 13.

79. Far from prescribing exclusive access to the court by the parties, the CAP contemplates that "matters that require court orders, directions or consideration" will be brought to the attention of the Administrative Judges by a "party, counsel or other entity with standing in respect of the Agreement". The term "other entity with standing" is not specifically defined in the Settlement Agreement.

80. The Commission submits that it would be contrary to principles of contract interpretation to ascribe no meaning to the phrase "other entity with standing". As such, the parties can be inferred to have intended that entities other than the parties to the litigation would have access to the court.

81. Consistent with this clear intention, the Chief Adjudicator has repeatedly sought direction from the Court on various matters without challenges to its standing[32]. In fact, SSJSM, the party which now contests the Chief Adjudicator's standing, previously brought an RFD jointly with the Chief Adjudicator.[33]

82. The British Columbia Court of Appeal addressed the issue of standing for non-parties under the Settlement Agreement in *Fontaine v. Attorney General of Canada*.[34] The Court rejected the argument now made by SSJSM that standing is restricted to parties by virtue of the Settlement Agreement. The Court recognized that the Indian Residential Schools litigation is *sui generis*, and that in the context of these unique proceedings it would "put form over substance" to insist that a party bring the matter before the court on "an important point of administration".[35]

[32] Affidavit of John Trueman sworn May 15, 2014 at para 7 -17.
[33] Affidavit of John Trueman sworn May 15, 2014, Exhibit D.
[34] *Fontaine v. Attorney General of Canada,* 2008 BCCA 329.
[35] *Fontaine v. Attorney General of Canada,* 2008 BCCA 329 at para 16.

83. In addition, the Commission respectfully submits that SSJSM's reliance on the "intention of the Settling Parties" fundamentally misapprehends the nature of class proceedings and the supervisory role of the Courts with respect to approving and implementing settlements. As stated in *Baxter v. Canada*:

> The court has an obligation under the *Class Proceedings Act* ("*CPA*") to protect the interests of the absent class members, both in determining whether the settlement meets the test for approval and in ensuring that the administration and implementation of the settlement are done in a manner that delivers the promised benefits to the class members. In seeking the approval of the court, the plaintiffs and defendants essentially seek the benefits of having the court sanction the settlement. Such approval cannot be divorced from the obligation it entails. Once the court is engaged, it cannot abdicate its responsibilities under the *CPA*.[36]

84. The court in *Baxter* went on to reject the IAP regime initially proposed by the parties because it purported to curtail the court's oversight role in settlement implementation.

85. In the context of class proceedings, the parties as a matter of law are in no position to limit the court's ability to supervise implementation of a settlement in the interests of absent class members. As such, the settling parties (including SSJSM) could not have agreed to bar the Commission access to the courts where to do so would effectively impede this Honourable Court's ability to supervise the fulfillment of the Commission's mandate.

86. Finally, this Honourable Court recently entertained an RFD brought by the Commission in respect of the documents pertaining to an Ontario Provincial Police investigation into offences committed at St. Anne's residential school.[37] While no party challenged the Commission's standing in that matter, this Honourable Court's decision to assume jurisdiction in that case

[36] *Baxter v. Canada (Attorney General)*, (2006), 83 OR (3d) 481 (SCJ).
[37] *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283

implicitly supports the Commission's standing to bring matters relating to documentary production before the court.

ISSUE B: The Request for Direction herein is not premature

87. In its notice of motion, the SSJSM, takes the position that the RFD herein is "premature":

> [G]iven that the dispute involves document production to the [Commission], the proper body to consider and adjudicate upon the dispute is the NAC … Pursuant to the Settlement Agreement, the TRC is only permitted to refer disputes related to the disclosure of documentation to the NAC. This was not done in this case.

