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

COURT OF APPEAL FOR ONTARIO

BETWEEN:

LARRY PHILIP FONTAINE IN HIS PERSONAL CAPACITY AND IN HIS CAPACITY AS THE EXECUTOR OF THE ESTATE OF AGNES MARY FONTAINE, DECEASED, MICHELLINE AMMAQ, PERCY ARCHIE, CHARLES BAXTER SR., ELIJAH BAXTER, EVELYN BAXTER, DONALD BELCOURT, NORA BERNARD, JOHN BOSUM, JANET BREWSTER, RHONDA BUFFALO, ERNESTINE CAIBAIOSAI-GIDMARK, MICHAEL CARPAN, BRENDA CYR, DEANNA CYR, MALCOLM DAWSON, ANN DENE, BENNY DOCTOR, LUCY DOCTOR, JAMES FONTAINE IN HIS PERSONAL CAPACITY AND IN HIS CAPACITY AS THE EXECUTOR OF THE ESTATE OF AGNES MARY FONTAINE, DECEASED, VINCENT BRADLEY FONTAINE, DANA EVA MARIE FRANCEY, PEGGY GOOD, FRED KELLY, ROSEMARIE KUPTANA, ELIZABETH KUSIAK, THERESA LAROCQUE, JANE MCCULLUM, CORNELIUS MCCOMBER, VERONICA MARTEN, STANLEY THOMAS NEPETAYPO, FLORA NORTHWEST, NORMAN PAUCHEY, CAMBLE QUATELL, ALVIN BARNEY SAULTEAUX, CHRISTINE SEMPLE, DENNIS SMOKEYDAY, KENNETH SPARVIER, EDWARD TAPIATIC, HELEN WINDERMAN AND ADRIAN YELLOWKNEE

Plaintiffs
(Respondents in Appeal)

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FACTUM OF THE CHIEF ADJUDICATOR IN RESPONSE TO CROSS-APPEALS
(Respondent)

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OBLATS DE MARIE IMMACULEE DU MANITOBA, THE ARCHIEPISCOPAL CORPORATION OF REGINA, THE SISTERS OF THE PRESENTATION, THE SISTERS OF ST. JOSEPH OF SAULT ST. MARIE, SISTERS OF CHARITY OF OTTAWA, OBLATES OF MARY IMMACULATE -ST. PETER'S PROVINCE, THE SISTERS OF SAINT ANN, SISTERS OF INSTRUCTION OF THE CHILD JESUS, THE BENEDICTINE SISTERS OF MT. ANGEL OREGON, LES PERES MONTFORTAINS, THE ROMAN CATHOLIC BISHOP OF KAMLOOPS CORPORATION SOLE, THE BISHOP OF VICTORIA, CORPORATION SOLE, THE ROMAN CATHOLIC BISHOP OF NELSON, CORPORATION SOLE, ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD, ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, LA CORPORATION ARCHIEPISCOPALE CATHOLIQUE ROMAINE DE ST. BONIFACE, LES MISSIONNAIRES OBLATES SISTERS DE ST. BONIFACE-THE MISSIONARY OBLATES SISTERS OF ST. BONIFACE, ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT, THE ROMAN CATHOLIC BISHOP OF THUNDER BAY, IMMACULATE HEART COMMUNITY OF LOS ANGELES CA, ARCHDIOCESE OF VANCOUVER - THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER, ROMAN CATHOLIC DIOCESE OF WHITEHORSE, THE CATHOLIC EPISCOPALE CORPORATION OF MACKENZIE-FORT SMITH, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, EPISCOPAL CORPORATION OF SASKATOON, OMI LACOMBE CANADA INC. and MT. ANGEL ABBEY INC.

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(Appellants and Respondents in Appeal and Cross-Appeals)

-and-

PRIVACY COMMISSIONER OF CANADA

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FACTUM OF THE RESPONDENT CHIEF ADJUDICATOR IN RESPONSE TO CROSS-APPEALS

PART I. INTRODUCTION AND OVERVIEW

1. A core principle of the IRSSA is that it is up to each residential school survivor to decide whether the most painful details of their life, which many have carried privately from their childhood into their senior years, are made available to others. Participation in the IAP does not prevent a claimant from choosing to also share his or her experiences with the TRC or the NCTR.[1] But it remains the claimant's story to tell. The IRSSA does not permit Canada, the NCTR or the TRC to make any other use of the intensely private information disclosed in and for the purposes of the IAP, unless the claimant consents.

2. The TRC says that the overarching imperative of the IRSSA is knowledge, and that this should trump the individuals' choice to keep their stories, shared only in the IAP, private. The NCTR purports to recognize the value of treating survivors with dignity and respect, and yet suggests their privacy should give way to the creation of a permanent record of their trauma and suffering. Canada suggests that the legislation governing records within its own institutions applies to the IAP records. Canada would effectively seize control of the most intimate internal and external details of claimants' lives, and put government officials in charge of what happens to that information. Essentially, Canada argues that the IRSSA has a secret term – that in exchange for compensation, claimants lose control of their stories. The Chief Adjudicator submits that is not the bargain that was struck.

3. The IAP is not a government program under Canada's control; it is a court-ordered

[1] In our main factum we referred to the NCTR as the "Centre" but have changed the reference here to conform with the usage of the other parties.

process for the resolution of continuing claims for serious abuse, in which Canada is a litigant. It is a confidential process for the resolution of individual claims to which there is no presumptive right of public or any other access. IAP records are governed by the court orders giving effect to the IRSSA, and not by the legislative regimes in the *Access to Information Act* [*ATIA*], the *Privacy Act* and the *Library and Archives Canada Act* [*LACA*] [collectively, the "Federal Legislation"]. It would be wholly inconsistent with the IRSSA's profound guarantee of confidentiality for IAP records to be treated as records under Canada's control, subject to possible, indeed inevitable, collateral use and disclosure under these statutes. And it would be perverse for Canada, the primary defendant, to control the disposition of records from the process aimed at compensating survivors for Canada's own tortious conduct.

4. Nor is the IAP a means for the TRC or NCTR to gather testimony from survivors who have not chosen to speak to the TRC directly and have not consented to their IAP evidence being used outside that process. While the TRC and NCTR may have a mandate to create and preserve a "national memory," they do not have any right under the IRSSA to appropriate the intensely personal memories of IAP claimants, without each claimant's express consent. The TRC's mandate to create an archive of the legacy of residential schools is separate and distinct from the IAP's purpose to confidentially adjudicate individual claims. The IRSSA itself balances the competing objectives of protecting individual dignity and privacy on the one hand, and creating a public record on the other. It does this by creating distinct processes, and by ensuring that any transfer of information from the IAP to the TRC, is based on voluntary individual consent. It is not open to the TRC or NCTR, or, with respect, this Court, to rebalance the IRSSA to

privilege the work of the TRC over the rights of claimants to choose whether to share the details of their stories.

5. The Chief Adjudicator submits that the Supervising Judge was correct that IAP records are confidential, generated within and subject to the court's process, and can only be used and disclosed on the terms agreed to by the parties in the IRSSA, which are given force through court orders implementing the settlement. As the Supervising Judge noted, the nature of the information at issue is such that if the same claims were being heard in court, any transcripts or records that contained the information would have been sealed by court order, and could not have been disclosed by any of the parties. It cannot be the case that by entering into a settlement with Canada, these highly vulnerable claimants have been required to forego a core benefit and inducement of that very settlement - truly confidential claim adjudication - to instead expose the most private details of their lives as appropriate subjects of study by researchers chosen by Canada or the NCTR.

6. The Supervising Judge held that the court's jurisdiction to control the disposition of the IAP records has three complementary sources: (1) jurisdiction to interpret, to enforce and to administer the IRSSA, which the judge held includes an express or implied term that the records will not be used for any purpose outside of the IAP and will be destroyed upon its completion; (2) jurisdiction with respect to the implied undertaking not to use records produced in a litigious proceeding for a collateral purpose; and (3) jurisdiction to remedy a breach of confidence. The Chief Adjudicator submits that the Supervising Judge was correct on each issue.

PART II. STATEMENT OF FACTS

A. The IAP

7. The IAP was established under the IRSSA to enable class members to continue to pursue their individual claims for compensation for harms suffered at residential schools. Schedule D is titled "Independent Assessment Process (IAP) for Continuing Indian Residential School Abuse Claims" [emphasis added].

