CITATION: Fontaine v. Canada (Attorney General), 2014 ONSC 4585
COURT FILE NO.: 00-CV-129059
DATE: 20140806

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Plaintiffs

- and -

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

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

Defendants

COUNSEL:

- *Julian N. Falconer, Julian K. Roy,* and *Junaid K. Subhan*, for the Truth and Reconciliation Commission
- *Joanna Birenbaum*, for the National Centre for Truth and Reconciliation
- *William C. McDowell, Jonathan E. Laxer* and *Susan E. Ross*, for the Chief Adjudicator of the Indian Residential Schools Adjudication Secretariat (Canada)
- *Paul Vickery, Catherine Coughlan* and *Brent Thompson*, for the Attorney General of Canada
- *Charles M. Gibson* and *Ian Houle*, for the Sisters of St. Joseph of Sault Ste. Marie
- *Stuart Wuttke*, for the Assembly of First Nations (in writing)
- *W.R. Donlevy, Q.C.*, and *Janine L. Harding*, for Twenty-Four Catholic Entities
- *Pierre-L. Baribeau*, for Nine Catholic Entities
- *Peter R. Grant, Diane Soroka,* and *Sandra Staats*, for Independent Counsel

HEARING DATES: July 14-16, 2014

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] Can and should this court order that documents that contain information about what happened at the Indian Residential Schools be destroyed?

[2] My answer to this question is: yes, destruction, but only after a 15-year retention period, during which the survivors of the Indian Residential Schools may choose to spare some of their documents from destruction and instead have the documents with redactions to protect the personal information of others transferred to the National Research Centre for Truth and Reconciliation ("NCTR").

[3] During the 15-year of the retention period, there shall be a court approved notice program to advise the survivors of their choice to transfer some of the documents instead of having the documents destroyed.

B. OVERVIEW

[4] Under the Indian Residential Schools Settlement Agreement ("IRSSA"), the parties agreed to establish an Independent Assessment Process ("IAP") to pay Claimants compensation for claims of sexual abuse, serious physical abuse, and other wrongful acts suffered by them when they were students at Indian Residential Schools.

[5] Under the IRSSA, the parties also agreed to establish a Truth and Reconciliation Commission ("TRC") to create a historical record of the residential school system and ensure its legacy is preserved and made accessible to the public for future study and use.

[6] The Chief Adjudicator of the IAP and the TRC each bring a Request for Directions ("RFD") about what is to happen to documents produced and prepared for the IAP ("IAP Documents"), which contain narratives about what happened at the schools.

[7] The Chief Adjudicator seeks an order that the IAP Documents be destroyed. In the other RFD, although it was not its initial request, the TRC seeks an order that the IAP Documents, which it regards as an irreplaceable historical record of the Indian Residential School experience, be archived at Library and Archives Canada ("LAC"), which is a part of the Government of Canada.

[8] The Chief Adjudicator and the TRC both seek a direction that a notice program be developed to inform Claimants that some of their IAP Documents, particularly redacted memorialization transcripts of the IAP hearing, may be archived at the National Research Centre for Truth and Reconciliation ("NCTR"), if the Claimant consents.

[9] The NCTR, another invention of the IRSSA, submitted that it is well-positioned to protect the privacy interests of all affected parties and able to ensure that the perspectives of Aboriginal peoples are brought to bear on the preservation of the documents.

[10] The Sisters of St. Joseph of Sault Ste. Marie (the "Sisters of St. Joseph") bring a motion to quash the RFDs on the grounds that the TRC and the Chief Adjudicator do not have standing to bring the RFDs.

[11] Further, the Sisters of St. Joseph submit that it is the responsibility of the National Administration Committee ("NAC"), another agency of the IRSSA, to determine disputes involving document production, disposal, and archiving, and, thus, the RFDs are premature and the RFDs should be redirected to the NAC. The Chair of the NAC stated, however, that the court should decide the RFDs.

[12] The Assembly of First Nations ("AFN"), Twenty-Four Catholic entities (the "Twenty-Four Catholic Entities"), Nine Catholic Entities (the "Nine Catholic Entities"), the Sisters of St. Joseph, and "Independent Counsel," lawyers who acted for IAP Claimants, support a court order for destruction of the IAP Documents.

[13] The Government of Canada ("Canada"), which possesses a complete set of the IAP Documents, opposes the destruction of the IAP Documents which it says it possesses and, without interference, controls as government records.

[14] Canada's plan for the IAP Documents is to have Aboriginal Affairs and Northern Development Canada ("AANDC"), a government department, retain the documents for a retention period and then after the retention period, AANDC will transfer to LAC those IAP Documents identified as having "historical or archival value." The transfer will include the adjudicators' decisions and perhaps the transcripts of the IAP hearings. Under Canada's plan, the remaining IAP Documents will remain under the control of AANDC, but these documents eventually will be destroyed at a time of Canada's choosing.

[15] I pause here to note that it is a matter of concern raised by AFN and several others that pursuant to the *Access to Information Act*, R.S.C. 1985, c. A-1 and the *Privacy Act*, R.S.C. 1985, c. P-21, LAC would be able to release information to third parties in specific circumstances, for example for research for statistical purposes, for native claims, or in the public interest. Further,

the regulations to the *Privacy Act* provide that an individual's personal information that is transferred to LAC by a government institution may be disclosed for research purposes 110 years after the birth of the individual. This concerns the AFN because many IAP Claimants are elderly and although personal information would not be disclosed while they are alive, personal information about them would be disclosed during the lifetimes of their children and grandchildren.

[16] Canada supports the idea that a notice program be developed to inform Claimants that their IAP Documents may be archived at the NCTR if the Claimant consents. To facilitate obtaining consents, Canada is prepared to undertake a court approved program. However, Canada says that the court has no jurisdiction to order a Notice Program. Canada's undertaking is entirely gratuitous.

[17] For the reasons that follow, I grant the Chief Adjudicator's request that the IAP Documents be destroyed. I make *in rem* - against the world - the following Order. It is ordered that: (a) with the redaction of personal information about alleged perpetrators or affected parties and with the consent of the Claimant, his or her IAP Application Form, hearing transcript, hearing audio recording, and adjudicator's decision may be archived at the NCTR; (b) Canada shall retain all IAP Documents for 15 years after the completion of the IAP hearings; (c) after the retention period, Canada shall destroy all IAP Documents; (d) any other person or entity in possession of IAP Documents shall destroy them after the completion of the IAP hearings.

[18] Further, I direct that the TRC or the NCTR may give Claimants notice that with the Claimant's consent his or her IAP Application, hearing transcript, hearing audio recording and adjudicator's decision may be archived at the NCTR. The archiving of the document would be conditional on any personal information about alleged perpetrators or affected parties being redacted from the IAP Document. The court will settle the terms of the notice program at another RFD hearing that may be brought by the TRC or the NCTR.

[19] By way of overview, my conclusions are as follows:

- The TRC and the Chief Adjudicator have standing, and the court has the jurisdiction to hear the two RFDs.
- The IAP Documents are governed by: the IRSSA, the *Class Proceedings Act, 1992*, S.O. 1992, the court's jurisdiction as a superior court to fashion remedies, the implied undertaking, and the common law and equity.
- The IAP Documents are neither court records nor government records.
- The court's jurisdiction extends over Canada's possession of the IAP Documents even if they are government records.
- The IAP Documents are confidential and private documents both as a matter of contract and as matter of the common law and equity.
- Although the court does not have the jurisdiction to determine how the IAP Documents may be used by the IAP adjudicators, the court has the *in rem* (against the world) jurisdiction to direct how the IAP Documents may be retained, archived, or destroyed after the IAP is completed. This jurisdiction exists regardless of whom has the custody or possession of the IAP Documents.
- The court's jurisdiction to control the disposition of the IAP Documents arises from three complementary sources; namely: (1) the court's jurisdiction to interpret, to enforce, and

to administer the IRSSA; (2) the court's jurisdiction with respect to the implied undertaking not to use documents produced in a litigious proceeding for a collateral purpose; and (3) the court's jurisdiction to remedy a breach of confidence.

- As a matter of contract interpretation, the IRSSA promises the destruction of the IAP Documents after a retention period during which the confidentiality of the documents can be abrogated only by court order for such matters as criminal proceedings or child protection proceedings. The court has the jurisdiction to determine a reasonable retention period which in this case would be 15 years.
- The court can and should exercise its jurisdiction to make a Destruction Order subject to a retention period of 15 years.
- Further, the court should order that a notice program be developed to notify Claimants that provided that the personal information about alleged perpetrators or affected parties is redacted, the Claimant's IAP Documents may be archived at the NCTR.
- The Destruction Order is not an amendment to the IRSSA and would safeguard against a breach of the agreement and against breaches of confidence.
- The Destruction Order is necessary: (a) to protect the confidentiality and privacy of the information contained in the IAP Documents; and (b) to prevent a serious risk to the administration of the IAP and the IRSSA.
- A notice plan to encourage voluntary delivery by Claimants of IAP Documents to the TRC and the NCTR with redactions to protect the personal information of others is an excellent idea, but involuntary disclosure of the IAP Documents would be a grievous betrayal of trust, a breach of the IRSSA, and it would foster enmity and new harms, not reconciliation.
- Destroying the IAP Documents is more likely to foster reconciliation, one of the goals of the IRSSA, but more to the point, destruction of the IAP Documents is what the parties contracted for under the IRSSA and destruction of the IAP Documents is what the common law and equity require.
- The destruction of the documents, however, should not come too soon because a survivor of the Indian Residential Schools may change his or her mind about the destruction of the IAP Documents. It is the survivor's story to tell or not tell and it is the survivor's individual decision that must be respected.

C. METHODOLOGY

[20] The two RFDS, the motion to quash, the competing plans and proposals for the IAP Documents raise a labyrinth of profound issues, some legal, some ethical, some political, some collective, and some intensely private and personal. The court's jurisdiction to respond to the RFDs is limited to its legal sphere. The court has no plenary jurisdiction to make a different settlement for the parties.

[21] By way of methodology, I will in these Reasons for Decision chart a route through the labyrinth of legal issues to the conclusion-exit that the court may and should direct the destruction of the IAP Documents, some immediately after the completion of the IAP, and the others after a 15-year retention period.

[22] It is in the nature of a labyrinth that its pathways meander, and it is in the nature of a labyrinth that it is difficult to find one's way out or to reach the exit. The route that I will chart has the following major guideposts or headings:

- Introduction
- Overview
- Methodology
- *Dramatis Personae*, the Infrastructure of the IRSSA and Canada's Roles
- The Arguments of the IRSSA Parties and Participants
- Evidentiary Background
- Principles of Contractual Interpretation Applicable to the IRSSA
- Factual Background
    - The IRSSA
    - The TRC
    - The NCTR
    - The IAP Procedure
    - Nature, Categorization, and the Confidentiality of the IAP Documents
    - Canada's Custody and Control of the IAP Documents and its Plan for Them
    - The Historical Value and Reliability of the IAP Documents
    - The History of the RFDs
- Discussion and Analysis
    - Introduction
    - The TRC's and the Chief Adjudicator's Standing
    - What Can and Should Happen to the IAP Documents?
- Conclusion

[23] Before getting underway, it is helpful to explain why several topics, some legal and some factual, must be explored in the discussion that follows, and it is helpful to say something about the reasons behind the ordering of the topic headings.

[24] In the case at bar, a better understanding of what is important in the factual account and to the eventual analysis is achieved by outlining the parties' legal arguments, the sources of their evidence, and the principles of contract interpretation before describing the facts and before undertaking the legal analysis.

[25] A fundamental component of the discussion and analysis will involve an interpretation of the IRSSA. As is normal in contract interpretation cases, it is necessary to understand the contractual nexus. It is a canon of contract interpretation that while evidence of negotiations and of the parties' subjective intent is not admissible to interpret the contract, in interpreting a contract, the court may have regard to the surrounding circumstances; that is, the factual background and the purpose of the contract: *Canada Square Corp. v. VS Services Ltd.* (1981), 34 O.R. (2d) 250 (C.A); *Prenn v. Simmonds*, [1971] 3 All E.R. 240 (H.L.); *Reardon Smith Line v. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.).

[26] In the case at bar, the factual nexus involves understanding the circumstances that led to the signing of the IRSSA, and the factual nexus includes the purposes of the negotiations, the subjective aspirations and needs of the negotiating parties, and what they respectively had to sacrifice in order to achieve a settlement.

[27] All the parties to the RFDs, several of whom were not in existence at the time of the negotiations, led evidence about what the negotiators intended to achieve and what they had to sacrifice in signing the IRSSA. I have considered this evidence for the purpose of understanding the factual nexus of the IRSSA and also to understand the factual nexus of the various court orders that followed the parties' agreement. I have used the evidence solely for the purpose of understanding the surrounding circumstances and the goals to be achieved by the IRSSA.

[28] I do not use the evidence of the subjective intentions of the parties to supersede the language finally adopted by the parties.

[29] In these Reasons for Decision, before describing the complex factual background, it is necessary and helpful to identify and to describe the *dramatis personae* of the IRSSA, some of whom are creatures of the IRSSA itself, and to describe the elaborate infrastructure of the IRSSA.

[30] Particularly important to understanding these Reasons for Decision are the multifarious emanations of Canada and the different roles played by Canada. This is important because some of the parties' arguments focus or pivot on the nature of Canada's custody and control of the IAP Documents. For instance, Canada's argument relies on its own nature as a governing institution and on the nature of its possession of the IAP Documents. Metaphorically speaking, Canada views its handling of the IAP Documents as its right hand (AANDC) handing the documents to its left hand (LAC) and it says that it always has control over its government records.

[31] In a few instances, as I proceed through the sections of these Reasons for Decision, it shall be convenient to decide a legal issue before the analysis and discussion portion of these Reasons for Decision. For example, I shall discuss the principles of contract interpretation applicable to the IRSSA before I discuss the factual background and before I explain the analysis of the RFDs.

D. *DRAMATIS PERSONAE*, THE INFRASTRUCTURE OF THE IRSSA, AND CANADA'S ROLES

1. *Dramatis Personae* and the Infrastructure of the IRSSA

[32] There are four major components to the IRSSA. First, Canada placed $1.9 billion into a trust fund to fund payments of the "Common Experience Payment" ("CEP") to Class Members who resided at an Indian Residential School during the class period. Based on residence eligibility, a Class Member receives $10,000.00 for the first year and $3,000.00 for each additional year at any acknowledged Residential School. Second, the IRSSA established the Independent Assessment Process ("IAP") under which Class Members who suffered physical or sexual abuse at an Indian Residential School may claim compensation commensurate with the seriousness of their injuries. Third, the IRSSA established the Truth and Reconciliation Commission ("TRC") with a mandate to create an historical record of the residential school system to be preserved and made accessible to the public for future study. The fourth component is that the Class Members released their legal claims in exchange for the benefits of the IRSSA. The releases extended to Canada and the Church Entities who were the named Defendants. The releases also extended to the Defendants' employees, agents, officers, directors, shareholders,

partners, principals, members, attorneys, insurers, subrogees, representatives, executors, administrators, predecessors, successors, heirs, transferees and assigns.

[33] Nine provincial and territorial superior courts certified the class action and approved the the IRSSA. The judges of the nine courts are designated as **Supervising Judges**. Supervising judges can hear applications to add institutions to the list of Indian Residential Schools for the purpose of CEP and IAP claims. Among other things, supervising judges hear appeals from decisions of the NAC with respect to eligibility for the CEP. Supervising judges hear RFDs, and the judges have administrative and supervisory jurisdiction over the IRSSA.

[34] Two of the Supervising Judges are **Administrative Judges**. Under the Court Administration Protocol the two Administrative Judges receive and evaluate RFDs and determine whether a hearing is necessary, and if so, in which jurisdiction.

[35] The judges, however, cannot amend the IRSSA in the guise of administrating it. See: *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283; *Lavier v. MyTravel Canada Holidays Inc.*, 2011 ONSC 3149.

[36] Pursuant to the Implementation Order, **Court Counsel** was appointed as legal counsel to assist the courts in their supervision over the implementation and administration of the Agreement. Court Counsel's duties are determined by the courts. A solicitor-client relationship exists between the Supervising Judges and Court Counsel.

[37] Pursuant to the IRSSA Implementation Order, Crawford Class Action Services was appointed **Monitor** of the IRSSA. The role of the Monitor is to receive, on behalf of the supervising courts, all information relating to the implementation or administration of the CEP and the IAP. The Monitor is required to take directions from and report to the supervising courts about the implementation and administration of the IRSSA, as directed by the courts.

[38] **The National Administration Committee** ("NAC") supervises the implementation of the IRSSA. The NAC is comprised of seven representative members, including Canada, the AFN, Inuit Entities, Church Entities, and three representatives of plaintiffs' counsel.

[39] The NAC prepares policy protocols and standard operating procedures. The NAC hears appeals with respect to CEP eligibility. It also determines references from the TRC. To be adopted, NAC decisions require five votes in favour. If five votes are not reached, four NAC members may refer the dispute to the court in the jurisdiction where the dispute arose by way of a reference. Subsection 4.11(14) of the IRSSA stipulates that the unanimous consent of the NAC is required for an amendment to the IRSSA to be considered by the court.

[40] The **Oversight Committee** ("OC") is responsible for supervising the IAP. It is comprised of an independent Chair (Professor Mayo Moran, who until recently was Dean of the University of Toronto's Faculty of Law) and eight other members consisting of: two former students, two Class Counsel representatives, two Church representatives, and two representatives for Canada. OC decisions require seven votes in favour (with the Chair voting) to be adopted. The OC is responsible for the recruitment and oversight of the Chief Adjudicator, recruitment and appointment of adjudicators, approval of adjudicator training programs, recruitment and appointment of experts for psychological assessments, instructions about the interpretation and application of the IAP, monitoring the implementation of the IAP and making recommendations to the NAC on changes to the IAP as necessary to ensure its effectiveness.

