

COURT OF APPEAL FOR ONTARIO

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
(Respondents in Appeal)

[style of cause continued on next page]

**UPDATED FACTUM WITH REFERENCE TO THE JOINT COMPENDIUM OF
DOCUMENTS AND BOOK OF AUTHORITIES OF THE CHIEF
ADJUDICATOR (Respondent)**

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**UPDATED FACTUM WITH REFERENCE TO THE JOINT COMPENDIUM
OF DOCUMENTS AND BOOK OF AUTHORITIES OF
THE CHIEF ADJUDICATOR**

PART I. INTRODUCTION AND OVERVIEW

1. This case involves a decision of a Supervising Judge designated pursuant to court orders implementing the Indian Residential Schools Settlement Agreement (the “IRSSA”).¹ The IRSSA is a negotiated resolution of numerous class actions brought against the Government of Canada and various Church entities for damages suffered by former students of Indian Residential Schools, as defined in the IRSSA. The decision under appeal (the “Records Decision”)² concerns two Requests for Directions (“RFDs”)³ regarding records produced and prepared for the Independent Assessment Process (the “IAP”), which is one component of the IRSSA.

2. The IAP, established under Article 6⁴ and Schedule D⁵ of the IRSSA, is the only means under the settlement by which former students can advance ongoing claims for compensation for specific incidents of abuse and consequential harm. The IAP is a *sui generis* form of litigation, an inquisitorial process conducted by IAP adjudicators under which the Claimant must establish his or her entitlement to compensation based on proof, on the civil standard, of serious physical or sexual abuse or other wrongful acts as defined in the IAP Compensation Rules. The Chief Adjudicator is the Officer of the Court responsible for the implementation and operation of the IAP.

¹ Joint Compendium of Documents (“JCoD”) Vol. 1, Tabs 23-25, pp. 236-392. Under the Court Administration Protocol incorporated into the Supervising Courts’ Implementation Orders, Justice Perell is a Supervising Judge and also one of the two Administrative Judges designated by the nine Supervising Courts to receive all Requests for Directions, for case management if necessary and referral for hearing by Supervising Judges.

² Reasons for Decision of Justice Perell dated August 6, 2014 (“Reasons”), JCoD Vol. 1, Tab 4, pp. 26-92

³ JCoD Vol. 1, Tabs 1 and 2, pp. 1-15

⁴ JCoD Vol. 1, Tab 23, pp. 285-88

⁵ JCoD Vol. 1, Tab 24, pp. 332-80

3. All parties agree that the records used in the IAP contain the most highly sensitive personal information of Claimants, alleged perpetrators, witnesses and others. Schedule D provides for closed hearings conducted on the basis of a written promise from each participant that the information obtained will be kept confidential, while preserving the ability of participants to discuss their own evidence outside of the IAP. The uncontradicted evidence of Claimants and Church participants is that they agreed to participate in the IAP based on the understanding that, with limited exceptions, records produced and prepared for the IAP were to be used and disclosed for that purpose alone.

4. Before the Supervising Judge, the Chief Adjudicator's RFD sought, *inter alia*, an order that the IAP records be destroyed after the completion of the IAP. The RFD of the Truth and Reconciliation Commission (the "TRC") sought an order that all IAP records be transferred to the TRC pursuant to its right under Schedule N⁶ of the IRSSA to access records held by Canada and the Churches that are relevant to the TRC's mandate to collect and archive an historical record of the legacy of residential schools. In its written argument on the RFD, the TRC limited its interest to four categories of IAP records: application forms, decisions, and transcripts and audio recordings of hearings. In response to the two RFDs, Canada asserted that the IAP records were government records in its control, and that Canada was required to retain them for a period and then, if they were of enduring value, to archive them. As a result, the Supervising Judge was required to decide whether records produced and prepared for the IAP could be retained, transferred and archived for research, study and public access, or whether the IRSSA required them to be destroyed at the end of their use in the IAP.

⁶ JCoD Vol. 1, Tab 25, pp. 381-92

5. The Supervising Judge held that “near to absolute confidentiality was a necessary aspect of the IAP,”⁷ and that, subject to very limited exceptions, the parties intended that claim records must be used and disclosed only for IAP purposes, and then be destroyed. The Supervising Judge held that this was what the parties had agreed to and what common law and equity required. The parties had negotiated the specific provisions of the IAP regarding confidentiality and had participated in the process on the basis of those privacy promises. To permit uses of IAP records, other than what was contemplated in the IRSSA, would be a betrayal of trust.

6. The three appeals before this Court do not challenge the Supervising Judge’s foundational findings about the confidential nature of the IAP or his finding that the claim records must be destroyed. Some of the cross-appeals do challenge these findings, and the Chief Adjudicator will address those challenges in his response to the cross-appeals.

7. These appeals concern, instead, the rulings that the Supervising Judge made on the TRC’s RFD. The Supervising Judge did not accept that IAP records could be transferred to the TRC, absent Claimant consent. However, he did find that application forms, transcripts and audio recordings of the Claimant’s own evidence, and the decision on the claim, could be archived by a Claimant, or on Claimant consent, if they were redacted to remove identifying information of alleged perpetrators and others. He also found that a notice program could be developed to inform Claimants of their rights in this regard, and that these records should be retained for a period to enable Claimants to exercise those rights.

⁷ Reasons, para. 326, JCoD Vol. 1, Tab 4, p. 79

8. The appellants say that the Records Decision is reviewable on the standard of correctness, and that the Supervising Judge erred in law in holding: (a) that the four categories of records, once redacted, could be archived on Claimant consent; (b) that a notice program about these records was authorized by the IRSSA; and (c) that a 15-year retention period for the four categories of records was authorized by the IRSSA.

9. The Chief Adjudicator says that the Records Decision is reviewable on a deferential standard, such that this Court should only interfere if the Supervising Judge committed a palpable or overriding error or was clearly wrong.

10. With respect to the ordered notice program and retention period, these are matters which are the subject of cross-appeals, and the Chief Adjudicator will respond on these issues in his factum in response to the cross-appeals.

11. With respect to the finding that the four categories of records, once redacted, can be archived with Claimant consent, the Chief Adjudicator says that the Supervising Judge's finding is reasonable as it applies to the application forms, the transcripts and the decisions, because these are records that Claimants have a right to possess and make use of after the conclusion of their IAP claim. Application forms originate with the Claimants and the IAP does not constrain their use by Claimants. The IAP expressly provides that Claimants are free to discuss their own evidence outside the IAP, and that they may request a redacted transcript of their own evidence, which they are permitted to use, without restriction, after the hearing. The IAP also provides that Claimants can discuss the outcome of their hearing, and they are provided with a redacted decision, which they could choose to archive.

12. Claimants have no right to the audio recordings created in the IAP, however, and so they have no right to archive them. Moreover, there is no provision for redaction of audio recordings in the IAP, and any disclosure without redaction would be a breach of the IRSSA. As a result, the Chief Adjudicator does not defend the Records Decision insofar as it applies to the audio recordings.

13. The core finding of the Records Decision is that the terms of the IRSSA define the uses to which the records produced and prepared for the IAP can be put. The IAP has a clear and specific mandate – to provide confidential and independent adjudication of individual claims. Records produced and prepared for the IAP cannot now be redacted and transferred to another entity, or put to any other use, whether or not that other use may promote the other objectives of the IRSSA. The Supervising Judge's holding that archiving by Claimants of redacted application forms, transcripts and decisions is permitted under the IAP is reasonable, because all parties knew that Claimants would have these records and that they could use them without restriction. The IRSSA does not contemplate audio recordings being accessed by any participant, including Claimants, or being used for any purpose other than to produce transcripts for use in the IAP, and it was not open to the Supervising Judge to hold that they could be disclosed or used in any other way.

PART II. STATEMENT OF FACTS

Background to the IRSSA

14. The IRSSA is a historic settlement for fair reparation and reconciliation of the legacy of residential schools. Justice Goudge (sitting *ad hoc* in *Fontaine v. Canada*

(*Attorney General*), 2013 ONSC 684) described the background to the IRSSA as follows:

[10] Starting in the 1880s, Canada undertook responsibility for the creation of the IRS system for the education of Aboriginal children. The schools were nearly all operated jointly by Canada and various religious organizations. By the time the last residential school closed in 1996, more than 150,000 Aboriginal, Inuit and Mtis (sic) children had been taken from their homes and communities and required to attend these institutions. The sternly assimilationist vision embodied in the IRS system was described in the Report of the Royal Commission on Aboriginal Peoples (Ottawa: Royal Commission on Aboriginal Peoples, 1996), at p. 337, as follows:

The tragic legacy of residential education began in the late nineteenth century with a three-part vision of education in the service of assimilation. It included, first, a justification of removing children from their communities and disrupting Aboriginal families; second, a precise pedagogy for re-socializing children in the schools; and third, schemes for integrating graduates into the non-Aboriginal world.

[11] The injustices and harms experienced by Aboriginal people as a result of this tragic episode in Canadian history caused many Aboriginal groups, particularly the AFN, to seek a response that would address both compensation and the need for continued healing. In addition, by the 1990s, litigation over the alleged abuse of students attending the schools began in earnest.

[12] It was in this context that Canada appointed the Honourable Frank Iacobucci on May 30, 2005 as federal representative to lead discussions with interested parties towards the resolution of the legacy of Indian Residential Schools. The shared objective was a fair and lasting resolution of the painful negative experiences of former students, the enduring impacts of these experiences, and the resolution of all individual and class actions.

[13] The result of the lengthy and detailed negotiations that ensued was, first, the agreement in principle, concluded by the parties on November 20, 2005, and approved by the previous Government of Canada. That was followed on May 8, 2006 by the conclusion of the Settlement Agreement, which was approved by the present Government of Canada and signed by Canada, the AFN and other leading Aboriginal organizations, some 50 religious organizations and some 79 law firms conducting the relevant litigation.⁸

⁸ [Joint Brief of Authorities \("JBoA"\) Vol. 2, Tab 41, paras. 10-13](#)

15. On December 15, 2006, the courts in nine provinces and territories concurrently issued reasons certifying a single national class action relating to residential schools and approving the proposed settlement with certain modifications. Implementation orders were made by each of the nine supervising courts incorporating the IRSSA, addressing its implementation and administration, and consolidating outstanding residential school litigation into the national class action.

Structure of the IRSSA

16. In 2004, the Assembly of First Nations (the “AFN”) published a report that stressed that compensation, alone, would not achieve the goals of reconciliation and healing in relation to residential schools. Rather, a two-pronged approach would be required to address: (a) compensation; and (b) truth-telling, healing and public education (Records Decision, para. 133).⁹

17. The IRSSA implements the AFN’s two-pronged approach. It deals with individual compensation through the Common Experience Payment (“CEP”) and the IAP. The other goals – truth telling, healing and public education – are addressed by the other components of the IRSSA: the TRC and the funds for healing programs and commemorative activities. These components are aimed at providing more general, indirect benefits to residential school survivors, their families, and their communities. While the CEP and the IAP provide compensation based on the resolution of *individual claims*, the TRC and other components address the *collective harms* suffered as a result

⁹ [JCoD Vol. 1, Tab 4, p. 48](#)

of the operation of residential schools: *Baxter v. Canada* (2006), 83 O.R. (3d) 481 (S.C.), paras. 7 and 18.¹⁰

18. The TRC's mandate, discussed in more detail below, includes facilitating truth telling and recording the stories of residential school survivors for future generations. At the heart of these appeals and cross appeals is the relationship between the confidential litigation procedure of the IAP, and the TRC's mandate to compile an historical record of the residential school system and its legacy through individual and public participation that is strictly voluntary. Any interpretation of the IRSSA and the orders implementing it must be based on an approach that harmonizes its components, by recognizing that the TRC's process of gathering information is wholly distinct from the IAP adjudication process. These two components of the IRSSA have different, although complementary goals. The IAP is aimed at proving abuse in specific cases and providing compensation to the individuals who suffered that abuse, in a forum that protects the privacy of both the Claimants and the alleged perpetrators, and in respect of which the defendants gave up significant procedural rights to test the truth of the allegations made. The TRC, on the other hand, is meant to address the ongoing legacy of the schools for the benefit of survivors, their families and broader communities, including by creating a public record.

19. While there may be subject matter overlap in the truth telling activities facilitated by the TRC and the testimony which takes place in the IAP, they are fundamentally different processes. Under the TRC's mandate, any decision to engage in truth telling or statements regarding individual stories of abuse must be entirely voluntary and the

¹⁰ [JBoA Vol. 1, Tab 7, paras. 7 and 18](#)

individual is free to tell as much or as little as he or she decides. The evidence given in the IAP process is entirely different. IAP Claimants are *required* to reveal the most painful and intimate details of the shocking physical, emotional and sexual abuse which they suffered. In a significant number of cases, they will be required to prove that other students, perhaps from their own communities, committed the abuse. This is a very different exercise from the voluntary witnessing or truth telling to be facilitated by the TRC.

Individual Compensation under the IRSSA – the IAP

20. There are two components of the IRSSA aimed at providing individuals with compensation. The CEP, set out in Article 5,¹¹ is a class-wide one time payment based solely on the length of time that an individual resided at residential school(s). The CEP is not at issue in this case.

21. Schedule D is titled “Independent Assessment Process for Continuing Indian Residential School Abuse Claims” [emphasis added]. The IAP is a *sui generis* form of litigation, an inquisitorial process under which Claimants must prove they suffered serious physical or sexual abuse or other wrongful acts as defined in the IAP Compensation Rules. The Chief Adjudicator is the Officer of the Court responsible for overseeing the IAP including the operation of the Indian Residential Schools Secretariat, which supports and reports to the Chief Adjudicator.

22. Claimants initiate the process by filling out applications forms, which require Claimants to identify the individual(s) who abused them at residential school, set out the

¹¹ [JCoD Vol. 1, Tab 23, pp. 278-85](#)

specific kind(s) of abuse which they suffered, and describe the consequences of that abuse (the application form). A Claimant must also provide a signed first-person narrative, and indicate the level of compensation sought.

Affidavit of Daniel Ish, sworn September 27, 2013 (“Ish Affidavit”), at para. 32, JCoD Vol. 2, Tab 32, p. 492

23. The application form is forwarded to the Government and any Church entity affiliated with the relevant residential school. The Government and the Church entities are instructed by the IRSSA to only share the application form with those who need to see it to assist in the defence of the claim, or for insurance coverage.

24. The Government is required to search for and report on the dates on which the Claimant attended a residential school, and search for documents relating to the named alleged perpetrators. The Government then provides: (a) documents confirming the Claimant’s attendance; (b) documents about the named abusers, including their jobs at the residential school, the dates of their employment or presence there, and any sexual or physical abuse allegations concerning them; (c) a report about the relevant residential school(s) and the background documents; and (d) any documents mentioning sexual abuse at that residential school(s).

Ish Affidavit, at para. 56, JCoD Vol. 2, Tab 32, p. 498

25. Claimants who seek compensation for higher level impacts from abuse must submit records related to their medical treatment and health, Workers’ Compensation, correctional history, education, tax and employment insurance. As noted by Dr. David Flaherty, a privacy expert, “[r]arely, if ever, in Canadian history has such a broad range of extremely sensitive records been demanded from so many claimants as part of a class action suit or a comparable compensation or reparations inquiry.”

IRSSA, Schedule D, Appendix VII at pp. 28-29, JCoD Vol. 1, Tab 24, pp. 359-60
Affidavit of David Flaherty, sworn May 2, 2014, at para. 13, JCoD Vol 4, Tab 45,
pp. 1613-14

26. The parties to an IAP claim are the Claimant, the Government and the relevant Church entity, if it chooses to participate.

Ish Affidavit, at para. 23, JCoD Vol. 2, Tab 32, p. 490

27. If located, an alleged perpetrator may choose, but cannot be compelled, to participate as a witness in a separate alleged perpetrator hearing. An alleged perpetrator is not a party, has “no right of confrontation,” and cannot attend the Claimant hearing except with the consent of the parties. Conversely, the Claimant is entitled to attend an alleged perpetrator hearing since the Claimant is a party. The parties may call any witness with relevant evidence, other than expert witnesses. No party has an opportunity to cross-examine a Claimant. Only the adjudicator questions a Claimant, alleged perpetrator or witness and only the adjudicator may order the expert assessments of the Claimant that are required to establish the most severe impacts or a compensable physical injury.

Ish Affidavit, at paras. 25 and 45, JCoD Vol. 2, Tab 32, pp. 490-91 and 495

28. The adjudicator is required to produce a decision outlining and supporting the award of compensation for proven acts of abuse and their impacts.

Privacy and Confidentiality in the IAP Process

29. The Supervising Judge found that concerns about privacy and confidentiality in the IAP were an extremely important part of the factual nexus of the negotiations leading to the IRSSA. For plaintiffs, the concern was that the claims were intensely private and difficult to describe in public. In addition, cases of student-on-student

abuse, which is alleged in 32% of IAP claims, raised special concerns. In such cases, abusers and abused may live together in the same community, and there may well be trauma within an entire community if these individuals are identified by name.