8. The Supervising Judge found that the privacy and confidentiality of the IAP, in which Canada participates as a litigant, was a key benefit bargained for by the parties who negotiated the IRSSA. He noted that "[i]n 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." (Reasons, ¶136). In addition, there were specific concerns about the impact of disclosing the details of student on student abuse, detailed in the Affidavit of Phillip Fontaine (Reasons, ¶137):

> During the course of [the IRSSA] 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.

9. Mr. Fontaine deposed, at ¶26, that if the identities of the alleged student perpetrators and their victims ever became known, even if not until "ten years, fifty years, a hundred years or longer," such knowledge in future generations "would continue the legacy of dysfunction and trauma that was created by the residential

schools." For this reason, the confidentiality of the IAP was critical to the AFN. (See also the affidavit of the Chief Adjudicator, Daniel Shapiro, sworn September 26, 2013 ("Shapiro Affidavit"), ¶9.)

10. As noted by the Supervising Judge, both claimants and Church defendants provided powerful evidence about the importance of privacy and confidentiality in the IAP. (see ¶¶216-21, 138-42) The Church entities made it clear they would not have signed the IRSSA but for the strong confidentiality provisions and the assurance of a private process. (Reasons, ¶¶140-42)

11. The confidentiality provisions of the IRSSA are set out in the various facta (for example, see ¶¶10-18 of the main Factum of Independent Counsel). The confidentiality agreements that Canada's representatives sign at each hearing (Reasons, ¶187) state:

> I will keep confidential and not disclose to anyone, whether in writing or orally, any information that is presented at 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.

12. Chief Adjudicator Shapiro has attended hundreds of hearings and has worked with many IAP adjudicators. He stated at ¶5 of his affidavit:

> During or before the start of the hearing, it was common for claimants to discuss their fear that their hearing testimony or sensitive information may become known by their family community or others, which would cause them serious distress and shame. Until 2012, when Chief Adjudicator Ish advised adjudicators to be more guarded in their remarks to claimants, it was my practice, and I believe the practice of most adjudicators, to reassure claimants that their testimony and records would remain confidential within our process. The explanation for the confidentiality agreements was often the key factor in allowing the claimant to gain sufficient comfort to proceed with the hearing.

13. The IAP adjudicators provided the assurances of confidentiality based on their understanding that the information disclosed in the hearing would never be otherwise

used. Canada never objected to the assurances of confidentiality that were provided and indeed its representatives have signed agreements at over 28,000 separate hearings.[2]

14. The subject matter of the hearings is extraordinarily sensitive. A claimant is required to not only detail the horrific abuse he or she suffered as a child, but also to demonstrate its ongoing impact on the claimant's life, family and other relationships, up to the present day. Evidence of harm ranges from modest symptoms to psychotic disorganization, loss of ego boundaries, suicidal tendencies, personality disorders and like evidence of serious dysfunction. (Reasons, ¶¶ 200-01)

15. Understandably, the hearing experience is deeply painful for many participants. The Chief Adjudicator deposed that it is not uncommon for claimants to exhibit extreme anxiety when confronted with sensitive issues, including experiencing panic attacks and vomiting during the hearing itself. (Shapiro Affidavit, ¶6)

16. The Supervising Judge concluded, at ¶¶225-27, that (1) the parties intended the IAP to be confidential and private, (2) claimants and alleged perpetrators relied on the confidentiality assurances in the IRSSA and given at each hearing, and (3) without those assurances, the IAP would not have functioned and the IRSSA would not have been able to meet the goal of providing compensation to victims of residential school abuse. He held that "the Class Members would not have taken up the benefits of the settlement of their claims without a confidential, private, and sensitive claims process."

17. These findings do not contain any palpable and overriding error. In fact, they are

[2] The caution issued by Chief Adjudicator Ish was prompted by the TRC's assertion that it was entitled to receive copies of the transcripts of those hearings under Article 11 of Schedule N of the IAP, a position

correct. The open and public nature of the court process was completely unsatisfactory for these claims, and was the main impetus for the confidential, inquisitorial IAP.

B. The IAP is a form of litigation given effect through court order, and under the supervision of the court

18. While it was the product of an agreement, the IRSSA is incorporated into, and given effect by, court orders. The Approval and Implementation Orders, issued by nine courts across Canada, incorporate by reference all of the terms of the IRSSA, and provide that the Supervising Courts shall supervise the implementation of the IRSSA and may issue such orders as are necessary to implement and enforce the provisions of the IRSSA and the judgements.

19. The IAP is thus established by court order as a means of continuing to litigate the individual tort claims within the protection of the settlement framework. The IRSSA allows for the claims to be resolved outside of the courtroom by creating a modified form of litigation that remains under the Supervising Courts' supervision and control.

20. The IAP "is described as inquisitorial in nature and is expressly different than the adversarial system of dispute resolution, but the IAP is a *sui generis* type of litigation." (*Fontaine v. Canada (Attorney General)*, 2015 ONSC 4061, ¶15). As stated in one case:

> [26] The parties, however, should understand that while other parts of the IRSSA are designed to further reconciliation, and while the IAP is designed to be an inquisitorial, claimant-centred procedure and not an adversarial one, the parties remain adverse and opponents. (*Fontaine v. Canada (Attorney General)*, 2014 ONSC 4024)

21. In another decision the Court noted that:

> [72] As the discussion that follows will indicate, there are many elements of the

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which it now appears to have abandoned (Affidavit of Daniel Ish, sworn September 27, 2013 ("Ish Affidavit"), ¶59).

> procedure for the IAP that denote or connote litigation and civil procedure. The procedure contains directions with respect to what amounts to pleadings of a case, the production of evidence, onus of proof, standard of proof, hearings, testimony, credibility, examinations, cross-examinations, etc. While there are also elements that are unique so that the IAP might be regarded as *sui generis*, it is undoubtedly a form of litigation. (*Fontaine v. Canada (Attorney General)*, 2014 ONSC 283 [*St. Anne's #1*])

22. IAP adjudicators exercise "judicial functions in accordance with the terms of the IRSSA" and are supervised by the Chief Adjudicator, not Canada (*Fontaine v. Canada (Attorney General)*, 2014 ONSC 4024, ¶15). The Office of the Chief Adjudicator "was created by order of the courts in approving the negotiated terms of settlement." (*Fontaine v. Duboff Edwards Haight & Schachter*, 2012 ONCA 471, ¶52)

23. Canada and the TRC refer to Canada as the administrator of the IAP. While Canada is required to provide support to the Chief Adjudicator through the IRSAS, the Chief Adjudicator directs the IRSAS's operations (Schedule D, III(t)(iv)). It is critical to the integrity of the IAP that the Chief Adjudicator be independent of Canada and that he, not Canada, oversees the IAP litigation. The Chief Adjudicator is accountable to the Courts and to the Oversight Committee established by the IRSSA and reports to the Courts on all aspects of the operation and implementation of the IAP. It is the Chief Adjudicator that supervises and administers the IAP, not Canada.

24. That the IAP is meant to be independent of Canada, and under the control of the Court, is evident from *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (ONSC) [*Baxter*], in which Winkler R.S.J., as he then was, approved the settlement in Ontario. The Court noted that although the application was on consent, the Court was required to ensure both that the settlement is "fair, reasonable and in the best interests of the class as a whole" (¶9) and "that the administration and implementation of the

settlement are done in a manner that delivers the promised benefits to the class members" (¶12). The Court held that "the court must be vigilant in scrutinizing the settlement, and in particular, its claims resolution and distribution mechanism, to ensure that the interests of the absent class members who are being bound by the settlement will be adequately protected" (¶26).

25. The Court noted that a settlement "most often represents the real start, rather than the end, of the litigation for the individual class member, especially in those cases, as here, where a key term of the settlement is merely access to a modified claims resolution procedure" (¶27). The Court must ensure that the whole process does in fact confer an actual benefit to the class members individually (¶28). The Court held that it:

> ... cannot be the case that class members receive nothing more than the opportunity to litigate their claims in an extra-judicial process that offers no material advantages over normal course litigation. Otherwise, the class members are compromising their rights, and possibly the entirety of their claims, without receiving a corresponding benefit for having done so. (¶29)

26. Justice Winkler's first concern was that the administration of the IAP be under the direction of the Court, and not, directly or indirectly, in the control of Canada, which, as a defendant, would continue to be "an instructing respondent in respect of individual claims made under the IAP" (¶37). The Court held that "the administrative function must be completely isolated from the litigation function with an autonomous supervisor or supervisory board reporting ultimately to the courts" (¶38). This was accomplished by the Implementation Orders ensuring that the Chief Adjudicator would be confirmed by, report to, and take direction from the Courts, and not from the government.

