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)

[style of cause continued on next page]

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(Respondent)

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

-and-

PRIVACY COMMISSIONER OF CANADA

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FACTUM OF THE RESPONDENT CHIEF ADJUDICATOR

PART I. INTRODUCTION AND OVERVIEW

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

2. The IAP, established under Article 6 and Schedule D of the IRSSA, is the only means under the settlement by which former students can advance ongoing claims for compensation for specific incidents of abuse and consequential harm. The IAP is a *sui generis* form of litigation, an inquisitorial process conducted by IAP adjudicators under which the Claimant must establish his or her entitlement to compensation based on proof, on the civil standard, of serious physical or sexual abuse or other wrongful acts as defined in the IAP Compensation Rules. The Chief Adjudicator is the Officer of the Court responsible for the implementation and operation of the IAP.

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[1] Under the Court Administration Protocol incorporated into the Supervising Courts' Implementation Orders, Justice Perell is a Supervising Judge and also one of the two Administrative Judges designated by the nine Supervising Courts to receive all Requests for Directions, for case management if necessary and referral for hearing by Supervising Judges.

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

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

transferred and archived for research, study and public access, or whether the IRSSA required them to be destroyed at the end of their use in the IAP.

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

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

7. These appeals concern, instead, the rulings that the Supervising Judge made on the TRC's RFD. The Supervising Judge did not accept that IAP records could be transferred to the TRC, absent Claimant consent. However, he did find that application forms, transcripts and audio recordings of the Claimant's own evidence, and the decision on the claim, could be archived by a Claimant, or on Claimant consent, if they were redacted to remove identifying information of

alleged perpetrators and others. He also found that a notice program could be developed to inform Claimants of their rights in this regard, and that these records should be retained for a period to enable Claimants to exercise those rights.

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

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

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

11. With respect to the finding that the four categories of records, once redacted, can be archived with Claimant consent, the Chief Adjudicator says that the Supervising Judge's finding is reasonable as it applies to the application forms, the transcripts and the decisions, because these are records that Claimants have a right to possess and make use of after the conclusion of their IAP claim. Application forms originate with the Claimants and the IAP does not constrain their use by Claimants. The IAP expressly provides that Claimants are free to

discuss their own evidence outside the IAP, and that they may request a redacted transcript of their own evidence, which they are permitted to use, without restriction, after the hearing. The IAP also provides that Claimants can discuss the outcome of their hearing, and they are provided with a redacted decision, which they could choose to archive.

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

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

was not open to the Supervising Judge to hold that they could be disclosed or used in any other way.

PART II. STATEMENT OF FACTS

Background to the IRSSA

14. The IRSSA is a historic settlement for fair reparation and reconciliation of the legacy of residential schools. Justice Goudge (sitting *ad hoc* in *Fontaine v. Canada (Attorney General)*, 2013 ONSC 684) described the background to the IRSSA as follows:

> [10] Starting in the 1880s, Canada undertook responsibility for the creation of the IRS system for the education of Aboriginal children. The schools were nearly all operated jointly by Canada and various religious organizations. By the time the last residential school closed in 1996, more than 150,000 Aboriginal, Inuit and Mtis (sic) children had been taken from their homes and communities and required to attend these institutions. The sternly assimilationist vision embodied in the IRS system was described in the Report of the Royal Commission on Aboriginal Peoples (Ottawa: Royal Commission on Aboriginal Peoples, 1996), at p. 337, as follows:
>
> > The tragic legacy of residential education began in the late nineteenth century with a three-part vision of education in the service of assimilation. It included, first, a justification of removing children from their communities and disrupting Aboriginal families; second, a precise pedagogy for re-socializing children in the schools; and third, schemes for integrating graduates into the non-Aboriginal world.
>
> [11] The injustices and harms experienced by Aboriginal people as a result of this tragic episode in Canadian history caused many Aboriginal groups, particularly the AFN, to seek a response that would address both compensation and the need for continued healing. In addition, by the 1990s, litigation over the alleged abuse of students attending the schools began in earnest.
>
> [12] It was in this context that Canada appointed the Honourable Frank Iacobucci on May 30, 2005 as federal representative to lead discussions with interested parties towards the resolution of the