Affidavit of Daniel Shapiro sworn September 26, 2013, at para. 9, JCoD Vol. 2, Tab 31, p. 472

Affidavit of Larry Philip Fontaine sworn May 1, 2014, at para. 15, JCoD Vol. 4, Tab 41, p. 1585

30. The Supervising Judge found that the fact that there is any chance that the IAP records may be archived has caused severe stress and anxiety to the Claimants who participated in the IAP on the basis that the records of their claim would be kept confidential and never used for any other purpose (paras. 214-21).¹²

31. The Supervising Judge also found that, as is clear in the appellants' facts, privacy and confidentiality were also essential to the defendants in negotiating the IRSSA (paras. 138-42).¹³

32. The Supervising Judge noted that there was a "countervailing and collective purpose" to the IRSSA that was a crucial part of addressing the *collective* interests that the legacy of the residential schools be known (para. 143).¹⁴ The Court found that the balance between individual privacy and public awareness was achieved in the IRSSA by making the disclosure of personal information *consensual* (para. 145).¹⁵

33. As a result, the IRSSA sets out a specific regime for protecting the confidentiality of the information disclosed in the IAP, while preserving Claimants' and

¹² JCoD Vol. 1, Tab 4, pp. 64-65

¹³ JCoD Vol. 1, Tab 4, pp. 49-50

¹⁴ JCoD Vol. 1, Tab 4, p. 50

¹⁵ JCoD Vol. 1, Tab 4, p. 50

other participants' rights to continue to discuss their own experiences outside of the IAP, as set out below.

34. The application form requires the Claimant to undertake to respect the private nature of the proceedings. A Declaration in the application form states:

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.
[emphasis added]

Ish Affidavit, Exhibit C at p. 21, JCoD Vol. 2, Tab 27, p. 457

35. Each person with whom the application form is shared, including counsel for any party, must agree to respect its confidentiality. Church entities will use their best efforts to secure the same commitment from any insurer with whom it is obliged to share the application. Copies of the application form provided to defendants, other than the Government, "will be destroyed on the conclusion of the matter, unless the Claimant asks that others retain a copy, or unless counsel for a party is required to retain such copy to comply with his or her professional obligations."

IRSSA, Schedule D at p. 19, JCoD Vol. 1, Tab 24, p. 350

36. Alleged perpetrators are only provided with extracts of the application form outlining the allegations made against them, which they must return at the end of the process. An alleged perpetrator does not receive the Claimant's contact information, or allegations regarding the impacts of the alleged abuse.

Ish Affidavit, at para. 43, JCoD Vol. 2, Tab 32, p. 495

37. Hearings are closed to the public. The parties, the alleged perpetrator and other witnesses are "required to sign agreements to keep information disclosed at the hearing confidential, except their own evidence, or as required within this process or otherwise

by law” [emphasis added]. Adjudicators commonly provided assurances to Claimants and alleged perpetrators at the outset of hearings about the confidentiality of their evidence.

IRSSA, Schedule D at p. 15, JCoD Vol. 1, Tab 24, p. 346
Ish Affidavit, at para. 58, JCoD Vol. 2, Tab 32, pp. 498-99

38. The adjudicator may request that a transcript be made of the evidence at the hearing. The Claimant may request a copy of his or her own evidence “for memorialization,” and must be “given the option of having the transcript deposited in an archive developed for the purpose.” These are the “redacted transcripts.”

IRSSA, Schedule D at page 15, JCoD Vol. 1, Tab 24, p. 346

39. The IRSSA provides that the Claimants will receive a copy of the decision on their claim, “redacted to remove identifying information about any alleged perpetrators” (“redacted decisions”). Claimants are “free to discuss the outcome of their hearing, including the amount of any compensation they are awarded.”

IRSSA, Schedule D at p. 15, JCoD Vol. 1, Tab 24, p. 346

40. Claimants’ counsel and the Government each receive an unredacted copy of the compensation decision. Alleged perpetrators are entitled to know the result of the hearing insofar as the allegations against them are concerned, but are not informed of the amount of compensation awarded.

IRSSA, Schedule D, p. 22, JCoD Vol. 1, Tab 24, p. 353
Ish Affidavit, para. 66-67, JCoD Vol. 2, Tab 32, p. 501

The Truth and Reconciliation Commission (“TRC”)

41. The TRC is established under Article Seven¹⁶ and Schedule N¹⁷ of the IRSSA, with a mandate to assemble an historical record of the residential school legacy that will be transferred to a centre established to make those materials accessible to the public for future use and study.

42. Section 1 of Schedule N sets out the goals of the TRC, which are to: acknowledge residential school experiences, impacts and consequences; provide a holistic, culturally appropriate and safe setting for former students, their families and communities as they come forward to the Commission; witness, support, promote and facilitate truth and reconciliation events at both the national and community levels; promote awareness and public education of Canadians about the IRS system and its impacts; and identify sources and create as complete an historical record as possible of the IRS system and legacy, which record shall be preserved and made accessible to the public for future study and use.

IRSSA, Schedule N, pp. 1-2, JCoD Vol. 1, Tab 25, pp. 381-82

43. Section 2(a) authorizes the TRC’s activities. It authorizes the TRC to receive statements and documents from former students and others, and to archive such documents. The TRC is not to make use of personal information or of statements which identify someone, without that individual’s express consent, unless that information and/or the individual’s identity has already been established through legal proceedings, admission, or public disclosure by that individual. Other information that could be identifying must be anonymized to the extent possible (ss. 2(h) and (j)).

¹⁶ JCoD Vol. 1, Tab 24, pp. 288-89

¹⁷ JCoD Vol. 1, Tab 25, pp. 381-425

IRSSA, Schedule N, pp. 2-4, JCoD Vol. 1, Tab 25, pp. 382-84

44. The TRC must hold *in camera* sessions for statement taking that will involve the names of persons alleged to have engaged in wrongdoing, unless the person named or identified has been convicted for the alleged wrongdoing. The names of alleged wrongdoers must not be recorded, unless they have been convicted. Other information that could be identifying must be anonymized to the extent possible (s. 2(i)).

IRSSA, Schedule N, pp. 3-4, JCoD Vol. 1, Tab 25, pp. 383-84

45. Schedule N clearly establishes that the TRC's activities are subject to the overarching and overriding requirement that individual and public participation must be voluntary. Section 2(c) provides that "[p]articipation in all Commission events and activities is entirely voluntary." Section 4(b) requires the TRC to recognize "that the truth and reconciliation process is committed to the principle of voluntariness with respect to individuals' participation." The principle of voluntariness is also referenced in the Principles set out in the introductory paragraph of Schedule N. Another identified principle is "confidentiality (if required by the former student)."

IRSSA, Schedule N, pp. 1, 3 and 5, JCoD Vol. 1, Tab 25, pp. 381, 383, 385

46. Thus, the TRC has no mandate to collect the stories or information of individuals without their express consent, and it may only use the information it collects for the sole purpose for which it was collected. It has no mandate to collect, or make available to the public, identifying information about any individual, without their consent.

47. Section 11 of Schedule N sets out the TRC's right to access information. It provides that Canada and the Church entities must provide relevant documents in their possession or control to and for the use of the TRC "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.” However, information from the IAP is to be transferred to the TRC for research and archiving purposes only “[i]nsofar as agreed to by the individuals affected and as permitted by process requirements.”

IRSSA, Schedule N, pp. 10-11, JCoD Vol. 1, Tab 25, pp. 390-91

PART III. STATEMENT OF ISSUES AND ARGUMENT

48. The Chief Adjudicator will address the appellants’ arguments regarding the standard of review of the Records Decision, and the assertion that the Supervising Judge erred in law in finding that the four categories of records, once redacted, can be archived with the consent of the Claimants. In addition, this Court has raised the preliminary question of whether the Records Decision is final or interlocutory. The Chief Adjudicator submits that it is final.

Preliminary Issue: Is the Records Decision Final or Interlocutory?

49. The *Class Proceedings Act*, 1992, S.O. 1992, c. 6 (the “CPA”) does not address appeals from orders under s. 12 of the CPA. The appeal route for such orders is therefore governed by the *Courts of Justice Act*, R.S.O. 1990, c. C.43, under s. 6(1)(b) of which only final orders are appealable to this Court.

Waldman v. Thomson Reuters Canada Ltd., 2015 ONCA 53 [Waldman], para. 5, JBoA Vol. 5, Tab 104, p. 4
Locking v. Armtec Infrastructure Inc., 2012 ONCA 774, para. 11, JBoA Vol. 4, Tab 78, p. 5

50. The Records Decision makes orders and declarations *in rem* against the world respecting the private and confidential nature of records produced and prepared for the

IAP, limiting their use and disclosure, and governing their disposition on completion of the IAP. It requires most records to be destroyed on the completion of an IAP claim, and requires a limited set be retained for a 15-year period. It is a final determination of what the IRSSA requires with respect to the disposition of IAP claim records. It is thus a final order for the purposes of s. 6(1)(b).

51. The conventional statement of the distinction between an interlocutory and final order is that an interlocutory order determines a collateral matter and not the real matter in dispute in the litigation (*Hendrickson v. Kallio*, [1932] O.R. 675 (C.A.), JBoA Tab 65). In the context of an ongoing proceeding, an order on a motion will not be final unless it terminates the action or resolves a substantive claim or defence of the parties (*Waldman*, para. 22)¹⁸.

52. In the context of a class action at the post-settlement stage, however, the test must be applied in a manner sensitive to that context, as recognized by this Court in *Parsons v. Ontario*, 2015 ONCA 158 [*Parsons*].¹⁹ In *Parsons*, the panel split on whether the order under appeal, that relating to participation in a joint hearing, was final.

53. The Chief Adjudicator submits that under either of the approaches adopted in *Parsons*, the Records Decision is final. In *Parsons*, the majority held that the order in that case was analogous to a final determination of an application under R. 14.05(3)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, because it involved the determination of an interpretation of the *Courts of Justice Act*, the *CPA*, the *Rules of Civil Procedure*, and the settlement agreement relevant to the case. LaForme J.A.,

¹⁸ JBoA Vol. 5, Tab 104, pp. 9-10

¹⁹ JBoA Vol. 5, Tab 90

Lauwers J.A. concurring, held that an “order’s final or interlocutory character will turn on the specific order of the supervisory judge acting under a settlement agreement within the discrete context of post-settlement litigation” (para. 53).²⁰

54. Juriansz J.A., dissenting on this issue, held that the order was interlocutory because, while it determined an important issue between the parties, it did not determine the *rights* of any party (paras. 187, 190-210).²¹

55. In this case, the Records Decision finally determines the rights at issue. The three appeals and four cross-appeals relate to: (a) the determination of IAP record privacy, confidentiality, retention, archiving, and destruction rights under the IRSSA and supervisory courts’ oversight and implementation jurisdiction; (b) whether a notice program and other aspects of the Records Decision are invalid amendments to the IRSSA; (c) the relationship of the IRSSA and the jurisdiction of the Supervising Courts to the applicability and operation of the *Privacy Act*, R.S.C. 1985, c. P-21, the *Access to Information Act*, R.S.C. 1985, c. A-1 and the *Library and Archives of Canada Act*, S.C. 2004, c. 11; and (d) whether the IAP includes claim records from its predecessor DR process.

56. Previous cases have held that decisions on RFDs under the IRSSA that determine rights respecting its implementation are final orders.

Fontaine v. Duboff Edwards Haight & Schachter, 2012 ONCA 471, [JBoA Vol. 3, Tab 54](#); *Fontaine v. Canada (Attorney General)*, 2008 BCCA 329, para. 29, [JBoA Vol. 2, Tab 37, p. 12](#); and 2008 BCCA 60, paras. 11-13, [JBoA Vol. 2, Tab 36, p. 7](#)

²⁰ [JBoA Vol. 5, Tab 90, p. 19](#)

²¹ [JBoA Vol. 5, Tab 90, pp. 59-67](#)

What is the Standard of Review of the Supervising Judge's Decision?

57. The IRSSA is a contract between its parties, which has been implemented and given force by court orders. The IAP, as established by the IRSSA, remains under the jurisdiction of the supervising courts and is conducted under their supervision and subject to their direction with respect to its processes. The task before the Supervising Judge was to determine the rights and obligations established under the IRSSA regarding the records at issue, and to give effect to those rights.

58. The appellants maintain that the Records Decision is reviewable on the correctness standard because of its great precedential value and because the Supervising Judge did not consider factors favoured by the appellants. The Chief Adjudicator disagrees and submits that the reasonableness standard of review applies.

59. In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [*Sattva*], paras. 50-55,²² the Court held that contract interpretation involves issues of mixed fact and law because it is an exercise in applying principles of contractual interpretation to the words of the written contract, considered in light of the factual matrix. The Court recognized that the meaning of words in a contract can be “derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement” (para. 48).²³ In addition, the goal of contractual interpretation is to ascertain the objective intent of the parties, which the Court recognized is a fact-specific goal. For these reasons, a deferential approach to the determinations made at first instance is appropriate.

²² [JBoA Vol. 5, Tab 98, pp. 658-61](#)

²³ [JBoA Vol. 5, Tab 98, p. 657](#)

60. *Sattva* also recognizes that appellate review is concerned with ensuring consistency of the law, across cases, rather than providing a new forum for parties to reargue their particular case. Thus correctness will apply if there is a constitutional question or a question of law of central importance to the legal system as a whole and outside the decision maker's expertise. Correctness will also apply if there is an extricable legal error in the analysis, such as application of an incorrect principle, failure to consider a required element of a legal test or failure to consider a relevant factor. However, these will be rare.

61. In this case, the interpretation of the provisions of the IRSSA relating to privacy and confidentiality must be firmly grounded in an appreciation of the particular factual circumstances surrounding the negotiation of the IRSSA, the relationships of the parties, the nature and content of IAP claims, and the purposes and objectives meant to be achieved by various components of the IRSSA. Because of the nature of the inquiry, pursuant to *Sattva*, the Supervising Judge's findings are entitled to deference.

62. *Sattva* has been considered in two appellate decisions concerning the administration of the IRSSA. The appellants rely on *Fontaine v. Canada (Attorney General)*, 2014 MBCA 93 [Kelly], which was an appeal from a judgment respecting the interpretation of an IAP provision that allows access to the courts for certain actual income loss compensation claims. The standard of review was not disputed, and the Court held that the standard was correctness because:

... the Agreement has applicability to thousands of Claimants across the country and as such, the manner in which it is interpreted has great precedential value, and brings certainty to others involved in similar disputes. See *Sattva*, at paras. 51-53.

Kelly, at para. 40, JBoA Vol. 2, Tab 43

63. *Sattva* was also applied in *Canada (Attorney General) v. Alexis*, 2015 ABCA 132 [*Alexis*], paras. 16-19,²⁴ but that case held that the appropriate standard of review was reasonableness. On the question of standard of review, the Court acknowledged but did not follow *Kelly*, instead finding that the standard of review was reasonableness because the IRSSA was not a standard form contract and the issues on appeal involved findings of fact and inferences drawn from facts.

64. The Chief Adjudicator submits that the standard of review analysis in *Kelly* was not a sound application of *Sattva*, and the approach and conclusion in *Alexis* is to be preferred. Under the *Kelly* analysis, correctness would always apply to the interpretation of class action settlements if the class contains a large enough number of people. This reasoning is flawed and not in keeping with the law of appellate standard of review, *Sattva* itself or other post-*Sattva* jurisprudence: see *Bell Mobility Inc. v. Anderson*, 2015 NWTCA 3, paras. 33-34.²⁵ The question is not how many people are affected by the result in this case, but rather whether the result here will have a significant precedential impact on other cases not involving the IRSSA.

65. The interpretation of the privacy and confidentiality regime in the IRSSA is a highly fact specific exercise, that must take into account the unique and intensely private content of the allegations considered in the IAP and the relationship of the IAP to the multiple goals and various objectives sought to be achieved by the IRSSA as a whole

²⁴ JBoA Vol. 1, Tab 17, pp. 4-5

²⁵ JBoA Vol. 1, Tab 8, p. 6

through its different discreet components. These considerations are unique to the IRSSA, and are matters in which the Supervising Court has expertise.

66. These appeals implicate the Supervising Court's role and expertise in contract interpretation, its broad discretionary jurisdiction to supervise the implementation of the IRSSA, and its authority over disclosure practices in its proceedings. The Supervising Judge has very considerable expertise and experience in interpreting and applying the IRSSA, including the interpretation of Schedules D and N. It is well recognized that certification and supervising courts in class actions are entitled to special, substantial deference in their weighing and balancing of relevant factors. The standard of review is palpable and overriding error of fact or other error in principle.