C. The expert evidence

27. David Flaherty, an internationally renowned privacy expert and historian, provided

expert evidence that was accepted by the Court. Dr. Flaherty's evidence was that the normal life cycle of most administrative records ends with destruction, and that "[i]t is not normal in Canada to collate, compile, and link such administrative records about such a large group of specific victims." He stated that "the accumulation of so much sensitive information on a stigmatized population is truly extraordinary." Dr. Flaherty confirmed that it is consistent with privacy principles to destroy the records once they have served their administrative purpose to settle claims. (Affidavit of David Flaherty, sworn May 2, 2014 ("Flaherty Affidavit"), ¶¶13, 31, 62-63)

28. Dr. Flaherty stated that there is no public interest in providing access to claimant files. In his view, "[j]ournalists, historians, political scientists, and other scholars can write about the legacy of residential schools in Canada without access to more than 38,000 claim files." (Flaherty Affidavit, ¶¶55-56, 65)

29. Dr. Flaherty stated that archiving the IAP records without the consent of the claimants would violate a number of privacy principles "in relation to an abnormal, large, and broad range of extremely sensitive records about very vulnerable individuals." These principles include: the obligation to identify uses at the time of collection; the obligation to obtain individual consent to the archiving of personal information; the obligation to limit use disclosure or retention to the purposes of collection; information self-determination; and the right to be forgotten. (Flaherty Affidavit, ¶¶45, 79-84)

30. Dr. Flaherty opined that the transfer to an archive of the IAP records, which represent a cradle to grave dossier of a claimant's most sensitive personal information could be "a privacy disaster in the making in terms of its ultimate impact on the privacy

interests of a disadvantaged, victimized and stigmatized population of survivors of residential schools, who now risk re-victimization." (Flaherty Affidavit, ¶81)

D. The TRC and the IAP

31. The IAP and the TRC, both created by the IRSSA, are separate processes serving different functions. The IAP is a claim adjudication process, and one of its main benefits is its confidentiality. The TRC was a public truth-telling exercise for recording and preserving the legacy of residential schools, meant to operate in parallel, and to be completely optional and voluntary for individual participation.

32. The TRC's mandate was to create an archive for research purposes and public access. But it did not allow the TRC to obtain the IAP records, absent consent of the affected parties. If it had, IAP confidentiality would have been lost. The parties did not contemplate that the TRC, or the NCTR, or researchers authorized by Canada, would be permitted to mine the claimants' stories without their consent. The IAP was not designed to create a public record for the history books. It was meant to allow individuals to resolve their own claims privately, and put them to rest.

33. If claimants <u>want</u> their experiences recorded in a more public fashion, they can share them with the TRC. They need not repeat them – they can have their memorialized IAP transcript sent to the TRC or, now, the NCTR, as provided for in the IRSSA.

34. Those transcripts will have the alleged perpetrators' names redacted, just as statements made to the TRC directly must be recorded without taking down the alleged perpetrators' names. While the TRC is charged with developing an historical record, insofar as it emerges from the IRSSA, that record is only permitted to name perpetrators

if they have been convicted of the abuse alleged. That too is part of the bargain that was struck when the class actions were settled. It is not open to the TRC or the NCTR to now refashion the agreement that was reached by the parties to the IRSSA.

E. Facts relating to the development of a consent form

35. The notice program ordered by the Supervising Judge is aimed at providing claimants an opportunity to decide to have their memorialized transcripts archived with the NCTR. The TRC, at ¶¶101-04, gives a selective and revisionist description of attempts to develop a consent form for claimants to share those transcripts.

36. For nearly two years, IAP officials attempted to engage the TRC in the development of such a form. The TRC, however, obstructed that process and sought to obtain all IAP records without the consent of claimants or anyone else. Aware of Canada's suggestion that it controlled IAP records, the TRC sought to rely on that to support the TRC's acquisition of all IAP records through Canada's disclosure obligations under Schedule N. The TRC withdrew from the development a claimant consent form out of concern that it could undermine the TRC's assertion of entitlement to acquire all IAP records without consent. (Affidavit of John Trueman, sworn April 8, 2014 ("Trueman Affidavit"), ¶¶86-126, Ex N, T, U)

37. The TRC's RFD asserted that its mandate required it to gather all IAP records and Canada was obliged to provide them pursuant to s. 11 of Schedule N. In the Court below, however, the TRC abandoned these positions (Reasons, ¶120). It also abandoned pursuing IAP records for the NCTR without the consent of claimants, and it supported a notice program to facilitate obtaining claimant consent to archiving of hearing transcripts (Reasons, ¶363). In this Court, the TRC, ¶105, again supports a notice

program to obtain claimant consent to the archiving. Yet the relief the TRC seeks in the alternative, ¶124, reverts to archiving all the records without either claimant consent or the redaction of anyone's identifying information. The TRC also supports Canada's position that IAP records are "government records" which would result in weak and ephemeral privacy protections; and, since the TRC holds AANDC Departmental Researcher Status, afford the TRC access to IAP records at LAC with only government, and not claimant, consent. (Affidavit of Tim Eryou, affirmed May 5, 2014 ("Eryou Affidavit"), Ex H)

38. The TRC did not negotiate the IRSSA and has no involvement with the conduct of the IAP, which it has regarded as a repository of information of interest to its own mandate and now for the NCTR's research objectives. The TRC has consistently argued against the need for claimant consent in order for the stories told in the privacy of the IAP to be shared with researchers, and has only selectively supported a notice program for claimant consent when that seemed necessary to obtain the records. The Chief Adjudicator's position is that the information in those records belongs not to Canada, a defendant in the IAP and the overall litigation, or to the TRC or the NCTR, who are strangers to the IAP and creations of the IRSSA, but to the individuals who lived, and survived, the schools.

PART III. STATEMENT OF ISSUES AND ARGUMENT

A. Canada's and the TRC's assertions of errors by the Supervising Judge

39. The TRC asserts that the Supervising Judge erred in his findings that: (1) the IRSSA contains an express or implied term that the records would be destroyed; (2) that the IAP records are not "government records;" (3) that the IAP Records are subject to

the implied undertaking; and (4) that archiving the records with LAC is a breach of confidence. Canada argues that the "essential error" of the Supervising Judge was his finding that the IAP records are not "government records." In fact, the Supervising Judge held that he had authority to order destruction of the IAP records in order to protect their confidentiality, whether or not they were government records.

40. Canada, supported by the TRC, makes two different arguments about the IAP records as "government records." First, Canada argues that the parties understood that the IAP records would be considered "government records" and therefore the IAP's confidentiality promises should be interpreted as being qualified by or consistent with Canada's obligations under the Federal Legislation. The Supervising Judge rejected this argument, holding that the parties intended Canada to be fully bound by the IAP privacy and confidentiality provisions, including the express or implied term that the records would be destroyed. Canada's and the TRC's arguments on this issue are really arguments that the Supervising Judge erred in his interpretation of the IRSSA. The Chief Adjudicator submits that that interpretation was reasonable and, indeed, correct.

41. Second, Canada argues that the IAP records are government records as a matter of law, and so Canada cannot be bound by, and the Court cannot enforce, any provisions of the IRSSA that require Canada to deal with the IAP records in a manner differently than Canada is required to deal with government records under the Federal Legislation. This argument contradicts Canada's concession, at the hearing in the Court below, that it had the ability to contract for absolute privacy for the IAP records.

42. More importantly, Canada's approach to the applicability of the Federal

Legislation, seeks to turn the matter on its head. The parties signed the IRSSA in May 2006. It was approved and implemented by court orders by early 2007. Since that time, thousands of IAP hearings have been conducted, and records have been generated for use in the IAP and provided to Canada, under the terms set out in the IAP. The question is whether those terms are binding on Canada, and whether the Court has authority to enforce those terms. Because the records were generated for the IAP, and Canada is bound to comply with the IRSSA terms respecting their use and disposition, the records are not "government records" for the purposes of the Federal Legislation. Even if they were government records, the Court could constrain their use. These arguments are developed below.

i. The Supervising Judge did not err in the interpretation of the IRSSA

43. The Supervising Judge held it was a term of the IRSSA, bargained by the parties, that the IAP records would be kept confidential, used only for the IAP, and destroyed when they were no longer necessary for IAP purposes. The Court held that the parties intended destruction to occur and that it is a necessary term to give the IRSSA operative effect. (Reasons, ¶¶325-28)

44. The Supervising Judge considered and rejected Canada's arguments that despite the promises of confidentiality, claimants knew that the IAP records "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." (Reasons, ¶¶309-15)

45. In order for the Supervising Judge's findings about what the parties intended to be set aside, the TRC and Canada must demonstrate a palpable and overriding error. No

such error can be shown.