88. The Commission submits that this RFD is not premature. The Commission submits that the permissive National Administration Committee ("**NAC**") process does not bar direct access to the court by the Commission. By virtue of s. 7.01(2) and (3) of the Settlement Agreement and paragraph 2(l) of Schedule N to the Settlement Agreement, the Commission "may" avail itself of NAC as a means of resolving disputes over document disclosure. There can be no doubt that the term "may" was both deliberately chosen and intended to be permissive in view of the fact that many other of the Commission's powers, duties and procedures are expressed in mandatory language ("shall").

89. Further, SSJSM's suggestion that NAC is the compulsory and exclusive forum available to the Commission to resolve production issues runs afoul of the supervisory jurisdiction of the court in settlement implementation. To the extent that access to the court is available only through and at the discretion of NAC, the parties to the Settlement Agreement would have the authority to finally determine any issue of production. In circumstances in which NAC exercised

its discretion not to refer the matter to court, any breaches of the Settlement Agreement would be insulated from review by the court.

90. As submitted above, the parties (including SSJSM) are in no position to come to an agreement to oust the Court's ultimate oversight role in the implementation of the settlement. This would include the implementation of the Settlement Agreement as it pertains to the Commission and the availability of documents to fulfill its mandate.

91. In summary, the Commission submits that the substantive issues raised in the RFD herein are properly before this Honourable Court, and should be determined on their merits.

ISSUE C: The IAP documents are relevant to the Commission's mandate

92. Section 11 of Schedule "N" imposes obligations on the defendants with respect to the production of documents to the Commission. It provides that "[i]n order to ensure the efficacy of the truth and reconciliation process, Canada and the churches will provide all relevant documents in their possession or control" to the Commission, subject to applicable privacy legislation.

93. In *Fontaine v. Canada (Attorney General)*, Justice Goudge defined the content of Canada's obligation to produce relevant documents. Justice Goudge ruled that access by the Commission to "the information needed to prepare an historical record and a report is obviously a critical precondition" for the Commission to discharge the parts of its mandate relating to the

NRC.[38] Justice Goudge held that "relevant documents are those that are reasonably required to assist the [Commission] to discharge its mandate".[39] In defining relevance, Justice Goudge focused on the following aspects of the Commission's mandate:

> (e) Identify sources and create as complete an historical record as possible of the IRS system and legacy. The record shall be preserved and made accessible to the public for future study and use;
>
> (f) Produce and submit to the Parties of the Agreement a report including recommendations to the Government of Canada concerning the IRS system and experience including: the history, purpose, operation and supervision of the IRS system, the effect and consequences of the IRS (including systemic harms, intergenerational consequences and the impact on human dignity) and the ongoing legacy of the residential schools[.][40]

94. Justice Goudge rejected any notion that the defendants' production obligations were subject to a fixed cut-off date. In particular, the court recognized that "the ongoing legacy" of residential schools was central to the Commission's mandate.

> [88] First, there is some suggestion in the TRC's materials that Canada proposes an arbitrary cut-off date for its obligation. For example, it is said that Canada proposes not to provide any documents concerning a particular school created after the school closed.
>
> [89] I do not take that to be Canada's position. Nor would it be one that is sustainable. An arbitrary cut-off date would be incompatible with the mandate extending to "the ongoing legacy" of the residential schools.[41]

95. The Commission submits that the information contained in the IAP documents falls within the core of the Commission's mandate. Each application is a statement by an individual survivor who attended a residential school about their experiences at that school. The applications, along with the transcripts and decisions of the adjudicators, document the "effect and consequences of the IRS" including "intergenerational consequences and the impact of

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[38] *Fontaine v. Canada (Attorney General)*, 2013 ONSC 684.
[39] *Fontaine v. Canada (Attorney General)*, 2013 ONSC 684 at para 80.
[40] *Fontaine v. Canada (Attorney General)*, 2013 ONSC 684 at paras 82 and 84.
[41] *Fontaine v. Canada (Attorney General)*, 2013 ONSC 684 at paras 88 and 89.

human dignity". Cumulatively, these records are the most comprehensive compilation of the experiences of Aboriginal children who attended residential schools in existence. The records provide the names, voices, experiences and the consequences of the residential schools on Aboriginal children.