AIC Limited v. Fischer, 2013 SCC 69, para. 65, JBoA Vol. 1, Tab 2, pp. 983;
Markson v. MBNA Canada Bank, 2007 ONCA 334, para. 33, JBoA Vol. 4, Tab 81;
1250264 Ontario Inc. v. Pet Valu Canada Inc., 2013 ONCA 279, paras. 40 and 69,
JBoA Vol. 1, Tab 1, pp. 15 and 29

67. The appeals raise issues of significance for the implementation of the IRSSA, within the expertise of the Supervising Court. They do not raise extricable questions of law and will not have precedential effect beyond these proceedings. The reasonableness standard of review applies.

Did the Supervising Judge Err in Finding That the IRSSA Permits Four Categories of IAP Records to be Archived by the Claimants, Provided That They are Redacted to Remove Information Which Identifies Alleged Perpetrators and Other Individuals, and That Notice Can Be Given to This Effect?

68. The Supervising Judge found that Claimants had rights under the IRSSA to tell their own stories, and that this permitted them to archive some records from the IAP with the TRC or the Centre. The starting point for the analysis is Article III(o) of Schedule D. This provides:

Adjudicators may require a transcript to facilitate report writing, especially since they are conducting questioning. A transcript will also be needed for a review, if requested. Proceedings will be recorded and will be transcribed for these purposes, as well as if a Claimant requests a copy of their own evidence for memorialization. Claimants will also be given the option of having the transcript deposited in an archive developed for the purpose. [emphasis added]²⁶

69. Pursuant to this provision, it has always been accepted that Claimants are entitled to receive a transcript of their own evidence from their own hearing, redacted to remove information that would identify others.

70. In the face of this clear language, there can be no doubt that under the terms of the IRSSA, Claimants can choose to have their redacted transcripts archived with the Centre. Indeed, the IRSSA requires that positive steps be taken to provide Claimants with this option, and that the redacted transcripts be deposited in an archive for the Claimants if they ask that this be done. The Supervising Judge committed no palpable and overriding error in interpreting the IRSSA in a manner which recognizes that redacted transcripts can be archived with Claimant consent.

71. The Nine Catholic Entities seem to accept that redacted transcripts can be archived, however, the other two appellants assert that the last paragraph of Article 11 of Schedule N²⁷ prohibits the archiving of any records from the IAP without the consent of everyone involved in an IAP claim, including the redacted transcripts provided to Claimants on request pursuant to Schedule D. Article 11 of Schedule N is titled “Access to Relevant Information” and sets out the scope of Canada’s and the Churches’ obligations to disclose records to the TRC. The last paragraph must be read in

²⁶ JCoD Vol. 1, Tab 24, p. 346

²⁷ JCoD Vol. 1, Tab 25, pp. 390-91

conjunction with the rest of the provision. The Chief Adjudicator submits that the last paragraph is clearly a qualification of the obligation of Canada and the Churches set out earlier in the same section to provide or make available to the TRC all relevant records in their possession. While the Supervising Judge correctly found that the IAP records are not within the control of Canada, a point to be dealt with in the cross appeals, there are certainly IAP records in the defendants' possession at various times during the IAP. The last paragraph of Article 11 makes it clear that the general disclosure obligation in the first paragraph does not require or authorize Canada or the Churches to deliver IAP records (or records from the IAP's predecessor DR process) to the TRC unless all relevant parties consent. This respects the overriding principle that the IAP is a confidential process, and its records are treated in a manner separate and distinct from other records about residential schools that are in the possession or control of the defendants.

72. Article 11 of Schedule N (see attached Appendix B) does not, however, negate a Claimant's specific right in Schedule D to have a redacted transcript of his or her own evidence archived.

73. This is consistent with the privacy framework of the IAP, which provides a strong guarantee to participants that what they say in a hearing will not be shared without their consent, but does not seek to muzzle them from sharing their own stories, including their own testimony, with others. The IAP makes it clear that individuals can continue discuss their own evidence.

74. The IRSSA clearly provides that Claimants will receive a transcript of their own redacted testimony, which they are free to distribute and discuss in any way they see fit, without the consent of any other IAP participants. According to two of the appellants however, the one thing Claimants cannot do with their redacted transcripts is deposit them in an archive developed specifically for that purpose by the TRC. This would be an absurd result. The Supervising Judge made no palpable and overriding error, and indeed was clearly correct, in finding otherwise.

75. All three appellants argue that the Supervising Court erred in finding that redacted decisions and application forms can be archived. Before the Supervising Judge, the Chief Adjudicator took the position that the redacted transcripts were the only records that Schedule D clearly contemplated archiving. Nevertheless, the Chief Adjudicator accepts that it is a reasonable interpretation of the IRSSA to find that it permits Claimants to archive their application forms and redacted decisions. While the IRSSA does not specifically require that Claimants be given an option to have these records archived, it is clear that under the provisions of the Schedule D, Claimants are to be given redacted decisions, with no constraint put on their use. In addition, Claimants are expressly permitted to discuss the outcome of the hearing. Claimants may retain copies of their own application form, and nothing in the IRSSA precludes them from making any particular use of them. It was not unreasonable for the Supervising Judge to conclude that one of the uses that a Claimant can make of these records of his or her own story is to provide them to an archive, as long as the records are properly redacted so that only the Claimant's personal information, and not that of others, is disclosed.

76. The Supervising Judge was not amending the IRSSA to read in a requirement that the IAP provides Claimants with the option to archive their redacted decisions and application forms in the same manner as their redacted transcripts. Rather, he was recognizing that under Schedule D, Claimants can already control the use they make of these materials and the information they contain. There is no doubt, for example, that a Claimant could provide the TRC with a voluntary statement that included the text of his or her redacted decision, if the Claimant was prepared to share his or her story to that extent. Similarly, a Claimant could provide the TRC with a statement that includes all of the information that would be included in a redacted application form. It was reasonable to hold that this same result could be achieved by the Claimant archiving redacted records in their possession.

77. The application form is, like the redacted transcripts, the Claimant's own story. The Claimant brings that story into the IAP, and when the Claimant exits the process, he or she takes that story along – either back to privacy of his or her own solitude or close intimates, or out into the world. Nothing in the IRSSA is meant to interfere with Claimants' ability to tell their stories outside the IAP. Indeed, the establishment of the TRC and the Centre is firmly grounded in the IRSSA's recognition that the ability to voluntarily tell one's story, and have it remembered, may be fundamental to the healing and reconciliation process. That is a decision for each Claimant, one that the Supervising Judge held to be a "very difficult, very private and very personal decision."²⁸ The Supervising Judge's decision that each Claimant could choose to have his or her story archived contains no palpable and overriding error.

²⁸ Reasons, para. 372, JCoD Vol. 1, Tab 4, p. 87

78. The final category of records that the Supervising Judge held could be archived by Claimants is the redacted audio recordings. While these will contain the same testimony as the redacted transcripts, nothing in the IRSSA provides for the audio recordings to be provided to Claimants – or anyone else. They are records internal to the IAP. In addition, there have been no process or technical or financial resources made available under the IRSSA to carry out audio redactions. The Supervisory Judge cannot provide Claimants with a new right that they do not already have under the IRSSA. The Chief Adjudicator agrees with the appellants that this aspect of the Records Decision is not reasonable.

79. It should also be noted that there is no process in place to redact application forms, and that compensation decisions are currently only minimally redacted. As a result, there will be some additional expense associated with processing these materials into a form that is suitable for archiving. However, unlike the audio recordings, the production of redacted paper documents for Claimants (redacted transcripts and redacted decisions) has been a funded responsibility carried out by the Chief Adjudicator under the IRSSA since its inception.

80. The Chief Adjudicator agrees with the Nine Catholic Entities that the standard set out in the Records Decision for “reasonable redaction” means that if a record cannot be redacted to remove identifying information without losing its meaning, that record cannot be archived. It does not mean that the record can be archived without redactions.

PART IV. CONCLUSION

81. The Supervising Judge was correct in his primary finding that IAP records must only be used as contemplated by the provisions of the IAP. This principle is core to the ability of the IAP to serve its purpose, which is to provide compensation for specific incidents of abuse in a confidential manner. It is critical to the bargain reached by the parties, which is given effect through court orders approving and implementing the IRSSA. The finding that Claimants can provide their redacted transcripts, decisions and application forms to the TRC or the Centre does not detract from this principle, because under the IRSSA Claimants have the right to tell their stories outside the IAP using these records, which they are entitled, under Schedule D, to retain. But it would be a breach of the IRSSA to allow the use of any other records, when that is not contemplated in the IRSSA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: October 14, 2015



Joseph J. Arvay, Q.C.,
and Catherine J. Boies Parker
Counsel for the Chief Adjudicator

Court of Appeal File No.: 59310
Court of Appeal File No.: 59311
Court of Appeal File No.: 59320

COURT OF APPEAL FOR ONTARIO

BETWEEN:

LARRY PHILIP FONTAINE ET AL.

-and-

THE ATTORNEY GENERAL OF CANADA ET AL

Defendants
(Appellants and Respondents in Appeal and Cross-Appeals)


CERTIFICATE

I, Joseph J. Arvay, Q.C., lawyer for the Respondent Chief Adjudicator, certify that:

1. An order under subrule 61.09(2) is not required.
2. An estimate that ~~two (2) hours~~ 50 minutes will be required for the Respondent's oral argument in the appeal and cross-appeal and reply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

October 14, 2015



Joseph J. Arvay, Q.C.
Counsel for the Respondent,
Chief Adjudicator

SCHEDULE A - LIST OF AUTHORITIES

Authorities

AIC Limited v. Fischer, 2013 SCC 69

Baxter v. Canada (2006), 83 O.R. (3d) 481 (S.C.)

Bell Mobility Inc. v. Anderson, 2015 NWTCA 3

Canada (Attorney General) v. Alexis, 2015 ABCA 132

Fontaine v. Canada (Attorney General), 2008 BCCA 60

Fontaine v. Canada (Attorney General), 2008 BCCA 329

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

Fontaine v. Canada (Attorney General), 2014 MBCA 93

Fontaine v. Duboff Edwards Haight & Schachter, 2012 ONCA 471

Hendrickson v. Kallio, [1932] O.R. 675 (C.A.)

Locking v. Armtec Infrastructure Inc., 2012 ONCA 774

Markson v. MBNA Canada Bank, 2007 ONCA 334

1250264 Ontario Inc. v. Pet Valu Canada Inc., 2013 ONCA 279

Parsons v. Ontario, 2015 ONCA 158

Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53

Waldman v. Thomson Reuters Canada Ltd., 2015 ONCA 53

Statutes

Access to Information Act, R.S.C. 1985, c. A-1

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 12

Courts of Justice Act, R.S.O. 1990, c. C. 43, s. 6(1)(b)

Library and Archives of Canada Act, S.C. 2004, c. 11

Privacy Act, R.S.C. 1985, c. P-21

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 14.05(3)(d)

SCHEDULE B – STATUTES AND RULES

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 12

Court may determine conduct of proceeding

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.

Courts of Justice Act, R.S.O. 1990, c. C. 43, s. 6(1)(b)

Court of Appeal jurisdiction

6. (1) An appeal lies to the Court of Appeal from,

...

- (b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19 (1) (a) or an order from which an appeal lies to the Divisional Court under another Act;

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 14.05(3)(d)

Application under Rules

14.05 (3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,

...

- (d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

Appendix A

FINAL: MAY, 2006

SCHEDULE "D"
INDEPENDENT ASSESSMENT PROCESS (IAP)
FOR CONTINUING INDIAN RESIDENTIAL SCHOOL ABUSE CLAIMS

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CONSOLIDATED IAP FOR CONTINUING IRS ABUSE CLAIMS

I: COMPENSABLE ABUSE

The following categories of claims are compensable within this IAP.

1. Sexual and physical assaults, as particularized in the Compensation Rules and Instructions below, arising from or connected to the operation of an IRS, whether or not occurring on the premises or during the school year, committed by adult employees of the government or a church entity which operated the IRS in question, or other adults lawfully on the premises, where the Claimant was a student or resident, or where the Claimant was under the age of 21 and was permitted by an adult employee to be on the premises to take part in authorized school activities.
2. Sexual or physical assaults, as particularized in the Compensation Rules and Instructions below, committed by one student against another at an IRS where:
 - a) the Claimant proves that an adult employee of the government or church entity which operated the IRS in question had or should reasonably have had knowledge that abuse of the kind alleged was occurring at the IRS in question during the time period of the alleged abuse, and did not take reasonable steps to prevent such abuse; or,
 - b) in a case in which the proven assault is a predatory or exploitative sexual assault at the SL4 or SL5 level, the defendants do not establish on a balance of probabilities that reasonable supervision was in place at the time.
3. Any other wrongful act or acts committed by adult employees of the government or a church entity which operated the IRS in question, or other adults lawfully on the premises, which are proven to have caused serious psychological consequences for the Claimant, as particularized in and causing the harms set out in the Compensation Rules and Instructions below. These claims are referred to in this document as "other wrongful acts"

For the purposes of this document, the above claims are collectively referred to as the "continuing claims".

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II: COMPENSATION RULES

	Acts Proven	Compensation Points
SL5	<ul style="list-style-type: none"> Repeated, persistent incidents of anal or vaginal intercourse. Repeated, persistent incidents of anal/vaginal penetration with an object. 	45-60
SL4	<ul style="list-style-type: none"> One or more incidents of anal or vaginal intercourse. Repeated, persistent incidents of oral intercourse. One or more incidents of anal/vaginal penetration with an object. 	36-44
SL3	<ul style="list-style-type: none"> One or more incidents of oral intercourse. One or more incidents of digital anal/vaginal penetration. One or more incidents of attempted anal/vaginal penetration (excluding attempted digital penetration). Repeated, persistent incidents of masturbation. 	26-35
PL	<ul style="list-style-type: none"> One or more physical assaults causing a physical injury that led to or should have led to hospitalization or serious medical treatment by a physician; permanent or demonstrated long-term physical injury, impairment or disfigurement; loss of consciousness; broken bones; or a serious but temporary incapacitation such that bed rest or infirmity care of several days duration was required. Examples include severe beating, whipping and second-degree burning. 	11-25
SL2	<ul style="list-style-type: none"> One or more incidents of simulated intercourse. One or more incidents of masturbation. Repeated, persistent fondling under clothing. 	11-25
SL1	<ul style="list-style-type: none"> One or more incidents of fondling or kissing. Nude photographs taken of the Claimant. The act of an adult employee or other adult lawfully on the premises exposing themselves. Any touching of a student, including touching with an object, by an adult employee or other adult lawfully on the premises which exceeds recognized parental contact and violates the sexual integrity of the student. 	5-10
OWA	<ul style="list-style-type: none"> Being singled out for physical abuse by an adult employee or other adult lawfully on the premises which was grossly excessive in duration and frequency and which caused psychological consequential harms at the H3 level or higher. Any other wrongful act committed by an adult employee or other adult lawfully on the premises which is proven to have caused psychological consequential harms at the H4 or H5 level. 	5-25

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Level of Harm	Consequential Harm	Compensation Points
H5	Continued harm resulting in serious dysfunction. <u>Evidenced by:</u> 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.	20-25
H4	Harm resulting in some dysfunction. <u>Evidenced by:</u> frequent difficulties with interpersonal relationships, development of obsessive-compulsive and panic states, severe anxiety, occasional suicidal tendencies, permanent significantly disabling physical injury, overwhelming guilt, self-blame, lack of trust in others, severe post-traumatic stress disorder, some sexual dysfunction, or eating disorders.	16-19
H3	Continued detrimental impact. <u>Evidenced by:</u> difficulties with interpersonal relationships, occasional obsessive-compulsive and panic states, some post-traumatic stress disorder, occasional sexual dysfunction, addiction to drugs, alcohol or substances, a long term significantly disabling physical injury resulting from a defined sexual assault, or lasting and significant anxiety, guilt, self-blame, lack of trust in others, nightmares, bed-wetting, aggression, hyper-vigilance, anger, retaliatory rage and possibly self-inflicted injury.	11-15
H2	Some detrimental impact. <u>Evidenced by:</u> occasional difficulty with personal relationships, some mild post-traumatic stress disorder, self-blame, lack of trust in others, and low self-esteem; and/or several occasions and several symptoms of: anxiety, guilt, nightmares, bed-wetting, aggression, panic states, hyper-vigilance, retaliatory rage, depression, humiliation, loss of self-esteem.	6-10
H1	Modest Detrimental Impact. <u>Evidenced by:</u> Occasional short-term, one of: anxiety, nightmares, bed-wetting, aggression, panic states, hyper-vigilance, retaliatory rage, depression, humiliation, loss of self-esteem.	1-5

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Aggravating Factors Add 5-15% of points for Act and Harm combined (rounded up to nearest whole number)	
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 to an act set out on page 3	
Use of religious doctrine, paraphernalia or authority during, or in order to facilitate, the abuse.	
Being abused by an adult who had built a particular relationship of trust and caring with the victim (betrayal)	

Future Care	Additional Compensation (Dollars)
General – medical treatment, counselling	up to \$10,000
If psychiatric treatment required, cumulative total	up to \$15,000

Consequential Loss of Opportunity		Additional Compensation (Points)
OL5	Chronic inability to obtain employment	21-25
OL4	Chronic inability to retain employment	16-20
OL3	Periodic inability to obtain or retain employment	11-15
OL2	Inability to undertake/complete education or training resulting in underemployment, and/or unemployment	6-10
OL1	Diminished work capacity – physical strength, attention span	1-5

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Compensation Points	Compensation (\$)
1-10	\$5,000-\$10,000
11-20	\$11,000-\$20,000
21-30	\$21,000-\$35,000
31-40	\$36,000-50,000
41-50	\$51,000-\$65,000
51-60	\$66,000-\$85,000
61-70	\$86,000-\$105,000
71-80	\$106,000-\$125,000
81-90	\$126,000-\$150,000
91-100	\$151,000-\$180,000
101-110	\$181,000-\$210,000
111-120	\$211,000 to \$245,000
121 or more	Up to \$275,000

Proven Actual Income Loss

Where actual income losses are proven pursuant to the standards set within the complex issues track of this IAP, an adjudicator may make an award for the amount of such proven loss up to a maximum of \$250,000 in addition to the amount determined pursuant to the above grid, provided that compensation within the grid is established without the allocation of points for consequential loss of opportunity. The amount awarded for actual income loss shall be determined using the legal analyses and amounts awarded in court decisions for like matters.