46. Canada and the TRC have identified no errors in the Supervising Judge's statement of the principles of contractual interpretation applicable to the IRSSA at ¶¶67-90. The TRC's factum at ¶¶75-76 is in fact extracted from the judgment ¶¶77-78. The TRC and Canada simply assert that the Court should have reached a different conclusion.

47. The TRC asserts, without authority, that there could be no "implied term" of destruction, because of the "protracted negotiations" leading up to the IRSSA. The length of negotiations leading to a far-reaching agreement like the IRSSA cannot obviate the need for a supervising court to imply terms if the legal test for finding such terms is met, as the Supervising Judge held it was in this case.

48. The TRC and the NCTR also suggest that a term of destruction cannot be implied because of their assertion of the IAP records' historical value. The historical value of the IAP records, which is significantly disputed, is not relevant, however, if the parties to the IRSSA did not intend them to be used for archiving or research purposes.

49. The main basis on which the TRC and Canada contend that the Supervising Judge erred is that he did not find that the parties intended the IAP records to be treated as "government records" for the purposes of the Federal Legislation. Canada asserts that the IRSSA was "purposely structured with federal legislation in mind for the management of government records as the best and most reliable way to ensure the confidentiality of the IAP and the privacy of all individuals involved" (¶13). The TRC asserts that references to the Federal Legislation mean that an implied term of destruction would be inconsistent with the IRSSA and not necessary to give it operative

efficiency.

50. The Chief Adjudicator submits that these positions have no merit. The Supervising Judge was correct that the parties bargained for stronger IAP privacy protections than what is provided by the Federal Legislation, and that destruction of the IAP records is a critical component of ensuring that class members receive the benefit of the IRSSA.

a. The statutory framework that Canada and the TRC say governs the IAP records

51. As stated in Canada's factum, if *LACA* applies, any IAP records may be subject to archiving if LAC decides that they are of "enduring value." According to Canada's evidence, after "several years of appraisal and analysis" LAC decided that only the IAP compensation decisions were of enduring value. However, there is evidence that discussions with the TRC subsequently influenced LAC to shift to a position that the transcripts and audio recordings may also be of enduring value. As a result, the unredacted testimony of claimants, alleged perpetrators and witnesses, and adjudicators' unredacted decisions, may all be archived. These, and the remaining materials held at AANDC, would then be made available in various ways, all collateral to the IAP's compensation purposes and inconsistent with the promises of confidentiality made about the IAP process. (Eryou Affidavit,¶¶26-34, Trueman Affidavit, ¶¶84-85)

52. First, as recognized by the Supervising Judge, pursuant to the *Privacy Regulations*, SOR/83-508, s. 6(c), personal information transferred to the LAC may be disclosed "to any person or body for research or statistical purposes where… 110 years have elapsed following the birth of the individual to whom the information relates." Canada does not mention this in its explanation of the legislative framework.

53. Second, records archived with LAC will be subject to access to information requests under the *ATIA*. Section 4 of the *ATIA* creates a public right of access to "any record under the control of a government institution," subject to certain exemptions, including s. 19, which requires that "the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in s. 3 of the *Privacy Act*." But s. 3 of the *Privacy Act* is not designed to provide the kind of durable protection that was so essential to the parties when they bargained the IRSSA. Rather, it provides that, for the purposes of s. 19 of the *ATIA*, "personal information" does not include information about an individual who has been dead for more than 20 years. Some adult and student alleged perpetrators of abuse at residential schools have already been deceased for more than 20 years, so the *Privacy Act* does not protect their personal information. Again, Canada's argument on the protection provided by its statutes entirely fails to mention this. Canada just says that an *ATIA* request for IAP records would be "very carefully reviewed." This is entirely inadequate and will provide cold comfort to claimants whose information is at issue.

54. Even before an individual's death, their personal information archived at LAC can be made available for research purposes. As soon as the records are transferred there, they may be accessed by anyone granted Departmental Researcher Status. At ¶23, Canada states that AANDC has the "sole discretion" to determine whether an individual will be granted researcher status. The TRC has already been granted such status (Eryou Affidavit, ¶¶43(a), 44-47, Ex H).

55. There are a myriad of other exemptions to the protection of privacy in the legislative scheme, which may lead to use and disclosure of ultra-sensitive personal

information if IAP records are treated like any other government record. For example, under s. 8(2)(k) of the *Privacy Act*, personal information may be disclosed to:

> … any aboriginal government, association of aboriginal people, Indian band, government institution or part thereof, or to any person acting on behalf of such government, association, band, institution or part thereof, for the purpose of researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada;

56. Under s. 8(2)(l), personal information may be disclosed to any government institution for the purpose of locating an individual in order to collect a debt owing to Canada. Under s. 8(2)(m)(i), personal information may be disclosed for any purpose where, in the opinion of the head of the institution, the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure.

57. In addition, if the IAP records are "government records," those not transferred to LAC will remain in AANDC's possession. At ¶25, Canada asserts that these records "would be destroyed by AANDC in accordance with the *RDA 2011-010* after the expiry of the applicable retention periods." However, *RDA 2011/010* only *permits* destruction – it does not *require* that. Rather, all IAP records not transferred to LAC would be retained and disposed of at AANDC's discretion. Canada's evidence is that AANDC has not yet determined what retention period or manner of disposition would be appropriate for the remainder of the IAP records, although Canada is considering retention for 25 years. Throughout that time, the records will be subject to access requests under *ATIA* as well as access for research purposes (Eryou Affidavit, ¶¶32, 37-41).

58. In addition, records held by LAC or AANDC may be the subject of requests under s. 12 of the *Privacy Act*, which allows an individual to access his or her own information in control of a government institution. This will give an alleged perpetrator a right to

obtain their own information as contained in IAP records, which would enable them to find out everything that was said about them in IAP hearings and decisions, and very possibly who said it. Section 12(2) would then give the alleged perpetrator the right to request "corrections" or notations of errors or omissions that they perceive in personal information about themselves that they have obtained, so they can "clear their name" in government records (*Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 270, ¶¶23-35). This is entirely inconsistent with alleged perpetrators' very limited participatory rights under the IAP.

59. Once information is disclosed pursuant to an *ATIA* or *Privacy Act* request, there is no limitation on how it may be used. The disclosure is to the world. Contrary to the assertions of the TRC, the NCTR and Canada, the application of the Federal Legislation does not raise a mere "threat" of disclosure – it virtually ensures it. The same is true under the legislation governing the NCTR. Indeed, the entire reason that the NCTR and TRC argue for preservation of the IAP records is so that they can be used. The only way to give effect to a promise that the records will not be used for any purpose other than to resolve an individual's IAP claim is to destroy them once that use is complete. Only that result is consistent with the privacy principles identified by Dr. Flaherty, including protecting the claimant's interests in informational self-determination and their right to be forgotten, and the privacy interests of alleged perpetrators, living and dead.

60. The Supervising Judge was correct when he held that near absolute privacy was essential to the proper functioning and integrity of the IAP, and that the legislative scheme does not provide that level of privacy. This is not surprising, since the purpose of the *ATIA* and the *Privacy Act* are distinct from the purpose of the IAP. They are

designed to work together to provide presumptive access to government records, with specific exemptions. They balance the public interest in transparency in government operations with some level of protection for personal information.

61. The IRSSA is not a government program, but a litigation settlement agreement between the parties, given the force of a court order. It balances public and private concerns differently. Schedule D provides for the IAP as a private and confidential process of individual claim adjudication outside of the courtroom where the open court principle would apply. Other aspects of the IRSSA, including the activities of the TRC, encourage public awareness of the legacy of residential schools.

62. The cross-appellants refer to the "quasi-constitutional" status of privacy legislation. Such legislation is quasi-constitutional insofar as it protects privacy interests, because of the fundamental role of privacy in a free and democratic society. The constitutional right to informational privacy protects the individuals' right to insist that intimate information they are required to divulge is kept confidential and not used for collateral purposes. To the extent that the application of the *Privacy Act* and the other Federal Legislation detract from the substantive protection of privacy, however, they in fact derogate from the constitutional interest in protecting the "biographical core of personal information." Claimants have a right to have their information "forgotten" by its destruction. (*Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, ¶¶19, 22; *R. v. Dyment*, [1988] 2 S.C.R. 417, ¶¶22-23 ; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, ¶¶65-67; *R. v. Spencer*, [2014] 2 SCC 43, ¶¶34-45)

b. The IRSSA, properly interpreted, does not provide that the IAP records will be dealt with as "government records"

63. There is nothing in the IRSSA that suggests that the parties intended Canada's commitment to keep the IAP records confidential to be modified by the Federal Legislation.