[41] **Canada**, which is defined in the IRSSA to mean the Government of Canada, was a party Defendant to the class actions and individual actions that were settled by the IRSSA. Canada signed the IRSSA. CEP Applications are administered and adjudicated at first instance by Canada, as are the applications for reconsideration of CEP eligibility determinations. Canada is a member of the NAC and a member of the OC. Canada is a party to applications to add to the list of Indian Residential Schools. Canada is the responding party to challenge the claims of IAP Claimants through the Settlement Agreement Operations branch ("SAO"), described below, which is another branch of AANDC. Canada through its department, the AANDC, provides the human resources for the Secretariat and the SAO. Canada includes LAC, which is a branch of Canada's public administration. Lawyers from Canada's Department of Justice are sometimes engaged as legal counsel for Canada's various roles under the IRSSA.

[42] **The Chief Adjudicator,** who is appointed pursuant to court Order under the IRSSA, supervises the IAP and the adjudicators that decide IAP Applications. The Chief Adjudicator's decisions are not subject to judicial review since he is an officer of the court and is not exercising a statutory power of decision: *Fontaine v. Duboff Edwards Haight & Schachter*, 2012 ONCA 417.

[43] The IAP is administered by the **Indian Residential Schools Adjudication Secretariat** (the "Secretariat"). The Secretariat provides secretarial and administrative support for the Chief Adjudicator. Its mandate is to implement and administer the IAP under the direction of the Chief Adjudicator.

[44] The Secretariat is a branch of AANDC, which is a department of Canada. However, save for specific financial, funding, auditing and human resource matters, the Secretariat is under the direction of the Chief Adjudicator and independent from the AANDC. The Secretariat's employees work in separate office space with separately keyed entrances. The Secretariat does utilize AANDC's electronic records system, but it maintains separate paper files from AANDC.

[45] The Secretariat began in 2007 as a branch of The Office of Indian Residential Schools Resolution Canada, a government department that in 2008 integrated with the Department of Indian Affairs and Northern Development which changed its name to AANDC in 2011.

[46] **Aboriginal Affairs and Northern Development Canada** ("AANDC") is a department of the federal government; i.e. of Canada. As a department of Canada, AANDC is subject to the *Library and Archives of Canada Act*, S.C. 2004, c. 11. As noted above, the Secretariat is a branch of AANDC but also autonomous with respect to its day to day administration of the IAP. As noted immediately below, "SAO" is another branch of AANDC.

[47] **The Settlement Agreement Operations Branch** ("SAO") is a branch of a section of the AANDC known as the **Resolution and Individual Affairs Section** ("RIAS"). SAO has possession and control of the IAP Documents. It has a complete set of IAP Documents. Its possession overlaps with the Secretariat's possession and control.

[48] SAO is responsible for representing Canada at IAP hearings, performing and providing Canada's document disclosure obligations to the TRC and in respect to individual IAP claims. RIAS is responsible for paying out compensation for settlements reached under the IAP.

[49] **Library and Archives Canada** ("LAC"). Under the *Library and Archives Canada Act*, S.C. 2004, c. 11, LAC is a branch of the federal public administration presided over by a

Minister and under the direction of the Librarian and Archivist. Under the *Act*, "government records" may only be destroyed with the written consent of the Librarian and Archivist. Government records with historical or archival value as determined by the Librarian and Archivist must be transferred to LAC.

[50] One of the non-compensatory aspects of the IRSSA was the creation of a **Truth and Reconciliation Commission** ("TRC"), whose mandate is, in part, to identify sources and create as complete an historical record as possible of the residential school system and its legacy to be preserved and made accessible to the public for future study and use.

[51] To assist the TRC in fulfilling its mandate, the IRSSA provides that Canada and the churches will provide all relevant documents in their possession or control to and for the use of the TRC.

[52] **The National Centre for Truth and Reconciliation** ("NCTR") was constituted pursuant to article 12 of Schedule "N" to the IRSSA. The NCTR is mandated to archive and store all records collected by the TRC and other records relating to Indian Residential Schools. The collections are to be accessible to former students, their families and communities, the general public, researchers, and educators.

[53] **The Assembly of First Nations** ("AFN") plays a political role in advocating on behalf of First Nations. It is a signatory of the IRSSA. It was largely responsible for the creation of the Alternative Dispute Resolution ("ADR"), which was a predecessor or model for the IAP. The AFN is member of the NAC. It has an on-going interest in protect the interests of all of the residential school survivors, especially to ensure that the overarching principles of healing and reconciliation are at the forefront of the IRSSA.

[54] **The Sisters of St. Joseph of Sault Ste. Marie** (the "Sisters of St. Joseph") is a party to the IRSSA. The Sisters of St. Joseph was formed in 1936, and its mission has been charitable works caring for women and children, the poor, the sick and the elderly, the disabled, and disadvantaged in Northern Ontario. From 1937 to 1968, the Sisters of St. Joseph owned and operated St. Joseph's Boarding School at Fort William, Ontario, which for a time was an Indian Residential School.

[55] **The Twenty-Four Catholic Entities,** who are parties to the IRSSA, are: Les Oeuvres Oblates de l' Ontario; Les Residences Oblates du Quebec; Soeurs Grises de Montreal /Grey Nuns of Montreal; Sisters of Charity (Grey Nuns) of Alberta; Les Soeurs de La Charite des T.N.O.; Hotel-Dieu de Nicolet; The Grey Nuns of Manitoba Inc.- Les Soeurs Grises du Manitoba Inc.; The Sisters of Saint Ann; Sisters of Instruction of the Child Jesus; The Sisters of Charity of Providence of Western Canada; Immaculate Heart Community of Los Angeles CA; Missionary Oblates- Grand in Province; Les Oblates de Marie Immaculee du Manitoba; Oblates of Mary Immaculate- St. Peter's Province; Order of the Oblates of Mary Immaculate in the Province of British Columbia; La Corporation Episcopale Catholique Romaine de Grouard; Roman Catholic Episcopal Corporation of Keewatin; The Catholic Episcopale Corporation of Mackenzie; Roman Catholic Episcopal Corporation of Prince Rupert; Sisters of Charity Halifax; The Roman Catholic Bishop of Kamloops Corporation Sole; Roman Catholic Episcopal Corporation of Halifax; Sisters of the Presentation; and Roman Catholic Archiepiscopal Corporation of Winnipeg.

[56] **The Nine Catholic Entities**, who are parties to the IRSSA, are: Les Sœurs de Notre-Dame Auxiliatrice, Les Sœurs de Saint-François d'Assise, L'Institut des Sœurs du Bon-Conseil also known as Les Sœurs de Notre-Dame du Bon-Conseil de Chicoutimi, Les Sœurs de Saint-Joseph de Saint-Hyacinthe, Les Sœurs de Jésus-Marie, Les Sœurs de l'Assomption de la Sainte-Vierge, Les Sœurs de l'Assomption de la Sainte-Vierge de l'Alberta, Les Sœurs Missionnaires du Christ-Roi and Les Sœurs de la Charité de Saint-Hyacinthe. The Nine Catholic Entities are all private corporations established by an act of the Québec National Assembly or, with the exception of the Defendant Les Sœurs de l'Assomption de la Sainte-Vierge de l'Alberta, which was established by an act adopted by the Legislative Assembly of Alberta.

[57] Under the IRSSA, **Independent Counsel** are Plaintiffs' lawyers who signed the IRSSA Agreement, excluding legal counsel who signed in their capacity as counsel for the AFN or for the Inuit Representatives or Counsel and excluding members of the Merchant Law Group or members of any of the firms of the National Consortium.

2. Canada's Roles under the IRRSA

[58] The parties to these RFDs have made the nature of Canada's possession of the IAP Documents a critical factor in their arguments, and it is, therefore, necessary to have an understanding of Canada's multifarious roles under the IRSSA and its position with respect to its custody and control of the IAP Documents.

[59] By way of analogy, Canada's role in the IAP seems to be that of some sort of trinity where there are three emanations from one omnipotent unity. In the context of the IAP, first, Canada has possession of the IAP Documents through SAO, which is the branch of AANDC that is defending its interests in the IAP and challenging the Claimants. Simultaneously, second and third, Canada has possession of the IAP Documents through the split personality of the Secretariat, another branch of AANDC but also autonomous of Canada for the purposes of the IAP's adjudication function, where the Secretariat is under the command of the Chief Adjudicator, who is a court appointed official recruited by the OC.

[60] Perhaps the kabbala, which has ten emanations of the godhead, is a better analogy than the trinity because Canada's emanations, sometimes conflicting emanations, are present throughout the IRSSA. As discussed further in the discussion of the facts below, it was a fact of life of the negotiations and of their outcome, the IRSSA, that Canada, which was providing billions of dollars of funding for the settlement, would have a role in administering the settlement funds and providing the infrastructure for the CEP and IAP while at the same time having a right to challenge entitlements.

[61] For example, Canada administers the CEP, but it is the first level of appeals for CEP claimants, and it is a member of the NAC, which hears the second level of appeals. The CEP and IAP payments depend upon a person attending an Indian Residential School, and Canada can oppose applications to have a school added to the list of Indian Residential Schools. Canada has an obligation to provide documents for IAP claims, but Canada has a right to challenge the Claimants. Canada has an obligation to provide documents for the TRC, but it has a right to challenge the scope of that obligation. Canada seeks to archive the IAP Documents at LAC, which is another emanation of Canada.

[62] I foreshadow here to say, as discussed again in the analysis and discussion part of these Reasons for Decision, in my opinion, the fact that Canada happens to have in its various emanations and for various purposes physical possession of the IAP Documents does not oust the court's jurisdiction over the IAP Documents.

[63] Justice Winkler made it clear that something special and unique was engaged by Canada's role under the IRSSA when he emphasized that ultimately the court would control the administration of the IAP and the IRSSA. In *Baxter v. Canada Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.), Justice Winkler stated at paragraphs 37 and 38 of his judgment, which approved the IRSSA:

> I preface my comments with a caution that the court has a general concern whenever a defendant proposes to change roles and become the administrator of a settlement. There must be a clear line of demarcation between the defendant as litigant and the defendant as neutral administrator. Further, there must be an express recognition by the defendant proposed as administrator that the settlement is being implemented and administered in a court supervised process and not subject to the direction of the defendant either directly or indirectly. The difficulty in drawing the distinction, and adhering to the underlying concept, is the reason why the court must be especially circumspect when considering the approval of a defendant as administrator. The line is even more blurred in this case where Canada, as defendant, will still be an instructing respondent in respect of individual claims made under the IAP.
>
> In order to satisfactorily achieve this requisite separation, the administrative function must be completely isolated from the litigation function with an autonomous supervisor or supervisory board reporting ultimately to the courts. This separation will serve to protect the interests of the class members and insulate the government from unfounded conflict of interest claims. ... Rather, the requisite independence and neutrality can be achieved by ensuring that the person, or persons, appointed by Canada with authority over the administration of the settlement shall ultimately report to and take direction, where necessary, from the courts and not from the government.

[64] In *Fontaine v. Canada (A.G.)*, 2013 ONSC 684, a RFD brought by the TRC, Justice Goudge held that the TRC is a unique creation and while a federal government department with respect to the application of federal privacy legislation, it was not a federal department for all purposes.

[65] Canada is obviously not a creation of the IRSSA but, in my opinion, its role in the IRSSA and the IAP is a creation of the IRSSA and subject to the court's jurisdiction over the administration of a class action settlement. The court's jurisdiction extends to government records if that is what the IAP Documents also happen to be.

[66] I will return to these topics later in these Reasons for Decision.

E. PRINCIPLES OF CONTRACTUAL INTERPRETATION APPLICABLE TO THE IRSSA

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

[68] The primary goal of contract interpretation is to give effect to the intentions of the parties at the time the contract was made: *Skye Properties Ltd. v. Wu*, 2010 ONCA 499 at para. 79. The rules of contract interpretation direct a court to search for an interpretation from the whole of the contract that advances the intent of the parties at the time they signed the agreement:

Consolidated-Bathurst Export Ltd. v. *Mutual Boiler & Machinery Insurance Co.*, [1980] 1 S.C.R. 888.

[69] In searching for the intent of the parties at the time when they negotiated their contract, the court should give particular consideration to the terms used by the parties, the context in which they are used and the purpose sought by the parties in using those terms: *Frenette* v. *Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 64. Provisions should not be read in isolation but in harmony with the agreement as a whole: *McClelland and Stewart Ltd.* v. *Mutual Life Assurance Co. of Canada*, [1981] 2 S.C.R. 6; *Hillis Oil and Sales Limited* v. *Wynn's Canada*, [1986] 1 S.C.R. 57; *Scanlon* v. *Castlepoint Dev. Corp.* (1993), 11 O.R. (3d) 744 (C.A.)

[70] Generally, words should be given their ordinary and literal meaning: *Indian Molybdenum Ltd.* v. *The King*, [1951] 3 D.L.R. 497 (S.C.C.). However, if there are alternatives, the court should reject an interpretation or a literal meaning that would make the provision or the agreement ineffective, superfluous, absurd, unjust, commercially unreasonable, or destructive of the commercial objective of the agreement: *Consolidated-Bathurst Export Ltd.* v. *Mutual Boiler & Machinery Insurance Co. supra*, *Scanlon* v. *Castlepoint Dev. Corp., supra*; *Aita* v. *Silverstone Towers Ltd.* (1978), 19 O.R. (2d) 681 (C.A.); *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust,* 2007 ONCA 205 at para. 24.

[71] As noted earlier in these Reasons for Decision, it is a canon of contract interpretation that while evidence of negotiations and of the parties' subjective intent is not admissible to interpret the contract, in interpreting a contract, the court may have regard to the surrounding circumstances; that is, the factual background and the purpose of the contract: *Canada Square Corp. v. VS Services Ltd.* (1981), 34 O.R. (2d) 250 (C.A); *Prenn v. Simmonds*, [1971] 3 All E.R. 240 (H.L.); *Reardon Smith Line v. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.).

[72] After a careful review of the background to the contract, a court will imply terms to a contract based on the presumed intention of the parties and to give the contract business efficacy: *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619; *Dynamic Transport. Ltd.* v. *O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072; *G. Ford Homes Ltd.* v. *Draft Masonry (York) Co.* (1983), 43 O.R. (2d) 401 (C.A.); *Pigott Const. Co.* v. *W.J. Crowe Ltd.*, [1961] O.R. 305 (C.A.); affd. [1963] S.C.R. 238; *Luxor, Ltd.* v. *Cooper*, [1941] 1 All E.R. 33 (H.L.).

[73] In *Canadian Pacific Hotels Ltd. v. Bank of Montreal, supra*, the Supreme Court identified three situations where terms will be implied. See also: *M.J.B. Enterprises Ltd. v. Defence Construction, supra*; *Lefebvre* v. *HOJ Industries Ltd.* (1992), 91 D.L.R. (4th) 491 (S.C.C.) and *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at para. 137.

[74] In the first situation, which is not pertinent to the case at bar, a term is implied as a matter of an established custom or usage.

[75] In the second situation, which is pertinent, a term is implied as a matter of presumed intention; i.e., the court adds what the parties know and would, if asked, unhesitatingly agree to be part of the bargain. A term is implied as a matter of presumed intention because it is necessary to give business efficacy to a contract. The test of the implication is one of necessity. As to a test of necessity, Lord Wilberforce said in *Liverpool City Council* v. *Irwin*, [1977] A.C. 239 at p.

254: "such obligation should be read into the contract as the nature of the contract itself requires, no more, no less: a test, in other words, of necessity."

[76] In the third situation, which is not pertinent to the case at bar, a term is implied as an incident of particular class of relationship. The implication in this third situation does not depend upon any presumed intention, but the implication still must meet the test of necessity.

[77] In determining whether the parties would have intended an unexpressed term to be a part of their contract, the court must be careful not to impose its own view of what reasonable parties would or ought to have intended to give their contract business efficacy. In this regard, in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, *supra,* at para. 29, Justice Iacobucci stated for the Supreme Court:

> A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. As G. H. L. Fridman states in *The Law of Contract in Canada* (3rd ed. 1994), at p. 476:
>
> > In determining the intention of the parties, attention must be paid to the express terms of the contract in order to see whether the suggested implication is necessary and fits in with what has clearly been agreed upon, and the precise nature of what, if anything, should be implied.

[78] An important point that I take from this passage is that in the process of determining whether to imply a term to a contract, the court is involved in a process of interpreting the contract that the parties actually signed; it is not determining the presumed intent of what either party acting reasonably ought to have intended when he or she signed the contract. Thus, as Justice Iacobucci notes, if there is evidence of a contrary intention in the actual contract on the part of either party, an implied term may not be found.

[79] In deciding whether to imply a contract term, the court does not look for an objective intent of what a reasonable contracting party ought to have intended. The court is not engaged in an exercise of making a better contract for one or both of the parties. The court remains engaged in an exercise of interpreting the actual contract signed by the parties. As Lord Hoffman explained in *Attorney General of Belize & Ors. v. Belize Telecom Ltd. v. Amor*, [2009] UKPC 10 at para. 21: "There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?"

[80] Earlier in his judgment, Lord Hoffman explained how the implication of terms can form part of the interpretative act of determining the meaning of the parties' contract. He stated at paras. 16-18:

> 16. The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed .... It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.

> 17. The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.
>
> 18. In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.

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

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

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

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

[83] During the argument of the RFDs, the Chief Adjudicator submitted that the honour of the Crown was an interpretative principle in interpreting the IRSSA notwithstanding that the IRSSA was not a treaty between Canada and its Aboriginal peoples and notwithstanding that parties not bound by the honour of the Crown; i.e. the Church Entities, were signatories of the IRSSA.

[84] I agree with the Chief Adjudicator's submission, but it is necessary to make it very clear that the honour of the Crown, is only operative in the case at bar, as an interpretative principle; it is not operative as a source of obligations independent of the IRSSA. The honour of the Crown principle is helpful in interpreting the IRSSA, but it cannot add or subtract or change the promises made by the parties as expressed by the IRSSA.