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III. ASSESSMENT PROCESS OUTLINE

a. Core Assumptions as to Legal and Compensation Standards

- i. All Eligible CEP Recipients will, by the terms of the Approval Orders, be deemed to have released the defendants for all claims arising from their IRS attendance or experience, subject to retaining the right to resolve within this IAP their continuing claims for IRS abuse.
- ii. This outline assumes that the parties have legal representation. See below for procedural modifications where Claimants represent themselves. The defendants may be represented by their employees on the same basis as by counsel.
- iii. Standards for compensable wrongs and for the assessment of compensation have been defined for this IAP. The adjudicator is bound by those standards.
- iv. The compensation rules set the ranges of compensation to be paid having regard to the objective seriousness of the proven act(s) and the subjective impact of proven aggravating factors and harms, as defined. An award can also be made to assist with future care.
- v. Adjudicators are, subject to rights of review, empowered to make binding findings on credibility, liability and compensation within the standards set for the IAP.
- vi. Where compensation is awarded to a Claimant who has been represented by counsel, a further 15% of the amount paid will be added as a contribution towards legal fees. Reasonable and necessary disbursements will also be paid. Adjudicators may resolve disputes about the disbursements to be paid.
- vii. Where a review is sought by counsel for a Claimant who was unrepresented at the initial hearing, and the review is successful, an amount equal to 15% of the compensation obtained on the review beyond the initial award will be paid as a contribution towards the Claimant's legal fees for the review. Reasonable and necessary disbursements for the review will also be paid, with the review adjudicator having jurisdiction to resolve any dispute as to disbursements.

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b. Resolution Processes within this IAP

- i. This IAP consists of a standard track, a complex issues track, and a provision for access to the courts for the resolution of certain of the continuing claims as set out below.
- ii. The complex issues track is for those continuing claims where the Claimant seeks an assessment of compensation for proven actual income losses resulting from continuing claims, and for other wrongful act claims (category OWA on page 3).
- iii. At the request of a Claimant, access to the courts to resolve a continuing claim may be granted by the Chief Adjudicator where he or she is satisfied that:
 - there is sufficient evidence that the claim is one where the actual income loss or consequential loss of opportunity may exceed the maximum permitted by this IAP;
 - there is sufficient evidence that the Claimant suffered catastrophic physical harms such that compensation available through the courts may exceed the maximum permitted by this IAP; or,
 - in an other wrongful act claim, the evidence required to address the alleged harms is so complex and extensive that recourse to the courts is the more appropriate procedural approach.

In such cases, the Approval Orders will exempt the continuing claims from the deemed release, and thereafter the matter shall be addressed by the courts according to their own standards, rules and processes.

- iv. Both tracks within the IAP utilize the inquisitorial model, as defined below.
- v. In the standard track, consequential harms and consequential loss of opportunity must be proven on a balance of probabilities and then proven to be plausibly linked to one or more acts proven. A finding of a plausible link does not require the negation of other potential causes of harms, but it must be based on or reasonably inferred from the evidence led in the case rather than assumptions or speculation as to possible links. Adjudicators shall have regard to their powers under Appendix X, below
- vi. In the complex issues track, consequential harms, consequential opportunity losses and actual income losses must be proven to have been caused by one or more continuing claims, and compensation must be assessed within the Compensation Rules, in both matters according to the same standards a court would apply in like matters.
- vii. In the standard track, when a case is ready to proceed to a hearing, the government and the Claimant may attempt to resolve the claim without a hearing, using a procedure acceptable to them for the case in question. At the request of the parties, the IAP Secretariat may assign an adjudicator to assist with efforts to resolve the claim.
- viii. In the complex issues track:
 - After the IAP Secretariat has determined that a case is ready to proceed to a hearing, the Claimant shall attend a preliminary case assessment hearing and answer an adjudicator's questions. The purpose of such a hearing is to provide for a preliminary assessment of credibility, and to ensure that there is a *prima facie* basis to support a claim of the nature for which the

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complex track is designed. Any answers given in these proceedings are on a without prejudice basis, shall not be recorded or transcribed, and are not admissible in other phases of the hearing.

- Provided the *prima facie* basis has been made out, the adjudicator shall arrange for expert assessments as required by the standards set in this IAP.
- On the receipt of the expert and/or medical evidence or at any point if such have been waived, the government and the Claimant may attempt to settle the claim having regard to the available evidence, the preliminary assessment of credibility, and all other evidence, or the claim may proceed to a hearing.

c. Safety and Support

- i. Reasonable costs for support persons for Claimants to travel to hearings will be paid.
- ii. Counsellors, or at least ready access to counselling services, will be available for the hearing process.
- iii. Cultural ceremonies such as an opening prayer or smudge will be incorporated at the request of the Claimant to the extent possible.

d. Materials for Adjudicator for Individual Cases

- i. The IAP Secretariat will provide the adjudicator with relevant documents and witness statements (as submitted by the parties), two weeks before hearings to facilitate structured questioning.
- ii. Before a hearing counsel may identify particular areas of concern or issues that they believe require extra scrutiny and may provide suggested questions. The adjudicator retains discretion on the wording of the questions put to a witness, but must explore the area proposed by counsel unless the adjudicator rules it to be irrelevant to credibility, liability or compensation in the IAP.

e. Procedure---General

- i. This 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.
- ii. In this inquisitorial model, the adjudicator is responsible for managing the hearing, questioning all witnesses (other than experts retained by the adjudicator) and preparing a decision with his or her conclusions and reasons.
- iii. The adjudicator's questioning must both draw out the full story from witnesses (leading questions are permitted where required to do this), and test the evidence that is given (questioning in the form of cross examination is permitted where required to do this).

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- iv. The role is inquisitorial, not investigative. This means that while the adjudicator must bring out and test the evidence of witnesses, only the parties may call witnesses or produce evidence, other than expert evidence.
- v. The Claimant and the alleged perpetrator may give their evidence in their own words in narrative form and are subject to questioning by the adjudicator. Refusal to answer questions may result in finding that answers would have been detrimental to the witness's position.
- vi. The Claimant may read a prepared statement, but this may impact credibility.
- vii. The Claimant may refer to their own notes as long as the notes are produced to counsel for the defendants two weeks in advance. Notes are not evidence.
- viii. The Claimant may refer to documents that are before the adjudicator.
- ix. Where counsel attend hearings, they may meet with the adjudicator at intervals to suggest questions or lines of inquiry. The adjudicator must explore the proposed lines of inquiry unless he or she rules them to be irrelevant to credibility, liability or compensation in the IAP, but the adjudicator retains discretion on the wording of the questions put to a witness.
- x. The parties may require the adjudicator to hear any witness who is willing to appear and who has evidence relevant to credibility, liability or compensation within the IAP, other than a medical professional or an expert witness on the issue of consequential harms, consequential loss of opportunity, or actual income loss, provided notice and a witness statement are given two weeks before the hearing. Criteria for the use of expert witnesses are set out in section (f) and Appendix VI, below.
- xi. Since witnesses cannot be compelled to appear, no adverse inference is to be drawn from the failure to produce a witness who may have relevant evidence, but the report of a treatment professional may be given less weight if they are available but refuse to testify.
- xii. Alleged perpetrators may be heard as of right, provided the parties are advised in advance of what their evidence will be.
- xiii. Except as required to obtain medical or expert evidence, or otherwise as provided for in this IAP, hearings should be adjourned only in very exceptional circumstances, for example where the evidence of the Claimant differs so substantially from the application that it amounts to a new application.
- xiv. At the conclusion of the evidence, counsel for the parties, if participating, may make brief oral submissions.
- xv. Where compensable abuse is proven, compensation is awarded for acts and, if the applicable evidentiary threshold is crossed, compensation is also awarded for impacts as set out in the Compensation Rules. Unless the parties consent, expert evidence is required to establish consequential harms or consequential loss of opportunity at levels 4 or 5, or actual income loss. Such evidence may only be obtained where the adjudicator is satisfied that it is justified and necessary, or where the parties have made a joint recommendation that it be obtained.

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f. Procedure---Treatment Reports and Expert Evidence (see consolidation in Appendix VI)

- i. Treatment notes and clinical records are admissible to prove that the treatment was given and observations were made, but not as proof of diagnoses of psychological conditions or the opinion leading to them. Such notes and records may also be used to provide evidence of the fact of a physical injury. They may also be used by the adjudicator as the basis for lines of questions, the answers to which could provide the basis for findings of consequential harms or consequential loss of opportunity at levels 1-3. They may also support a finding of consequential harms or consequential loss of opportunity at levels 4 or 5 where the parties consent to proceeding without expert reports.
- ii. If treatment notes and clinical records from treating doctors or counsellors are not available, Claimants may submit reports from treating doctors or counsellors for the same purposes, without the requirement of defence medicals, but the defendants may require the treatment professional to testify. If the treatment professional is not available, or is available but will not testify, a report remains admissible, but the adjudicator may give it less weight.
- iii. Unless the parties consent, an adjudicator shall not make a finding of a physical injury for the purposes of this IAP without obtaining and considering medical evidence as to the timing, causation, and continuing impact of such injury. Where such evidence is not contained in treatment notes or clinical records, or treatment reports admitted into evidence, the adjudicator shall ask the Claimant to submit to an examination by an appropriate medical professional. Provided the Claimant has submitted to the medical assessment, as required, the adjudicator shall decide the issue having regard to the available evidence and the standard of proof, including where the results of the medical assessment are inconclusive.
- iv. Except on consent, points within the compensation rules for consequential harms or consequential loss of opportunity above level 3, or compensation for actual income loss, may only be awarded where the adjudicator has obtained and considered expert assessments of the extent and causation of the harms or losses, or medical evidence as to the timing, causation and continuing effect of the alleged physical harms.
- v. Where the Claimant is seeking compensation based on psychological harms at level 4 or 5 of the consequential harms or consequential loss of opportunity at levels 4 or 5 or actual income loss caused by psychological harms:
 - The Claimant so indicates in the application
 - The adjudicator has discretion to order an assessment by an expert. Only the adjudicator may order such assessments, and unless the parties have made a joint recommendation for such an assessment before the hearing, only after hearing the claim and making findings as to credibility, and determining that the assessment is justified by the evidence accepted and is necessary to assess compensation fairly.
 - Where an assessment is ordered, the adjudicator retains and instructs an expert from a roster approved by the IAP Oversight Committee. The expert prepares a report which is tabled before the adjudicator.

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- Counsel for the parties may require that the expert give oral evidence and that they be allowed to question the expert at the hearing and make submissions.
 - When the parties consent to the adjudicator considering the assignment of points within those ranges, or actual income loss, without the benefit of an expert assessment, such consent does not eliminate the need for the adjudicator to be satisfied, on the civil standard of proof, that the Claimant suffers from those harms, and that they are linked to proven abuses at the IRS according to the standards in this IAP.
- vi. In the complex issues track where a claim for actual income loss is being advanced, the adjudicator shall order psychiatric and medical reports as outlined above or any other expert reports required to assess and evaluate the claim.

g. Procedure--Involvement of Alleged Perpetrator At Hearing

- i. An alleged perpetrator is to be heard as of right, provided the parties are advised in advance of what their evidence will be. The alleged perpetrator must submit a statement of their proposed evidence two weeks before the hearing; if they do not, counsel must share their notes, again two weeks before the hearing, of what the alleged perpetrator said when interviewed.
- ii. Normally the alleged perpetrator will be heard after the Claimant. Either can be recalled to resolve a credibility issue, but this should happen rarely.
- iii. The alleged perpetrator does not have a role as a party.
- iv. There is no right of confrontation.
- v. See Appendix III for additional provisions concerning alleged perpetrators.

h. Burden of Proof and Evidentiary Standards

- i. Except as otherwise provided in this IAP, the standard of proof is the standard used by the civil courts for matters of like seriousness. Although this means that as the alleged acts become more serious, adjudicators may require more cogent evidence before being satisfied that the Claimant has met their burden of proof, the standard of proof remains the balance of probabilities in all matters.
- ii. The adjudicator may receive, and base a decision on, evidence adduced in the proceedings and considered credible or trustworthy in the circumstances.
- iii. The application and witness statements may be used as a basis for questioning at the hearing, and material variations from them may be used in deciding the claim, unless those variations are explained to the adjudicator's satisfaction by progressive disclosure or otherwise.
- iv. At a hearing, the application form may also be used by the Claimant to assist their own recall. While the Claimant may refer to their application at the hearing, it is not evidence (other than of a prior inconsistent statement). This reflects the rules of evidence used by the courts which provide that in general, prior statements of a party can be used as admissions against interest, but not otherwise as evidence of their truth. They can also be used to demonstrate a prior inconsistent statement,

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although in this IAP it is specifically recognized that progressive disclosure is a possible explanation for inconsistencies.

- v. Counsel may agree on foundation and other facts and so advise the adjudicator. Such agreement binds the adjudicator. This is not to prevent the whole narrative being told if the Claimant so wishes.
- vi. Relevant findings in previous criminal or civil trials, where not subject to appeal, may be accepted without further proof.
- vii. An adjudicator may permit a witness to give their evidence by video-conference where such facilities are available to them, and may also permit a Claimant to do so where a medical professional provides advice that the Claimant's health prohibits them from travelling to a hearing.
- viii. A Claimant may adopt their prior recorded statements, provided they remain subject to questioning by adjudicator, and provided that, without the consent of the defendants, a recorded statement is not admissible if it was made for the purpose of seeking redress for the Claimant's IRS experience.
- ix. Where an alleged perpetrator has given an interview or submitted a witness statement, but thereafter does not appear at a hearing to give evidence, neither the interview notes nor the statement (including any documents submitted with it which are not otherwise admitted in evidence, and whether or not it is in the form of an affidavit) is admissible in evidence at the hearing except to the extent it contains an admission.

i. Solemnity

- i. Participants and other witnesses shall give evidence under oath, by affirmation or another way that binds their conscience.

j. Setting

- i. Hearings will take place in a relaxed and comfortable setting. Claimant will have a choice of location, subject to hearings being scheduled to promote economy.

k. Decision

- i. The adjudicator will produce a decision in a standard format outlining key factual findings and providing a rationale for finding or not finding compensability within the IAP and for the compensation assessed, if any.
- ii. At the conclusion of the hearing, the adjudicator will advise the Claimant that the decision will be provided in writing within 30 days for standard track hearings and within 45 days for complex track hearings.
- iii. The decision will normally be delivered to the Claimant via their counsel, who will be able to access health supports for the Claimant at the time the decision is shared with them.
- iv. Where the Claimant is not represented by counsel, the adjudicator will also inquire at the end of the hearing into how the Claimant would like to receive the

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decision, having regard to the desirability of health or family support being available at the time of receipt.

l. Review

- i. For cases within the standard or complex track, any party may ask the Chief Adjudicator or designate to determine whether an adjudicator's, or reviewing adjudicator's, decision properly applied the IAP Model to the facts as found by the adjudicator, and if not, to correct the decision, and the Chief Adjudicator or designate may do so.
- ii. In both the standard and the complex issues tracks, Claimants may require that a second adjudicator review a decision to determine whether it contains a palpable and overriding error.
- iii. In the complex issues track, the defendants may require that a second adjudicator review a decision to determine whether it contains a palpable and overriding error.
- iv. If a palpable and overriding error is found, the reviewing adjudicator may substitute their own decision or order a new hearing.
- v. All reviews are on the record (no new evidence permitted) and without oral submissions.
- vi. The party seeking the review may provide a short written statement of their objections to the decision (not to exceed 1500 words) and the other parties may provide a brief reply (not to exceed 1000 words). In exceptional circumstances the Chief Adjudicator may permit the parties to exceed these limits.
- vii. The reply shall be provided to the party seeking the review, who may seek leave from the Chief Adjudicator to make further submissions, not to exceed 500 words. The application shall be accompanied by the proposed submissions. Leave may be granted only in exceptional cases where the Chief Adjudicator determines that the submissions respond to a significant issue raised for the first time in the reply, or seek to correct a fundamental error of fact or interpretation in the reply.

m. Consistency

- i. Adjudicators may consult each other about the hearing and decision-making processes. They will attempt to conduct consistent sessions and produce decisions in a consistent fashion, and may discuss issues arising in individual cases provided they remain solely responsible for deciding the claims they have heard.
- ii. The Chief Adjudicator shall implement training programs and administrative measures designed to ensure consistency among the decisions of adjudicators in the interpretation and application of the IAP.

n. Specialization of Adjudicators

- i. The Chief Adjudicator shall endeavour to assign adjudicators to cases in a way which facilitates their specialization in one or more schools.