64. There is no reference whatsoever in Schedule D to the *LACA* or the *ATIA*. The one reference to the *Privacy Act* relates to Canada's obligation to produce records it already possesses (Schedule D, Appendix VIII). Protections of the *Privacy Act* are adopted, but not where information about alleged perpetrators is concerned. On that the parties agreed to disclosure of personal information for the purposes of the IAP, which was necessary for the IAP to function, and approved by the Courts.

65. The single reference to archiving provides that claimants will be given the option of having the transcript of their own evidence deposited in an archive developed for the purpose. This contemplates archiving only with the consent of the claimant. (Schedule D, III(o)(ii))

66. The only reference to LAC in Schedule D is in Appendix XIV, the Application Form, which includes a Declaration, which an applicant is required to sign. It describes a limited circle with whom the claimant's personal information may be shared in order to research and resolve their claim, and grants permission to Canada to gather information from LAC and other government agencies.

67. Nothing in the Declaration, or anything else in the Application Form, gives notice of or permission for archiving or research, or for any other use of information provided

in the IAP, other than to resolve the claim itself. Nothing in the Application Form or the Declaration in it suggests that the information provided by the claimant or generated in the processing of the claim will be considered a "government record" subject to use, disclosure or disposition under the Federal Legislation.

68. Because there is no reference in the IRSSA itself to IAP claim information being subject to the Federal Legislation, Canada and the TRC rely heavily on the document titled "Guide to the Independent Assessment Process Application" (the "Guide") (Ish Affidavit, Ex D). The Guide was not developed at the time the IAP was signed by the parties nor included in the joint motion record for the certification hearing.[3]

69. In any case, the Guide is not part of the IRSSA. It is referred to in, but does not form part of, the Application Form. The Chief Adjudicator supports Independent Counsel's submission at ¶69 of their main factum that s. 18.06 of the IRSSA (the entire agreement clause) prevents reliance on the Guide.

70. The TRC also incorrectly asserts, at ¶37, that the Guide includes a Declaration that claimants are required to sign. The only Declaration is found in the Application Form. A claimant is not required to sign anything in the Guide. Nothing indicates whether a claimant has read any or all of the Guide and nothing is signed to indicate any acceptance of any terms set out in the Guide.

71. The Guide itself states, at page 9, that it is provided to assist with completing the Application Form, and that if there are any differences between the Guide and the IRSSA, then the IRSSA will "govern and take priority over this *Guide*." Thus, the Guide

has no force if it is inconsistent with the confidentiality provisions of the IRSSA.

72. The Guide, at page 12, tells claimants about how the information in their application will be used. The only identified uses relate to the resolution of the IAP claim. There is no reference to archiving, research, or *ATIA* or *Privacy Act* requests.

73. Page 24 of the Guide directs claimants to sign the Declaration in the Application Form. It refers to Appendix B of the Guide, titled "Protection of your personal information." This is the only reference in the Guide itself to Appendix B of the Guide.

74. The TRC asserts, at ¶70, that "[t]he IAP Guide is replete with references to federal legislation." In fact, with one exception, only the two-page Appendix B to the Guide mentions the Federal Legislation. The exception, on page 7 of the Guide, relates only to claimant consent to sharing personal information to arrange counselling support.

75. Appendix B promises that the form will be treated with care and confidentiality and says that "security rules are in place to protect your *Application Form*." It says that the *ATIA* allows access to government information but protects personal information. There is no mention of the expiry of that protection after a certain period or that the protection will be subject to exemptions. It says that "[p]ersonal information in your *Application Form* and all documents we gather for your claim are collected **only** so we can (1) operate and administer this Independent Assessment Process and (2) resolve your residential school claim" [emphasis in original]. Under the heading "Sharing your personal information with others," it refers only to sharing information in order to resolve the claim or, with claimant permission, to obtain counselling support through

[3] Available online at http://www.classactionservices.ca/irs/library.htm

Health Canada. Again, there is no mention made of archiving or research purposes.

76. The final section of Appendix B is headed "Keeping your records" and says:

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

77. This single last paragraph is the only reference to information being kept in archives, or to the application of *LACA.* It is, as Dr. Flaherty points out ¶17, decidedly unclear. There is no mention of using information for research purposes or otherwise.

78. The TRC states, at ¶85, that "the obligations of confidentiality in this case were qualified by express notification to the survivors that Canada would be retaining their records within the archives, as is provided for in federal legislation." What the TRC is really saying is that the IAP's express promise of confidentiality in Schedule D, the written promise of confidentiality given by Canada's representatives in each hearing, and the verbal assurances made by the adjudicators in each hearing are "qualified" by a single paragraph in an appendix to a guide that: (1) does not form part of the IRSSA; (2) is by its own terms subject to the IRSSA; (3) was issued to assist applicants in filling out their Application Forms; and (4) which was never referenced in response to any other step in the IAP. This is, with respect, absurd. The confidentiality provisions of the IAP, and the agreements signed at the start of each hearing, are binding on the parties. The Guide cannot affect those obligations.

79. As the Supervising Court held, ¶¶83-90, an interpretation of the IRSSA which upholds the honour of the Crown is to be preferred over one that does not. An interpretation which permits Canada to use and disclose IAP records without claimant

consent, in the face of its repeated promises to keep the information private and only use it for the IAP, is not in keeping with the honour of the Crown.

80. The TRC, ¶49, objects to the confidentiality assurances given by adjudicators but does not suggest any way in which they were contrary to the IRSSA. They were in fact exactly consistent with it. Consistency with the Guide is irrelevant, since the Guide cannot qualify the terms of the IRSSA itself. Whether there are "legal requirements" that could render hollow these assurances, given after Canada repeatedly and voluntarily signed the confidentiality agreements, is addressed below.

81. The Supervising Judge was correct that the application of the Federal Legislation would be inconsistent with the high degree of privacy and confidentiality the parties intended for the IAP hearings and records associated with them. The IAP, properly interpreted, did not provide that Canada could unilaterally decide whether the records would be archived and made available for research purposes. Instead, as the Court held, the parties intended IAP records would be kept private and then destroyed, except where the IAP permits the parties to an IAP hearing to otherwise use those records. As set out in our main factum, claimants' ability to archive their own evidence, redacted to remove the identifying information of others, is one of these exceptions.

82. Canada and the TRC rely on the fact that Schedule D provides that all copies of an application, except those held by government, will be destroyed on the conclusion of the matter to argue that this means that the IRSSA contemplates Canada retaining all of the IAP Records as "government records." The Chief Adjudicator submits that this provision only recognizes that there may be some purpose <u>related to the IAP</u> why

Canada may retain the application. For example, it may be that Canada is required or permitted to retain some information from the application form for the purpose of appeals, or give effect to the release provisions of the IRSSA. This does not detract from the Supervising Judge's holding that the IAP records are not government records, must not be archived, must be held in confidence while they are in Canada's possession, and must be destroyed when they are no longer needed for the purposes of the IAP.

83. The Supervising Judge held that there was also one category of implicit exceptions to the confidentiality requirements relating to IAP records. He held that the *ATIA* and *Privacy Act* would require or permit disclosure of certain information in the particular circumstances set out in the Guide – namely, to address child welfare or criminal proceedings – and that the parties intended, as a matter of agreement between them, that the confidentiality promises in the IRSSA would be subject to the same exceptions. The confidentiality agreements state that the information will be kept private "except… as required by law" (Schedule D, III(o)(i)). The Supervising Judge held that this phrase did not import the entirety of the Federal Legislation into the IRSSA - that would have defeated the parties' clear intention to ensure the near absolute privacy of the process. But it did permit disclosure for these limited purposes.

84. The Chief Adjudicator submits that this is what the Supervising Judge meant when he said that the parties intended this aspect of the *ATIA* to apply to the IAP records during their retention period, ¶¶315-20. This does not mean that the *ATIA* and the *Privacy Act* are in fact applicable to the records such that the whole machinery of these Acts would apply. The parties cannot and did not, as a matter of contract, grant general rights of access to the IAP records subject to certain exceptions, to be overseen by the

Access to Information and Privacy Commissioners. Rather, the parties agreed that the confidentiality provisions of the settlement should be defined in a manner which incorporated the specific exceptions referred to by the Supervising Judge.

c. The Court's jurisdiction to issue the destruction order to implement the IRSSA

85. The Court found that the parties intended that the IAP records should be used only for the purposes set out in the IAP. They could be used for resolving the claim, and where the IAP gave control of the records to the claimant, the claimant could choose to archive them. Once those purposes were fulfilled, the records were to be destroyed.