[85] The honour of the Crown is a fundamental concept that exists as a source of obligations independent of fiduciary duties and treaty obligations: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 51. The honour of the Crown is a general principle that underlies all of the Crown's dealings with Aboriginal peoples, but it cannot be used to call into existence undertakings that were never given: *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56 at para. 13.

[86] The honour of the Crown infuses the processes of treaty making and treaty interpretation, and in making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of sharp dealing: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at paras. 19, 35. Interpretations of treaties and statutory provisions which have an impact upon treaty or Aboriginal rights are approached in a manner which maintains the integrity of the Crown, which is assumed to honour its promises without any sharp dealing: *Simon v. The Queen*, [1985] 2 S.C.R. 387 at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456 at paras. 49-51.

[87] In interpreting the terms of a treaty, the honour of the Crown is always at stake, and the court's approach is to assume that the Crown was acting honourably, and the court will imply terms to make honourable sense of the treaty arrangement to produce a result that accords with the intent of both parties although unexpressed: *Simon v. The Queen*, [1985] 2 S.C.R. 387; *R. v. Sundown*, [1999] 1 S.C.R. 393; *R. v. Marshall*, *supra* at paras. 14, 43-44.

[88] The IRSSA is not a treaty between Canada and its Aboriginal peoples, but it is at least as important as a treaty.

[89] During argument, Canada submitted that the honour of the Crown had nothing to do with the negotiation and interpretation of the IRSSA. I agree that the honour of the Crown is not an operative principle in the IRSSA, but I disagree that it is not an interpretative principle for an agreement in which Canada makes an attempt to make peace with its Aboriginal peoples.

[90] If an honourable interpretation and a dishonourable interpretation are both available, obviously it would be wrong to interpret the IRSSA in a way that does dishonor to Canada. As an interpretative principle, the honour of the Crown would also apply as an interpretative principle to the other signatories of the IRSSA, who can be taken to have intended an honourable interpretation over a dishonourable one.

F. THE ARGUMENTS OF THE IRSSA PARTIES AND PARTICIPANTS

1. Introduction

[91] In this section of my Reasons for Decision, I shall summarize the arguments of the parties. As noted above in the methodology, I shall continue to postpone the description of the facts, to first describe the arguments of the parties that arise from those facts. I think this is helpful because it makes for a better understanding about what facts are important and why they are important.

[92] The essential subject of the two RFDs is the question of what is to happen to the IAP Documents. Although the positions morphed during the course of argument, generally speaking, the IRSSA parties and participants provide two answers to that question.

[93] One group answers that with some exceptions, the IAP Documents be destroyed. In this group are: the Chief Adjudicator, the AFN, the Twenty-Four Catholic Entities, the Nine Catholic Entities, the Sisters of St. Joseph, and Independent Counsel.

[94] A second group answers that the IAP Documents belong to Canada as government records and after a period of retention, some IAP Documents will be destroyed and some will be archived at LAC. In the second group are: Canada, the TRC, and the NCTR.

[95] In the sections that follow, I shall summarize the arguments that the parties rely on for their competing answers to the fundamental question of what is to happen to the IAP Documents.

2. Canada's Argument

[96] Canada submits that the IAP Documents are in its possession and control because the Secretariat and the SAO of RIAS are branches of AANDC and these branches have actual possession of the documents, which are government records. Canada submits that since the IAP Documents were collected and created by AANDC, they are government records and subject to government regulation. Canada submits that no provisions of the IRSSA entitle anybody else to decide the manner of the retention or disposition of its IAP Documents.

[97] More to the point, Canada submits that the plain meaning of the IRSSA is that Canada controls the disposition of the IAP Documents and that the parties knew at the time of negotiating and agreed and the Claimants were subsequently told (when they applied for IAP payments) that some of the IAP Documents would be archived at LAC.

[98] Canada says that the IAP Documents are "government records" and, as such, they are governed by the *Library and Archives Canada Act*, *supra,* which stipulates that government records cannot be destroyed without the consent of LAC. Canada notes that the Librarian and Archivist has identified certain IAP Documents as having historical or archival value and pursuant to the *Act*, these documents must be transferred to LAC.

3. The Argument of the Chief Adjudicator

[99] The Chief Adjudicator says that it has the standing to bring its RFD.

[100] Relying on *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 and *Andersen Consulting v. R.*, [2001] 2 F.C.J. No. 57, the Chief Adjudicator submits that the IAP Documents are not "government records."

[101] The Chief Adjudicator submits that the IAP Documents are court records and that the court has the jurisdiction to order how they should be dealt with after the completion of the IAP.

[102] The Chief Adjudicator submits that the IAP Documents are confidential and that the interpretation of the IRSSA is that after a retention period, the IAP Documents should be destroyed. The Chief Adjudicator also submits that the IAP Documents are subject to the implied undertaking and to the principles about breach of confidence that empower the court to order the destruction of the IAP Documents.

[103] The Chief Adjudicator argues that the redacted transcripts may be archived at the NCTR only with the Claimant's informed consent and otherwise the IAP Documents should be

destroyed. He submits that the IRSSA does not provide authority for either Canada or the TRC to archive the highly sensitive and confidential materials that were gathered in the IAP.

4. The Argument of the AFN

[104] The AFN argues that the IRSSA is more than a private agreement; it is a resolution of a complex political, cultural, and collective dispute and courts should not second-guess the accord reached by the parties. It submits that the IAP Documents are deemed to be in the custody of the court, although Canada also has possession and control of the IAP Documents.

[105] Relying on *Fontaine v. Canada (Attorney General)*, 2014 MBQB 113 at paras. 54-55, AFN submits that Canada's agreement with LAC pursuant to the *Library and Archives of Canada Act*, *supra*, which would see documents transferred to LAC, is not enforceable because the consent of Claimants was not obtained. AFN asserts that privacy legislation that would apply at LAC falls short of the promises of confidentiality made to Claimants and Persons of Interest under the IRSSA.

[106] AFN notes that to the extent that documents are not transferred to the LAC, then the standard practice is that the documents would be destroyed. The AFN argues that given the standard practice, the IRSSA would need to contain very clear language to authorize the archiving of IAP Documents at LAC.

5. The Argument of the Sisters of St. Joseph

[107] The Sisters of St. Joseph bring a motion to quash the RFDs of the TRC and the Chief Adjudicator on the grounds that both lack standing to bring the RFDs, or alternatively, the RFDs are premature because the TRC and the Chief Adjudicator have not exhausted the dispute resolution mechanisms mandated by the IRSSA.

[108] The Sisters of St. Joseph submit that the RFDs involve document production, disposal, and archiving and thus must be considered first by the NAC. The Sisters of St. Joseph request a declaration that any dispute regarding documents be referred to the NAC.

[109] The Sisters of St. Joseph submit that it was always the intention of the parties to the IRSSA that the IAP Documents be kept confidential and that it was the intention of the parties that the IAP Documents be destroyed upon the completion of the IAP and that under the IRSSA, the IAP Documents do not form part of TRC's mandate.

[110] The Sisters of St. Joseph submit that to change the rules at the end of the game would result in a breach of the IRSSA and the terms of the IAP, be a breach of trust and a breach of confidence and a violation of the procedural rights and natural justice of all parties to the IRSSA. It submits that if the IAP Documents were made available to the public, even in the future, great harm would be caused to the religious orders and to the Claimants, all of whom participated in or chose not to participate in the IAP on the basis of confidentiality.

6. The Argument of Twenty-Four Catholic Entities

[111] The Twenty-Four Catholic Entities submit that the IAP Documents are subject to the law of absolute privilege, the implied undertaking, and the law of confidential communications, all which should prevent disclosure of the documents.

[112] The Twenty-Four Catholic Entities submit that the proposed archiving of IAP Documents at LAC (or NCTR) would be a grave breach of confidence and a violation of quasi-constitutional privacy rights that would cause harm not only to the former students and the alleged perpetrators but also to the reputations of the organizations that negotiated the IRSSA and it would undermine the IAP.

[113] The Twenty-Four Catholic Entities submit that as a matter of contract interpretation, the IRSSA does not authorize the IAP Documents, which contain highly confidential and private information to be unilaterally distributed for archival. They submit that ordering the documents to the NCTR would require an amendment to the IRSSA. The Twenty-Four Catholic Entities oppose any notice plan to Claimants and assert that a notice plan is beyond what was contracted for in the IRSSA.

[114] Given the significance of the privacy considerations, the Twenty-Four Catholic Entities submit that the only way to ensure that there will be no privacy breaches is to destroy the entire collection of the IAP Documents in accordance with the IRSSA.

7. The Argument of Nine Catholic Entities

[115] The Nine Catholic Entities submit that they provided sensitive personal information believing that its confidentiality would be protected and that they never would have agreed to the IRSSA without the assurances of confidentially. The Nine Catholic Entities submit that the proper interpretation of the IRSSA is that IAP Documents be destroyed after the completion of the IAP.

[116] The Nine Catholic Entities submit that anything but the destruction of the IAP Documents would contravene the IRSSA and that the communication of any information about the Nine Catholic Entities' members or former members to the TRC would be a breach of contract, a breach of confidence, a breach of faith, and a violation of civil law and privacy legislation.

8. The Argument of Independent Counsel

[117] Independent Counsel submits that the IAP Documents are in the court's possession, but to the extent that the IAP Documents are in Canada's possession, Canada is bound by the IRSSA, confidentiality agreements, and the implied undertaking pursuant to which Canada may not use the IAP Documents for any purpose other than for the IAP.

[118] Independent Counsel submits that Canada's plans for the documents would be contrary to the IRSSA and the court cannot authorize those plans because to do so would be to amend the IRSSA which the court cannot do.

[119] Independent Counsel submits that the IRSSA was designed to assure Claimants that they controlled their own stories about their experiences at the Indian Residential Schools. The IRSSA protects the confidentiality of the IAP Documents and that confidentiality is essential, because without it, Claimants would not feel comfortable enough to make claims for the wrongs they suffered. The involuntary transfer of IAP Documents to any archive would be a gross betrayal of trust and devastatingly harmful to the Claimant, his or her family, his or her descendants, and his or her community.

9. The Argument of the TRC

[120] The TRC originally submitted that the IAP Documents are in the possession and control of Canada and Canada is obliged by the production provisions of the IRSSA to produce the IAP Documents, which are "relevant documents" to the TRC. It originally submitted that the production of the IAP Documents to the TRC is mandated by the IRSSA. The TRC abandoned this argument during the hearing of the RFDs.

[121] The TRC's argument, at the hearing of the RFDs, aimed at preserving some of the IAP Documents from destruction.

[122] The TRC was interested in the IAP Documents because it is charged with creating as complete an historical record as possible of the IRS system and legacy and the IAP Documents are allegedly the most complete and detailed set of documents in existence that describe the IRS system and legacy.

[123] The TRC submits that the IAP Documents are an essential resource to ensure that challenges to truth and memory can be met, and that the experiences of residential school survivors can never be denied or forgotten. It submits that it is only by preserving this history that Canadian society can ensure that the tragedy of the Indian Residential Schools will never be repeated.

[124] The TRC argued that the IAP Documents should be retained by Canada for a 30-year period and that a notice plan be developed to advise Claimants of their rights to preserve their stories at the NCTR.

10. The Argument of the NCTR

[125] The NCTR adopted the TRC's submissions and was both eager and anxious that a notice program be developed to preserve IAP Documents and the Claimants' stories.

[126] It was anxious to preserve IAP Documents because it regarded them as an invaluable and irreplaceable history of the Indian Residential Schools.

G. EVIDENTIARY BACKGROUND

[127] The evidentiary background to these RFDs was provided by the following affiants:

- Amy Abrahamson, a paralegal for Peter Grant who is counsel for Independent Counsel.

- Rev. Robert J. Britton, Chancellor for the Archdiocese of Halifax-Yarmouth.

- G.C., a former student of an Indian Residential School and an IAP Claimant.

- Peter Dinsdale, the Chief Executive Officer of the AFN.

- Jane Doe, a former student of an Indian Residential School and an ADR Claimant and then an IAP Claimant.

- Tim Eryou, the Chief Information Officer for AANDC and with a few intervals away has been at what is now AANDC in various capacities since 1990.

- David Flaherty, Professor Emeritus of History and Law at the University of Western Ontario and a privacy consultant. He is a member of the External Advisory Committee to the Privacy Commissioner of Canada and a member of the External Advisory Committee to the Information and Privacy Commissioner of British Columbia.

- Larry Phillip Fontaine, O.C., the primary named Representative Plaintiff in the class action that was settled by the IRSSA and who was instrumental in the negotiations of the settlement. He is a former National Chief of the AFN.

- Percy Gordon, a former student of an Indian Residential School who has received a CEP and an IAP payment.

- N.B.H., a former student of an Indian Residential School and an IAP Claimant.

- Daniel Ish, the former Chief Adjudicator of the IAP (September 2007-July 2013).

- Gregory Juliano, the General Counsel and Director of Fair Practices and Legal Affairs at the University of Manitoba with oversight of University's Access and Privacy Office. He was the University's chief negotiator of the agreements that established the NCTR.

- E.K., a former student of an Indian Residential School and an IAP Claimant.

- Fred Kelly, a former student of an Indian Residential School and an IAP Claimant.

- Sister Bonnie MacLellan, a member of the Sisters of St. Joseph and an eyewitness to the negotiations that led to the IRSSA. From 2002 to 2012, she was the General Superior of the Congregation.

- Tom McMahon, General Counsel to the TRC and formerly its Executive Director. Mr. McMahon was cross-examined.

- F. Mark Rowan, a lawyer who has acted for persons of interest or alleged perpetrators in connection with the IAP and the Dispute Resolution Process that the IAP replaced.

- David Russell, the Director of SAO (West) and former Director of the National Research and Analysis Directorate within RIAS of AANDC and before that he worked within Indian Residential Schools Resolution Canada.

- Daniel Shapiro, the current Chief Adjudicator of the IAP and a former Deputy Chief Adjudicator.

- John Trueman, the Senior Policy and Strategic Advisor of the Secretariat. Before joining the Secretariat, from 2003 to 2006, he worked on the Alternative Dispute Resolution that pre-dated the IAP. He reports to the Executive Director, who reports to the Chief Adjudicator. Mr. Trueman was cross-examined.

- D.W., a former student of an Indian Residential School and an IAP Claimant.

- Eric Wagner, a lawyer who represents Claimants.

H. FACTUAL BACKGROUND

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

[128] Between the 1860s and 1990s more than 150,000 First Nations, Inuit, and Métis children were required to attend Indian Residential Schools operated by religious organizations with the funding of Canada. Approximately half of the students of the Indian Residential Schools are no longer living to tell their stories.

[129] In 1999, the Sisters of St. Joseph were given notice that approximately 110 former students at the St. Joseph's Boarding School alleged that they had been victims of psychological, physical, and sexual abuse while attending the school.

[130] In 2000, about 154 former students represented by one law firm filed civil claims in connection with their mistreatment at St. Anne's Indian Residential School against Canada and others.

[131] Following the launch of other individual and class actions across the country by former students of the Indian Residential Schools, in November 2003, Canada established a National Resolutions Framework, which included a compensation process called the Alternative Dispute Resolution ("ADR") Process. The ADR Process was the predecessor or the model for the IAP in the IRSSA.

[132] After the launch of the numerous court proceedings, there were extensive negotiations to settle the individual actions and the class actions.

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

[134] In May 2005, a Political Agreement was signed between Canada and AFN that a settlement would be negotiated that would include compensation, healing, and a truth and reconciliation process. A few months later, the AFN became a plaintiff by launching a class action against Canada, and Mr. Fontaine, a former National Chief was named as proposed Representative Plaintiff.

[135] For the Plaintiffs and Representative Plaintiffs, one of the purposes of the negotiations was to achieve compensation for the students of the Indian Residential Schools and their families. In this regard, it should not be lost sight of that the Plaintiffs and Representative Plaintiffs were advancing claims for compensation for wrongs beyond physical and psychological harms. Certain claims were being brought for the collective interests of the Aboriginal peoples, who alleged that they had lost language and cultural and spiritual identity.

[136] In achieving the goal of compensation, a problem for Plaintiffs and Representative Plaintiffs was that the claims were intensely private and difficult for the Claimants to describe in

public. Further, unfortunately some claimants had been victimized by other students at the Indian Residential Schools. Moreover, some claimants were both victims and perpetrators of child abuse in the toxic environment of the Indian Residential Schools. Thus, privacy and confidentiality concerns were an extremely important part of the factual nexus of the negotiations.

[137] Mr. Fontaine, who it may be noted has not himself publically described his personal experiences at the Indian Residential Schools, explained why confidentiality and privacy were essential elements in the IRSSA, especially in claims involving student-on-student abuse (32% of the claims). He deposed:

> During the course of those negotiations, I argued that the names of the children who abused other children should not be disclosed to the adjudicators in the IAP process. The reason I argued this was because I knew myself from my own community and other aboriginal communities across Canada that both abusers and abused lived in the same communities and that there would be ongoing trauma within an entire community if these individuals were identified by name.
>
> The solution to this and other problems was the confidentiality of the IAP process to ensure that no person could identify a perpetrator by name outside of the IAP process and everybody had to agree to that at the beginning of the IAP process. Furthermore, nobody except the survivor would have access to the story of the survivor. The IAP hearings were to be held in the strictest confidence.

[138] Privacy and confidentiality was also extremely important to the Defendants. If true, the allegations against the Church Entities that had managed the Indian Residential Schools for Canada would show their members and employees to be criminals, sinners, and moral degenerates, and if untrue, the allegations were grave slanders.

[139] Further, privacy and confidentiality were essential to the Defendants negotiating the IRSSA, because they were being asked to give up the right to test the allegations made against them in court. As explained in the affidavit of Sister MacLellan:

> When entering into the Settlement Agreement, the Congregation and its members gave up a number of their fundamental rights which would normally be used to test the veracity of abuse claims in a court of law. These rights included the right to face the accusers, the right to cross-examine the accusers and other witnesses, and the right to appeal.
>
> In consideration for the loss of said fundamental rights, the Settlement Agreement contemplates that the Independent Assessment Process..., and the documents arising from the IAP, will remain confidential, which confidentiality would only be breached with the consent of all interested parties/persons.