> legacy of Indian Residential Schools. The shared objective was a fair and lasting resolution of the painful negative experiences of former students, the enduring impacts of these experiences, and the resolution of all individual and class actions.
>
> [13] The result of the lengthy and detailed negotiations that ensued was, first, the agreement in principle, concluded by the parties on November 20, 2005, and approved by the previous Government of Canada. That was followed on May 8, 2006 by the conclusion of the Settlement Agreement, which was approved by the present Government of Canada and signed by Canada, the AFN and other leading Aboriginal organizations, some 50 religious organizations and some 79 law firms conducting the relevant litigation.

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

Structure of the IRSSA

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

17. The IRSSA implements the AFN's two-pronged approach. It deals with individual compensation through the Common Experience Payment ("CEP") and

the IAP. The other goals – truth telling, healing and public education – are addressed by the other components of the IRSSA: the TRC and the funds for healing programs and commemorative activities. These components are aimed at providing more general, indirect benefits to residential school survivors, their families, and their communities. While the CEP and the IAP provide compensation based on the resolution of *individual claims*, the TRC and other components address the *collective harms* suffered as a result of the operation of residential schools: *Baxter* v. Canada (2006), 83 O.R. (3d) 481 (S.C.), paras. 7 and 18.

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

allegations made. The TRC, on the other hand, is meant to address the ongoing legacy of the schools for the benefit of survivors, their families and broader communities, including by creating a public record.

19. While there may be subject matter overlap in the truth telling activities facilitated by the TRC and the testimony which takes place in the IAP, they are fundamentally different processes. Under the TRC's mandate, any decision to engage in truth telling or statements regarding individual stories of abuse must be entirely voluntary and the individual is free to tell as much or as little as he or she decides. The evidence given in the IAP process is entirely different. IAP Claimants are *required* to reveal the most painful and intimate details of the shocking physical, emotional and sexual abuse which they suffered. In a significant number of cases, they will be required to prove that other students, perhaps from their own communities, committed the abuse. This is a very different exercise from the voluntary witnessing or truth telling to be facilitated by the TRC.

Individual Compensation under the IRSSA – the IAP

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

21. Schedule D is titled "Independent Assessment Process for Continuing Indian Residential School Abuse Claims" [emphasis added]. The IAP is a *sui*

generis form of litigation, an inquisitorial process under which Claimants must prove they suffered serious physical or sexual abuse or other wrongful acts as defined in the IAP Compensation Rules. The Chief Adjudicator is the Officer of the Court responsible for overseeing the IAP including the operation of the Indian Residential Schools Secretariat, which supports and reports to the Chief Adjudicator.

22. Claimants initiate the process by filling out applications forms, which require Claimants to identify the individual(s) who abused them at residential school, set out the specific kind(s) of abuse which they suffered, and describe the consequences of that abuse (the application form). A Claimant must also provide a signed first-person narrative, and indicate the level of compensation sought.

Affidavit of Daniel Ish, sworn September 27, 2013 ("Ish Affidavit"), at para. 32

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

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

(c) a report about the relevant residential school(s) and the background documents; and (d) any documents mentioning sexual abuse at that residential school(s).

Ish Affidavit, at para. 56

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

IRSSA, Schedule D, Appendix VII at pp. 28-29
Affidavit of David Flaherty, sworn May 2, 2014, at para. 13

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

Ish Affidavit, at para. 23

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

adjudicator may order the expert assessments of the Claimant that are required to establish the most severe impacts or a compensable physical injury.

Ish Affidavit, at paras. 25 and 45

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

Privacy and Confidentiality in the IAP Process

29. The Supervising Judge found that concerns about privacy and confidentiality in the IAP were an extremely important part of the factual nexus of the negotiations leading to the IRSSA. For plaintiffs, the concern was that the claims were intensely private and difficult to describe in public. In addition, cases of student-on-student abuse, which is alleged in 32% of IAP claims, raised special concerns. In such cases, abusers and abused may live together in the same community, and there may well be trauma within an entire community if these individuals are identified by name.