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- ii. In assigning adjudicators to cases within the complex issues track, the Chief Adjudicator shall have regard to their experience and/or expertise in like matters. For greater certainty, where an other wrongful act claim involves allegations of physical abuse which was grossly excessive in duration and frequency, the Chief Adjudicator shall have regard to expertise in the assessment of child abuse in the assignment of an adjudicator.

o. Privacy

- i. Hearings are closed to the public. Parties, an alleged perpetrator and other witnesses are required to sign agreements to keep information disclosed at a hearing confidential, except their own evidence, or as required within this process or otherwise by law. Claimants will receive a copy of the decision, redacted to remove identifying information about any alleged perpetrators, and are free to discuss the outcome of their hearing, including the amount of any compensation they are awarded.
- ii. Adjudicators may require a transcript to facilitate report writing, especially since they are conducting questioning. A transcript will also be needed for a review, if requested. Proceedings will be recorded and will be transcribed for these purposes, as well as if a Claimant requests a copy of their own evidence for memorialization. Claimants will also be given the option of having the transcript deposited in an archive developed for the purpose.

p. Self-represented Claimants

- i. Self-represented Claimants (SRCs) will receive document production and witness statements on the same basis as if represented.
- ii. SRCs will receive notes of what was said at any interview provided by an alleged perpetrator, and a witness statement, if provided.
- iii. SRCs may submit proposed areas for scrutiny and proposed lines of questioning to the adjudicator in advance of a hearing (this will particularly apply where the alleged perpetrator or a defence witness is to give evidence).
- iv. SRCs will receive the defendants' advance submissions to the adjudicator on areas/lines of questioning to be explored.
- v. During a hearing, both SRCs and the defendants may suggest lines of questioning, but this will be done in the hearing room, on the record and in the presence of each other, and SRCs will be allowed to make brief closing submissions.

q. Representation of Claimants by Agents

- i. Agents, whether paid by the Claimant or not, may not discharge the roles specifically established for counsel in this IAP.

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r. IAP Oversight Committee

- i. The Chief Adjudicator Reference Group shall be reconstituted as the IAP Oversight Committee, which shall be composed of an independent chair and 8 other members, two reflecting the interests of each of the following constituencies: former students; plaintiffs' counsel; church entities; government.
- ii. The Committee shall operate by consensus to the greatest extent possible. In the event a vote is required, the Chair may vote, and a majority of seven shall be required to decide an issue, provided that if the issue would increase the cost of the IAP, whether for compensation or procedural matters, one government representative must be among the seven.
- iii. The duties of the Oversight Committee are to:
 - Recruit and appoint, and if necessary terminate the appointment of, the Chief Adjudicator.
 - Provide advice to the Chief Adjudicator on any issues he or she brings to it.
 - Recruit and appoint adjudicators, and approve training programs for them.
 - Approve designates to exercise the Chief Adjudicator's review authority as set out in item l(i) above.
 - On the advice of the Chief Adjudicator, renew or terminate the contract of an adjudicator.
 - Recruit and appoint experts for psychological assessments.
 - Consider any proposed instructions from the Chief Adjudicator on the interpretation and application of the IAP Model, and as appropriate prepare its own instructions or forward proposed instructions from the Chief Adjudicator for approval by the National Administration Committee, provided that:
 - no instruction may alter pages 2-6 of this IAP, nor the interpretation of those pages set out elsewhere in this IAP, nor the provisions of the IAP allocating claims to the standard or complex issues tracks or requiring expert evidence or medical assessments; and,
 - instructions only come into force when approved by the National Administration Committee and published by the Oversight Committee, and only bind participants who have had at least two weeks notice of the instructions before their hearing.
 - Monitor the implementation of the IAP and make recommendations to the National Administration Committee on changes to the IAP as are necessary to ensure its effectiveness over time.

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s. The Chief Adjudicator

i) The duties of the Chief Adjudicator are to:

- Assist in the selection of adjudicators.
- Implement training programs and administrative measures designed to ensure consistency among the decisions of adjudicators in the interpretation and application of the IAP.
- Assess on an ongoing basis the other training and mentoring needs of adjudicators and develop appropriate programs.
- Assign adjudicators to hearings and reviews or to assist with settlement discussions.
- Provide advice to adjudicators on compliance with this IAP.
- Prepare for consideration by the Oversight Committee any proposed instructions to better give effect to the provisions of the IAP.
- Receive complaints about the performance of adjudicators and as appropriate meet with adjudicators to discuss concerns and develop remedial actions to resolve same.
- Determine, in his or her exclusive authority, whether to terminate or renew the contract of an adjudicator.
- Conduct reviews as provided for in item l(i) above, or assign such to designates approved by the Oversight Committee.
- Set the policies and standards for the Secretariat and direct its operations.
- Make the final decision on a request by a Claimant for a reconsideration of a decision by the Secretariat that their application to this IAP process fails to allege matters which can be resolved within it.
- Conduct hearings as he or she determines appropriate, provided that designates have been approved for the purpose of item l(i) above.
- Carry out all other functions assigned by this IAP.
- Prepare annual reports to the Oversight Committee on the functioning of the adjudicative process under this IAP.

t. Secretariat

- i. A Secretariat shall be established to support the Chief Adjudicator and to be responsible for determining whether applications fall within the terms of the IAP.
- ii. Where an application fails to raise a claim which falls within the IAP, the Secretariat shall so advise the Claimant, with reasons, and provide them with the opportunity to make a further application. On the request of the Claimant, a decision to refuse to admit a claim into the IAP will be reviewed by the Chief Adjudicator, whose decision will be final.
- iii. The Secretariat shall also recruit and approve a panel of interpreters.
- iv. The Secretariat reports to the Chief Adjudicator.

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APPENDIX I: THE APPLICATION

- a) In applying to the IAP, the Claimant is asked to:
- i. List points of claim: indicate by reference to the standards for this IAP each alleged wrong with dates, places, times and information about the alleged perpetrator for each incident sufficient to identify the alleged perpetrator or in the case of adult employees permit the identification of the individual or their role at the school.
 - ii. Provide a narrative as part of the application. The narrative must be in the first person and be signed by the Claimant and can be both a basis for and a subject of questioning at a hearing.
 - iii. Indicate by reference to the Compensation Rules established for this IAP the categories under which compensation will be sought and, where appropriate, indicate that compensation will be sought for consequential harm and/or opportunity loss above level 3, or for actual income loss.
 - iv. Include authorizations so that the defendants may produce their records as set out in Appendix VIII.
 - v. Safety mechanisms will be provided in consultation with Health Canada. Where Claimants are proceeding as a group, they may negotiate to have the group administer the available safety resources.

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APPENDIX II: ACCEPTANCE OF APPLICATION

- i. The Secretariat will admit claims to the IAP as of right where the application is complete and sets out allegations which if proven would constitute one or more continuing claims, and where the Claimant has signed the Declaration set out in the application form, including the confidentiality provisions in the Declaration.
- ii. If the case is not admitted into the IAP the Claimant will be advised why and given a chance to provide additional information. At the request of the Claimant, the Chief Adjudicator may review any final decision to refuse to admit an application into the IAP, and may confirm or reverse that decision. If the decision is reversed, the initial and any subsequent applications, or supplementary information, will be given to the adjudicator.
- iii. On admitting the claim to the IAP, the Secretariat shall forward a copy of the application to the Government and to a church entity which is a party to the Class Action Judgments and was involved in the IRS from which the claim arises.
 - A church entity may waive its right to receive applications for all claims, or for defined classes of claims, by notice in writing to the Secretariat, and may amend or withdraw such waiver at any time by notice in writing.
- iv. The following conditions apply to the provision of the application to the Government or a church entity:
 - The application will only be shared with those who need to see it to assist the Government with its defence, or to assist the church entities with their ability to defend the claim or in connection with their insurance coverage;
 - If information from the application is to be shared with an alleged perpetrator, only relevant information about allegations of abuse by that person will be shared, and the individual will not be provided with the Claimant's address or the address of any witness named in the application form, nor with any information from the form concerning the effects of the alleged abuse on the Claimant, unless the Claimant asks that this be provided to the alleged perpetrator;
 - Each person with whom the application is shared, including counsel for any party, must agree to respect its confidentiality. Church entities will use their best efforts to secure the same commitment from any insurer with whom it is obliged to share the application;
 - Copies will be made only where absolutely necessary, and all copies other than those held by the Government will be destroyed on the conclusion of the matter, unless the Claimant asks that others retain a copy, or unless counsel for a party is required to retain such copy to comply with his or her professional obligations.
- v. Once the claim is admitted, counsel may attempt to agree on certain facts to reduce research needs.
- vi. Group claims will be accepted where the individual applications of the group members have been submitted together or within a short interval; each of the Claimants has indicated their desire to proceed as a group member; the applications show commonality among group members (school, community, issues); and a

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representative of the group has submitted an application to proceed as a group, demonstrating that:

- the group is an established one with evident viability and decision-making capacity;
- its members are already providing each other with support in connection with their IRS experiences or have a clear plan and realistic capacity to do so;
- the issues raised by the individuals within the group are broadly similar; and
- the group has a clear plan and intention to manage safety resources, where they desire to do so, and to achieve healthy and lasting resolution of their claims.

vii. Where a proposal to proceed as a group is not accepted, the individuals will be advised of their right to continue as individuals if their applications otherwise meet the criteria for this IAP.

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APPENDIX III: INVOLVEMENT OF ALLEGED PERPETRATORS

- i. The defendants will attempt to locate the alleged perpetrator to invite them to the hearing. If the alleged perpetrator is dead, cannot be located, or declines to attend, the hearing may still occur.
- ii. Subject to items (iii) and (iv) below, no hearing may be set to commence until:
 - the Government has had 60 days from its receipt of the screened-in application to attempt to locate the alleged perpetrator, or in the event that contact is first attempted by a church entity with an agreement with the Government providing for a right of first contact, an additional 30 days; and
 - thereafter the alleged perpetrator has had a total of 75 additional days to seek advice on whether to participate, and if so, to provide a witness statement or be interviewed as set out below.
- iii. Where the above-noted events occur prior to the expiry of the time allotted, the Government may so notify the Secretariat, and the Secretariat may schedule a hearing when the matter is otherwise ready to proceed.
- iv. If a Claimant provides medical evidence that any delay in hearing their testimony involves a significant risk that they may die or lose the capacity to provide testimony, the Secretariat may schedule a hearing for the limited purpose of taking such testimony, after which the hearing shall be adjourned to allow for the location of the alleged perpetrator and the obtaining of their testimony if they decide to participate.
- v. The alleged perpetrator will be provided with extracts from the application outlining the allegations made against them, to be returned at the conclusion of the process, in order to help them recall the student/incident and to determine their response. Information on the Claimant's current address or the addresses of other potential witnesses will be deleted from this material, as will information on the impacts of the alleged abuse, unless the Claimant asks that it be provided to the alleged perpetrator.
- vi. Notice of the alleged perpetrator's desire to respond to allegations will be given to counsel for the Claimant at the earliest opportunity.
- vii. A witness statement will be requested from the alleged perpetrator. If he or she declines to provide one, counsel for any party may request an interview with the alleged perpetrator. This would not be the equivalent of an examination for discovery, and the interview notes of what he or she said must be shared among the parties two weeks before the hearing, as must a witness statement, if provided.
- viii. The witness statement, or failing that the interview notes, are a condition of the alleged perpetrator being heard by the adjudicator.
- ix. Counsel and a support person for the alleged perpetrator are permitted at a hearing while the alleged perpetrator gives evidence, but the alleged perpetrator or their counsel may not attend at same time and place as the Claimant without the advance consent of the parties. Canada will pay up to \$2500 for the alleged perpetrator to receive legal advice about the implications of giving evidence, plus the reasonable costs of the alleged perpetrator's attendance, and of the attendance of a support person. For greater certainty, support person in this context does not include counsel for an alleged perpetrator.
- x. Where the testimony of the Claimant at a hearing differs materially from the account provided in the application which was shared with the alleged perpetrator, the

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adjudicator shall prepare a summary of the new allegations and provide it to the alleged perpetrator and the parties before the alleged perpetrator gives evidence.

- xi. The alleged perpetrator is a witness, not a party.
- xii. The alleged perpetrator is entitled to know the results of the hearing with respect to the allegations against them, but not the amount of any compensation awarded.

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APPENDIX IV: INFORMATION COLLECTION; SETTING HEARING DATE;
ATTENDANCE AND PARTICIPATION AT HEARINGS

- i. The defendants will collect and submit their documents to the Secretariat.
- ii. Claimants will collect and submit their documents and the treatment notes and clinical records they want to rely on, or, where they cannot obtain such notes or records, will indicate the steps taken to attempt to do so.
- iii. Witness statements shall be prepared and submitted by the party calling the witness.
- iv. No date shall be set until the IAP Secretariat is satisfied that exchange of documents, including treatment notes and clinical records is as complete as reasonably necessary, unless a Claimant provides medical evidence that any delay in hearing their testimony involves a significant risk that they may die or lose the capacity to provide testimony. In such circumstances, the Secretariat may schedule a hearing for the limited purpose of taking such testimony, after which the hearing shall be adjourned to allow for the preparation of the case as otherwise provided for in this IAP.
- v. The hearing date will be set based on the availability of the parties, counsel and the adjudicator, and on cost effectiveness having regard to the location and the number of hearings to be held in any one place in a given time frame.
- vi. The Claimant may attend a hearing where the alleged perpetrator gives evidence without that individual's consent. This is based on the Claimant being a party, and needing to be aware of all evidence to raise possible lines of questioning and make submissions if unrepresented, or to instruct counsel if represented.
- vii. Given the non-adversarial nature of this IAP and the neutral, inquisitorial role played by the adjudicators under it, as well as the need to respect the safety of the Claimant, neither an alleged perpetrator nor counsel for an alleged perpetrator may attend while the Claimant gives evidence, without the Claimant's advance consent. Where counsel for a church entity also acts for an alleged perpetrator, this means that they may not attend the hearing while the Claimant gives evidence without the Claimant's advance consent. Government representatives may always attend this part of the hearing, as may representatives of church entities who are parties to the Class Action Judgments except their counsel if he or she is also acting for an alleged perpetrator in the case.
- viii. Support persons attend hearings to help ensure the health and safety of the Claimant during a stressful event. Their focus needs to be on how the Claimant is handling the stress they face. Accordingly support persons should not become distracted from that goal by seeking to become a participant in the proceedings, for example, by attempting to give evidence. If it becomes necessary for a support person to give evidence, they should be sworn (or affirmed) as a witness, but only after the adjudicator is satisfied that appropriate arrangements for the safety of the Claimant are in place.
- ix. Finally, since the central purpose of the hearing is an assessment of credibility, counsel or representatives of any party must refrain from speaking to a witness about the evidence in the case once that witness begins giving evidence and until their evidence is complete. An adjudicator may authorize an exception to this where he or she is of the view that the discussion is necessary to elicit evidence from the witness in a timely manner.