96. In summary, the IAP documents are relevant to the mandate of the Commission.

ISSUE D: The Documents are in Canada's Possession or Control

97. Justice Goudge held that the first paragraph of section 11 sets out the basic obligation of the defendants concerning documents in their respective possession or control. As it pertained to Canada, Justice Goudge found that the particular location within which documents are housed within government plays no role in defining the scope of the obligation to produce relevant documents:

> [69] In my view, the first paragraph of section 11 sets out Canada's basic obligation concerning documents in its possession or control. The plain meaning of the language is straightforward. It is to provide all relevant documents to the TRC. The obligation is in unqualified language unlimited by where the documents are located within the government of Canada. Nor is the obligation limited to the documents assembled by Canada for production in the underlying litigation.[42]

98. Following this reasoning, Justice Goudge went on to find that the plain meaning of "all relevant documents" within section 11 included documents under the jurisdiction of LAC. It was undisputed that documents held by LAC were within the possession or control of Canada: "It is, after all, the archives of the government of Canada".

[42] *Fontaine v. Canada (Attorney General)*, 2013 ONSC 684 at para 69.

99. The Commission submits, based on Justice Goudge's reasoning, that the IAP documents at issue in the herein RFD are in the possession or control of Canada. Canada is in possession or control of the IAP documents in two distinct capacities.

i. Canada's Possession or Control as Defendant

100. First, Canada is in possession or control of the IAP documents in its capacity as a defendant in the IAP hearings. As set out in paragraphs 17 through 20 above, the SAO branch of AANDC maintains its own IAP documents for the purposes of responding to claims made in the IAP setting. That Canada will maintain its own IAP documents in its capacity as defendant is specifically contemplated in Schedule "D", wherein it is acknowledged that "the government" is exempt from an obligation to destroy its copy of the IAP application.

101. Canada's possession and control of IAP documents in its capacity as defendant is reinforced in the Application Guide, which provides *inter alia* that Canada's current practice (subject to change at any time) is to retain the records for 30 years, and that they can only be destroyed by the National Archivist. The Guide also provides that the records are subject to the federal *Privacy Act* and the *Access to Information Act*.

102. The Commission submits that the verbal assurances provided to some IAP claimants cannot as a matter of law exempt the IAP documents in Canada's possession or control from operation of privacy and access legislation of general application.[43] The SAO as a branch of AANDC is bound by the *Privacy Act* and the *Access to Information Act*.

[43] *Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration)* 2002 FCA 270, [2003] 1 FC 219, at para 11. See also *St. Joseph Corp. v. Canada (Public Works and Government Services)* [2002] FCJ No 361; 2002 FCT 274 at para 55 (in respect of confidential information in a commercial context); *Glaxo Canada Inc.*

103. Canada's possession and control of the IAP documents is further confirmed by the fact that LAC has exercised its jurisdiction to issue a RDA in respect of the records held by the SAO branch of AANDC. There has been no challenge, nor could there be, to LAC's authority to make directions as to the disposition of documents held by Canada in its own right, as a defendant in the IAP proceedings. As matters presently stand, Canada will continue to hold IAP documents pursuant to LAC's authority.

ii. Canada's Possession or Control as Administrator of the IAP

104. Canada is also in possession or control of the IAP documents in its administrative capacity in support of the IRSAS. The IRSAS was intended by the parties (and was directed by the Approving Court) to maintain independence from Canada in respect to its adjudicative function, to ensure that Canada was not in a position of conflict in respect of its dual roles as defendant and administrator of the settlement. However, the Approving Court did not go so far as to require that the court become the *de facto* administrator of the settlement. The Court assumed an "executive oversight" role, whilst leaving Canada in place as administrator of IAP aspect of the settlement agreement.