Affidavit of Daniel Shapiro sworn September 26, 2013, at para. 9
Affidavit of Larry Philip Fontaine sworn May 1, 2014, at para. 15

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

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

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

33. As a result, the IRSSA sets out a specific regime for protecting the confidentiality of the information disclosed in the IAP, while preserving Claimants' and other participants' rights to continue to discuss their own experiences outside of the IAP, as set out below.

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

> I agree to respect the private nature of any hearing I may have in this process. I will not disclose any witness statement I receive or anything said at the hearing by any participant, <u>except what I say myself</u>. [emphasis added]
>
> Ish Affidavit, Exhibit C at p. 21

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

IRSSA, Schedule D at p. 19

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

Ish Affidavit, at para. 43

37. Hearings are closed to the public. The parties, the alleged perpetrator and other witnesses are "required to sign agreements to keep information disclosed at the hearing confidential, except their own evidence, or as required within this process or otherwise by law" [emphasis added]. Adjudicators commonly provided assurances to Claimants and alleged perpetrators at the outset of hearings about the confidentiality of their evidence.

IRSSA, Schedule D at p. 15
Ish Affidavit, at para. 58

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

IRSSA, Schedule D at page 15

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

IRSSA, Schedule D at p. 15

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

IRSSA, Schedule D, p. 22
Ish Affidavit, para. 66-67

The Truth and Reconciliation Commission ("TRC")

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

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

IRSSA, Schedule N, pp. 1-2

43. Section 2(a) authorizes the TRC's activities. It authorizes the TRC to receive statements and documents from former students and others, and to archive

such documents. The TRC is not to make use of personal information or of statements which identify someone, without that individual's express consent, unless that information and/or the individual's identity has already been established through legal proceedings, admission, or public disclosure by that individual. Other information that could be identifying must be anonymized to the extent possible (ss. 2(h) and (j)).

IRSSA, Schedule N, pp. 2-4

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

IRSSA, Schedule N, pp. 3-4

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

IRSSA, Schedule N, pp. 1, 3 and 5

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

47. Section 11 of Schedule N sets out the TRC's right to access information. It provides that Canada and the Church entities must provide relevant documents in their possession or control to and for the use of the TRC "subject to the privacy interests of an individual as provided by applicable privacy legislation, and subject to and in compliance with applicable privacy and access to information legislation, and except for those documents for which solicitor-client privilege applies and is asserted." However, information from the IAP is to be transferred to the TRC for research and archiving purposes only "[i]nsofar as agreed to by the individuals affected and as permitted by process requirements."

IRSSA, Schedule N, pp. 10-11

PART III. STATEMENT OF ISSUES AND ARGUMENT

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

Preliminary Issue: Is the Records Decision Final or Interlocutory?

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

Waldman v. Thomson Reuters Canada Ltd., 2015 ONCA 53 [Waldman], para. 5
Locking v. Armtec Infrastructure Inc., 2012 ONCA 774, para. 11

50. The Records Decision makes orders and declarations *in rem* against the world respecting the private and confidential nature of records produced and prepared for the IAP, limiting their use and disclosure, and governing their disposition on completion of the IAP. It requires most records to be destroyed on the completion of an IAP claim, and requires a limited set be retained for a 15-year period. It is a final determination of what the IRSSA requires with respect to the disposition of IAP claim records. It is thus a final order for the purposes of s. 6(1)(b).

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

52. In the context of a class action at the post-settlement stage, however, the test must be applied in a manner sensitive to that context, as recognized by this

Court in *Parsons v. Ontario*, 2015 ONCA 158 [*Parsons*]. In *Parsons*, the panel split on whether the order under appeal, that relating to participation in a joint hearing, was final.