[140] Sister MacLellan deposed that because many of the persons who worked at the Indian Residential Schools were deceased, elderly, or sick, it would not be easy or possible for them to defend themselves. For this reason, the Sisters of St. Joseph and other religious entities were steadfast in ensuring that the terms of the IRSSA about the IAP provided for the confidentiality of all information.

[141] Sister MacLellan deposed that if the Sisters of St. Joseph, none of whose members had ever been charged criminally, had been told that there was any possibility that the information collected for the IAP would become available to the public, it would not have signed the IRSSA.

[142] The evidence of the Twenty-Four Catholic Entities was that they agreed that the IAP would be a private and confidential process in exchange for abandoning their ordinary

procedural rights to test the veracity of the abuse claims in a court of law. They said that they agreed to give up the rights to face their accuser, to challenge the allegations, to appeal, and to give full answer and defence to the serious allegations that besmirched the alleged perpetrator's reputation and the historical reputation of the Church group.

[143] In the bringing of individual court actions and in particular in the bringing of the class actions, there, however, was a countervailing and collective purpose that went against the goal of achieving privacy and confidentiality for individual Claimants and for Defendants.

[144] Mr. Dinsdale, the Chief Executive Officer of AFN, deposed:

> Further, a truth commission would address the fact that the Indian Residential School system was a systemic violation of human rights that had a significant impact on the collective rights of Aboriginal peoples. It was not a matter to be adjudicated through individual claims litigated on an individual basis or through an alternative dispute resolution process. No amount of money could compensate for the magnitude and systemic nature of the effects of the Residential School system. Truth telling was sought to be achieved through the TRC.

[145] As explained by Mr. Fontaine, the Plaintiffs, and particularly the Representative Plaintiffs, desired that the history of the Residential Schools tragedy be known and preserved for future generations and never repeated. Mr. Fontaine testified, however, that the negotiators understood that some balance needed to be achieved between individual privacy and public awareness. The balance would be achieved by making the disclosure of personal information consensual. Mr. Fontaine deposed:

> In negotiating the TRC it was always understood that the individual stories of survivors would only become part of that record if survivors themselves decided to speak to the TRC and advise that they wished their story to be made public.

[146] As noted above in the discussion of the infrastructure of the IRSSA, another and different factor in the negotiations was the reality that Canada wished to have a role in administering the billions of dollars of settlement funds it was contributing, but there was a need to establish an independent tribunal to adjudicate claims for compensation and to allow Canada to challenge Claimants. The outcome was that with certain safeguards, Canada was allowed both an administrative role and also and an adversarial one. There was an obvious conflict of interest that had to be managed.

[147] As deposed by the former Chief Adjudicator, Daniel Ish, to preserve the independence of adjudicators in their role as neutral administrators of the IAP and arbiters of compensation, it was important to establish the Secretariat as an autonomous branch, especially because Canada, represented by AANDC was a defendant in every IAP Claim.

[148] Thus, both the administrative and the adversarial roles were assumed by branches of Canada's AANDC, and as will have been apparent from the discussion above and as will be seen again in the discussion below, this situation was problematic from the outset and has continued to be problematic.

[149] With these various countervailing forces at work, the negotiations ultimately led to the multiple-court approved settlement of the individual and class actions known as the IRSSA. The IRSSA was signed on May 8, 2006.

[150] The signing parties to the IRSSA were: Canada, as represented by the Honourable Mr. Frank Iacobucci; various Plaintiffs, as represented by a National Consortium of lawyers, the Merchant Law Group, and Independent Counsel; the AFN; Inuit Representatives; the General Synod of the Anglican Church of Canada; the Presbyterian Church of Canada; the United Church of Canada; and 50 Roman Catholic Church entities, including the Sisters of St. Joseph, the Nine Catholic Entities, and the Twenty-Four Church Entities.

[151] Under the IRSSA, Canada and the other Defendants obtained releases. The IRSSA provides at Article 4.06 (g) as follows:

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

[152] The specification of those who were to be released was defined very broadly. Releasee was defined as follows:

> "Releasees" means, jointly and severally, individually and collectively, the defendants in the Class Actions and the defendants in the Cloud Class Action and each of their respective past and present parents, subsidiaries and related or affiliated entities and their respective employees, agents, officers, directors, shareholders, partners, principals, members, attorneys, insurers, subrogees, representatives, executors, administrators, predecessors, successors, heirs, transferees and assigns the definition and also the entities listed in Schedules "B", "C", "G" and "H" of this Agreement.

[153] The ambit of the release was also very broad. Article Eleven of the IRSSA stated as follows:

> ARTICLE ELEVEN
> RELEASES
>
> 11.01 Class Member and Cloud Class Member Releases
>
> (1) The Approval Orders will declare that in the case of Class Members and Cloud Class Members:
>
> (a) Each Class Member and Cloud Class Member has fully, finally and forever released each of the Releasees from any and all actions, causes of action, common law, Quebec civil law and statutory liabilities, contracts, claims and demands of every nature or kind available, asserted or which could have been asserted whether known or unknown including damages, contribution, indemnity, costs, expenses and interest which any such Class Member or Cloud Class Member ever had, now has, or may hereafter have, directly or indirectly arising from or in any way relating to or by way of any subrogated or assigned right or otherwise in relation to an Indian Residential School or the operation of Indian Residential Schools and this release includes any such claim made or that could have been made in any proceeding including the Class Actions or the Cloud Class Action whether asserted directly by the Class Member or Cloud Class Member or by any other person, group or legal entity on behalf of or as representative for the Class Member or Cloud Class Member.
>
> (b) ...
>
> (c) Canada's, the Church Organizations' and the Other Released Church Organizations' obligations and liabilities under this Agreement constitute the consideration for the

> releases and other matters referred to in Section 11.01(a) and (b) inclusive and such consideration is in full and final settlement and satisfaction of any and all claims referred to therein and the Class Members or and Cloud Class Members are limited to the benefits provided and compensation payable pursuant to this Agreement, in whole or in part, as their only recourse on account of any and all such actions, causes of actions, liabilities, claims and demands. ....

[154] In their practical effect, the releases re-directed Plaintiffs and Class Members in actions against Canada and others to resort to the CEP and IAP as the recourse for their compensatory claims and it directed the survivors to the TRC and NCTR for their collective claims and grievances which would be memorialized in the historical account of their experiences.

[155] The Nine Catholic Entities state that they decided to sign the IRSSA for two reasons: (1) to obtain a release from civil liability; and (2) to protect the privacy of their members or former members.

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

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

> 12. THIS COURT ORDERS that the Agreement, which is attached hereto as Schedule "A", and which is expressly incorporated by reference into this judgment, including the definitions included therein, is hereby approved and shall be implemented, in accordance with this judgment and any further order of this Court.
>
> 13. THIS COURT ORDERS AND DECLARES that this Court shall supervise the implementation of the Agreement and this judgment and, without limiting the generality of the foregoing, may issue such orders as are necessary to implement and enforce the provisions of the Agreement and this judgment.
>
> 30. THIS COURT ORDERS AND DECLARES that no person may bring any action or take any proceedings against the Trustee, the Chief Adjudicator, the IAP Oversight Committee, the National Certification Committee, the National Administration Committee, the Chief Adjudicator's Reference Group, the Regional Administration Committees, as defined in the Agreement, or the members of such bodies, the adjudicators, or any employees, agents, partners, associates, representatives, successors or assigns, of any of the aforementioned, for any matter in any way relating to the Agreement, the administration of the Agreement or the implementation of this judgment, except with leave of this court on notice to all affected parties.
>
> 31. THIS COURTS DECLARES that the Representative Plaintiffs, Defendants, Released Church Organizations, Class Counsel, the National Administration Committee, or the Trustee, or such other person or entity as this Court may allow, after fully exhausting the dispute resolution mechanisms contemplated in the Agreement, may apply to the Court for directions in respect of the implementation, administration or amendment of the Agreement or the implementation of this judgment on notice to all affected parties, all in conformity with the terms of the Agreement.

> 36. THIS COURT DECLARES that the provisions of the applicable class proceedings law shall apply in their entirety to the supervision, operation and implementation of the Agreement and this judgment.

[158] In March 2007, on consent of the parties, the nine courts issued identical Approval Orders and Implementation Orders. Both the judgments of the courts and the Approval Orders provide that that the respective courts shall supervise the implementation of the IRSSA and the judgment and may issue such orders as are necessary to implement and enforce the provisions of the agreement and the judgment.

[159] For present purposes, the following term of the Implementation Order should be noted:

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

[160] In a point that is relevant to the Sisters of St. Joseph's motion to quash the RFDs, the IRSSA provides for dispute resolution mechanisms, and under the IRSSA, the parties agreed to exhaust those mechanisms before making an application for a RFD. Section 18.04 of the IRSSA states:

> *Dispute Resolution*
>
> 18.04 The parties agree that they will fully exhaust the dispute resolution mechanism contemplated in the Agreement before making any application to the Courts for directions in respect of the implementation, administration or amendment of this Agreement or the implementation of the Approval Orders. Application to the Court will be made with leave of the Courts, on notice to all affected parties, or otherwise in conformity with the terms of the Agreement.

2. The TRC

[161] In order to resolve the arguments of the parties and the RFDs, it is necessary to understand the role of the TRC and to understand its responsibilities with respect to gathering documents and its relationship with the IAP. As will become apparent, the IRSSA's provisions about the TRC are relevant to the interpretation problem of what should happen to the IAP Documents.

[162] An important aspect of the IRSSA was the establishment of the TRC. Article 7.01 of the IRSSA stated:

> *7.01 Truth and Reconciliation*
>
> (1) A Truth and Reconciliation process will be established as set out in Schedule "N" of this Agreement.
>
> (2) The Truth and Reconciliation Commission 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) Where the NAC makes a decision in respect of a dispute or disagreement that arises in respect of the Truth and Reconciliation Commission as contemplated in Section 7.01(2), either or both the Church Organization and Canada may apply to any one of the Courts for a hearing *de novo*.

[163] Thus, Article 7.01 of the IRSSA provided for the establishment of the TRC and specified that its process and mandate was set out in Schedule "N." For present purposes, the relevant provisions of Schedule "N" are set out in Schedule "A" to these Reasons for Decision. I have emphasized certain portions that are particularly relevant to resolving the interpretative issues.

3. The NCTR

[164] In order to resolve the arguments of the parties and the RFDs, it is also necessary to understand the role of the NCTR.

[165] The NCTR's mandate, pursuant to Schedule "N" of the IRSSA and the Trust and Administrative Agreements between the TRC and the University of Manitoba, commits the NCTR to continuing the spirit and work of truth and reconciliation.

[166] The NCTR came into being on National Aboriginal Day, June 21, 2013. The NCTR is hosted by the University of Manitoba in partnership with other entities across Canada, including Aboriginal organizations, universities and colleges.

[167] On June 21, 2013, there was a ceremony to mark the signing of the agreement to establish the NCTR. At that time the Honourable Justice Murray Sinclair, in his remarks, stated:

> The importance of the National Research Centre that is being established here today...is that it will be a constant reminder to all Canadians. ... It will be a reminder to all future Canadians that indeed what we have heard from Survivors in the past ten years or so did happen. We are creating a national memory here. ... Because we know, if we do not do that, then it will be just a matter of two or three generations from now that most Canadians will not only be able to forget that this occurred, but they will be able to deny that it occurred. And that can never happen, that must never happen, because this is part of what Canada is all about.

[168] Under the Administrative Agreement, the NCTR's governance structure includes a Governing Circle comprised of a majority of persons who identify as Aboriginal, with specified positions for First Nations, Inuit and Métis representation. The NCTR's governance structure includes a Survivor's Circle comprised of survivors of the residential school system, their families or their ancestors. The Survivor's Circle provides advice to the Governing Circle, University, and Partners.

[169] The NCTR is governed in accordance with national and international ethical research and archiving principles, protocols, guidelines, and best practices for Indigenous and human rights research and archiving, including Aboriginal principles of Ownership, Control, Access and Possession, Protocols for Native American Archival Materials, and the *Tri-Council Policy Statement: Ethical Conduct of Research Involving Humans* (particularly the chapter on First Nations, Inuit and Métis peoples of Canada).

[170] In its factum, the NCTR sought to show that it can and will honour and respect the sensitive and private nature of the IAP Documents and would protect their confidentiality. It submitted that it has the technological and administrative capacity and expertise to safeguard the IAP Documents in compliance with all applicable access and privacy legislation and University

of Manitoba standards and NCTR-specific privacy policies, procedures and protocols, as well as any Orders made by this court.

[171] The NCTR submitted that it was founded on Aboriginal control and governance and is the most culturally appropriate archive of the IAP Documents and its archiving of them would be consistent with the spirit and intent, as well as express terms, of the IRSSA and would ensure that these records were archived in accordance with best practices for Indigenous, human rights and truth and reconciliation archiving.

4. The IAP Procedure

[172] In order to resolve the arguments of the parties and the RFDs, it is necessary to understand in detail the operation of the IAP with particular attention on how the procedure addresses confidentiality and privacy concerns. Indeed, understanding the IAP process is fundamental to resolving the RFDs now before the court.

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

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

[174] The procedure begins with an Application. Appendix I of Schedule "D" explains the Application; the appendix states:

> 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.

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

[176] As is readily apparent, for a Claimant to complete the Application Form, he or she will disclose the most private and most intimate personal information, including a first person narrative outlining his or her request for compensation. Express privacy and confidentiality assurances for this personal information are found in the Application Form, which comes with a Guide.

[177] Every page of the Application Form and Guide in its header states: "Protected B document when completed." Under the *Privacy Act*, *supra* and the *Access to Information Act*, *supra* this designation identifies the document as having information that if compromised "could result in grave injury, such as loss of reputation." Every page of the Application Form and Guide states in its footer: "24 hour IRS Crisis Line is available at 1-866-925-4419."

[178] Appendix II of Schedule "D" outlines the procedure for the acceptance and use of the Application Form. The relevant parts of Appendix II are set out below with some emphasis added:

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.**
>
> ....
>
> iii. On admitting the claim to the IAP, the Secretariat shall forward s copy of the application to the Government and to a church entity which is party to the Class Action Judgments and was involved in the IRS from which the claim arises.
>
> ....
>
> **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.**

[179] Appendix B to the Guide explains that the personal information being provided is protected information. Appendix B to the Guide states with some emphasis added:

APPENDIX B: PROTECTION OF YOUR PERSONAL INFORMATION

Definition of personal information

Personal information means information about an identifiable person that is recorded in some way. Some examples of personal information include name, age, income, medical records and school attendance.

How your personal information is treated:

Level of security

Your *Application Form* will be treated with care and confidentiality. This means that security rules are in place to make sure that your *Application Form* is protected. "Protected B" is the level of security used by government for sensitive and personal information. Once completed, your *Application Form* will be treated as a "Protected B" document.

Privacy and information laws

• The *Privacy Act* is the federal law that controls the way the government collects, uses, shares and keeps your personal information. The *Privacy Act* also allows individuals to access personal information about themselves.

• The *Access to Information Act* is the federal law that provides access to government information, but protects certain kinds of information, including personal information.

• Subject to the *Access to Information Act*, the *Privacy Act* and any other applicable law, or where your consent to share information has been obtained, personal information about you and other individuals identified in your claim will be dealt with in a private and confidential manner. In certain situations, the government may have to provide personal information to certain authorities. For example, in a criminal case before the courts, the government may have to provide information to the police if they have a search warrant. Another example is where the government has to provide information to child welfare authorities or the police if it becomes aware that a child is currently in need of protection. The government will also share this personal information with those involved in the resolution of your claim, as set out in the section "Sharing your personal information with others" on the next page.

• You can find more information about these laws on the Internet at: www.privcom.gc.ca and www.infocom.gc.ca.

Collection of personal information

Personal information in your *Application Form*, and all documents gathered for your claim are collected only for the purpose of operating and administering this Independent Assessment Process, and for resolving your residential school claim.

Use of your personal information

The personal information you provide in your Application Form, and all documents gathered for your claim, will be reviewed to assess whether your claim can be processed in this Independent Assessment Process. If your application is accepted, the information will be used as the basis of research to check your attendance at the residential school(s) and to find documents relevant to you and your claim.

Sharing your personal information with others

If a church organization is participating in the resolution of your claim, some of your personal information will be shared with church representatives on a confidential basis.

If you decide to ask for counselling support and give your permission, Health Canada will be provided with information about your participation in this Independent Assessment Process so that you can receive counselling support.

If the person you claim abused you is found, some of the personal information you have provided will be shared with him or her, including details of any claims made against them.

This needs to be done so the person is given a chance to answer to your claim. Some of your personal information will also be shared with witnesses participating in the resolution of your claim. Only information needed to answer to your claim will be provided to witnesses or the person(s) you claim abused you, unless you ask that it be shared. Information that identifies your address will not be shared.

The decision-maker will be provided with your personal information before the hearing, so he or she can learn about your claim, question you and other witnesses, and decide whether to award you compensation and, if so, how much.

Keeping your records

The *Privacy Act* requires that the government keep your personal information for at least two years. Currently, government practice is to keep this information in the National Archives for 30 years, but this practice can change at any time. Only the National Archivist can destroy government records.

[180] The Application Form in Section 7 includes a Declaration to be signed by the Claimant: The Declaration states:

> I give my permission to Library and Archives of Canada, Indian and Northern Affairs Canada, and any other federal, provincial or territorial government having records relevant to my claim to share them with Indian Residential Schools Resolution Canada. This permission will allow the government to research my claim.
>
> I understand that my personal information, including the details of any claim of abuse, may be shared with the government, the decision-maker, any participating church organizations, person(s) I identify as having abused me, and witnesses. Information provided to the person(s) I identify as having abused me and witnesses will not include my contact details or other information not relevant to their role in the claim, unless I want it to be shared.