> [38] … [T]he administration of the plan must be neutral and independent of any concerns that Canada, as a party to the settlement, may otherwise have. In order to satisfactorily achieve this requisite separation, the administrative function must be completely isolated from the litigation function with an autonomous supervisor or supervisory board reporting ultimately to the courts. This separation will serve to protect the interests of the class members and insulate the government from unfounded conflict of interest claims. To effectively accomplish this separation and autonomy it is not necessary to alter the

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v. Canada (Minister of National Health and Welfare) [1992] FCJ No 143, 41 CPR (3d) 176 (in respect of confidential information in a commercial context); *StenoTran Services v. Canada (Minister of Public Works and Government Services)* [2000] A.C.F. no 747, 186 F.T.R. 134 (in respect of confidential information in a commercial context).

> administrative scheme by replacing the proposed administration or by imposing a third party administrator on the settlement. Rather, the requisite independence and neutrality can be achieved by ensuring that the person, or persons, appointed by Canada with authority over the administration of the settlement shall ultimately report to and take direction, where necessary, from the courts and not from the government.
>
> * * *
>
> [51] I do not want the foregoing to be misunderstood as imparting a requirement that the court be the de facto administrator of the settlement. Rather, the court must be in a position to effectively evaluate the administration and the performance of the administrator and, further, be empowered to effect any changes that it finds necessary to ensure that the benefits promised under the settlement are being delivered. Any terms of the settlement that attempt to curtail this jurisdiction cannot be sanctioned by the court.

105. The Commission respectfully submits that the collection and management of documents to support the IAP process is an administrative function that was left to Canada to perform. The collection and management of documents does not implicate the Approving Court's concern about a potential conflict between Canada's role as continuing litigant and as neutral administrator of the settlement agreement. As such, AANDC (and therefore Canada) is also in possession of the IAP documents in its capacity as the government department housing the IRSAS.

ISSUE E: If the IAP documents are in the possession of Canada, they should be provided to the Commission under strict conditions

106. The Commission respectfully submits that the IAP documents, given that they are in the possession or control of Canada, should be provided to the Commission on strict terms. The Commission submits that this result is consistent with the plain meaning of the words of the

Settlement Agreement, understood in the context provided by the circumstances that existed at the time of its creation.

107. It was the intention of the parties to the Settlement Agreement that Canada produce to the Commission all relevant documents in its possession or control, regardless of where they were housed within the Canadian government. This was described by Justice Goudge as Canada's "basic obligation" with respect to document production.[44] The only exception to this basic obligation provided for under the Settlement Agreement was with respect to documents subject to solicitor client privilege.

108. It is acknowledged that section 11 of Schedule "N" contemplates that affected persons would be given an opportunity to provide consent to the transfer of information from the IAP process to the Commission. The Commission submits that this provision must be read in the context of the entire Settlement Agreement, and the Commission's broad mandate in Schedule "N".

109. The Commission submits that the consent provision in section 11 of Schedule "N" cannot be read as a limitation on Canada's basic obligation to produce all relevant documents in its possession. In the context in which the Settlement Agreement was negotiated, it is unlikely that any of the parties had a precise understanding of the scope of relevant documents that were in Canada's possession or control at the time, or that would come into Canada's possession or control. However, what is clear from the language of section 11 is that the entirety of relevant material in Canada's possession was to be made available for the Commission's work, and that

[44] *Fontaine v. Canada (Attorney General)*, 2013 ONSC 684 at para 69.

the Commission would need to provide privacy protection for what was understood to be sensitive information.

110. Reading the consent provision in section 11 as a limitation on Canada's production obligation would create a result that was never intended by the parties: that Canada would be permitted to possess and archive records relevant to the harms and legacy of residential schools that would be denied to the Commission and the NRC. It was intended that the NRC would be the comprehensive national archive of the history and legacy of residential schools. It cannot fulfill this mandate in circumstances in which Canada unilaterally retains the richest and most comprehensive collection of the experiences of survivors.