53. The Chief Adjudicator submits that under either of the approaches adopted in *Parsons*, the Records Decision is final. In *Parsons*, the majority held that the order in that case was analogous to a final determination of an application under R. 14.05(3)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, because it involved the determination of an interpretation of the *Courts of Justice Act*, the *CPA*, the *Rules of Civil Procedure*, and the settlement agreement relevant to the case. LaForme J.A., Lauwers J.A. concurring, held that an "order's final or interlocutory character will turn on the specific order of the supervisory judge acting under a settlement agreement within the discrete context of post-settlement litigation" (para. 53).

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

55. In this case, the Records Decision finally determines the rights at issue. The three appeals and four cross-appeals relate to: (a) the determination of IAP record privacy, confidentiality, retention, archiving, and destruction rights under the IRSSA and supervisory courts' oversight and implementation jurisdiction; (b) whether a notice program and other aspects of the Records Decision are invalid amendments to the IRSSA; (c) the relationship of the IRSSA and the

jurisdiction of the Supervising Courts to the applicability and operation of the *Privacy Act*, R.S.C. 1985, c. P-21, the *Access to Information Act*, R.S.C. 1985, c. A-1 and the *Library and Archives of Canada Act,* S.C. 2004, c. 11; and (d) whether the IAP includes claim records from its predecessor DR process.

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

Fontaine v. Duboff Edwards Haight & Schachter, 2012 ONCA 471; *Fontaine v. Canada (Attorney General)*, 2008 BCCA 329, para. 29; and 2008 BCCA 60, paras. 11-13

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

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

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

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

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

61. In this case, the interpretation of the provisions of the IRSSA relating to privacy and confidentiality must be firmly grounded in an appreciation of the particular factual circumstances surrounding the negotiation of the IRSSA, the relationships of the parties, the nature and content of IAP claims, and the purposes

and objectives meant to be achieved by various components of the IRSSA. Because of the nature of the inquiry, pursuant to *Sattva*, the Supervising Judge's findings are entitled to deference.

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

> … the Agreement has applicability to thousands of Claimants across the country and as such, the manner in which it is interpreted has great precedential value, and brings certainty to others involved in similar disputes. See *Sattva*, at paras. 51-53.
>
> *Kelly*, at para. 40

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

64. The Chief Adjudicator submits that the standard of review analysis in *Kelly* was not a sound application of *Sattva*, and the approach and conclusion in *Alexis* is to be preferred. Under the *Kelly* analysis, correctness would always apply to the interpretation of class action settlements if the class contains a large

enough number of people. This reasoning is flawed and not in keeping with the law of appellate standard of review, *Sattva* itself or other post-*Sattva* jurisprudence: see *Bell Mobility Inc. v. Anderson*, 2015 NWTCA 3, paras. 33-34. The question is not how many people are affected by the result in this case, but rather whether the result here will have a significant precedential impact on other cases not involving the IRSSA.

65. The interpretation of the privacy and confidentiality regime in the IRSSA is a highly fact specific exercise, that must take into account the unique and intensely private content of the allegations considered in the IAP and the relationship of the IAP to the multiple goals and various objectives sought to be achieved by the IRSSA as a whole through its different discreet components. These considerations are unique to the IRSSA, and are matters in which the Supervising Court has expertise.

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

AIC Limited v. Fischer, 2013 SCC 69, para. 65; *Markson v. MBNA Canada Bank*, 2007 ONCA 334, para. 33; *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2013 ONCA 279, paras. 40 and 69

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

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

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

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

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

70. In the face of this clear language, there can be no doubt that under the terms of the IRSSA, Claimants can choose to have their redacted transcripts

archived with the Centre. Indeed, the IRSSA requires that positive steps be taken to provide Claimants with this option, and that the redacted transcripts be deposited in an archive for the Claimants if they ask that this be done. The Supervising Judge committed no palpable and overriding error in interpreting the IRSSA in a manner which recognizes that redacted transcripts can be archived with Claimant consent.