> 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.
>
> I confirm that the statements in this Application, whether made by me or on my behalf, are true. Where someone helped me with the Application, they have read to me everything they wrote and confirm that it is true. I know that signing this Application has the same effect as if I made it under oath in court.

[181] As noted above, to make an acceptable application, Claimants must sign the Declaration set out in the Application Form, including the confidentiality provisions in the Declaration. I will discuss again the confidentiality of the IAP process in the next section of these Reasons for Decision.

[182] As noted above, alleged perpetrators are provided only with extracts of the Application outlining the allegations made against them, and these extracts must be returned at the end of the process. The alleged perpetrator is not provided with the Claimant's contact information, or information regarding the impacts of the alleged abuse.

[183] If the Claimant's claim is not settled, there is a hearing before an adjudicator supervised by the Chief Adjudicator.

[184] The Secretariat's website promises confidentiality within the IAP. It reads:

> The hearing is held in private. The public and the media are not allowed to attend. Each person who attends the hearing must sign a confidentiality agreement. This means that what is said at the hearing stays private.

[185] As noted above, the participants at an IAP hearing must sign a confidentiality agreement. There is a standard form Confidentiality Agreement for Claimants and a standard form Confidentiality Agreement for Participants.

[186] The standard form Confidentiality Agreement for Claimants is set out below:

> INDIAN RESIDENTIAL SCHOOS ADJUDICATION SECRETARIAT
> INDEPENDENT ASSESSMENT PROCESS
> IN THE MATTER OF _____:
>
> CONFIDENTIALITY AGREEMENT
>
> I understand that:
>
> [*name*] has made a claim in the Independent Assessment Process, a process established to resolve claims of sexual abuse, serious physical abuse, and certain other wrongful acts which caused serious psychological consequences for the individual arising from the operation of Indian residential schools.
>
> - Hearings in the IAP Process are closed to the public
> - I am a claimant I this hearing and will observe or participate in all or part of the proceedings
>
> I_____, agree that I will keep confidential and not disclose to any person or entity, whether in writing or orally, any information that is presented in this hearing or disclosed in relation to this hearing, except my own evidence or as required within the IAP or otherwise by

law. I understand that I may discuss the outcome of the hearing, including the amount of any compensation awarded to me.

_____ _____

CLAIMANT WITNESS

DATED

[187] The standard form Confidentiality Agreement for other participants in the IAP hearing is set out below:

INDIAN RESIDENTIAL SCHOOS ADJUDICATION SECRETARIAT
INDEPENDENT ASSESSMENT PROCESS
IN THE MATTER OF _____:

CONFIDENTIALITY AGREEMENT

I understand that:

[*name*] has made a claim in the Independent Assessment Process (IAP), a process established , a process established to resolve claims of sexual abuse, serious physical abuse, and certain other wrongful acts which caused serious psychological consequences for the individual arising from the operation of Indian residential schools.

- Hearings into claims in the Independent Assessment Process are closed to the public;
- I will observe or participate in all or part of the proceedings.

I agree that

- I will keep confidential and not disclose to anyone, whether in writing or orally, any information that is presented in the hearing or disclosed in relation to this hearing, except my own evidence or as required with the Independent Assessment Process or otherwise by law.

<u>This is the official record of attendance, so everyone present at all or part of the Hearing, except Legal Counsel, must sign this form. If your name does not appear, please add it.</u>

Name of Attendee	Signature	Address (Town and Province Only
Support		
Claimant's Legal Counsel		
Adjudicator		
Canada's Representative		
Church Representative		

RHSW		
Other		

DATED:

[188] I note that the form has an inconsistency in that it indicates that Legal Counsel need not sign the form, which must be an error, because the form then has a place for counsel's signature. In any event, the evidence is that all participants sign a confidentiality agreement.

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

[190] Canada is required to search for and report the dates that the Claimant attended a residential school. Canada must also search for documents relating to the alleged perpetrators named in the Application Form, and is required to provide the Secretariat with the following documents: (a) documents confirming the Claimant's attendance at the school(s); (b) 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; (c) a report about the residential school(s) in question and the background documents; and (d) any documents mentioning sexual abuse at the residential school(s) in question.

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

[192] As noted above, IAP hearings are closed to the public, and participants are required to agree to keep information confidential, except their own evidence or as required within the IAP or otherwise by law. At the hearings, the adjudicators assure the Claimants and Persons of Interest that the evidence will be treated as confidential. Section "o" of Schedule "D" of the IRSSA explains the privacy of the IAP hearings; it states:

> *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.

[193] For present purposes it is important to note that section "o" provides that a Claimant may request a copy of their own evidence for memorialization and that Claimants are given the option of having the transcript deposited in an archive developed for the purpose; i.e., at the NCTR.

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

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

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

[196] Before the IAP hearing, Canada or the Defendant Church Entity must attempt to locate the alleged perpetrator and invite him or her to the hearing, but the alleged perpetrator is not a party and has no right of confrontation at the IAP hearing. The alleged perpetrator is not compelled to attend an IAP hearing, but he or she may give evidence as of right.

[197] If the alleged perpetrator does give evidence, he or she may be accompanied by counsel, but the alleged perpetrator cannot attend or be represented during the evidence of the Claimant without the advance consent of the parties. In contrast, the Claimant is entitled to attend to hear the evidence of the alleged perpetrator.

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

[199] A medical assessment is required for an adjudicator to make a finding of a physical injury. Only the adjudicator may order that an expert conduct an assessment of the Claimant. Unless the parties consent, an expert assessment is required in order to make a finding that the Claimant has suffered the most severe levels of consequential harms or consequential loss of opportunity (levels 4 and 5).

[200] If the Claimant establishes that he or she was abused in a manner covered by Schedule "D" of the IRSSA, the adjudicator then determines whether the Claimant suffered consequential harm as a result. There are five gradations of consequential harm provided for in Schedule "D". At the lowest end is a "Modest Detrimental Impact", which is evidenced by:

> Occasional short-term, one of: anxiety, nightmares, bed-wetting, aggression, panic states, hyper-vigilance, retaliatory rage, depression, humiliation, loss of self-esteem

[201] The most severe consequential harm is level 5, entitled "Continued harm resulting in serious dysfunction", which is evidenced by:

> Psychotic disorganization, loss of ego boundaries, personality disorders, pregnancy resulting from a defined sexual assault or the forced termination of such pregnancy or being required to place for adoption a child resulting therefrom, self-injury, suicidal tendencies, inability to form or maintain personal relationships, chronic post-traumatic state, sexual dysfunction, or eating disorders.

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

[203] Decisions are redacted to remove identifying information about Claimants and perpetrators. While the documentation and information provided to Claimants and adjudicators may include allegations of abuse by individuals other than those named in the complaint at issue, names of other students or persons are redacted.

[204] The IRSSA provides that the Claimants will receive a copy of the decision, "redacted to remove identifying information about any alleged perpetrators." The balance of the decision provided to Claimants is not redacted and contains extensive personal information. Claimants are free to discuss the outcome of their hearing, including the amount of any compensation they are awarded. Alleged perpetrators are entitled to know the result of the hearings insofar as the allegations against them are concerned, but not the amount of compensation awarded.

[205] The IRA, thus produces, a large number of documents of different types. The documents generally fall into seven categories: (1) applications submitted by the Claimants; (2) mandatory documents containing private personal information; (3) witness statements; (4) documentary evidence produced by the parties; (5) transcripts and audio recordings of the hearings; (6) expert and medical reports; and (7) decisions of the adjudicators and any appeals.

[206] Subject to limited exceptions, the deadline for applying to the IAP was September 19, 2012.

[207] As of March 31, 2013, the Secretariat received 37,716 applications and has held 16,700 hearings.

[208] As of June 2014, 25,800 claims have been resolved.

5. Nature and the Confidentiality of the IAP Documents

[209] Crucial to resolving the competing RFDs is the nature of the IAP Documents. For the facts and reasons that follow, in my opinion, they are confidential and private documents subject to the law providing remedies for breach of confidence. See: *Slavutych v. Baker*, [1976] 1 S.C.R. 254; *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Visagie v. TVX Gold Inc.* (2000), 49 O.R. (3d) 198 (C.A.); *Seager v. Copydex Ltd.*, [1976] 2 All E.R. 415; *Coco v. A.N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch.); *Terrapon Ltd. v. Builders' Supply Co (Hayes) Ltd.*, [1960] R.P.C. 128.

[210] As explained later, I also agree with the arguments of the Chief Adjudicator and Independent Counsel that the IAP Documents are subject to the implied undertaking.

[211] As the above details reveal, under the IRSSA, the IAP is a private and confidential process. Claimants are assured of confidentiality expressly by various provisions and statements

in the IRSSA, by express assurances or promises of confidentiality in forms and documents prepared to implement the IAP, in website information and by oral assurances of confidentiality expressed by adjudicators at IAP hearings.

[212] Although there is some dispute about the truth and reliability of the information, there is no dispute between the parties that the IAP Documents capture very sensitive personal information about the Claimants and the alleged perpetrators of wrongdoing at the Indian Residential Schools. There are allegations of sexual abuse, serious physical abuse, and atrocious acts committed against children. There are accounts of the suffering and the harm inflicted on the children and the consequences to their physical, mental, and spiritual health.

[213] The details are found in IAP application forms, transcripts and audio recordings of hearings, and in the decisions of the adjudicators, and there is no doubt that atrocities occurred. As the Prime Minister acknowledged in Canada's apology on June 11, 2008:

> The government now recognizes that the consequences of the Indian Residential Schools policy were profoundly negative and that this policy has had a lasting and damaging impact on Aboriginal culture, heritage and language. While some former students have spoken positively about their experiences at residential schools, these stories are far overshadowed by tragic accounts of the emotional, physical and sexual abuse and neglect of helpless children, and their separation from powerless families and communities. .... It has taken extraordinary courage for the thousands of survivors that have come forward to speak publicly about the abuse they suffered. It is a testament to their resilience as individuals and to the strength of their cultures. Regrettably, many former students are not with us today and died never having received a full apology from the Government of Canada.

[214] The prospect that IAP Documents may be archived and potentially disclosed to the public has caused severe stress and anxiety to Claimants who fear identification and the revelation of intensely private experiences and their feelings to members of their family, community, and the public at large. The Claimants are distressed by this prospect, and having regard to the various assurances of confidentiality, they regard disclosure as a betrayal and an egregious breach of confidence and contrary to the IRSSA.

[215] Mr. Fontaine testified that the disclosure of the information would perpetuate the harm to the Aboriginal communities if the names of alleged perpetrators of student-on-student abuse ever became public knowledge. He stated:

> If any of this information is placed into an archive, even if it is sealed for ten years, fifty years, a hundred years or longer, the identities of these perpetrators and their victims will someday become available to their descendants or researchers who may publish information. Within our communities, such knowledge even in future generations would continue the legacy of dysfunction and trauma that was created by the Residential Schools.

[216] Fred Kelly and Percy Gordon, both of whom are former students at the Indian Residential Schools, strongly oppose the archiving of their IAP Documents. G.C., Jane Doe, Mr. Fontaine, N.B.H., E.K., and D.W., and other former students stated that they did not consent to the release of their personal information to anyone. Mr. Gordon deposed:

> I have a personal sense of the past and the future. Culturally, I believe that First Nations people have that similar sense. We continue to honour hereditary Chiefs in many First Nations. As National Chief Atleo puts it, this is "through the pride of our culture and the strength of our ancestors". I do not want my grandchildren or my grandchildren's grandchildren to be able to study and read about the wrongdoing done to me. Some within our community may take a

different view but that is their individual choice. But I rely on the promises that were made to me and believe a judge may not undo a promise made to me and reverse that promise.

[217] Jane Doe, another Claimant, deposed:

What happened to me at the IRS is tragic and personal. I would never have entered into the IAP process if I thought that the abuse that I disclosed at my NSP [Negotiated Settlement Process] would ever have been revealed to anyone or any entity outside of the IAP process. If this information is ever disclosed outside of my IAP file, it would re-victimize and destroy me. I did not nor do I consent to my IAP NSP transcript, fee review, recording, documents, application or any other information disclosed by me or made available about me for the purpose of completing my IAP claim to be released to the TRC of NCTR for any purpose.

[218] D.W., another Claimant, deposed:

I oppose that my file be provided to any organization regardless of the measures that could be taken to protect my identity. I did not give any consent to this effect and I always understood that my application, the mandatory documents, and the recording and transcripts of my testimony would not serve any purposes other than those of the IAP. I particularly fear the possibility of being identified by mistake, negligence or a leak of information and therefore permitting individuals to learn facts that concern only me. I am equally concerned by the fact that the family of the person who abused me could one day learn what I suffered at IRS. I still travel in certain native communities in Ontario where members of that family reside.

[219] E.K., another Claimant, deposed:

Any other use or disclosure of IAP records about me further violates my dignity, integrity and autonomy and taken away my trust in the confidentiality of the IAP. The risk or prospect of any other use or disclosure, during my lifetime or even only to my descendants after my death, is deeply distressing for me and compounds my suffering from residential school. I want, and believe I should have the right, to live secure and at peace in the knowledge that IAP records about me will not be used or disclosed for other purposes, and they will be securely and permanently destroyed at the conclusion of the IAP.

[220] G.C., another Claimant deposed:

I deliberately choose not to give a statement to the TRC or the NCTR. My story belongs to me. I was told on more than one occasion that the information I provided at my IAP hearing would be held in the strictest of confidentiality. Absolutely no one would have access to my IAP information. I was the only one who could tell my story. The information disclosed at my IAP belongs to me and it contains information that I have lived my entire life trying to forget.

[221] N.B.H, another Claimant, deposed:

I deliberately did not attend any of the TRC's events because what happened to me at the IRS was so painful and devastating that I could not participate in any type of public gathering that focused on any aspect regarding an IRS. I deliberately chose not to provide a statement to the TRC. [...] I would be devastated if anyone else, other than those that were at my IAP hearing, ever learned of this information.

[222] The Merchant Law Group received 66 responses to a letter asking Claimants if they objected to the disclosure of their personal information to the TRC. Of the 66 responses, only nine Claimants stated that they did not object.

[223] Mr. Shapiro, the current Chief Adjudicator expressed serious concern about the consequences of any court Order that resulted in the unilateral archiving of IAP Documents. He deposed as follows:

> As Chief Adjudicator, I am greatly concerned that any direction issued by this Honourable Court regarding the disposition of IAP Records may result in deterring Claimants or alleged perpetrators from coming forwards to testify in the many cases remaining to be decided. The IAP provides rights of participation to Alleged Perpetrators, who have also expressed serious concern at their hearings about allegations made against them becoming known. Such allegations can be among the most serious possible, including pedophilia, sadism and racism. Again, adjudicators have provided assurances of confidentiality and explained the confidentiality agreements.

[224] Dr. Flaherty, a historian and consultant with respect to the regulation of privacy and access to information, who was a witness for the Chief Adjudicator, deposed that it would be inappropriate to archive IAP Documents. He deposed:

> The sensitivity of the contents of the IAP claimant files is so great that it would be completely inappropriate to collect, use, disclose, or retain them for archival purposes, or for any other administrative purposes affecting specific individuals, beyond the specific IAP process of determining results in individual cases. .... [The] notion of archiving all IAP claimant records contradicts at least five of the ten privacy commandments/fair information practices enshrined in Canadian federal, provincial, and territorial legislation during the past fifty years

[225] The evidence on these RFDs establishes that the negotiators of the IRSSA intended that the IAP be a confidential and private process. As I shall explain below, that subjective intent is manifested in the objective interpretation of the IRSSA.

[226] The evidence establishes that the Claimants and the alleged perpetrators relied on the confidentially assurances expressed in the IRSSA and that they relied on the reiteration and expressions of confidentiality and privacy made as the IAP applications got underway and that reliance on confidentiality and privacy continues to this day.

[227] The evidence also establishes that without assurances of confidentiality, the IAP would not have functioned and the IRSSA would not have achieved the goal of providing compensation to the victims of the Indian Residential Schools. To employ the idiom of class actions, the Class Members would not have taken up the benefits of the settlement of their claims without a confidential, private, and sensitive claims process.

[228] In my opinion, the IAP Documents are confidential documents as a matter of contract and as a matter of the law of confidentiality communications; i.e. they are subject to the law about breach of confidence. They are also subject to various statutory provisions about privacy, some of those provisions mentioned in the IRSSA.

[229] In this last regard, the Nine Catholic Entities rely on the right to privacy under the *Civil Code of Québec, supra* and the *Quebec Charter of Human Rights and Freedoms, supra.* The relevant sections of the *Code* are Articles 3, 35, and 36, which state:

> 3. Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy.
>
> These rights are inalienable.

> 35. Every person has a right to the respect of his reputation and privacy.
>
> No one may invade the privacy of a person without the consent of the person unless authorized by law.
>
> 36. No one may invade the privacy of a person without the consent of the person unless authorized by law.
>
> The following acts, in particular, may be considered as invasions of the privacy of a person: ...
>
> (6) using his correspondence, manuscripts or other personal documents.

[230] The relevant sections of the *Quebec Charter of Human Rights and Freedoms* are sections 4 and 9, which state:

> 4. Every person has a right to the safeguard of his dignity, honour and reputation.
>
> 9. Every person has a right to non-disclosure of confidential information.
>
> No person bound to professional secrecy by law and no priest or other minister of religion may, even in judicial proceedings, disclose confidential information revealed to him by reason of his position or profession, unless he is authorized to do so by the person who confided such information to him or by an express provision of law.

[231] I will discuss the legal consequences of the above findings later in these Reasons for Decision.

6. The Historical Value and the Reliability of the IAP Documents

[232] There is a dispute about the historical value of the IAP Documents and their utility for the purposes of the mission of the TRC and the NCTR. This dispute is yet another factor in resolving the request that the IAP Documents be destroyed, but the dispute is also relevant to the issue of whether there should be a notice plan to inform Claimants of their option of providing personal information about their stories to the NCTR.

[233] The dispute is that the parties disagree about the value of the IAP Documents to composing an historical account of what occurred at the Indian Residential Schools.