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APPENDIX V: CRITERIA FOR THE SELECTION OF ADJUDICATORS

- i. Law degree from a recognized university. Consideration will also be given to candidates with a combination of related training and/or significant experience
- ii. Knowledge of and sensitivity to Aboriginal culture and history
- iii. Knowledge of and sensitivity to sexual and physical abuse issues
- iv. Knowledge of personal injury law
- v. Knowledge of damages assessment
- vi. Ability to interview or examine witnesses
- vii. Ability to elicit useful evidence in a concise manner
- viii. Ability to act in an impartial manner
- ix. Respect for all parties involved
- x. Demonstrated ability to assess credibility and reliability
- xi. The ability to work under pressure and to write clear, concise and well-reasoned decisions that take into account evidence, submissions, the rules and policies of this IAP, within required deadlines
- xii. The ability to work effectively with staff and participants from diverse backgrounds
- xiii. Computer literacy and superior communication and writing skills
- xiv. Personal suitability including an aptitude for adjudication, fairness, good listening skills, open-mindedness, sound judgment, tact, and comfort with complex and/or sensitive issues
- xv. Willingness and ability to travel across Canada or within a designated region, including to First Nations communities, using various modes of transportation
- xvi. Flexibility and availability to be called for hearings on an as required basis

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APPENDIX VI: CONSOLIDATION OF PROVISIONS CONCERNING EXPERT AND MEDICAL EVIDENCE

This IAP seeks to confine the use of expert witnesses to matters where their evidence is essential, and to eliminate the prospect of competing reports from experts on the same issue. This will produce significant savings in cost and time.

This Appendix consolidates and provides additional instructions on the IAP's provisions concerning medical and expert evidence in four categories:

1. Treatment reports
2. Psychiatric assessments
3. Medical assessments
4. Vocational and actuarial assessments.

1. Treatment Records

Treatment notes and clinical records prepared in the normal course of the Claimant dealing with their injuries, whether physical or psychological, are admissible as of right to help the adjudicator decide the particular case. In this connection, this IAP provides as follows:

- The Claimant may submit treatment notes and clinical records from treating doctors or counsellors, or if such are not available, a report from treating doctors or counsellors, as of right, subject to notice and disclosure as provided for in this IAP.
- This includes records of and reports from customary or traditional counsellors or healers.
- The defence may not require a defence medical, but may ask that the person who provided the treatment give evidence at the hearing.
- If the person who prepared a treatment report is dead or not available, then the report may be admitted subject to the adjudicator being able to give it less weight
- Where the person who provided the treatment gives evidence, only the adjudicator may question them, and the questioning may explore the treatment professional's qualifications as well as the records and report.
- Treatment notes and clinical records are admissible to prove that the treatment was given and observations were made, but not as proof of diagnoses of psychological conditions or the opinion leading to them. Such notes and records may be used to provide evidence of the fact of a physical injury. They may also be used by the adjudicator as the basis for lines of questions, the answers to which could provide the basis for findings of consequential harms or consequential loss of opportunity at levels 1-3. They may also support a finding of consequential harms or consequential loss of opportunity at levels 4 or 5 where the parties consent to proceeding without expert reports.

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2. Psychiatric and Psychological Assessments

Assessments prepared for litigation purposes raise different issues. They are very dependent on the information given to the expert as the basis for the report. That information is generally limited to the Claimant's version of events, and can differ from the evidence presented at a hearing, or found credible by the adjudicator. Where the Claimant obtains such an assessment, normally the defendants would as well, quite often leading to a series of complex contradictions between the assessments.

As a result, this IAP adopts a more restrictive approach to assessments. Only the adjudicator may order such assessments, and, unless the parties have made a joint recommendation to the contrary, only after hearing the claim and making preliminary findings as to credibility, and determining that ordering an assessment is justified by the evidence accepted and is necessary to assess compensation fairly. In such circumstances the adjudicator will retain an expert from a roster agreed to by the IAP Oversight Committee, and that expert's assessment will be considered as set out below in assessing compensation. This can only be done where consequential harms or opportunity losses at levels 4 or 5, or actual income losses are in issue.

Except on consent, points within the compensation rules for consequential harms or consequential loss of opportunity above level 3, or compensation for actual income loss, may only be awarded where the adjudicator has obtained and considered an expert's assessment of the extent and causation of the alleged psychological harms (or medical evidence as to the timing, causation and continuing effect of the alleged physical harms: see below).

The following summarizes the approach to psychiatric and psychological evidence:

- An adjudicator has the discretion to order an assessment by an expert. Only the adjudicator may order such assessments, and unless the parties have made a joint recommendation for such an assessment before the hearing, only after hearing the claim and making findings as to credibility, and determining that the assessment is justified by the evidence accepted and is necessary to assess compensation fairly.
- Where an assessment is ordered, the adjudicator retains an expert from a roster approved by the IAP Oversight Committee, and thereafter, the following principles apply:
 - The expert is to be provided with the transcript of the hearing, and any records filed at the hearing that are relevant to the proposed assessment, all on a confidential basis. The parties shall be advised of which records are provided to the expert.
 - The adjudicator is to brief the expert on his or her preliminary findings, so that the assessment may be conducted on the basis of the facts likely to be found, and shall instruct the expert to refrain from making any findings as to credibility.

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- The adjudicator shall give significant regard to the expert's opinion on the level of harm and on its causation pursuant to the standards in this IAP.
- After reviewing the expert's report, any party may require that the expert give evidence, and any party may question them.
- When the parties consent to the adjudicator considering the assignment of points within those ranges without the benefit of an expert assessment, such consent does not eliminate the need for the adjudicator to be satisfied, on the civil standard of proof, that the Claimant suffers from those harms, and that they are linked to proven continuing claims according to the standard provided for in this IAP.

3. Adjudicator-ordered Medicals to Assess Physical Injuries

- Unless the parties consent, an adjudicator shall not make a finding of a physical injury for the purposes of this IAP without obtaining and considering medical evidence as to the timing, causation, and continuing impact of such injury. Where such evidence is not contained in treatment notes or clinical records admitted into evidence, the adjudicator shall ask the Claimant to submit to an examination by an appropriate medical professional. Provided the Claimant has submitted to the medical assessment, as required, the adjudicator shall decide the issue having regard to the available evidence and the standard of proof, including where the results of the medical assessment are inconclusive.
- The parties shall endeavour to agree on the medical professional who will conduct the assessment. If they cannot, the adjudicator, with the assistance of the Secretariat, shall select an appropriate individual.
- In both circumstances, the professional is to be retained by the Secretariat and shall take instructions from and report to the adjudicator. The retainer shall be conditional on the professional being willing to testify if required.
- Where a report has been obtained, the parties may require that the professional attend the hearing (or its resumption) and give evidence.
- The same standard for questioning will apply here as for treatment reports: the adjudicator does the questioning, and the questioning can explore the examiner's qualifications as well as the records and report.

4. Actual Income Loss Assessments

- ♦ In the complex issues track where a claim for actual income loss is being advanced, the adjudicator shall order expert reports or medical assessments as set out above.
- ♦ At the request of a party, the adjudicator shall also order any other expert reports required to assess and evaluate the claim in accordance with the above procedure for obtaining medical assessments.

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APPENDIX VII: MANDATORY DOCUMENT PRODUCTION BY CLAIMANTS

Following the receipt of a completed application form, and the acceptance of an individual into the IAP, relevant documents must be exchanged. This appendix outlines the documents a Claimant must produce, or explain the absence of, as a condition of proceeding to a hearing with a claim seeking particular kinds of compensation within the Compensation Rules.

This appendix does not outline other kinds of documents which could assist a Claimant in proving their claim. These will be admissible as provided for in this IAP. The kinds of documents the defendants will produce are outlined in a separate appendix.

In terms of proving the abuse itself, no documents are required from Claimants, although Claimants are free to produce documents to support their claim.

1. TO PROVE CONSEQUENTIAL HARMS

LEVELS 3, 4 AND 5

- Treatment records which are relevant to the harms claimed (including clinical, hospital, medical or other treatment records, but excluding records of counselling obtained to help ensure safety while pursuing an IRS claim). In the complex issues track, records from general practitioners, clinics or community health centres are deemed to be relevant unless the defendants consent to the contrary.
- Workers' Compensation records, if the claim is based in whole or in part on a physical injury.
- Corrections records (insofar as they relate to injuries or harms).

LEVELS 1 AND 2

None required

2. TO PROVE CONSEQUENTIAL LOSS OF OPPORTUNITY

LEVELS 3, 4 AND 5

- Workers' Compensation records, if the claim is based in whole or in part on a physical injury.
- Income Tax records (if not available, then EI and CPP records)
- Treatment records which are relevant to the asserted basis for the opportunity loss (including clinical, hospital, medical or other treatment records, but excluding records of counselling obtained to help ensure safety while pursuing an IRS claim). In the complex issues track, records from general practitioners, clinics or community health centres are deemed to be relevant unless the defendants consent to the contrary.

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- Secondary (non-residential) school and post-secondary school records.

LEVEL 2

- Workers' Compensation records, if the claim is based in whole or in part on a physical injury.
- Income Tax records, or at the Claimant's choice, EI and CPP records
- Secondary (non-residential) school and post-secondary school records.

LEVEL 1

None required.

3. TO ESTABLISH A NEED FOR FUTURE CARE

None required, but a treatment plan should be submitted to support any claim for future care in any case where the Claimant is represented by counsel or is otherwise in a position to prepare one.

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APPENDIX VIII: GOVERNMENT DOCUMENT DISCLOSURE

The government will search for, collect and provide a report setting out the dates a Claimant attended a residential school. There are several kinds of documents that can confirm attendance at a residential school, and as soon as one or more are found which deal with the entire relevant period, further searches will not be undertaken.

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

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

The government will also gather documents about the residential school the Claimant attended, and will write a report summarizing those documents. The report and, upon request, the documents will be available for the Claimant or their lawyer to review.

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

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

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

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

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APPENDIX IX: INSTRUCTIONS FOR ADJUDICATORS

I. APPLICATION OF THE COMPENSABLE CLAIMS CRITERIA

In this IAP, compensation will be paid for all proven continuing claims, but not otherwise.

It is the adjudicator's responsibility to assess the credibility of each allegation, and, for those allegations which are proven on the civil standard, to determine whether what has been proven constitutes a continuing claim under this IAP.

The criteria for a continuing claim flow from, but may differ from, established case law on vicarious liability and negligence. Adjudicators are not to have reference to case law on vicarious liability or negligence. The compensability of proven continuing claims must be determined only by reference to the terms of this IAP, including instructions issued pursuant to it.

A. Physical or Sexual Abuse Committed by an Adult

1. Where the victim was a student or resident

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

- a) Was the alleged perpetrator an adult employee of the government or a church entity which operated the IRS in question? If so, it does not matter whether their contract of employment was at that IRS.
- b) If the alleged perpetrator was not an adult employee, were they an adult lawfully on the premises?
- c) Did the assault arise from, or was its commission connected to, the operation of an IRS? This test will be met where it is shown that a relationship was created at the school which led to or facilitated the abuse. If the test is met, the assault need not have been committed on the premises.

2. Where the victim was not a student or resident

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

- a) Was the alleged perpetrator an adult employee of the government or a church entity which operated the IRS in question? If so, it does not matter whether their contract of employment was at that IRS.

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

B. Sexual or Physical Assaults Committed by a Student

Where a proven incident of predatory or exploitative sexual abuse at levels SL4 or SL5 was committed by another student, the following tests must be met:

- a) Did the assault take place on IRS premises?
- b) Was the sexual assault of an exploitative or predatory nature?
- c) Has the government failed to prove that reasonable supervision was in place at the school?

In this connection:

A sexual assault is deemed to have been predatory or exploitative where the perpetrator was significantly older than the victim, or where the assault was occasioned by threats, coercion or violence.

For greater certainty, the fact of a sexual assault having taken place at an IRS does not itself prove that reasonable supervision was not in place.

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?

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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?

C. Additional Instructions re Physical Assaults

1. Since a physical injury is required to establish a compensable physical assault in this IAP, a need for medical attention or hospitalization to determine whether there was an injury does not establish that the threshold had been met.
2. 'Serious medical treatment by a physician' does not include the application of salves or ointment or bandages or other similar non-invasive interventions.
3. Loss of consciousness must have been directly caused by a blow or blows and does not include momentary blackouts or fainting.
4. Compensation for physical abuse may be awarded in this IAP only where physical force is applied to the person of the Claimant. This test may be deemed to have been met where:

- the Claimant is required by an employee to strike a hard object such as a wall or post, such that the effect of the force to the Claimant's person is the same as if they had been struck by a staff member;

provided that the remaining standards for compensation within this IAP have been met.

D. Other Wrongful Acts

This category is intended to provide compensation for wrongful acts not listed within the Compensation Rules which have caused the defined level of psychological consequential harms. If the basis for a claim being asserted in this category is described in another category, the latter must be applied to the claim.

Because of the novel nature of these claims, and the importance of establishing a clear causal connection between such acts and the defined level of psychological consequential harms, these claims are handled only in the complex issues track.

For the purpose of this category, a wrongful act, other than the specified act of physical abuse of grossly excessive duration and frequency, is one which

- a) was committed by an adult employee or another adult lawfully on the premises,

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- b) is outside the usual operational practices of the IRS at the time in question, and,
- c) exceeds recognized parenting or caregiving standards at the time.

Once an act or series of acts have been found to be wrongful, and not to be captured in another part of the Compensation Rules, then unless the parties consent to the contrary, the adjudicator must order the psychiatric or medical reports necessary to determine whether harms at the H4 or H5 level were caused by the act or acts.

In all OWA claims, the standard for proof of causation and the assessment of compensation within the Compensation Rules is the standard applied by the courts in like matters.

II. APPLICATION OF THE COMPENSATION RULES

Compensation for proven continuing claims is to be determined exclusively pursuant to the Compensation Rules. The Rules are designed to ensure that compensation is assessed on an individualized basis. While the abuse suffered is an important indicator of the appropriate level of compensation, so too are the circumstances in which the abuse was suffered by the individual, and the particular impacts it had on him or her.

The Compensation Rules were expressly designed to avoid a mechanistic approach to compensation by recognizing that a relatively less serious act can have severe consequences, and vice versa. They accomplish this goal by requiring both an objective assessment of the severity of the abusive act, and then a distinct and highly subjective assessment of how that act affected the individual Claimant. Accordingly, the categories defining acts and harms must be assessed separately, and the words in each category must be read purposively within their respective contexts.

In particular, in determining the level of harm suffered by a Claimant, adjudicators are to consider each of the five categories as a whole, and in relation to the other categories, rather than focussing on isolated words within a given category. This IAP calls for a contextual consideration, having particular regard to the headings for each category, in order to determine which of the categories best reflects the Claimant's proven level of harms resulting from compensable abuse.

1. The Proven Acts

The first step in applying the framework is to determine which acts of abuse have been proven on the civil standard of proof. The most serious act or acts of proven abuse, whether physical or sexual, determines the single range within which points for all abusive acts suffered over the course of attendance at one or more residential schools are to be assigned. Multiple acts of either physical or sexual abuse are recognized in the definitions of the categories of abuse; the impact of sexual abuse being accompanied by physical abuse is dealt with later as an aggravating circumstance.

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Once the most serious category among the proven act categorizations has been determined, a point total will be assigned within that category's range. The adjudicator has the discretion to choose the point level within that range, having regard to the relative seriousness of the proven acts compared to the acts listed within that category. For example, in the category of nude photographs it is expected that a single photo of nude buttocks retained by the photographer would be assigned fewer points for the act itself than a series of highly sexualized photos which had been put into wide distribution. The potential for an individual to suffer a high degree of trauma from an objectively less serious act is recognized, but is to be addressed in the harms categories within the framework, rather than by increasing the points otherwise appropriate for the act itself.

2. Consequential Harms

After the assignment of points for the proven acts has been determined, the next step is to assess any proven consequential harms which flowed from the proven acts, including those which were subsumed for the purpose of assigning points to the acts. This is done by reference to the consequential harms categories.

A Claimant must provide evidence or there must be expert evidence to prove each asserted harm on the balance of probabilities. In the standard track, once a compensable act and a compensable harm have each been established on the evidence according to a balance of probabilities, only a plausible link between them need be established in order for compensation to be awarded for them. A finding of a plausible link does not require the negation of other potential causes of harms, but it must be based on or reasonably inferred from the evidence led in the case rather than assumptions or speculation as to possible links. Adjudicators shall have regard to their powers under Appendix X, below.

In the complex issues track, harms must be proven to have been caused by one or more continuing claims, and compensation must be assessed within the Compensation Rules, using the same standards a court would apply in like matters.

Harms not proven to be linked to or caused by acts constituting compensable abuse may not be taken into account in assessing points in the harms categories.

Harms up to and including H3 are not to be the subject of expert assessments, although treatment notes and clinical records from treating doctors or counsellors, or if such are not available, a report from treating doctors or counsellors may be relied upon to supplement or contradict the Claimant's evidence of harms suffered. Where a Claimant's evidence credibly establishes the abuse plus apparent harms at levels 4 or 5, or on the joint recommendation of the parties before the hearing, the adjudicator may order an expert assessment. Only where such an assessment has been obtained and considered, or where the parties consent to points at these levels being considered without such an assessment, may the adjudicator find that harms at the two highest levels have been proven and were caused by the proven abuse.