71. The Nine Catholic Entities seem to accept that redacted transcripts can be archived, however, the other two appellants assert that the last paragraph of Article 11 of Schedule N prohibits the archiving of any records from the IAP without the consent of everyone involved in an IAP claim, including the redacted transcripts provided to Claimants on request pursuant to Schedule D. Article 11 of Schedule N is titled "Access to Relevant Information" and sets out the scope of Canada's and the Churches' obligations to disclose records to the TRC. The last paragraph must be read in conjunction with the rest of the provision. The Chief Adjudicator submits that the last paragraph is clearly a qualification of the obligation of Canada and the Churches set out earlier in the same section to provide or make available to the TRC all relevant records in their possession. While the Supervising Judge correctly found that the IAP records are not within the control of Canada, a point to be dealt with in the cross appeals, there are certainly IAP records in the defendants' possession at various times during the IAP. The last paragraph of Article 11 makes it clear that the general disclosure obligation in the first paragraph does not require or authorize Canada or the Churches to deliver IAP records (or records from the IAP's predecessor DR

process) to the TRC unless all relevant parties consent. This respects the overriding principle that the IAP is a confidential process, and its records are treated in a manner separate and distinct from other records about residential schools that are in the possession or control of the defendants.

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

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

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

75. All three appellants argue that the Supervising Court erred in finding that redacted decisions and application forms can be archived. Before the Supervising

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

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

information that would be included in a redacted application form. It was reasonable to hold that this same result could be achieved by the Claimant archiving redacted records in their possession.

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

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

that they do not already have under the IRSSA. The Chief Adjudicator agrees with the appellants that this aspect of the Records Decision is not reasonable.

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

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

PART IV. CONCLUSION

81. The Supervising Judge was correct in his primary finding that IAP records must only be used as contemplated by the provisions of the IAP. This principle is core to the ability of the IAP to serve its purpose, which is to provide compensation for specific incidents of abuse in a confidential manner. It is critical to the bargain reached by the parties, which is given effect through court orders approving and implementing the IRSSA. The finding that Claimants can

provide their redacted transcripts, decisions and application forms to the TRC or the Centre does not detract from this principle, because under the IRSSA Claimants have the right to tell their stories outside the IAP using these records, which they are entitled, under Schedule D, to retain. But it would be a breach of the IRSSA to allow the use of any other records, when that is not contemplated in the IRSSA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: July 16, 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.

July 16, 2015

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

SCHEDULE A - LIST OF AUTHORITIES

Authorities

AIC Limited v. Fischer, 2013 SCC 69

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

Bell Mobility Inc. v. Anderson, 2015 NWTCA 3

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

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

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

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

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

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

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

Locking v. Armtec Infrastructure Inc., 2012 ONCA 774

Markson v. MBNA Canada Bank, 2007 ONCA 334

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

Parsons v. Ontario, 2015 ONCA 158

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

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

Statutes

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

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

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

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

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

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

SCHEDULE B – STATUTES AND RULES

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

Court may determine conduct of proceeding

12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

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

Court of Appeal jurisdiction

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

...

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

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

Application under Rules

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

…

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

Appendix A

FINAL: MAY, 2006

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

TABLE OF CONTENTS

Appendix B

SCHEDULE "N"

MANDATE FOR THE TRUTH AND RECONCILIATION COMMISSION

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

Principles

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

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

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

Terms of Reference

1. **Goals**

The goals of the Commission shall be to:

(a) Acknowledge Residential School experiences, impacts and consequences;

(b) Provide a holistic, culturally appropriate and safe setting for former students, their families and communities as they come forward to the Commission;

LARRY PHILIP FONTAINE -and- et al.	THE ATTORNEY GENERAL OF CANADA et al.	Court of Appeal File No.: 59310, 59311, 59320
Plaintiffs (Respondents in Appeal)	Defendants (Appellants and Respondents in Appeal and Cross-Appeal)	Court File No.: 00-CV-192059CP

COURT OF APPEAL FOR ONTARIO
Proceeding Commenced at Toronto

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