[234] LAC performed a preliminary assessment of the records in the possession of the AANDC and determined that very few of the documents were of enduring value. LAC did assess some IAP material relating to strategy, policy, and adjudication and the overall management of the IAP and the ADR processes as of enduring value. LAC considered the recordings and transcripts of the IAP hearings to be of enduring historical value and it requested copies of each decision for the IAP and ADR.

[235] LAC advised that all other information resources related to the IAP are not to be transferred to the Library and Archives. The contents of the Single Access to Dispute Resolutions Enterprise ("SADRE") database will not be transferred.

[236] Canada submits that the IAP decisions have both legal and historical components that militate against their destruction and favour their preservation at LAC. Canada says that the IAP decisions form a record of Canada's fulfillment of its obligations under the IRSSA and establish issue estoppels confirming the releases provided by the IRSSA. Canada says that the decisions

contain information of historical significance memorializing the IRS system and its legacy. Conversely, Canada submits that holding the decisions at LAC, would be consistent with LAC's role as the national repository of records with historical or archival value.

[237] I pause here to say that Canada is simply wrong that it needs the IAP decisions to protect itself from re-litigation of released claims. The releases provided by the IRSSA operate whether or not a Claimant made an IAP claim, and it appears that with more than 150,000 First Nations, Inuit, and Métis children required to attend Indian Residential Schools, about 25% (37,716) made IAP claims. I also rather doubt that IAP Documents are the only way that Canada can document that it honoured its obligation to pay successful IAP Claimants.

[238] For its part, the TRC submits that the IAP Documents are the single-most comprehensive collection of documents that evidence the harms suffered by residential school survivors. The TRC submits that the IAP Documents contain a unique aggregation of items, which taken as a whole provide the most comprehensive understanding of the abuses that took place in the Indian Residential School system. The TRC and the NCTR submit that the IAP Documents are essential to the creation of "as complete an historical record as possible of the IRS system and legacy."

[239] In correspondence dated October 25, 2010 to Dean Moran, the Chair of OC, Justice Murray, the Chair of the TRC, expressed his opinion as to the importance of the IAP Documents; he wrote:

> The preservation of IAP records is fundamental to maintaining a full and complete record of Residential Schools. Future generations will never know what went on in the schools if the records are lost. It will be easy to dismiss second and third hand accounts of that history without the first-hand accounts to add their weight of truth.

[240] Dean Moran acknowledged the importance of the IAP Documents gathered with the consent of the Claimants. In her reply letter dated January 11, 2011, she wrote:

> The specific individual information gathered with claimants' consent, together with the systemic information provided by the Adjudication Secretariat, would provide the TRC with an excellent qualitative and quantitative research base. The ultimate product would be comprised of a rich foundation of firsthand accounts married with broad based information resulting in a detailed portrayal of the nature and extent of the deplorable abuse perpetrated upon the students of Canada's Indian Residential Schools.

[241] I observe that Dean Moran does not suggest that all of the IAP Documents are necessary for an excellent qualitative and quantitative research base.

[242] The TRC reports that as of November 6, 2013, the TRC had gathered approximately 6,200 oral statements from residential school survivors, but by contrast, there were 37,847 IAP applications.

[243] The TRC also submits that unlike the statements it has collected, the Claimant's IAP testimony is given under oath and subjected to questioning by the adjudicator to ascertain its reliability.

[244] In contrast, the Chief Adjudicator relied on Dr. Flaherty's opinion that IAP Documents are not required for the TRC to achieve its mandate. Dr. Flaherty noted that journalists, historians, political scientists, and other scholars write about the legacy of residential schools in Canada without access to Claimant files. It was also noted that the TRC may obtain statements

from Claimants on a voluntary basis and that it has obtained 7,000 such statements from survivors of whom 40 percent have chosen to remain anonymous.

[245] The Twenty-Four Catholic Entities weighed into the debate by submitting that the nature of the IAP procedure reduces the reliability of the IAP Documents as a record of the truth of the allegations.

[246] The Twenty-Four Catholic Entities point out that the alleged perpetrator is not a party and sometimes not a participant at the IAP because of death, unavailability, or choice. They note that when a participant, the alleged perpetrator has no right of confrontation and his or her right to defend the allegations of wrongdoing are attenuated. The Twenty-Four Catholic Entities suggest that some of the Claimants' allegations are false allegations and made against persons who can be shown not to have been at the Indian Residential School at the time of the alleged wrongdoing. The Twenty-Four Entities submit that the outcome of the IAP should be treated as no more than a confidential claims process and not a reliable or a complete historical record.

[247] The Sisters of St. Joseph also weighed in and it submitted that the IAP was a flawed process that could and did lead to biased and inaccurate outcomes. It noted that of the approximately 20,000 IAP Claims which have been completed, the overwhelming vast majority were not defended by a religious order and that meant that IAP Documents produced and collected for those IAP Claims would reflect a one-sided record of what allegedly happened.

[248] The Sisters of St. Joseph submitted that there is no historical value of the IAP Documents because they were not created for the purpose of recording history; rather, the Sisters of St. Joseph submitted that the IAP Documents were created in the context of a private and confidential adjudicative process where if certain allegations were made and told a certain way, the teller would receive significant amounts of money.

[249] For their part, Independent Counsel acknowledged the importance of maintaining an historical record of the residential schools; however, Independent Counsel submitted that the TRC and the NRC do not require the IAP Documents in order to fulfill their mandates.

7. Canada's Custody and Control of the IAP Documents and its Plan for Them

[250] I return to the matter of Canada's custody and control of the IAP Documents because how Canada treats government records is a part of the factual nexus for interpreting the IRSSA, and how Canada treats government records is also part of the factual nexus for determining the competing RFDs.

[251] As a department of Canada, AANDC is subject to the *Library and Archives of Canada Act*, the *Privacy Act, supra* and the *Access to Information Act, supra*. Canada submits that both SAO and the Secretariat, which are branches of AANDC, are subject to this statutory regime.

[252] During the time when AANDC is using government records and until the documents or records have no operational value, AANDC retains its documents. While it is retaining the documents, in accordance with the exemption in s. 19 of the *Access to Information Act*, *supra*, AANDC protects the privacy of individuals with respect to whom personal information has been collected by preventing public distribution of that information, while also providing individuals with a right of access to their own information as provided in the federal *Privacy Act, supra*.

[253] The Secretariat and SAO both have digital and hard copies of IAP Documents.

[254] The digital documents are stored on the SADRE. This database contains approximately 45,000 pages of material. SADRE functions with an asymmetrical access system that permits employees of SAO and the Secretariat to access different, but overlapping, sets of electronic records. Employees from either the Secretariat and/or SAO may effectively transfer documents through SADRE by granting access permissions.

[255] In addition, the Secretariat maintains a secure server that contains transcripts of all IAP hearings held before mid-2011, the audio recordings of all the hearings held since mid-2011, and electronic copies of transcripts for every hearing that was transcribed since mid-2011.

[256] As of February 3, 2014, there were 795,038 unique documents in SADRE. Of these, medical, workers' compensation, income tax, employment insurance, Canada Pension Plan, corrections, and education documents constituted 272,547 of the documents (34.3%).

[257] The hard copies of IAP Documents are in offices in Regina and Ottawa. The Regina office possesses approximately 21,000 IAP files and approximately 1,540 hearing transcript files. It also holds 5,380 ADR files (the predecessor to the IAP) and 110 boxes of closed financial files.

[258] Between September 19, 2007 and August 25, 2013, approximately 1,924 ADR decisions and approximately 14,744 IAP decisions were rendered. These decisions are only minimally redacted to remove the name of the alleged perpetrator from the Claimant's copy of the decision. Unredacted versions, which are provided to counsel for the parties, are also kept by the Secretariat.

[259] Upon the expiry of the retention period, the issue will become how to dispose of the documents. Pursuant to s. 12 of the *Library and Archives of Canada Act*, *supra* disposition of any records held by AANDC may occur only with the written consent of the Librarian and Archivist. LAC has the authority to destroy government records. Subsection 12(1) of the *Library and Archives Canada Act*, states:

> 12(1) No government or ministerial record, whether or not it is surplus property of a government institution, shall be disposed of, including by being destroyed, without the written consent of the Librarian and Archivist or of a person to whom the Librarian and Archivist has, in writing, delegated the power to give such consents.

[260] With regards to IAP records, LAC issued a *Records Disposition Authority No. 2011/010*, dated February 26, 2013. A Record Disposition Authority ("RDA") is the official instrument used to direct the disposition of government records.

[261] *RDA No. 2011/010* stated:

> The Deputy Head and Librarian and Archivist of Canada, pursuant to subsections 12(1) and 13(1) of the *Library and Archives of Canada Act*, is of the opinion that records described in the attached Agreement are of historic or archival importance. The Librarian and Archivist, therefore, requires their transfer to the care and control of Library and Archives Canada in accordance with the Terms and Conditions set out in the Appendix to the Agreement, and consents to the disposal of all other records, when the Aboriginal Affairs and Northern Development Canada decides that it is no longer necessary to preserve these information resources to satisfy operational or legal requirements.

[262] Under a RDA, records identified as having historical or archival value by the Librarian and Archivist are transferred to LAC after the expiry of the retention period in accordance with a transfer agreement between LAC and AANDC. After transfer, the transferred records fall under the care and control of LAC. The non-transferred documents remain under the custody and control of their custodian, in this case AANDC.

[263] On August 7, 2012, AANDC and LAC signed an Agreement for the Transfer of Archival Records. A substantive appendix to the AANDC-LAC Agreement provides that "[all] electronic copies of the Notice of Decision document and Settlement Package for each IAP and ADR case" must be transferred to LAC when they are no longer required by AANDC.

[264] Under the Agreement for the Transfer of Archival Records, the balance of the IAP Documents could be disposed of by AANDC at its discretion and in accordance with law.

[265] Records transferred to LAC are registered into LAC's collection management system, where they are identified as Code 32, meaning that they are restricted by law, until a determination has been made otherwise. Access restrictions on records at LAC may be re-evaluated upon an Access to Information and Privacy request.

[266] Of the IAP Documents, the Appendix specifies that only electronic copies of the Notice of Decision for each IAP case are to be transferred to LAC: the Appendix also requires the transfer of certain other records that do not qualify as IAP Records, including settlement packages, strategic documents relating to the IAP, and ADR pilot project case files.

[267] The Appendix further specifies certain documents that are not to be transferred to LAC, including IAP paper case files, other electronic case documentation related to the IAP, working files related to the IAP, Persons of Interest files (relating to alleged perpetrators), and tombstone information contained in SADRE. Such documents may be destroyed by AANDC in accordance with the RDA 2011/010 after the expiry of applicable retention periods.

[268] Dr. Flaherty, who was a deponent for the Chief Adjudicator, predicted that most of the IAP Documents not sent to LAC would be destroyed. He deposed:

> It is important to remember that most of the administrative records produced about IAP claimants on a mandatory basis would normally be destroyed by the original custodians - and not archived by them - because such routine records are not "of enduring value." This would be true for individual health records, welfare records, social work records, unemployment records, and income tax records. Criminal and correctional records would likely be stored in a manner comparable to court records. Juvenile court records might be preserved but are not normally available to researchers except under very strict controls.

[269] Dr. Flaherty, who is an expert about the regulation of privacy and access to information, recommended the destruction of the documents to protect the privacy interests of Claimants. In his affidavit, at paragraphs 13 and 62, he deposed as follows:

> It is not normal in Canada to collate, compile, and link such administrative records about such a large group of specific victims. Having served their administrative purposes to settle claims, there is a strong argument to destroy all of the claimant records to protect the current and historical reputations and privacy interests of the claimants and any third parties identified in the claims records. ... The accumulation of so much sensitive information on a stigmatized population is truly extraordinary. My primary recommendation is destruction.

8. The History of the RFDs

[270] Before moving on to the discussion and analysis, the last factual matter to discuss is the circumstances that prompted the RFDs.

[271] The ADR process, which was the precursor to the IAP, opened in November 6, 2003, and continued to accept applications until the Approval Date of the IRSSA Agreement, March 19, 2007. Under the ADR Claimants were given the option of having the transcript of their hearing deposited in an archive developed for the purpose. As noted above, this option was continued as part of the IAP. However, the option was an arid option because no work was done during the life of the ADR process or for the first few years of the IAP, to develop an archive for the transcripts or to promote the option.

[272] In mid-2010, then Executive Director of the Secretariat Jeffery Hutchinson asked John Trueman of the Secretariat to develop a consent form to enable Claimants to share information from their IAP claims with the TRC. Mr. Trueman drafted a form and communicated with Tom McMahon, TRC's Executive Director and with Ry Moran, TRC's Director of Statement Gathering.

[273] There seems to have some progress in developing a form, and in October 2010, the OC met with the TRC and there was a direction to go forward with a consent form for Claimants who wished to share their information with the TRC. However, on October 25, 2010, Justice Murray Sinclair, Chair of the TRC, wrote Dean Moran, Chair of the OC, and requested that the IAP provide all of its records to the TRC. He also requested that the IAP recognize the TRC as an archive developed for the purpose of receiving Claimant transcripts.

[274] On January 11, 2011, Dean Moran replied that the OC was unanimously of the view that the disclosure of IAP Documents would be a profound breach of trust to the Claimants who had been promised confidentiality, but the OC was ready to assist those Claimants who choose to share their testimony and was prepared to make a vigorous effort to obtain consents to the release of transcripts and other information. She said that the OC would work with the TRC to develop a consent form that could be given to IAP Claimants. She said, however, that the fundamental principle that must be respected was that the personal information contained in the IAP Documents belonged to each Claimant, who had the right to choose whether it would be disclosed.

[275] After this exchange, the Secretariat resumed a dialogue with the TRC to develop a consent form, but the problem appears to be that the TRC never abandoned its wish to obtain the IAP Documents, even if the Claimant did not sign a consent.

[276] The TRC was also of the view that it was the Secretariat's responsibility to develop and implement a consent program and that it had failed to do so. The TRC was prepared to be helpful, but it was not its responsibility to develop the program. Nevertheless, the communications between the Secretariat and the TRC about developing a consent form continued until around May 2011 and then the dialogue stopped.

[277] Meanwhile, discussions began between the Secretariat and LAC about the eventual disposition of the IAP Documents. These discussions engaged the interest of the OC, which

formed a working group to examine the question of disposition of records and make recommendations.

[278] In October 2011, the working group reported, and the OC decided as an interim measure to create a transcript archive to be housed within the Secretariat for later transfer to a permanent home. With the Claimant's consent, transcripts could be delivered to an archive with names of persons materially implicated in the claim redacted but the Claimant's own information preserved. The Secretariat was directed to redraft the consent form for review by the OC and then the plan was that following approval of the draft, the Chair would write to the TRC to advise that the IAP planned to implement the transcript archive.

[279] In December 2011, the OC met to review the revised draft of the consent form and discussed how the form should address the TRC's desire to obtain the documents. The Committee members were generally of the view that court intervention would likely be in cases where the Claimant did not consent, and the TRC would likely be involved. The OC decided to contact the TRC to determine whether they would be open to a structured discussion of these issues with the possible assistance of the Hon. Frank Iacobucci.

[280] On February 2, 2012, representatives of the Secretariat met with Ms. Kim Murray, Executive Director of the TRC, and she indicated that the TRC was not interested in the assistance of the Honourable Frank Iacobucci, who was Canada's negotiator in the process that led to the settlement. Instead, she asked if the TRC could meet with the OC.

[281] On February 28, 2012, the TRC's Justice Sinclair, Executive Director Kim Murray, and Legal Counsel Julian Falconer attended a meeting of the OC. Justice Sinclair indicated that the TRC wished to put into place a plan to obtain the IAP Documents because the IAP had the bulk of IRS survivors' stories of abuses and the TRC was concerned that if these stories were not reflected in its report, it would lack a full picture.

[282] Justice Sinclair raised the TRC's view that the confidentiality assurances given to Claimants were not compatible with the IRSSA. Justice Sinclair explained that the TRC would be bringing a request for directions on the document disclosure obligations of Canada and the churches to the courts and would, if the OC wished, include a question about the IAP's obligations.

[283] Dean Moran thanked Justice Sinclair and his colleagues for coming to the OC meeting. After the meeting, although there was supposed to be a follow up, no work resumed to develop a consent form.

[284] On August 14, 2013, the TRC delivered its RFD.

[285] On October 11, 2013, the Secretariat delivered its RFD.

I. DISCUSSION AND ANALYSIS

1. Introduction

[286] At the most general level, the two RFDs and the Sisters of St. Joseph's motion to quash raise four questions. The first question is whether the Chief Adjudicator and the TRC have standing to bring the RFDs. The second question is whether their RFDs are premature. The third

question is what can and should the court direct with respect to the disposition of the IAP Documents. The fourth question arises from the answer to the third. The fourth question is what should be done with the documents and by whom before their final disposition, be that archiving the documents at LAC or NCTR or be that destroying the IAP Documents.

[287] These four questions raise a myriad of particular questions some of which I have addressed and already answered above. In the discussion that follows, I will complete the analysis and answer the questions.

[288] By way of overview, I answer the first question "yes." The Chief Adjudicator and the TRC have standing because they are entitled to bring RFDs as "such other entity as this court may allow [to] apply for a directions."

[289] My answer to the second question is that the RFDs are not premature. I have two explanations for this answer. First, the RFDs are not premature because the IRSSA does not provide a prior dispute resolution mechanism for the Chief Adjudicator's RFD and since the TRC's RFD raises the same questions, there is no point in postponing resolving the RFDs, particularly because it would be irresponsible for the court to do so where the issues are important to ensuring that the IRSSA is properly administered.

[290] Second, it would be triumph of form over substance to postpone making a decision and this is especially so because it is inconceivable that the NAC would be able to agree on a binding solution that, in any event, involves a determination of several legal issues within the domain of the court.