86. Having found destruction to be a term of the settlement, the Supervising Judge had jurisdiction to order compliance with that term. Neither the Chief Adjudicator nor individual adjudicators have authority to enforce confidentiality obligations under the IAP. That jurisdiction rests with the independent oversight of the courts. (*St. Anne's #1*, ¶¶205-07; *Fontaine v. Canada (Attorney General)*, 2015 ABQB 225, ¶52)

87. The court has authority under the *Class Proceedings Act*, the IRSSA itself and the inherent authority of the Court, to make orders necessary to ensure that the settlement is complied with, and that class members receive the benefits that were bargained for. (*St. Anne's #1*, ¶¶154-65)

88. The TRC and Canada cite *Lavier v. MyTravel Canada Holidays Inc.* The question from that case is whether the Court's order only gives effect to the benefits already promised in the settlement, or whether it materially increases the burden on the defendant(s) by providing a benefit that was not bargained for. The confidentiality of the IAP is a significant benefit, for not only claimants but also alleged perpetrators, that was

bargained for by the parties. While Canada asserts at ¶72 that portions of the notice plan order increase its burden under the settlement, there is no increased burden as a result of the destruction order.

89. Canada and the TRC also argue that the Federal Legislation applies as a matter of law, and Canada therefore could not agree to, or the court enforce, more stringent confidentiality protection than is available under the Federal Legislation.

90. While Canada cannot simply "contract out" of the application of the Federal Legislation, Canada can agree to resolve the class proceedings against it by participating in an alternative dispute resolution process, given effect and implemented by court order, that requires records used in it to remain private. When Canada participates in such a process, the court has authority to enforce its confidentiality provisions.

91. As the Supervising Judge noted at ¶336, during argument Canada conceded that it could contract for absolute confidentiality as can be achieved by private arbitration. Canada's concession was well founded and is binding on Canada now. The Supervising Judge disagreed with Canada's interpretation of what was required by the IRSSA, but that does not permit Canada to resile from the concession that it had the capacity to agree to a confidential process, as the Supervising Judge held it did here.

92. In any event, there can be no doubt of the court's authority to impose restrictions on the use of records generated by or used in the court's process, and that Canada is bound by those restrictions. For example, the court can issue sealing orders which restrict the use and disclosure of records parties have obtained through the court's processes. Canada is bound by such orders in the same way as any other litigant. As the

Supervising Judge held, if the IAP claims were heard in court, the records would have been sealed. Just as the court would have authority to order records sealed in court, it has authority to order how records created in the IAP can be used.

93. The IRSSA sets out the manner in which records generated for use in the IAP can be used and disposed. The IRSSA is given effect by court order. As a result, the terms of the IRSSA, as part of a court order, govern the manner in which Canada and all other parties can use IAP records.

ii. The Supervising Judge did not err in finding that the IAP records are not "government records"

94. Canada and the TRC argue that because Canada has possession of the IAP Records, they are "government records" under Canada's control for the purposes of the Federal Legislation. While possession may in many circumstances be sufficient to give the government "control" over a record for the purpose of the Federal Legislation, where the government is in possession of records only as a result of litigation, and is constrained in its use of those records as a result of the court process or a specific court order, those records are not "records in control of a government institution."

95. The TRC says that "[t]he nature of the IAP documents as government records cannot change to correct the concern that naturally arises given Canada's conflict of interest as both defendant in the IAP claim and administrator of the IAP." In fact the independence of the IAP from Canada is critical to the analysis for two reasons.

96. First, while Canada may have responsibility for administrative aspects of the IRSSA, it does not perform any supervisory or control functions over the IAP. The IRSAS is under the direction of the Chief Adjudicator, not Canada, insofar as the

operation of the IAP is concerned.

97. This independence from Canada is central to the understanding of the IAP as a court-ordered form of continuing litigation under the control and supervision of the courts, not a government program. As a result, the records are not "in relation to government program," as required by the control test in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, ¶50.

98. Second, the IRSAS has possession of the IAP records on behalf of the Chief Adjudicator, who is an officer of the Court and not a government institution. In *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 172 [*Ontario v. Ontario*], the Court recognized that records which bear on the exercise of the judicial function, including but not limited to information in specific court files, are under the control of the courts, although they may be in the physical possession of the Ministry that provides administrative support to the courts. As a result of the court's control over the records, the Court found that the Ministry's possession of the records did not give it "control" for the purposes of the Ontario *Freedom of Information and Protection of Privacy Act*.

99. The Court quoted with approval from Order P-994, [1995] O.I.P.C. No. 342. That case recognized that while the Ministry had an administrative role in maintaining court records, the common law recognized the right of the courts to supervise and protect their own records. The Ministry, while in physical possession, acts as custodian only, because its use is subject to supervision by the courts. Adjudicator Cropley held:

> In order for the judiciary to maintain its independence with respect to its adjudicative function, this must necessarily entail the ability to control those

records which are directly related to this function. (*Ontario v. Ontario*, ¶35)

100. The IRSAS similarly possesses IAP records in a custodial role that does not mean Canada is in "control" of the records for the purposes of the Federal Legislation.

101. Canada also possesses some IAP records through the Settlement Agreement Operations Branch [SAO], in its capacity as litigant in the IAP. However, Canada's use of those records is subject to the court's supervision of the process and the documents used within it. In this case, the Court's authority over the IAP records has been exercised to give effect to the IRSSA confidentiality provisions which are binding on Canada.

102. In *Andersen Consulting v. Canada*, [2001] 2 F.C. 324 (T.D.) [*Anderson Consulting*], the Court held that documents that were subject to the implied undertaking were not within Canada's control for the purposes of the *National Archives of Canada Act* [*NACA*], the predecessor to *LACA*. Canada had obtained documents from the plaintiffs in the discovery process. After the action settled, Canada asserted that it was "subject to an overriding statutory obligation" to turn the records over the National Archivist (¶8). The Court held that because the records were subject to the implied undertaking, their use was "constrained and restricted by law" (¶17). As a result, they were not in the government's "control," and thus not subject to the *NACA.*

103. When Canada participates in litigation, it is subject to court orders about the use of material arising from that litigation. The next section of this factum argues that the IAP records are subject to the implied undertaking. The implied undertaking is thus one way that the law may constrain the use of records in Canada's possession, but it is not the only way. However, the very fact that IAP records are subject to the terms of the IRSSA,

which is given effect through court order, means that they are not in Canada's control. This is another constraint that leads to the IAP records not being in Canada's control.

104. This case is different than *CIBC v. Canada*, relied on by Canada. In that case, the *Employment Equity Act* [*EEA*] imposed a constraint on the use of a record which was subject to an *ATIA* request. Section 4(1) of the *ATIA* provides that it applies "notwithstanding any other Act of Parliament." In addition, s. 24(1) provides for a mandatory exemption for information subject to statutory protections imposed under listed provisions. Because the *EEA* provision was not listed, the court held that the records remained within the government's control for purposes of the *ATIA.*

105. Of course, none of the Federal Legislation provides that it applies "notwithstanding any court order." The *ATIA* does not provide any exemption to disclosure based on records being subject to a court order. This is because such records are excluded from the *ATIA* as not being within Canada's control.

106. In *Andersen Consulting*, ¶¶11, 23, the Court was highly critical of the Crown for accepting the records produced through the litigation discovery process and then claiming to be incapable of complying with the terms of the undertaking under which they were produced. Similarly, in this case, Canada agreed to the confidentiality terms of the IAP, both when the IRSSA was signed and at the start of each hearing, and obtained the claimant's evidence on that basis. It is not now open to Canada to argue that it is permitted, or required, to deal with the records in another way.

iii. The Supervising Judge did not err in finding that the IAP records are subject to the implied undertaking

107. The Supervising Judge also held that the implied undertaking was an independent

basis for ordering the protection and destruction of the IAP records. Canada, as litigant in the IAP, is bound by the undertaking not to use the records generated for use in it for any purpose other than to resolve IAP claims (Reasons, ¶¶329, 341, 344).

108. Canada, ¶94, and the TRC, ¶81, submit the implied undertaking does not apply to the IAP because it is a court-made rule that protects discovery material until it is produced in open court.