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Points for consequential harm are assessed only once, at the level of harm which best reflects the evidence in the case and the causation standards of this IAP. Within the range for that level, the adjudicator has the discretion to determine the points to be assigned. Again, the relative gravity of the harm within the appropriate category will determine where within the applicable range the points should be assigned.

3. Aggravating Circumstances

The adjudicator must then determine whether any of the listed aggravating factors have been proven on the civil standard of proof. Only the specific aggravating factors listed in this IAP may be taken into account in assessing this category. Provided such factors are specifically proven, and are proven to have made the compensable abuse worse, they may be taken into account whether or not they were coincident in time and place with such abuse.

Once these tests have been met, the adjudicator has the discretion to determine a percentage to be added for one or more proven aggravating factors collectively. This discretion is to be exercised having regard to the seriousness of the aggravating factor in the specific context in which it occurred, including the impact the factor actually had on the Claimant. No other aggravating factors may be considered.

The percentage for aggravating factors is then applied to the total of the points assigned for the acts and the harms. The resulting number of points for aggravating factors is then rounded up to the nearest whole number.

4. Consequential Loss of Opportunity

Where the Claimant has asserted that the abuse caused them to suffer a consequential loss of opportunity, the adjudicator will then consider that part of the claim. Two aspects must be taken into account. First, the Claimant must prove, on the civil standard of proof, one or more of the circumstances or experiences listed in this part of the Rules, with expert evidence being required to establish the harms leading to the losses at levels 4 or 5 unless the parties have agreed to dispense with it. Second, in the standard track he or she must convince the adjudicator that there is a plausible link between the abuse proven to have occurred at the IRS, and the proven subsequent experience. In the complex track, consequential loss of opportunity must be proven to have been caused by one or more continuing claims, and compensation must be assessed within the Compensation Rules, using the standards a court would apply in like matters.

Where this proof is established, the adjudicator will then select the range of points reflecting the most serious proven loss linked to the abuse according to the standards for the track in question, and assign a point total within that range. Within the appropriate range the adjudicator will assign points based on the relative seriousness within the category of the proven experiences.

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It is important to note that consequential loss of opportunity within the compensation framework is not intended as a surrogate for a loss of income claim. Actual income loss claims constitute a distinct basis for compensation within this IAP, and the standards for their assessment do not apply to consequential loss of opportunity claims.

5. Actual Income Loss

Except on consent, actual income loss claims must be determined on the basis of expert evidence. The link between any proven actual income losses and the proven continuing claim must be established, and compensation must be assessed, using the same standards a court would apply in like matters.

Actual income loss claims are an alternative to a claim for consequential loss of opportunity, and both cannot be awarded.

6. Assessment of Compensation

All points assigned will now be totalled. This total determines the dollar range within which compensation can be awarded (except for the actual income loss element of an award), but it does not determine where within that range the adjudicator will award compensation. While a higher number of points within a range will normally lead to a higher level of compensation, the adjudicator has the discretion to determine compensation within the applicable dollar range having regard to the totality of the proven facts and impacts.

7. Future Care

Finally, where a claim has been made for future care, the adjudicator will consider whether to award additional compensation within and according to the criteria in the Compensation Rules. Relevant factors here will include the impacts of the proven abuse on the individual; any treatment already received for those impacts; the availability of treatment in the Claimant's home community and the need for assistance with travel costs; and the availability of alternative sources of funding for parts of the plan.

No award for future care shall be made unless the adjudicator is satisfied that the Claimant has a need for treatment of the kind proposed, and a genuine desire to use the funding for that purpose. In most cases, this will be evidenced by a treatment plan and an articulated and credible determination to follow that plan.

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8. Conclusion

The compensation framework is designed to provide an individual assessment of abuse suffered and its impact to generate compensation levels consistent with or more generous than court awards in each jurisdiction, using in a systematic and transparent way the factors applied by the courts. In the interests of fairness and consistency, all adjudicators must follow these instructions in applying the framework to the cases before them.

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APPENDIX X: THE USE OF EXTRA-CURIAL KNOWLEDGE BY ADJUDICATORS

INTRODUCTION

A number of issues will arise concerning the ability of adjudicators to make use of information obtained or known beyond that provided by the parties in each individual case. There are several aspects to this matter:

- use of background information and/or personal knowledge, for example on
 - schools
 - child abuse and its impacts
 - the residential school system
- carry-forward of information from hearing to hearing, for example on
 - alleged perpetrators and the *modus operandi* of proven perpetrators
 - conditions at a school
 - credibility findings
- use of precedents from other adjudicators
- ability of adjudicators to confer

The approach to be taken to these issues is set out below, by reference to the source of the information in question.

1. Orientation Materials Provided to Adjudicators

Adjudicators will be supplied with orientation materials on the residential school system and its operations, as well as on child abuse and its impacts.

If any of the orientation materials are specifically identified as containing uncontested facts or opinions, they may be used as follows:

Adjudicators are expected to inform themselves from this material. They may use it to question witnesses, but also to make findings of fact and to support inferences from evidence they find credible, for example to conclude that trauma of a certain kind can be expected to flow from a sexual assault on a child. These latter uses of this information are justified by the fact that representatives of all interests have agreed to its inclusion in the orientation materials for this use, and all participants in a hearing will have access to the orientation materials.

Wherever possible the adjudicator should use the information at the hearing to formulate questions to any witnesses who may be able to

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comment on it, or whose testimony it may contradict, support, or help explain. Where this is not possible, the proposed use in reaching a decision should be identified to the parties at the hearing to give them a chance to comment on it in their submissions, but so doing is not a condition precedent to the proposed use.

Where the material is used in coming to a finding of fact, or drawing an inference, it should be cited and its relevance and the rationale for its use set out in the decision.

Where orientation information provided to adjudicators does not represent uncontested facts or opinions, it may be used by adjudicators as follows:

Adjudicators may use this category of orientation materials as a basis for questioning witnesses, or testing the evidence, but may not rely on it as an independent basis for their conclusions of fact or their assessment of the actual impact of abuse on an individual.

2. Personal Knowledge of Abuse and its Impacts

Some adjudicators may bring to the job an extensive background in dealing with child abuse, or may receive information on child abuse and its impacts at training sessions or continuing education programs, or through their own reading or research.

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

Adjudicators may use their personal knowledge, training they have received, or general educational materials, as a basis for questioning witnesses, or testing the evidence, but may not rely on them as an independent basis for their conclusions of fact or their assessment of the actual impact of abuse on an individual.

3. Document Collections

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

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

Adjudicators are expected to inform themselves from this material, which may be used as a basis for findings of fact or credibility. Where any of it is so used by adjudicators, it must be cited and its relevance and the rationale for use set out in the report.

Because this information is specific to the school in question and is provided in advance, it is expected that adjudicators will be familiar with it

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before starting a hearing to which it is relevant. Given this, before relying on specific documents to help decide a given case, the adjudicator should seek the consent of the parties, or put the relevant extracts to any witnesses who may be able to comment on them, or whose testimony they may contradict or support. Where there are no such witnesses, or where one or more parties contest the use of the documents, the adjudicator may still use them in his or her decision, but wherever possible should advise the parties of the proposed use of the document so that they may address it in their submissions.

4. Previous findings

Adjudicators will hear evidence about, and make findings of fact about, the operations of various schools, their layouts, the conditions that pertained in them, the acts and knowledge of adult employees, and where an individual is found to have committed a number of assaults in a particular way, their *modus operandi*.

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

Adjudicators must treat each individual's claim as a unique claim to be determined on the evidence presented, plus information expressly permitted to be used according to the guidelines agreed to for this process. They may not carry forward, much less be bound by, previous findings they have made, including findings of credibility.

They may, though, use information from previous hearings to inquire about possible admissions, or failing that, to question witnesses. This ability to bring forward information from previous hearings for these specific purposes flows from the fact that this IAP is not a party-controlled adversarial process. Instead, the inquisitorial model is being used to have adjudicators inquire into what happened, using their skills and judgment to question witnesses to determine the facts.

While it would not be fair to base a decision on evidence from a previous hearing, since some or all of the parties would not know its context, and would be unable to challenge its reliability, it is also not appropriate to insist that adjudicators act as if each case were their first one. Their job requires them to test evidence and determine what happened. While they cannot call witnesses, it is their duty to question them, and they must be free to pose questions and follow lines of inquiry they believe to be relevant. Whether that belief flows from common sense, instinct, or something heard at another hearing, it is appropriate as a basis of inquiry, although, in the absence of an admission, not as evidence.

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5. Stare decisis

Although reasons will be issued in each case, the IAP will not operate on the basis of binding precedent. All adjudicators are of equal authority, and should not consider themselves bound by each other's previous decisions. Through conferencing, adjudicators may come to a common interpretation of certain procedural issues, but each case must be determined on its own merits.

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APPENDIX XI: TRANSITION FROM LITIGATION OR ADR PROJECTS, AND PRIORITIES FOR ACCESS TO THE IAP.

All IRS Claimants who meet the criteria for this IAP may apply to it for the validation of their claim except:

1. Claimants who have settled their IRS claim, whether in the litigation stream or the existing DR, except as provided for in the transition rules established by the Class Action Judgments.
2. Claimants whose claims have been dealt with at trial.

For greater certainty, participation in unsuccessful resolution discussions with the Government or a church in an attempt to settle claims does not preclude access to the IAP. Only where one of the above conditions applies will an application to enter the new process be rejected.

Rules for Pre-existing Evidence

Where a Claimant who has given evidence in a previous IRS proceeding in a pilot project, or in a hearing under the DR Model or this IAP (where a new hearing has been ordered following a review), or in litigation proceedings (including answers to interrogatories or participation in an examination for discovery), wants to and is eligible to enter the IAP:

- (i) the record of the previous evidence must be provided to the adjudicator in the IAP, who may use it as a basis to question the Claimant;
- (ii) the Claimant must appear before the adjudicator to give evidence, if a hearing is held;
- (iii) the Claimant may adopt their previous evidence rather than provide a narrative account at the hearing;
- (iv) the Claimant is subject to questioning by the adjudicator on the same basis as other Claimants.

The fact that a case is transferred from litigation where documentary rules are different does not change the kinds of documents permitted in proceedings under the IAP. For greater certainty, the only expert assessments permitted in this IAP are those conducted by an agreed-upon expert on the order of, and under the direction of, an adjudicator.

Potential for Expediting the Transfer

To expedite transition to the new system, and reduce the burden of completing an application in circumstances where the Claimant has already given evidence, counsel for

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the Government and the claimant should endeavour to develop an agreed statement of fact on some or all of the issues based on the evidence given.

Phasing of Acceptance into the IAP

In considering applications to the IAP, including applications to the DR Model which are transferred to the IAP, priority will be given, in order, to:

- a) Applications from persons who submit a doctor's certificate indicating that they are in failing health such that further delay would impair their ability to participate in a hearing;
- b) Applications from persons 70 years of age and over;
- c) Applications from persons 60 years of age and over;
- d) Persons who have completed examinations for discovery;
- e) Persons who are applying as members of groups.

Among persons in categories d or e, above, the health of any alleged perpetrator who has indicated they will give evidence at a hearing may be used to establish priority.

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APPENDIX XII: FORMAT FOR DECISIONS

Adjudicators must produce a decision outlining and supporting their findings in each case. To help ensure consistency, fairness and efficiency, these decisions must be prepared in a standard format.

The decisions are primarily to explain to the parties how the adjudicator's decision was reached, but they must also support and facilitate consultation among adjudicators, and review for error.

The format does not contemplate a narrative exposition of the evidence heard. Instead, it requires a focus on findings, and the rationale for those findings. A transcript of the evidence will be available for Claimants who wish a record of their testimony; it is not the purpose of the report to provide such a record. Similarly, the transcript will be available for a review; the evidence need not be summarized in the decision for those purposes.

While an arbitrary page limit will not be set, it is expected that most decisions will be in the range of 6-10 pages. The approved format is as follows:

A. Summary

1. Summary of allegations
2. Summary of conclusions

B. Decision

Where the claim was proven in whole or in part state the compensation awarded. Where the claim is not established, state that it is dismissed.

C. Analysis

1. Outline each specific allegation or linked series of allegations, and set out the findings of fact pertinent to it. Do not outline the evidence as a whole.
2. In making findings for each abuse allegation or series of linked abuse allegations:
 - a. if the evidence was uncontradicted, indicate whether, and the basis on which, it was found credible or not credible, or
 - b. if there was conflicting evidence, indicate which evidence was found credible and why, and
 - c. having regard to the evidence found credible, outline whether, and the basis on which, the civil standard of proof was found to have been met, or not met.

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3. Having regard to the proven allegations as a whole, outline the harms, impacts and aggravating factors found, or not found, to have been established on the civil standard of proof, along with the basis for those findings. For the proven harms and impacts, indicate whether, and on what evidence, the Claimant has established causation of the proven harms as required under this IAP.
4. In relation to the proven acts, and the proven and plausibly-linked harms and impacts, outline the calculation of compensation by indicating:
 - a. The most serious proven acts, the applicable range, and the rationale for the points assessed within the applicable range
 - b. The most serious proven harms for which causation pursuant to this IAP has been proven, the applicable range, and the rationale for the points assessed within the applicable range.
 - c. The proven aggravating factors, and the rationale for the percentage found appropriate.
 - d. The most serious proven opportunity loss for which causation pursuant to this IAP has been proven and the rationale for the points assessed within the relevant category.
 - e. In the case of an actual income loss assessment, the evidence and caselaw relied upon for the assessment.
 - f. Findings and rationale for any future care compensation assessed.

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APPENDIX XIII TO THE IAP: APPOINTMENT PROCESSES AND TRANSITION
PROVISIONS FOR THE OVERSIGHT COMMITTEE, THE CHIEF ADJUDICATOR
AND THE ADJUDICATORS

Former IRS Student Representatives on the Oversight Committee

The AFN shall designate one former student to serve on the Oversight Committee, and another to serve as an alternate, as shall collectively the Inuit organizations which under the Settlement Agreement have a representative on the NAC.

Default

In the event that the designations are not made, the NCC (once established, the NAC) shall make the appointment or appointments, following consultations with representative aboriginal organizations.

Plaintiff Counsel Representatives on the Oversight Committee

The plaintiffs' counsel bodies represented on the NCC shall designate the first two plaintiffs' counsel to serve on the Oversight Committee, plus one alternate, with subsequent designations being made by the plaintiffs' counsel bodies represented on the NAC.

In the event that the designations are not made, the NCC (once established, the NAC) shall make the appointments.

Church Representatives on the Oversight Committee

The denominations which are a party to the Settlement Agreement shall collectively designate two representatives, plus one alternate, to serve on the Oversight Committee.

In the event that the designations are not made, the NCC (once established, the NAC) shall make the appointments.

Government of Canada Representatives on the Oversight Committee

The government shall designate two representatives plus one alternate to serve on the Oversight Committee.

Neutral Chair of the Oversight Committee

The first chair shall be a person nominated by the Hon. Frank Iacobucci and approved by at least 6 members of the NCC. Subsequent chairs shall be a person nominated by the outgoing chair and approved by at least 6 members of the NAC. If a chair dies or is incapacitated before making a nomination, the nomination shall be made by majority vote of the Oversight Committee.

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Chief Adjudicator and Adjudicators

The government shall issue RFPs for the positions of Chief Adjudicator and Adjudicators for the IAP, following the applicable recruitment processes for positions of this kind. For the first recruitment process, the terms of the RFPs shall be substantially the same as the terms used to recruit similar positions under the DR Model. Any proposed changes from those terms shall be discussed with the NCC before being adopted. For subsequent recruitments, the RFPs shall be on terms which are substantially the same as the terms of the first RFPs, with any proposed changes being discussed with the NAC.

Chief Adjudicator

The Chief Adjudicator shall be chosen by the unanimous agreement of a selection board composed of one representative of each of former students, plaintiffs' counsel, church entities, and government. These members of the selection board shall be appointed by the representatives of those interests serving on the Oversight Committee when the appointment is to be made.

Adjudicators

The adjudicators, other than adjudicators previously appointed for the DR Model, shall be chosen by the unanimous agreement of a selection board composed of one representative of each of former students, plaintiffs' counsel, church entities, and government. These members of the selection board shall be appointed by the representatives of those interests serving on the Oversight Committee when the appointment is to be made. The selection board shall conduct its interviews and make its selections with the non-voting participation of the Chief Adjudicator or his or her designate. More than one selection board may be appointed to operate concurrently.

Transition

Until the conclusion of the above competitions, the Chief Adjudicator under the DR Model and any of the Process A adjudicators designated for the purpose by the Chief Adjudicator shall discharge the corresponding functions under the IAP. For greater certainty, existing DR Model adjudicators must compete for ongoing appointments under the IAP, but may continue to hear DR matters until the expiry of their appointments thereunder.