[291] I have outlined my answer to the third question in the Introduction to these Reasons for Decision. My answer is that the court has and should exercise its jurisdiction to make a Destruction Order. More particularly, the Order should provide that: (a) with the redaction of personal information about alleged perpetrators or affected parties and with the consent of the Claimant, his or her IAP Application Form, hearing transcript, hearing audio recording, and adjudicator's decision may be archived at the NCTR; (b) Canada shall retain all IAP Documents for 15 years after the completion of the IAP hearings; (c) after the retention period, Canada shall destroy all IAP Documents; (d) any other person or entity in possession of IAP Documents shall destroy them after the completion of the IAP hearings.

[292] There are three reasons for the answer that the court can order the destruction of the documents. First, as a matter of contract interpretation, destruction is what the parties agreed, and the court can enforce *in rem* the parties' bargain. Second, the IAP Documents are subject to the implied undertaking, and the court can enforce the implied undertaking to require the destruction of the IAP Documents. Third, the IAP Documents are subject to the law governing a breach of confidence and in the circumstances of the IAP Documents, the appropriate remedy to prevent a breach of confidence is to destroy the documents.

[293] My answer to the fourth question has also been foreshadowed. There should be a notice program to advise Claimants of their option of providing personal information about their experiences at the Indian Residential Schools to the NCTR.

2. The TRC's and the Chief Adjudicator's Standing

[294] The first question is whether the Chief Adjudicator and the TRC have standing to bring the RFDs. The second question is whether their RFDs are premature.

[295] The Sisters of St. Joseph bring a motion to quash the RFDs of the TRC and the Chief Adjudicator on the grounds that both lack standing or alternatively because the TRC and the Chief Adjudicator have not exhausted the dispute resolution mechanisms provided by the IRSSA.

[296] I disagree with the Sisters of St. Joseph's argument for two mutually distinct reasons.

[297] The first reason is that because the Chief Adjudicator's RFD is not premature, both he and the TRC have standing,

[298] Under paragraph 31 of the Order approving the IRSSA, the court declared that "such other entity as this court may allow" may apply for directions in respect of the implementation or administration of the IRSSA. Both the TRC and the Chief Adjudicator are "such other entity as this court may allow." In other words, I grant them leave to bring their respective RFDs.

[299] Although its standing has not previously been challenged, the Chief Adjudicator has previously brought five RFDs. Indeed, the Chief Adjudicator brought a RFD jointly with the Sisters of St. Joseph regarding the procedure for dealing with allegations of bias on the part of an adjudicator during an IAP. Similarly, although it has not previously been challenged, the TRC has previously brought RFDs. In any event, I would grant standing to both entities.

[300] However, to be compliant with paragraph 31 of the Approval Order, "the other entity" may apply for directions only after fully exhausting the dispute resolution mechanisms mandated by the Agreement. In the circumstances of the case at bar, there is no dispute resolution mechanism for the Chief Adjudicator to exhaust and, therefore, it has standing to bring its RFD and its RFD is not premature.

[301] I disagree with the argument of the Sisters of St. Joseph that there was a dispute resolution mechanism available to the Chief Adjudicator in the circumstances of its RFD request. The Sisters of St. Joseph posited that the Chief Adjudicator ought to have sought instructions from the OC, which, in turn, would seek directions from the NAC, which, in turn, would have a right to bring this matter to the court. I disagree with this proposition.

[302] While it undoubtedly would be exhausting, I do not see how following this serpentine route makes for a dispute resolution mechanism for the Chief Adjudicator. Ultimately, the Chief Adjudicator's dispute about the fate of the IAP Documents is as much if not more of a dispute with Canada as it is dispute with the TRC. The dispute involves the autonomy of the Secretariat and the administration of the IAP. The Chief Adjudicator's dispute with Canada goes to the enforcement of the confidentiality provisions of the IRSSA, and much more is involved than document production, disposal, and archiving. The heart of the dispute is about the operative integrity and success of the missions of both the IAP and the TRC. It is much more about the confidentiality and privacy concerns of the parties to the IRSSA and it is about the tension in the agreement between providing compensation without further harming the victims and achieving truth and reconciliation so that the harms will not be repeated in the future. The IRSSA did not provide an alternative dispute resolution mechanism for this dispute.

[303] In my opinion, there was no dispute resolution mechanism available for the Chief Adjudicator to exhaust.

[304] Since the Chief Adjudicator has standing for its RFD, the TRC also has standing even if it did not avail itself of the dispute resolution mechanisms available to it. This conclusion follows from the analysis of Justice Goudge in *Fontaine v. Canada (Attorney General)*, 2013 ONSC 684.

[305] In that case, Canada contested the standing of the TRC to bring a RFD on the exact same grounds relied on by the Sisters of St. Joseph in the immediate case. However, in the case before Justice Goudge, the AFN and the Inuit Representatives – who are both signatories to the Agreement – also had sought answers to the same questions as the TRC. Consequently, the issue of the TRC's standing was technically moot because others had standing. Thus, an RFD applicant without standing can coattail its RFD when there is a RFD applicant with standing before the court. Given the fact that the treatment of IAP Documents impacts the work of both the TRC and the Chief Adjudicator, and given the broader importance of the issues to the legacy of Residential Schools, it would be a victory of form over substance to preclude the TRC from bringing forward matters important to the administration of the IRSSA. The court is, after all, charged with supervision of the proper implementation of the Agreement.

[306] That last comment brings me to my second reason for concluding that the TRC and the Chief Adjudicator have standing to bring their RFDs and for concluding that the RFDs are not premature. The second reason is that in my opinion, in appropriate cases, the court retains the jurisdiction to deem that a party or "other entity" has exhausted the dispute resolution mechanisms of the IRSSA. This extraordinary jurisdiction does not require an amendment to the IRSSA, and this jurisdiction exits because the court always has an obligation to oversee the administration of the IRSSA and always retains the attendant jurisdiction to do so.

[307] In the case at bar, it was a foregone conclusion that the NAC would not muster five votes in favour of the TRC's plan for the IAP Documents. There are seven representatives on NAC and it appears that Canada, AFN, likely the Inuit Organizations, the Church Organizations, and likely the three plaintiffs' counsel are opposed to the TRC's plans. The TRC's RFD request would inevitably have exhausted itself unfavourably, and thus it would inevitably be in the position to say that it had exhausted the dispute resolution mechanisms. As for the Chief Adjudicator's RFD request, it appears to be opposed by Canada, and, thus, even if approved by the NAC, a RFD would have inevitably followed. In any event, both the TRC and the Chief Adjudicator raised very serious issues that ultimately would require the court's attention. Thus, if necessary, I would deem any dispute resolution mechanisms to have been exhausted.

[308] I, therefore, conclude that the Chief Adjudicator and TRC have standing and that their respective RFDs are not premature.

3. <u>What Can and Should Happen to the IAP Documents?</u>

(a) <u>The Interpretation of the IAP Confidentiality Provisions in the IRSSA</u>

[309] In essence, Canada argues that by the express references to the *Access to Information Act* and the *Privacy Act,* the plain meaning of the confidentiality provisions of the IRSSA expressly told the Claimants that their IAP Documents might be disclosed, and, therefore, whatever other

express assurances of confidentiality the Claimants might find in the IRSSA, they knew that their IAP Documents were not confidential and could be retained by Canada and Canada could decide which documents would be destroyed and which documents would be archived at LAC. Further, Canada argues that given the express references to the *Access to Information Act* and the *Privacy Act,* it would take an amendment to the IRSSA for the court to order the destruction of the IAP Documents.

[310] Given Canada's argument, it is perhaps ironic that APPENDIX B to the Guide, which was used by the Secretariat (a branch of a government department of Canada) and endorsed or adopted by other emanations of Canada, comes closer to what I regard as the proper interpretation of the confidentiality provisions in the IRSSA.

[311] My interpretation is that before a necessary and promised destruction of the IAP Documents, the documents will be retained by Canada, where, in the interim, the IAP Documents would be governed by the *Access to Information Act* and the *Privacy Act.* The retention period was designed to allow the documents to be disclosed in very limited circumstances involving criminal and child protection proceedings. That is, in essence, the interpretation provided in APPENDIX B, which promotes confidentiality and provides the examples of the reasons why the documents might have to be disclosed in limited circumstances including current child protection proceedings.

[312] For convenience, I repeat the interpretation of the confidentially provisions that Canada had and continues to announce as set out in APPENDIX B; visualize:

> Subject to the *Access to Information Act, the Privacy Act* and any other applicable law, or where your consent to share information has been obtained, personal information about you and other individuals identified in your claim will be dealt with in a private and confidential manner. In certain situations, the government may have to provide personal information to certain authorities. For example, in a criminal case before the courts, the government may have to provide information to the police if they have a search warrant. Another example is where the government has to provide information to child welfare authorities or the police if it becomes aware that a child is currently in need of protection.

[313] Mr. Russell from SAO, who was a deponent for Canada, deposed that Canada complied with its statutory obligations to protect privacy and confidentiality. He stated that "consent from affected individuals remains the primary prerequisite for the release of IAP records outside the IAP Process, except where otherwise required by law, such as in criminal investigations or by court order."

[314] During argument, however, Canada relied on the provision in Section "o" of Schedule "D" that explains that information at a hearing will be kept confidential "except their own evidence, or as required within this process or otherwise by law." Canada submitted that this provision meant that the Claimants were told that their documents would not be confidential because "or otherwise by law" meant the *Access to Information Act* and the *Privacy Act*, which entailed possible disclosure. I asked whether "or otherwise by law" might just be a reference to the needs of the *Criminal Code*. Notwithstanding the examples set out in APPENDIX B, Canada denied that "or otherwise by law" included the *Criminal Code*.

[315] In my opinion, the plain meaning of the confidentiality provisions of the IRSSA is different than the interpretation posited by Canada for these RFDs and closer to the interpretation set out in APPENDIX B. The parties to the IRSSA interested in confidentiality, most particularly the survivors of the Indian Residential Schools and the Church entities obliged by law to protect the privacy of their members and interested in protecting their own reputations, intended the highest possible degree of confidentiality and privacy during the IAP and most particularly during IAP hearings, which would be recorded sessions.

[316] That high degree of confidentiality is what the plain meaning of the IAP promises. But, by the plain meaning of the IRSSA, the Claimants and the Defendants, including Canada, also did not intend (nor could they reasonably have expected) that the IRSSA could be used to cover up criminal activity or to bury information that a child is currently in need of protection.

[317] There is certainly no express language in the IRSSA that told the Claimants and Defendants that in addition to necessary and predictable exceptions to confidentially for criminal proceedings and current; i.e., imminent, child welfare proceedings, their IAP Documents would be archived at LAC, where pursuant to s. 8 (3) of the *Privacy Act* their personal information may be disclosed in accordance with the regulations to any person or body for research or statistical purposes. That is not the high degree of confidentiality that the parties bargained for.

[318] In advancing its purported plain language interpretation of the confidentiality provisions, Canada relies on the interpretative fact that the confidentiality provisions for the IAP refer to the *Privacy Act* and the *Access to Information Act*. I regard these references as necessary to provide a mechanism during the retention period for the disclosure of the documents for the limited purposes of the prosecution of criminal or child protection proceedings. But for these provisions, the *Privacy Act*, and the *Access to Information Act* would not apply to the IAP Documents.

[319] In other words, I agree with the Chief Adjudicator's argument that these statutes would not apply because both statutes require that the information is "under the control of a government institution." A document is under the control of a government institution when: (1) the contents of the document relate to a departmental matter; and (2) the government institution could reasonably expect to obtain a copy of the document upon request: *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306 at para. 50. In my opinion, the IAP Documents are not under the control of a government institution; rather, they are under the control of various supervisory bodies, including ultimately the court under the IRSSA.

[320] I disagree, however, with the Chief Adjudicator's categorical submission that the *Privacy Act* and the *Access to Information Act* do not apply to the IAP Documents. It was the contracting parties' intention that these Acts apply during the retention period.

[321] In advancing its purported plain language interpretation of the confidentiality provisions of the IRSSA, Canada relies on the interpretative fact that Appendix II (Acceptance of Application) of Schedule "D" expressly requires everybody but Canada to destroy the IAP Application Form. The Appendix states that: "and all copies other than those held by the Government will be destroyed on the conclusion of the matter." However, it is precisely because there needs to be a retention period where the IAP Documents would be available for criminal and child welfare proceedings that Canada needed to retain a copy of the Application Form. But, it does not follow that Canada could retain the Application Form and other IAP Documents and

then send some part of them to LAC, where the documents would be available for persons for research or statistical purposes. That is not what the parties bargained for.

[322] What the parties bargained for was that the IAP Documents would be treated as highly confidential but subject to the very limited prospect of disclosure during a retention period and then the documents, including Canada's copies, would be destroyed. That's more or less what Canada told the IAP Claimants in the Guide to the IAP Application, omitting the point that eventually the documents would be destroyed. In interpreting the IRSSA, the court can now give the Claimants the assurance that the IAP Documents will eventually be destroyed and in the interim the documents will be kept confidential subject to very limited exceptions.

[323] I arrive at the above interpretation by the normal principles of contract interpretation and without relying on the implication of terms to the IRSSA.

[324] That said, if I am wrong and the express language of the IRSSA cannot be taken to specify what is to happen to the IAP Documents after the completion of the IAP hearings, then I agree with the Chief Adjudicator's argument that it is an implied term of the IRSSA that the IAP Documents will be destroyed.

[325] After a careful review of the background to the IRSSA, it can be presumed that the parties intended that the IAP Documents would be destroyed after the completion of the IAP. That implied term arises as a matter of necessity and to give the Agreement operative efficiency because otherwise the IAP's objective of compensating the survivors would fail, and failure is the worst kind of inefficiency.

[326] Near to absolute confidentiality was a necessary aspect of the IAP. Near to absolute confidentiality meant that the IAP Documents would be used for the IAP only subject to very limited exceptions that necessitated that the documents be retained so that criminals and child abusers or those incapable of caring for their children would not escape the administration of justice. After these uses were completed, the confidentiality would become absolute and the IAP Documents would be destroyed. This approach to confidentiality is necessary to make the IAP work and this treatment of the IAP Documents is also necessary to not re-victimize the Claimants and to promote healing and reconciliation between the Claimants and Canada.

[327] The eventual destruction of the IAP Documents after a retention period is the proper interpretation of the IRSSA. I can add that the retention period is also necessary so that the Claimants could have a cooling down period to decide whether they might exercise their option to have the transcript of the IAP archived with redactions to protect the private information of others.

[328] I, therefore, conclude that as a matter of contract interpretation, this court can answer the RFDs by stating that the IAP Documents be destroyed after a retention period.

(b) <u>The Implied Undertaking and the Court's Control of the IAP Documents</u>

[329] The implied undertaking provides a second reason that the court has the jurisdiction to order that the IAP Documents be destroyed after a retention period. However, before explaining why this is so, it is necessary to address again the matter of who controls the IAP Documents.

[330] The Chief Adjudicator argues that the IAP Documents are court records and that it then follows that the documents are not in the possession or control of Canada. The Chief Adjudicator makes this argument with the aim that the court exclusively have the authority to determine what is to happen to the IAP Documents

[331] In my opinion, the IAP Documents are in the possession of Canada, but ultimately nothing turns on that conclusion because having possession of IAP Documents is not determinative. The pertinent question is whether the court has the jurisdiction to decide what should happen to these documents after the completion of the IAP and that question is not determined by the mere fact of who has possession or control over the documents.

[332] As I will explain, my answer is that the court has the jurisdiction to make an order *in rem* (against the world) that the IAP Documents be destroyed subject to the right of the Claimants to consent to certain IAP Documents being archived at the NCTR. The Destruction Order would be binding on persons in possession of the IAP Documents, be their possession pursuant to ownership, bailment, licence, statutory authority or even just finding the document.

[333] I can say immediately that the court's jurisdiction does not arise because the IAP Documents are court records. In my opinion, the IAP Documents are not court records; rather, they are documents that the court has the jurisdiction to control *in rem*, which does not make them court records.

[334] Court records would be subject to s. 74 of Ontario's *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides that court records are to be disposed of in accordance with the directions of the Deputy Attorney General subject to the approval of the Chief Justice of the relevant court. Canada submitted that the IAP Documents could not be court records because if they were, then the IAP Documents would be subject to the open court principle, and this would expose the IAP Documents to the public, which was obviously not the intent of the parties to the IRSSA. I agree that the IAP Documents were not intended to be subject to the open court principle, which they would be, if they were court records.

[335] The IAP Documents are a product of an alternative dispute resolution mechanism, and one of the attractions of adjudication outside of the court is that the adjudication is private and the open court principle does not apply. Under an arbitration agreement, the parties can obtain privacy, something not available from the court system, which is public and invasive of privacy. The IAP is an alternative dispute resolution system, and the parties bargained for privacy and confidentiality.

[336] During argument, Canada conceded, however, that it would have been possible for the IRSSA parties to contract for absolute confidentiality as might be achieved by private arbitration. Canada argued, however, that in the IRSSA negotiations, the potential had not been actualized by the Agreement signed by the parties. For the reasons set out above, I disagree with Canada's interpretation of the contract.

[337] This all said, as I will explain below, the open court principle is relevant to the analysis of what to do with the IAP Documents after the work of the IAP is completed. The relevance is that in its exceptions, the open court principle has lessons about when and how to protect the confidentiality and the privacy of parties who might be injured by the disclosure of a court record.

[338] I can also say immediately that the court's jurisdiction over the IAP Documents does not depend upon whether the Secretariat is a branch of AANDC or a separate or semi-separate or autonomous or semi-autonomous entity independent of Canada and its branches. Insofar as the IRSSA is concerned, the court's jurisdiction extends to the signing parties, to the Chief Adjudicator, to the OC, the NAC, the TRC, the Secretariat, and to SAO, which undoubtedly is a branch of the AANDC. In some instances, the court's jurisdiction over the IAP Documents is *in rem* and would extend to non-parties such as the Ontario Provincial Police ("OPP"), which was the case in *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283.