109. This is an incomplete understanding of the common law principle and the relationship of the IAP to the court's procedural powers in respect of class proceedings. The rationale for the rule is the principle that when a party is given access to and use of documents for a particular purpose, "there is necessarily an implication that they are not to be used for any other purpose" (*Goodman v. Rossi* (1995), 24 O.R. (3d) 359 (C.A.) [*Goodman*] at 368, quoting *Lindsey v. Le Sueur* (1913), 29 O.L.R. 648 (C.A.), p. 655; also *P.(D) v. Wagg* (2004), 71 O.R. (3d) 229 (C.A.) [*Wagg*], ¶30). The undertaking protects privacy by preventing the collateral use of material produced under compulsion of law. It recognizes that where court processes compel a party to disclose documents or information, the use of the results should be limited to the purposes of the compulsion. The common law implied undertaking principle, and the court's jurisdiction to protect privacy by preventing collateral use of material produced for its processes, applies with necessary modifications to contexts beyond conventional civil litigation, including criminal proceedings, class proceedings, and judicial meditation. In *Wagg*, at ¶¶46-47, this Court observed that there were important and compelling policy reasons to recognize an implied undertaking rule respecting disclosure materials to the defence in

criminal proceedings.[4] The implied undertaking has been expressly accepted in the criminal context in British Columbia. (*R. v. Basi*, 2011 BCSC 314 [*Basi*], ¶¶41-46)

110. *Robinson v. Medtronic Inc.*, 2011 ONSC 3663 [*Medtronic*], recognized that the deemed undertaking in Rule 30.01 has particular importance in class proceedings and may require contextual modification. An order was made pursuant to the court's broad supervisory jurisdiction under s. 12 of the *Class Proceedings Act* and the common law implied undertaking principle that extended the undertaking in various ways.

111. The animating rationale of the implied undertaking rule - to allow parties to obtain as full a picture of the case as possible without fear that disclosure will be harmful of their interests, privacy-related or otherwise - also applies to pre-trial negotiations and mediation including judicial mediation, where it takes the form of settlement privilege and court rules that protect the confidentiality of offers to settle and judicial settlement conferences. (*Globe & Mail v. Canada (Attorney General)*, 2010 SCC 41, ¶¶77-81)

112. As recognized in *Baxter*, the IAP is the start of the litigation for class members promised private adjudication of their individual claims as both a necessary condition and unsurpassable benefit of the settlement. The protection of the implied undertaking extends to all the materials generated for use in litigating an IAP claim, and does not terminate with the hearing. The protection of the common law rule as it has developed in civil litigation ends when the open court principle is engaged by a party's discovery documents or answers being introduced at trial. If the action settles instead, the

[4] While it was not necessary to decide the issue, the Court found that the reasons supporting recognition of rule in criminal proceedings were justification for the screening process it established to govern use of the Crown brief in civil proceedings.

undertaking continues to bind. (*Juman v. Doucette*, 2008 SCC 8 [*Juman*], ¶¶21-22, 51) The open court principle does not apply to the IAP. The parties agreed not to proceed to the courtroom and have specifically agreed that IAP hearings are closed. As a result, the implied undertaking continues to shield the IAP records from use for any other purpose.

113. The Supervising Judge's conclusion that the implied undertaking rule applied to protect the privacy of IAP records was based in principle and law. Its application beyond discovery material was a necessary, not disconsonant, contextual adaptation.

114. Canada, ¶95, also relies on the IRSSA, s. 18.06. However, the implied undertaking rule is not a contractual term between the parties. It is an obligation owed to the court for the benefit of the parties that arises from the legal process and is within the control of the court to enforce, modify or release. (*Juman*, ¶27; *Goodman*, at 368-69)

115. The TRC's submission, ¶79, that the IRSSA "ousts" the implied undertaking with respect to IAP applications, hearings transcripts and recordings, and decisions is another face of its arguments about the interpretation of the IRSSA. In the Chief Adjudicator's submission, those records are protected by the implied undertaking except to the extent that the IRSSA and the Court's implementing orders have created exceptions.

116. The TRC, ¶82, contends, without authority, that the implied undertaking rule does not support record destruction. This is unfounded. The rule prevents collateral use, its purpose being to ensure that records required to be produced for one purpose are not used or disclosed for others. One means of ensuring this is record destruction. Dr. Flaherty described data destruction as "always a key component of privacy and data protection compliance" (Flaherty Affidavit, ¶52). He also explained the normative

nature of destruction in data management (Flaherty Affidavit, ¶63):

> Having served their administrative purposes to settle claims, these records should be destroyed to protect the current and historical reputations and privacy interests of claimants and third parties identified in the records.

117. Dr. Flaherty opined as both a privacy expert and a professional historian. His opinion also makes striking instinctual and logical sense, especially where ultra-sensitive personal information is involved. There is also judicial precedent for enforcing the implied undertaking rule through record destruction. (*Basi*, ¶79, *Medtronic*, ¶28(8), and *Andersen*, ¶¶6, 19)

118. The TRC also relies, ¶80, on the finding in *St. Anne's #1*, at ¶¶183-85. In *St. Anne's #1*, there was no issue of records produced or prepared for the IAP being disclosed to the TRC, or to anyone else. In that case, Canada's disclosure of police records *was* in accordance with its obligations under the IRSSA - to the TRC under Schedule N, and for the IAP under Schedule D. In this case, Canada would breach the implied undertaking "as a party to the IRSSA" (Reasons, ¶344) if it provided IAP records to the TRC or the NCTR.

iv. The Supervising Judge did not err in setting aside the Agreement for the Transfer of Archival Records [Archiving Agreement] and ordering destruction as a remedy for breach of confidence

119. If the IAP records are not "government records," there is no authority for the Archiving Agreement insofar as it applies to those records. However, even if the IAP records were government records for purposes of *LACA*, or all of the Federal Legislation, the Supervising Judge was still correct in setting aside the Archiving Agreement and ordering record destruction as a remedy for the breach of confidence.

120. The Supervising Judge set out the law regarding breach of confidence at ¶¶357-59,

including that if a breach of confidence is established, the court has jurisdiction to grant a broad range of remedies. None of the cross-appellants take any issue with this statement of the law.

121. As noted, Canada agreed in the IRSSA, and reiterates its agreement at each hearing, that it will keep all information disclosed in relation to that hearing confidential "except… as *required* by law." Nothing in the Federal Legislation *requires* the IAP records to be archived at the LAC. As a result, whether or not the Federal Legislation applies as a matter of law, archiving the records with the LAC is inconsistent with Canada's confidentiality obligation.

122. Indeed, if the Federal Legislation did apply, Canada would be obligated to take all necessary steps to ensure that the application of that legislation did not require Canada to breach its promise to maintain the confidentiality of the records. This would require Canada to refrain from archiving the records, refuse to grant anyone researcher status, and destroy the records as soon as permitted to do so, so that they cannot be used or disclosed under the *ATIA* or *Privacy Act*. None of this would require Canada to act contrary to the Federal Legislation.

123. Any conclusion that the records were "government records" would not relieve Canada from fulfilling its confidentiality promise to the best of its ability. As a result, regardless of the status of the IAP records, the Supervising Judge was correct that a destruction order is an appropriate remedy to ensure no breach of confidence can occur.

B. No individual claimant consent is needed for destruction

124. The suggestion made by the TRC and the NCTR that express claimant consent is

required before IAP Records can be destroyed must be rejected. This would fatally undermine the confidentiality provisions of the IRSSA, impose an unacceptable burden on claimants, lead to unredacted private testimony identifying claimants and alleged perpetrators being archived by default, and require a vast new notice program that is not provided for anywhere in the IRSSA. Nor should this Court entertain any submissions about the feasibility of redacting IAP records for archiving and data mining without claimant consent. Either of these options would be a material amendment to the IRSSA.

C. The Notice Program and Retention Period

125. The Chief Adjudicator agrees with and adopts the submissions of Independent Counsel at ¶¶95-100 of its main factum that the retention period of 15 years ordered by the Supervising Judge is far too long and increases the risk of accidental disclosure unnecessarily. The Chief Adjudicator submits that a 2-year period is appropriate, and supports the order sought at ¶110(a) of the Independent Counsel's main factum.

126. With respect to the notice program, given the order made by Justice Brown on June 26, 2015 (Independent Counsel, ¶¶105, 109), the TRC cannot conduct a notice program. The NCTR, as another stranger to the IAP, is also not an appropriate body to do so. As the independent overseer of the IAP, accountable to the Courts, the Chief Adjudicator is properly situated to prepare and implement a notice plan in a timely way. In the court below, the Chief Adjudicator offered to implement a notice program, through measures such as notices in printed and online media, community information sessions, partnerships with Aboriginal organizations, providing information to claimants and receiving and processing consent forms. The Chief Adjudicator proposed that the notice program commence within 6 months of the Court's order and continue for

18 months. If this Court includes these terms as part of its order, it would obviate the need for an additional RFD and the process for archiving on consent could get underway.