Adjudicators appointed for the DR Model who apply to become IAP adjudicators shall be chosen by a selection board composed of one representative of each of former students, plaintiffs' counsel, church entities, and government. These members of the selection board shall be appointed by the representatives of those interests serving on the Oversight Committee when the appointment is to be made. More than one selection board may be appointed to operate concurrently.

The selection board shall conduct its interviews and make its selections with the non-voting participation of the Chief Adjudicator or his or her designate. If a decision cannot

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be reached by consensus, the Chief Adjudicator or designate may vote, with four affirmative votes being required for the selection of a candidate.

Designations of representatives for the Oversight Committee shall be made, and the neutral chair shall be selected, within 60 days of the date of the last of the Approval Orders.

The Chief Adjudicator Reference Group established for the DR Model shall act as the Oversight Committee until the latter is established

[Click here](#) if you would like to see a draft of the IAP Application Form.

The IAP Application Form is a DRAFT only and cannot be printed; a final version for the form will be made available following the approval and implementation of the Settlement Agreement.

Appendix B

SCHEDULE "N"

MANDATE FOR THE TRUTH AND RECONCILIATION COMMISSION

There is an emerging and compelling desire to put the events of the past behind us so that we can work towards a stronger and healthier future. The truth telling and reconciliation process as part of an overall holistic and comprehensive response to the Indian Residential School legacy is a sincere indication and acknowledgement of the injustices and harms experienced by Aboriginal people and the need for continued healing. This is a profound commitment to establishing new relationships embedded in mutual recognition and respect that will forge a brighter future. The truth of our common experiences will help set our spirits free and pave the way to reconciliation.

Principles

Through the Agreement, the Parties have agreed that an historic Truth and Reconciliation Commission will be established to contribute to truth, healing and reconciliation.

The Truth and Reconciliation Commission will build upon the "Statement of Reconciliation" dated January 7, 1998 and the principles developed by the Working Group on Truth and Reconciliation and of the Exploratory Dialogues (1998-1999). These principles are as follows: accessible; victim-centered; confidentiality (if required by the former student); do no harm; health and safety of participants; representative; public/transparent; accountable; open and honourable process; comprehensive; inclusive, educational, holistic, just and fair, respectful; voluntary; flexible; and forward looking in terms of rebuilding and renewing Aboriginal relationships and the relationship between Aboriginal and non-Aboriginal Canadians.

Reconciliation is an ongoing individual and collective process, and will require commitment from all those affected including First Nations, Inuit and Métis former Indian Residential School (IRS) students, their families, communities, religious entities, former school employees, government and the people of Canada. Reconciliation may occur between any of the above groups.

Terms of Reference

1. Goals

The goals of the Commission shall be to:

- (a) Acknowledge Residential School experiences, impacts and consequences;
- (b) Provide a holistic, culturally appropriate and safe setting for former students, their families and communities as they come forward to the Commission;

- (c) Witness,¹ support, promote and facilitate truth and reconciliation events at both the national and community levels;
- (d) Promote awareness and public education of Canadians about the IRS system and its impacts;
- (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 Agreement² a report including recommendations³ 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;
- (g) Support commemoration of former Indian Residential School students and their families in accordance with the Commemoration Policy Directive (Schedule "X" of the Agreement).

2. Establishment, Powers, Duties and Procedures of the Commission

The Truth and Reconciliation Commission shall be established by the appointment of "the Commissioners" by the Federal Government through an Order in Council, pursuant to special appointment regulations.

Pursuant to the Court-approved final settlement agreement and the class action judgments, the Commissioners:

- (a) in fulfilling their Truth and Reconciliation Mandate, are authorized to receive statements and documents from former students, their families, community and all other interested participants, and, subject to (f), (g) and (h) below, make use of all documents and materials produced by the parties. Further, 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;

¹ This refers to the Aboriginal principle of "witnessing".

² The Government of Canada undertakes to provide for wider dissemination of the report pursuant to the recommendations of the Commissioners

³ The Commission may make recommendations for such further measures as it considers necessary for the fulfillment of the Truth and Reconciliation Mandate and goals.

- (b) shall not hold formal hearings, nor act as a public inquiry, nor conduct a formal legal process;
- (c) shall not possess subpoena powers, and do not have powers to compel attendance or participation in any of its activities or events. Participation in all Commission events and activities is entirely voluntary;
- (d) may adopt any informal procedures or methods they may consider expedient for the proper conduct of the Commission events and activities, so long as they remain consistent with the goals and provisions set out in the Commission's mandate statement;
- (e) may, at its discretion, hold sessions in camera, or require that sessions be held in camera;
- (f) shall perform their duties in holding events, in activities, in public meetings, in consultations, in making public statements, and in making their report and recommendations without making any findings or expressing any conclusion or recommendation, regarding the misconduct of any person, unless such findings or information has already been established through legal proceedings, by admission, or by public disclosure by the individual. Further, the Commission shall not make any reference in any of its activities or in its report or recommendations to the possible civil or criminal liability of any person or organization, unless such findings or information about the individual or institution has already been established through legal proceedings;
- (g) shall not, except as required by law, use or permit access to statements made by individuals during any of the Commissions events, activities or processes, except with the express consent of the individual and only for the sole purpose and extent for which the consent is granted;
- (h) shall not name names in their events, activities, public statements, report or recommendations, or make use of personal information or of statements made which identify a person, without the express consent of that individual, unless that information and/or the identity of the person so identified has already been established through legal proceedings, by admission, or by public disclosure by that individual. Other information that could be used to identify individuals shall be anonymized to the extent possible;
- (i) notwithstanding (e), shall require in camera proceedings for the taking of any statement that contains names or other identifying information of persons alleged by the person making the statement of some wrong doing, unless the person named or identified has been convicted for the alleged wrong doing. The Commissioners shall not record the names of persons so identified, unless the person named or identified has been

convicted for the alleged wrong doing. Other information that could be used to identify said individuals shall be anonymized to the extent possible;

- (j) shall not, except as required by law, provide to any other proceeding, or for any other use, any personal information, statement made by the individual or any information identifying any person, without that individual's express consent;
- (k) shall ensure that the conduct of the Commission and its activities do not jeopardize any legal proceeding;
- (l) may refer to the NAC for determination of disputes involving document production, document disposal and archiving, contents of the Commission's Report and Recommendations and Commission decisions regarding the scope of its research and issues to be examined. The Commission shall make best efforts to resolve the matter itself before referring it to the NAC.

3. Responsibilities

In keeping with the powers and duties of the Commission, as enumerated in section 2 above, the Commission shall have the following responsibilities:

- (a) to employ interdisciplinary, social sciences, historical, oral traditional and archival methodologies for statement-taking, historical fact-finding and analysis, report-writing, knowledge management and archiving;
- (b) to adopt methods and procedures which it deems necessary to achieve its goals;
- (c) to engage the services of such persons including experts, which it deems necessary to achieve its goals;
- (d) to establish a research centre and ensure the preservation of its archives;
- (e) to have available the use of such facilities and equipment as is required, within the limits of appropriate guidelines and rules;
- (f) to hold such events and give such notices as appropriate. This shall include such significant ceremonies as the Commission sees fit during and at the conclusion of the 5 year process;
- (g) to prepare a report;
- (h) to have the report translated in the two official languages of Canada and all or parts of the report in such Aboriginal languages as determined by the Commissioners;

- (i) to evaluate commemoration proposals in line with the Commemoration Policy Directive (Schedule "X" of the Agreement).

4. Exercise of Duties

As the Commission is not to act as a public inquiry or to conduct a formal legal process, it will, therefore, not duplicate in whole or in part the function of criminal investigations, the Independent Assessment Process, court actions, or make recommendations on matters already covered in the Agreement. In the exercise of its powers the Commission shall recognize:

- (a) the unique experiences of First Nations, Inuit and Métis former IRS students, and will conduct its activities, hold its events, and prepare its Report and Recommendations in a manner that reflects and recognizes the unique experiences of all former IRS students;
- (b) that the truth and reconciliation process is committed to the principle of voluntariness with respect to individuals' participation;
- (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;
- (d) the significance of Aboriginal oral and legal traditions in its activities;
- (e) that as part of the overall holistic approach to reconciliation and healing, the Commission should reasonably coordinate with other initiatives under the Agreement and shall acknowledge links to other aspects of the Agreement such that the overall goals of reconciliation will be promoted;
- (f) that all individual statements are of equal importance, even if these statements are delivered after the completion of the report;
- (g) that there shall be an emphasis on both information collection/storage and information analysis.

5. Membership

The Commission shall consist of an appointed Chairperson and two Commissioners, who shall be persons of recognized integrity, stature and respect.

- (a) Consideration should be given to at least one of the three members being an Aboriginal person;
- (b) Appointments shall be made out of a pool of candidates nominated by former students, Aboriginal organizations, churches and government;

- (c) The Assembly of First Nations (AFN) shall be consulted in making the final decision as to the appointment of the Commissioners.

6. Secretariat

The Commission shall operate through a central Secretariat.

- (a) There shall be an Executive Director in charge of the operation of the Commission who shall select and engage staff and regional liaisons;
- (b) The Executive Director and the Secretariat shall be subject to the direction and control of the Commissioners;
- (c) The Secretariat shall be responsible for the activities of the Commission such as:
 - (i) research;
 - (ii) event organization;
 - (iii) statement taking/truth-sharing;
 - (iv) obtaining documents;
 - (v) information management of the Commission's documents;
 - (vi) production of the report;
 - (vii) ensuring the preservation of its records;
 - (viii) evaluation of the Commemoration Policy Directive proposals.
- (d) The Executive Director and Commissioners shall consult with the Indian Residential School Survivor Committee on the appointment of the Regional Liaisons.
- (e) Regional liaisons shall:
 - (i) act as knowledge conduits and promote sharing of knowledge among communities, individuals and the Commission;
 - (ii) provide a link between the national body and communities for the purpose of coordinating national and community events;
 - (iii) provide information to and assist communities as they plan truth and reconciliation events, coordinate statement-taking/truth-sharing and event-recording, and facilitate information flow from the communities to the Commission.

7. Indian Residential School Survivor Committee (IRSSC)

The Commission shall be assisted by an Indian Residential School Survivor Committee (IRSSC).

- (a) The Committee shall be composed of 10 representatives drawn from various Aboriginal organizations and survivor groups. Representation shall be regional, reflecting the population distribution of Indian Residential Schools (as defined in the Agreement). The majority of the representatives shall be former residential school students;
- (b) Members of the Committee shall be selected by the Federal Government, in consultation with the AFN, from a pool of eligible candidates developed by the stakeholders;
- (c) Committee members are responsible for providing advice to the Commissioners on:
 - (i) the characteristics of a "community" for the purposes of participation in the Commission processes;
 - (ii) the criteria for the community and national processes;
 - (iii) the evaluation of Commemoration Policy Directive proposals;
 - (iv) such other issues as are required by the Commissioners.

8. Timeframe

The Commission shall complete its work within five years. Within that five year span, there are two timelines:

Two Year Timeline

- (a) Preparation of a budget within three months from being launched, under the budgetary cap provision in the Agreement;
- (b) Completion of all national events, and research and production of the report on historic findings and recommendations, within two years of the launch of the Commission, with the possibility of a 6 month extension, which shall be at the discretion of the Commissioners.

Five Year Timeline

- (a) Completion of the community truth and reconciliation events, statement taking/truth sharing, reporting to the Commission from communities, and closing ceremonies;
- (b) Establishment of a research centre.

9. Research

The Commission shall conduct such research, receive and take such statements and consider such documents as it deems necessary for the purpose of achieving its goals.

10. Events

There are three essential event components to the Truth and Reconciliation Commission: National Events, Community Events and Individual Statement-Taking/Truth Sharing. The Truth and Reconciliation process will be concluded with a final Closing Ceremony.

(A) National Events

The national events are a mechanism through which the truth and reconciliation process will engage the Canadian public and provide education about the IRS system, the experience of former students and their families, and the ongoing legacies of the institutions.

The Commission shall fund and host seven national events in different regions across the country for the purpose of:

- (a) sharing information with/from the communities;
- (b) supporting and facilitating the self empowerment of former IRS students and those affected by the IRS legacy;
- (c) providing a context and meaning for the Common Experience Payment;
- (d) engaging and educating the public through mass communications;
- (e) otherwise achieving its goals.

The Commission shall, in designing the events, include in its consideration the history and demographics of the IRS system.

National events should include the following common components:

- (f) an opportunity for a sample number of former students and families to share their experiences;
- (g) an opportunity for some communities in the regions to share their experiences as they relate to the impacts on communities and to share insights from their community reconciliation processes;
- (h) an opportunity for participation and sharing of information and knowledge among former students, their families, communities, experts, church and government officials, institutions and the Canadian public;

- (i) ceremonial transfer of knowledge through the passing of individual-statement transcripts or community reports/statements. The Commission shall recognize that ownership over IRS experiences rests with those affected by the Indian Residential School legacy;
- (j) analysis of the short and long term legacy of the IRS system on individuals, communities, groups, institutions and Canadian society including the intergenerational impacts of the IRS system;
- (k) participation of high level government and church officials;
- (l) health supports and trauma experts during and after the ceremony for all participants.

(B) Community Events

It is intended that the community events will be designed by communities and respond to the needs of the former students, their families and those affected by the IRS legacy including the special needs of those communities where Indian Residential Schools were located.

The community events are for the purpose of:

- (a) acknowledging the capacity of communities to develop reconciliation practices;
- (b) developing collective community narratives about the impact of the IRS system on former students, families and communities;
- (c) involving church, former school employees and government officials in the reconciliation process, if requested by communities;
- (d) creating a record or statement of community narratives - including truths, insights and recommendations - for use in the historical research and report, national events, and for inclusion in the research centre;
- (e) educating the public and fostering better relationships with local communities;
- (f) allowing for the participation from high level government and church officials, if requested by communities;
- (g) respecting the goal of witnessing in accordance with Aboriginal principles.

The Commission, during the first stages of the process in consultation with the IRSSC, shall develop the core criteria and values consistent with the Commission's mandate that will guide the community processes.

Within these parameters communities may submit plans for reconciliation processes to the Commission and receive funding for the processes within the limits of the Commission's budgetary capacity.

(C) Individual Statement-Taking/Truth Sharing

The Commission shall coordinate the collection of individual statements by written, electronic or other appropriate means. Notwithstanding the five year mandate, anyone affected by the IRS legacy will be permitted to file a personal statement in the research centre with no time limitation.

The Commission shall provide a safe, supportive and sensitive environment for individual statement-taking/truth sharing.

The Commission shall not use or permit access to an individual's statement made in any Commission processes, except with the express consent of the individual.

(D) Closing Ceremony

The Commission shall hold a closing ceremony at the end of its mandate to recognize the significance of all events over the life of the Commission. The closing ceremony shall have the participation of high level church and government officials.

11. 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.

12. National Research Centre

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.

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.

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 of records, all materials collected through this process should be accessible to the public.

13. Privacy

The Commission shall respect privacy laws, and the confidentiality concerns of participants. For greater certainty:

- (a) any involvement in public events shall be voluntary;
- (b) notwithstanding 2(i), the national events shall be public or in special circumstances, at the discretion of the Commissioners, information may be taken in camera;
- (c) the community events shall be private or public, depending upon the design provided by the community;
- (d) if an individual requests that a statement be taken privately, the Commission shall accommodate;
- (e) documents shall be archived in accordance with legislation.

14. Budget and Resources

The Commission shall prepare a budget within the first three months of its mandate and submit it to the Minister of Indian Residential Schools Resolution Canada for approval. Upon approval of its budget, it will have full authority to make decisions on spending, within the limits of, and in accordance with, its Mandate, its establishing Order in Council, Treasury Board policies, available funds, and its budgetary capacity.

The Commission shall ensure that there are sufficient resources allocated to the community events over the five year period. The Commission shall also ensure that a portion of the budget is set aside for individual statement-taking/truth sharing and to archive the Commission's records and information.

Institutional parties shall bear the cost of participation and attendance in Commission events and community events, as well as provision of documents. If requested by the party providing the documents, the costs of copying, scanning, digitalizing, or otherwise reproducing the documents will be borne by the Commission.

LARRY PHILIP FONTAINE
et al.

-and-

THE ATTORNEY GENERAL OF CANADA
et al.

Court of Appeal File No.: 59310, 59311, 59320

Plaintiffs (Respondents in
Appeal)

Defendants (Appellants and Respondents in
Appeal and Cross-Appeal)

Court File No.: 00-CV-192059CP

COURT OF APPEAL FOR ONTARIO

Proceeding Commenced at Toronto

UPDATED FACTUM OF THE CHIEF ADJUDICATOR
(Respondent) WITH REFERENCE TO THE JOINT
COMPENDIUM OF DOCUMENTS AND BOOK OF
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