[339] In *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283, I explained at length the sources of this court's jurisdiction over the production of documents in the IAP process. Although I rely on it, I will not repeat that discussion here, and I simply say that those sources of jurisdiction apply not only to deciding what documents should be produced for the IAP proceedings, which was the issue in *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283, but also to deciding what should happen to IAP Documents after the completion of the IAP hearings, which is the issue in the immediate case.

[340] In *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283, after some analysis, which again I will not repeat here, I concluded that the IAP was a form of litigation that replaced or continued the individual and class actions that were settled by the IRSSA. I held that the implied or deemed undertaking that applied to the proceedings that came before the IAP did not preclude Canada from producing certain documents (the OPP documents) for the IAP and for the TRC because the deemed undertaking rule only applies to proceedings other than the proceeding in which the evidence was obtained. Provided that the disclosure was in accordance with the IRSSA, it was not a breach of the implied undertaking to transfer OPP documents to the TRC. It is a logically corollary of my analysis that the deemed or implied undertaking, however, would apply to the IAP Documents should they be used outside of the IRSSA.

[341] Apart from being a logical extension of my analysis in *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283, the disclosure of documents in the IAP is part of litigation, and it arises as a matter of the common law and the civil law as an incident of litigation. See: *Juman v. Doucette*, [2008] 1 S.C.R. 157; *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, [2001] S.C.R. 743; *Goodman v. Rossi* (1995), 24 O.R. (3d) 359 (C.A.). The purpose of the implied undertaking is to protect a litigant in civil proceedings from having his or her discovery testimony used for collateral purposes.

[342] In *Goodman v. Rossi*, at pages 363-64, the Ontario Court of Appeal stated:

> Where a party has obtained information by means of a court compelled production of documents or discovery, which information could not otherwise have been obtained by legitimate means independent of the litigation process, the receiving party impliedly undertakes to the court that the private information so obtained will not be used, vis-à-vis the producing party, for a purpose outside the scope of the litigation for which disclosure was made, absent consent of the producing party or with leave of the court; any failure to comply with the undertaking shall be a contempt of court.

[343] At page 367, the Court explained the rationale for the implied undertaking as follows:

> [The] principle is based on recognition of the general right of privacy which a person has with respect to his or her documents. The discovery process represents an intrusion on this right under the compulsory processes of the court. The necessary corollary is that this intrusion should not be

> allowed for any purposes other than that of securing justice in the proceeding in which the discovery takes place.

[344] In my opinion, the implied undertaking applies to the IAP and it would be a breach of the implied undertaking, for Canada as a party to the IRSSA to provide its IAP Documents to the TRC or the NCTR or to LAC. Achieving IAP Documents at LAC may have a commendable collateral purpose or preserving history, but it would constitute a breach of the implied undertaking, unless the court ordered that the undertaking does not apply. I would not make such an order in the circumstances of the administration of the IRSSA.

[345] The case at bar is similar to the situation in *Andersen Consulting v. R.*, [2001] 2 F.C.J. No. 57, where the Federal Court held that where Canada obtains materials subject to the implied undertakings rule, that material is not within the control of a government institution and must be returned or destroyed at the conclusion of the litigation.

[346] In *Andersen, supra*, Andersen Consulting and Canada settled a civil dispute, and the lawyers for Canada took the position that Canada would neither return nor destroy the documents it had obtained as a part of the discovery process and that Canada was obliged by law to retain them and in due course to deliver them to what is now LAC. Justice Hugessen ordered the documents destroyed. Justice Hugessen explained that the implied undertaking is not a matter of contract but is imposed by the court itself on a litigant. He disagreed that what is now the *Library and Archives Canada Act, supra* and what was then the *National Archives of Canada Act*, R.S.C., 1985 (3rd Supp.), c. 1, stood in the way of imposing the implied undertaking. He stated at paragraphs 16 and 17 of his judgment:

> 16. It is a fair inference that Parliament's interest in creating the public archive was primarily in ensuring that the archives should contain those documents relating to the actual operations of government as such [page333] rather than to government in its incidental role as plaintiff or defendant in civil litigation.
>
> 17. More important, the cases under the Access to Information Act do not deal with a situation where the law itself imposes a condition upon the government institution which receives a document. This is critical. Documents received by Justice in the discovery process are not subject to a merely voluntary condition. Lawyers for the Crown do not have the option of refusing to give the implied undertaking: by accepting the documents they are bound towards the court to deal with them only in the way permitted by the undertaking. That condition is imposed upon the solicitors and upon the department and the government they serve prior to the documents ever coming into their possession. Furthermore, the undertaking extends not only to the documents themselves but, much more significantly, to all information obtained as a result of the discovery process, e.g. through answers to oral questions. The court in extracting the undertaking is concerned not so much with the documents as pieces of paper but rather, and significantly, with the information they may contain. That information is to remain private unless and until it comes out in open court. While the point does not arise for decision herein, I seriously doubt that it could be called "government information". It is not in the government's control because the latter's possession of it is constrained and restricted by law.

[347] Relying on the Federal Court of Appeal's decision in *Canadian Imperial Bank of Commerce v. Canada (Canadian Human Rights Commission)*, 2007 FCA 272, Canada, however, submitted that *Andersen Consulting v. R.* was distinguishable and that Canada was entitled to have the IAP Documents that it controlled archived at LAC without court interference.

[348] In *Canadian Imperial Bank of Commerce v. Canada (Canadian Human Rights Commission)*, pursuant to the *Employment Equity Act*, CIBC provided confidential commercially sensitive information to the Canadian Human Rights Commission. The Commission subsequently received a request under the *Access to Information Act* for disclosure of the information, and the Commission advised CIBC that it would disclose the confidential information. Reversing the lower court, the Federal Court of Appeal held that the Canadian Human Rights Commission controlled the information, which made the information subject to the *Access to Information Act,* but CIBC's information was covered by an exception to disclosure under the *Access to Information Act*. The outcome of CIBC's appeal was that the confidentiality of its information was protected, but Canada relies on the Federal Court's conclusion that the Commission controlled CIBC's documents and thus the information was subject to the *Access to Information Act*. Canada uses that holding to argue that in the case at bar, Canada controlled the IAP Documents subject to the *Access to Information Act*.

[349] Subject to its relevance to the law about the enforcement of the law about breach of confidence, which I discuss later, I do not see, however, how *Canadian Imperial Bank of Commerce v. Canada (Canadian Human Rights Commission)*, helps Canada in the case at bar. In that case, the Federal Court of Appeal did not overrule or even doubt *Andersen Consulting*, which it noted was not an *Access to Information Act* case. Further, *Canadian Imperial Bank of Commerce v. Canada (Canadian Human Rights Commission)* did not involve the implied undertaking and did not engage the same policy concerns as the case at bar.

[350] I conclude that Canada's possession of the IAP Documents is subject to the implied undertaking and that the court can order the IAP Documents destroyed to enforce the implied undertaking.

(c) Privacy, Confidentiality, and the Court's Control of the IAP Documents

[351] *Canadian Imperial Bank of Commerce v. Canada (Canadian Human Rights Commission)*, *supra,* and several other cases noted in *Andersen Consulting v. R.*, *supra* are authority that an expectation of confidentiality arising from the dealings and agreements between the source of the record and the government institution are not sufficient to withdraw a record from the control of the government institution within the meaning of the *Access to Information Act*. See: *Canada (Information Commissioner) v. Canada (Immigration and Refugee Board),* (1997), 4 Admin. L.R. (3d) 96 (F.C.T.D.); *Canada Post Corp. v. Canada (Minister of Public Works*), [1995] 2 F.C. 110.

[352] In my opinion, none of these cases have any application to the circumstances of the case at bar where Canada entered into an agreement that contained confidentiality provisions that settled class proceedings in nine jurisdictions and which agreement required court approval and which agreement was subject to the administrative and supervisory jurisdiction of the courts under class action statutes including Ontario's *Class Proceedings Act, 1992*. In such circumstances, Canada is bound by the class action settlement agreement including its confidentiality provisions. The IRSSA, a class action and court-approved settlement agreement, bound Canada to the terms of the settlement and bound Canada and the other parties to the courts' administration of the agreement including its confidentiality provisions that are

entrenched into the agreement and that were complemented by additional assurances from Canada and from the Chief Adjudicator, who is a court officer.

[353] The Destruction Order that I shall make does not require an amendment to the IRSSA and indeed is an express or implied term of the IRSSA. Conversely, the archival of the IAP Documents at LAC or at NCTR without the consent of the Claimants would require an amendment to the IRSSA. Further, without the consent of the Claimants, the archiving would be a breach of the implied undertaking and a breach of confidence.

[354] Earlier in these Reasons for Decision I held that the IAP Documents were not court records and as such were not subject to the open court principle that would provide the public with access to what would otherwise be private and in the case of IAP Documents very private and very personal information. I also observed, however, that the open court principle has lessons about when and how to protect the confidentiality and the privacy of parties who might be injured by the disclosure of a court record.

[355] The point I now wish to make is that if the IAP Documents had been court documents, they, without doubt, would have been sealed by court order. In my text with John Morden, *The Law of Civil Procedure in Ontario* (2nd ed.) (Markham, NexisLexis, 2014), I discuss the open court principle at paragraphs 3.735 and 3.738 as follows [footnotes omitted]:

> In *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 which concerned a request for a sealing order in proceedings before the Federal Court, the Supreme Court of Canada formulated a test for when a sealing order should be granted. Justice Iacobucci stated that a sealing order should only be granted when: (1) the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes the public interest in open and accessible court proceedings.
>
> While courts are reluctant to grant a sealing order, there are grounds that would justify a sealing order, and courts have been prepared to grant sealing orders in a variety of circumstances including:
>
> - protecting the privacy of infants and parties under a disability, particularly a mental disability;
> - protecting the safety of a child of a wealthy couple involved in a custody case from an appreciable risk of being kidnapped if information regarding the child was made public;
> - protecting the identity of a police informant;
> - protecting the privacy of personal medical information in a class action;
> - protecting the privacy of victims of a sexual assault;
> - protecting a genuine trade secret or confidential property;
> - preventing the disclosure of a non-parties' confidential information, especially where disclosure by a party would contravene a confidentiality agreement;
> - protecting the disclosure of information subject to the privilege for communications in furtherance of settling litigation (litigation settlement privilege);

- preventing the subject matter of the litigation from being ruined by its disclosure; and
- preventing the efficacy of proceedings under the Companies' Creditors Arrangement Act from being undermined.

[356] If a sealing order had been granted for the IAP Documents, the sealed documents, practically speaking, would never be unsealed, and they certainly would not be unsealed so that Canada could deliver copies of IAP Documents to LAC where, among other exceptions, an individual's personal information may be disclosed for research purposes 110 years after the birth of the individual.

[357] A breach of confidence occurs when a confider discloses confidential information to a confidant in circumstances in which there is an obligation of confidentiality and the confidant misuses the confidential information: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Coco v. A.N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch.).

[358] A confider and confidant relationship does not necessarily require that there be any contractual, fiduciary, or other direct relationship between the parties and confidential relationships may arise as a matter of the common law and equity. A confidant may include any direct recipient of confidential information from the confider and any third party who uses or discloses information that is actually or constructively known to have been used or disclosed by someone in breach of confidence or that is subsequently discovered to have been so used or disclosed. A confidant who receives confidential information, even if it later becomes public knowledge, may not use it to the detriment of the confider. Any use of confidential information other than for a permitted use is a breach of confidence. If a breach of confidence is established, the court has the jurisdiction to grant a wide range of both common law and equitable remedies. The general goal of the remedies is to put the confider into as good a position as it would be but for the breach.

[359] See: *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1994] 8 W.W.R. 727 (B.C.S.C.), varied (1996), 138 D.L.R. (4th) 682 (B.C.C.A.), varied [1999] 1 S.C.R. 142; *Visagie v. TVX Gold Inc.* (2000), 49 O.R. (3d) 198 (C.A.), affg. (1998), 42 B.L.R. (2d) 53 (Ont. Gen. Div.); *Apotex Fermentation Inc. v. Novopharm* (1997), 162 D.L.R. (4th) 111 (Man. C.A.); *International Tools Ltd. v. Kollar*, [1968] 1 O.R. 669 (C.A.); *Tenatronics Ltd. v. Hauf*, [1972] 1 O.R. 329 (H.C.J.); *Polyresins Ltd. v. Stein-Hall Ltd.*, [1972] 2 O.R. 188 (H.C.J.); *Terrapin Ltd. v. Builders Supply Co. (Hayes) Ltd.*, [1967] R.P.C. 375.

[360] Canada's argument is that the parties to the IRSSA and the persons who signed the confidentiality agreements and who received assurances of confidentially contracted out of absolute confidentiality and absolute privacy for the Claimants' personal information. I agree that the parties and participants contracted out of absolute confidentiality and privacy. There were to be exceptions but those exceptions did not include the imperatives of the *Library and Archives Canada Act, supra*. The August 7, 2012 Agreement for the Transfer of Archival Records between AANDC and LAC is a breach of confidence. The appropriate remedy is to have the IAP Documents destroyed after a 15-year retention period.

(d) What Should Be Done with the IAP Documents Before their Final Disposition

[361] As discussed above, the IRSSA envisioned that IAP Documents would be retained for a period of time during which they might be disclosed for very limited purposes associated with criminal or child protection proceedings. As discussed above, under the IAP, a Claimant could request a copy of his or her own evidence for memorialization and had the option of having the transcript of the IAP deposited in an archive.

[362] The IRSSA does not specify the duration of the retention period, and in these circumstances a reasonable retention period would be an implied term of the IRSSA. In my opinion, a reasonable retention period is 15 years. Fifteen years is the duration of the absolute limitation period under Ontario's *Limitations Act, 2002*, S.O. 2002, c. 24 Sch. B, and that duration provides a comparable public policy measure for a maximum retention period.

[363] The TRC is no longer pursuing a request to obtain IAP Documents for the NCTR without the Claimants' consent, but the TRC does wish to encourage Claimants to exercise the option of having the transcript of the IAP deposited with the NCTR.

[364] The evidence establishes that to date, perhaps because of the trauma and stress of the retelling of their stories at the IAP hearings, few Claimants have exercised their option to archive the IAP transcript.

[365] The evidence establishes that there has been a dialogue between the OC and the TRC about obtaining transcripts and that Canada is willing to facilitate a notice program to encourage Claimants to archive their transcripts.

[366] The evidence establishes that the Claimants were not advised of their option to archive a transcript during the early years of the IAP and the more recent practice of advising Claimants of their rights is not working possibly because of the emotional turmoil of the IAP hearing. A cooling off period is required so that a reasoned decision may be made. After the cooling off period, the Claimants can revisit their decision about the IAP Documents with the knowledge that if they do not exercise their option the documents will be destroyed after the retention period.

[367] In my opinion, it would be a worthwhile project to develop a notice program to advise the IAP Claimants of the rights they have under the IRSSA to tell their stories to the NCTR.

[368] The Church entities oppose the development of a notice program, but provided that the program did not go beyond what is consistent with the IRSSA, I see no merit to their opposition.

[369] I do not regard ordering a program to encourage Claimants to exercise a right or rights that they have under the IRSSA as requiring any amendment to the IRSSA, and, in my opinion, the order falls within the administrative or supervisory jurisdiction of the court.

[370] However, the precise terms of the notice program should be an evidence-based decision. Care needs to be taken that the notice program not inflict physiological harm and re-victimize the survivors of the Indian Residential Schools. Therefore, I direct that the TRC or the NCTR may give Claimants notice that with the Claimant's consent, his or her IAP Application, hearing transcript, hearing audio recording and adjudicator's decision may be archived at the NCTR. The archiving of the document would be conditional on any personal information about alleged

perpetrators or affected parties being redacted from the IAP Document. The court will settle the terms of the notice program at another RFD hearing that may be brought by the TRC or the NCTR.

[371] It may be noted that in arriving at the above decisions, it was not necessary to decide the issue of whether the IAP Documents have historical value. The above decisions are based on: (a) the promises made to the Claimants under the IRSSA and during the IAP; (b) the Claimants' right to control their personal information; and (c) the Claimants' right to control the telling of their own stories; and (d) respect for the Claimants' individual decisions.

[372] A notice program must be designed in a way that respects what is a very difficult, very private, and very personal decision.

J. CONCLUSION

[373] An order should be issued in accordance with the above Reasons for Decision.

[374] The Order will have to be carefully drawn, and it may be necessary to have a further attendance to settle the language and terms of the Order.

[375] As I pointed out during argument, the definition of what is an IAP Document may have to be specified with some precision in any court Order and the manner of making redactions in any documents that make their way to the NCTR will require some attention.

[376] The court's Destruction Order should not be overbroad, and the Destruction Order should not apply to NAC, OC, Chief Adjudicator, AANDC, SAO, and Department of Justice documents simply because they are related to the IAP.

[377] The IAP is itself now a part of the history of Canada, and the court's Destruction Order needs to focus on the personal information of the Claimants and not be overbroad.

[378] I direct that the Chief Adjudicator whose RFD was largely successful to prepare and circulate the first draft of the Order with the above observations in mind.

[379] If the parties cannot agree about the form of the Order, they should contact Court Counsel to make arrangements for an attendance to settle the Order.

[380] Finally, if the parties cannot agree about the matter of costs, they may make submissions in writing within 20 days of the release of these Reasons for Decision followed by a right of reply within a further 20 days.

Perell, J.

Released: August 6, 2014

Schedule "A"

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 Metis 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 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 Agreement a report including recommendations to the Government of Canada concerning the IRS system and experience including: the history, purpose, operation and supervision of the IRS system, the effect and consequences**

of IRS (including systemic harms, intergenerational consequences and the impact on human dignity) and the ongoing legacy of the residential schools;

(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;

(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 wrongdoing, 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 recognise:

(a) the unique experiences of First Nations, Inuit and Metis 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.

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.

CITATION: Fontaine v. Canada (Attorney General), 2014 ONSC 4585
COURT FILE NO.: 00-CV-129059
DATE: 20140806

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA, et al.

Defendants

REASONS FOR DECISION

Perell, J.

Released: August 6, 2014