D. The ADR Documents

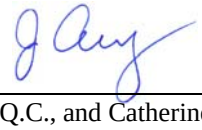
127. The Chief Adjudicator also agrees with and adopts the submissions of Independent Counsel at ¶¶8-9 and 64-66 regarding records from the Alternative Dispute Resolution process and supports the order sought at ¶110(b) of their main factum.

PART IV. CONCLUSION

128. The history of the residential schools is one of terrible betrayal. The IRSSA, crafted by the parties, adopts a model of reconciliation that compensates survivors without requiring them to publicly share what happened to them. It is the survivor's choice – and no one else's – whether to share these painful and intimate details, or to forget and have forgotten. That choice is fundamental to the dignity of survivors, and core to the integrity of the IRSSA as a whole. The public work of the TRC to preserve the legacy of the schools is an important part of IRSSA. But participation in that history making must be voluntary. It would be another, grievous betrayal of trust to induce claimants to participate in the IAP and then appropriate what they disclose privately to obtain compensation, for use in whatever manner Canada, the TRC, or the NCTR see fit. This would put many class members in a worse position than they were before the settlement, and forever taint the historic and internationally-recognized achievement that the Indian Residential Schools Settlement Agreement represents.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: August 28, 2015



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

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

COURT OF APPEAL FOR ONTARIO

BETWEEN:

LARRY PHILIP FONTAINE ET AL.

-and-

THE ATTORNEY GENERAL OF CANADA ET AL

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

CERTIFICATE

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

1. An order under subrule 61.09(2) is not required.

2. An estimate that two (2) hours will be required for the Respondent's oral argument in the appeal and cross-appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

August 28, 2015

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

SCHEDULE A - LIST OF AUTHORITIES

Authorities

Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401, 2013 SCC 62

Andersen Consulting v. Canada, [2001] 2 F.C. 324 (T.D.)

Baxter v. Canada (Attorney General) (2006), 83 O.R. (3d) 481 (ONSC)

Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration), 2002 FCA 270

Canada (Information Commissioner) v. Canada (Minister of National Defence), 2011 SCC 25

Canadian Imperial Bank of Commerce v. Canada (Chief Commissioner, Human Rights Commission), 2007 FCA 272

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403

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

Fontaine v. Canada (Attorney General), 2014 ONSC 4024

Fontaine v. Canada (Attorney General), 2014 ONSC 4585

Fontaine v. Canada (Attorney General), 2015 ABQB 225

Fontaine v. Canada (Attorney General), 2015 ONSC 4061

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

Globe & Mail v. Canada (Attorney General), 2010 SCC 41

Goodman v. Rossi (1995), 24 O.R. (3d) 359 (C.A.)

Juman v. Doucette, 2008 SCC 8

Lavier v. MyTravel Canada Holidays Inc., 2011 ONSC 3149

Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner), 2011 ONSC 172

P.(D) v. Wagg (2004), 71 O.R. (3d) 229 (C.A.)

R. v. Basi, 2011 BCSC 314 [*Basi*]

R. v. Dyment, [1988] 2 S.C.R. 417

R. v. Spencer, 2011 SKCA 144

Robinson v. Medtronic Inc., 2011 ONSC 3663

Statutes and Regulations

Access to Information Act, R.S.C. 1985, c. A-1, ss. 4, 19

Canadian Charter of Rights and Freedoms, ss. 7-8, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

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

Privacy Act, R.S.C. 1985, c. P-21, ss. 3, 8(2)(k), (l), (m)(i), 12

Privacy Regulations, SOR/83-508, s. 6(c)

SCHEDULE B – STATUTES AND REGULATIONS

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***Access to Information Act*, R.S.C. 1985, c. A-1, ss. 4, 19**

Right to access to records

4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is

(a) a Canadian citizen, or

(b) a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*,

has a right to and shall, on request, be given access to any record under the control of a government institution.

Extension of right by order

(2) The Governor in Council may, by order, extend the right to be given access to records under subsection (1) to include persons not referred to in that subsection and may set such conditions as the Governor in Council deems appropriate.

Responsibility of government institutions

(2.1) The head of a government institution shall, without regard to the identity of a person making a request for access to a record under the control of the institution, make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested.

Records produced from machine readable records

(3) For the purposes of this Act, any record requested under this Act that does not exist but can, subject to such limitations as may be prescribed by regulation, be produced from a machine readable record under the control of a government institution using computer hardware and software and technical expertise normally used by the government institution shall be deemed to be a record under the control of the government institution.

…

Personal information

19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in s. 3 of the *Privacy Act*.

Where disclosure authorized

(2) The head of a government institution may disclose any record requested under this Act that contains personal information if

(*a*) the individual to whom it relates consents to the disclosure;

(*b*) the information is publicly available; or

(*c*) the disclosure is in accordance with section 8 of the *Privacy Act*.

***Canadian Charter of Rights and Freedoms*, ss. 7-8, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11**

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

***Privacy Act*, R.S.C. 1985, c. P-21, ss. 3, 8(2)(k), (l), (m)(i), 12**

Definitions

3. In this Act,

"personal information"

« renseignements personnels »

"personal information" means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,

(*a*) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual,

(*b*) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(*c*) any identifying number, symbol or other particular assigned to the individual,

(*d*) the address, fingerprints or blood type of the individual,

(*e*) the personal opinions or views of the individual except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual by a government institution or a part of a government institution specified in the regulations,

(*f*) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence,

(*g*) the views or opinions of another individual about the individual,

(*h*) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual by an institution or a part of an institution referred to in paragraph (*e*), but excluding the name of the other individual where it appears with the views or opinions of the other individual, and

(*i*) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

but, for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, does not include

(*j*) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,

(i) the fact that the individual is or was an officer or employee of the government institution,

(ii) the title, business address and telephone number of the individual,

(iii) the classification, salary range and responsibilities of the position held by the individual,

(iv) the name of the individual on a document prepared by the individual in the course of employment, and

(v) the personal opinions or views of the individual given in the course of employment,

(*k*) information about an individual who is or was performing services under contract for a government institution that relates to the services performed, including the terms of the contract, the name of the individual and the opinions or views of the individual given in the course of the performance of those services,

(*l*) information relating to any discretionary benefit of a financial nature, including the granting of a licence or permit, conferred on an individual, including the name of the individual and the exact nature of the benefit, and

(*m*) information about an individual who has been dead for more than twenty years;

…

8. **(**2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed

…

(*k*) to any aboriginal government, association of aboriginal people, Indian band, government institution or part thereof, or to any person acting on behalf of such government, association, band, institution or part thereof,

for the purpose of researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada;

(*l*) to any government institution for the purpose of locating an individual in order to collect a debt owing to Her Majesty in right of Canada by that individual or make a payment owing to that individual by Her Majesty in right of Canada; and

(*m*) for any purpose where, in the opinion of the head of the institution,

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or

…

Right of access

12. (1) Subject to this Act, every individual who is a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act* has a right to and shall, on request, be given access to

(*a*) any personal information about the individual contained in a personal information bank; and

(*b*) any other personal information about the individual under the control of a government institution with respect to which the individual is able to provide sufficiently specific information on the location of the information as to render it reasonably retrievable by the government institution.

Other rights relating to personal information

(2) Every individual who is given access under paragraph (1)(*a*) to personal information that has been used, is being used or is available for use for an administrative purpose is entitled to

(*a*) request correction of the personal information where the individual believes there is an error or omission therein;

(*b*) require that a notation be attached to the information reflecting any correction requested but not made; and

(*c*) require that any person or body to whom that information has been disclosed for use for an administrative purpose within two years prior to the time a correction is requested or a notation is required under this subsection in respect of that information

(i) be notified of the correction or notation, and

(ii) where the disclosure is to a government institution, the institution make the correction or notation on any copy of the information under its control.

Extension of right of access by order

(3) The Governor in Council may, by order, extend the right to be given

access to personal information under subsection (1) to include individuals not referred to in that subsection and may set such conditions as the Governor in Council deems appropriate.

***Privacy Regulations*, SOR/83-508, s. 6(c)**

6. Personal information that has been transferred to the control of the Library and Archives of Canada by a government institution for archival or historical purposes may be disclosed to any person or body for research or statistical purposes where

…

(*c*) 110 years have elapsed following the birth of the individual to whom the information relates; or