111. The Commission submits that the IAP documents, if provided to the Commission and thereafter the NRC, should be subject to very strict conditions to protect the legitimate privacy interests of claimants and all affected parties. The Commission suggests that a lengthy closed period is appropriate, with very limited exceptions based on the consent of the claimants, with redactions in respect of other affected parties, or for statistical research purposes. The NRC has the institutional capacity to ensure that the IAP documents are protected in a manner that complies with whatever this Honourable Court may order.

112. The Commission notes that the IAP process will continue for a period of time after the expiration of the Commission's mandate. As is evident from Article 6.03(1)(d) of the Settlement Agreement (which provides that the IAP process was expected to be completed within six years of the implementation date), the parties anticipated that the IAP process would be completed

prior to the completion of the Commission's work. Under these circumstances, the Commission respectfully requests that, should this Honourable Court determine that production of the IAP documents to the Commission is appropriate, an order be made to ensure that IAP documents created after the expiration of the Commission's mandate be produced directly to the NRC.

ISSUE F: If the IAP documents are in the possession of the Court, they should be preserved under strict conditions

113. The Commission submits that, should this Honourable Court determine that the IAP documents are in the Court's possession, they should be preserved under strict conditions to protect the privacy interests of the claimants and affected parties.

114. The Commissions repeats and relies on its submissions above in this regard. In particular, the Commission submits that neither the Settlement Agreement, the written assurances provided in the IAP hearing process, nor any verbal assurances given to individual claimants, support the destruction of these vitally important records. On a fair reading of the record before this Honourable Court, no party appears to have adverted in a focused manner to the fate of the IAP documents.

115. The process that was intended to provide claimants with an opportunity to preserve their IAP evidence in an "archive developed for the purpose" pursuant to Schedule "D" of the Settlement Agreement, was never implemented by the IRSAS.

116. Reading the Settlement Agreement as a whole, it was the intention of the parties to preserve "as complete an historical record as possible of the IRS system and legacy". The

parties were also concerned about protecting privacy and confidentiality in the IAP process. Both of these laudable objectives can be achieved through the preservation and archiving of the records with very restrictive conditions applied. These would include a lengthy closed period for the records, with very limited exceptions.

PART V: ORDER REQUESTED

117. The Commission respectfully requests that this Honourable Court order production of the IAP applications, decisions, and hearing transcripts and/or audio recordings to the Commission, for the purpose of archiving these documents at the NRC. The Commission proposes that a lengthy closed period apply to the documents, along with appropriate conditions to ensure that privacy is protected.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 9TH DAY OF JUNE, 2014.

_____

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SCHEDULE "A" – LIST OF AUTHORITIES

1. *Baxter v. Canada (Attorney General)*, (2006), 83 OR (3d) 481 (SCJ)

2. *Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration)* 2002 FCA 270, [2003] 1 FC 219

3. *Fontaine v. Attorney General of Canada*, 2008 BCCA 329

4. *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283

5. *Fontaine v. Canada (Attorney General)*, 2013 ONSC 684

6. *Glaxo Canada Inc. v. Canada (Minister of National Health and Welfare)* [1992] FCJ No 143, 41 CPR (3d) 176

7. *St. Joseph Corp. v. Canada (Public Works and Government Services)* [2002] FCJ No 361; 2002 FCT 274

8. *StenoTran Services v. Canada (Minister of Public Works and Government Services)* [2000] A.C.F. no 747, 186 F.T.R. 134

SCHEDULE "B" – LEGISLATION

***Library and Archives of Canada Act*, SC 2004, c 11**

Objects

7. The objects of the Library and Archives of Canada are

(*a*) to acquire and preserve the documentary heritage;

(*b*) to make that heritage known to Canadians and to anyone with an interest in Canada and to facilitate access to it;

(*c*) to be the permanent repository of publications of the Government of Canada and of government and ministerial records that are of historical or archival value;

(*d*) to facilitate the management of information by government institutions;

(*e*) to coordinate the library services of government institutions; and

(*f*) to support the development of the library and archival communities.