Court File No. 00-CV-192059

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

LARRY PHILIP FONTAINE, et. al

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA, et. al

Defendants

Proceedings under the *Class Proceedings Act*, 1992, S.O. 1992. C.6

FACTUM OF THE CHIEF ADJUDICATOR

June 9, 2014

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP
Barristers
Suite 2600
130 Adelaide Street West
Toronto ON M5H 3P5

William C. McDowell (28554G)
Tel: (416) 865-2949
Fax: (416) 865-2850
Email: wmcdowell@litigate.com
Jonathan Erik Laxer (60765I)
Tel: (416) 865-2893
Fax: (416) 865-2978
Email: jlaxer@litigate.com

Lawyers for the
Chief Adjudicator of the Indian Residential Schools
Adjudication Secretariat

Court File No. 00-CV-192059

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

LARRY PHILIP FONTAINE, et. al

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA, et. al

Defendants

Proceedings under the *Class Proceedings Act*, 1992, S.O. 1992. C.6

FACTUM OF THE CHIEF ADJUDICATOR

PART I - OVERVIEW

1. The Chief Adjudicator of the Independent Assessment Process ("IAP") and the Truth and Reconciliation Commission ("TRC") have both brought Requests for Directions ("RFDs") before this Court regarding disposition of the records from the IAP.

2. While the two RFDs seek direction on different points, both are addressed to the same fundamental issue: what is to be done with the records produced by and disclosed to the IAP when that process is concluded?

3. The IAP was an integral component of the Indian Residential Schools Settlement Agreement (the "Settlement Agreement"). Under the IAP claimants are entitled to damages over and above the Common Experience Payment ("CEP"), calculated according to a formula in the Settlement Agreement if they demonstrate that they experienced certain physical or sexual abuse or other wrongful acts, either at the hands of staff or other students at a Residential School.

4. The claimants, parties and participants gave evidence at 20,000 hearings held to date on the understanding that their testimony and documents would be kept in the strictest confidence. All were required to sign reciprocal confidentiality undertakings before the hearings. The adjudicators also sought to reassure participants that they could reveal intimate and inherently private details because their privacy would be protected. These assurances of confidentiality were preconditions to claimants agreeing to discuss the most private details of their lives and to file the most sensitive documentation, including medical, employment and correctional records and psychiatric evaluations.

5. The Chief Adjudicator brings this RFD in his capacity as an officer of the Court. The Chief Adjudicator's primary objective is to ensure that the terms of the Settlement Agreement, including the confidentiality guarantees given to the participants in the IAP, and inherent in the very structure of the IAP, are respected and enforced by the Courts.

6. The Settlement Agreement establishes that the IAP is a private and confidential process, and explicitly opts out of the open court principle. Accordingly, records of the IAP may only be archived if it is provided for in the Settlement Agreement, and must only be done under the terms set out therein. The only records that Schedule "D" of the Settlement Agreement contemplates archiving are the redacted transcripts of the claimant's evidence, and only in the event that the claimant provides informed consent.

7. As for the other records, the Chief Adjudicator shares the position of the Assembly of First Nations that the records of the IAP should be destroyed at the completion of the process.

8. The Chief Adjudicator also seeks a declaration that the information and documents received by the parties and participants in the IAP may not be published or provided to anyone else, including the TRC, unless consent is obtained from all "affected individuals."

PART II - FACTS

A. OVERVIEW OF THE IAP

9. The RFDs before the Court are brought in the context of a class action under the *Class Proceedings Act* between the former students of Indian Residential Schools, and the Government of Canada and Church Organizations that operated those schools. The Settlement Agreement was an agreed-upon resolution of that action, which established a mechanism for the assessment of individual damages suffered by the class members over and above the CEP.

10. As explained by Justice Veale in *Fontaine v. Canada (Attorney General),* class members were required "to release their court actions against the government and churches in exchange for the claims permitted under the Independent Assessment Process."

Reference: *Fontaine v. Canada (Attorney General*), 2006 YKSC 63 at para. 10, Book of Authorities of the Chief Adjudicator ("Authorities"), Tab 1

11. The IAP was established by Article 6 of the Settlement Agreement. It is a claimant-centred, non-adversarial out-of-court process for assessment of damages for claims of sexual abuse, serious physical abuse, and other wrongful acts suffered at the Indian Residential Schools.

Reference: Affidavit of Dan Ish, sworn September 27, 2013 ("Ish Affidavit") at paras. 5-7

Settlement Agreement, Article 6 at pp. 50-53

12. As established by Schedule "D" to the Settlement Agreement, the IAP uses a "uniform inquisitorial process for all claims to assess credibility, to determine which allegations are proven and result in compensation, to set compensation according to the Compensation Rules, and to determine actual income loss claims".

Reference: Settlement Agreement, Schedule "D" at p. 9

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

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

Reference: Settlement Agreement, Schedule "D" at p. 4

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

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

Reference: Settlement Agreement, Schedule "D" at p. 4

15. Subject to limited exceptions ordered by the supervising courts, the deadline for applying to the IAP was September 19, 2012.

16. Canada pays all awards to claimants, including a contribution of 15% towards legal fees and reasonable and necessary disbursements. The Churches made global contributions to the overall cost of the Settlement Agreement.

Reference: Ish Affidavit at para. 25

Parties to the Hearing in the IAP

17. The parties to a hearing in the IAP are the claimant, the Government of Canada, and any Church entity affiliated with the Residential School in question that chooses to participate. The alleged perpetrator is not a party to the hearing. Further, the Settlement Agreement states that alleged perpetrators have "no right of confrontation".

Reference: Settlement Agreement, Schedule "D" at p. 12

18. If located, alleged perpetrators may give evidence "as of right," though they cannot be compelled to attend. They are, in essence, non-compellable witnesses with specific rights outlined in the Settlement Agreement. The alleged perpetrator may be accompanied by counsel during his or her evidence, but cannot attend or be represented during the evidence of the claimant without the advance consent of the parties. Conversely, as the claimant is a party, he or she is entitled to attend the hearing for the evidence of the alleged perpetrator.

Reference: Ish Affidavit at paras. 27-28

Privacy and Confidentiality

19. Privacy and confidentiality are essential ingredients of the IAP. As held by Justice Perell in *Fontaine v. Canada (Attorney General)*:

> The IAP is private and confidential. Hearings are closed to the public and participants are required to agree to keep information confidential or as required by law. […] While the documentation and information provided

> to Claimants and adjudicators may include allegations of abuse by individuals other than those named in the complaint at issue, names of other students or persons are redacted.
>
> **Reference:** *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283 at para. 82, Authorities, Tab 2

20. The affidavit of Larry Philip Fontaine (the primary named representative plaintiff in the underlying class action) confirms the central role of privacy and confidentiality to the process. Mr. Fontaine was instrumental in the negotiations that led to the Settlement Agreement. As he explains, confidentiality and privacy in the IAP were essential elements of the bargain struck in the Settlement Agreement. As Mr. Fontaine explains, these elements are particularly important in the case of student-on-student abuse, alleged in 32% of IAP claims:

> [D]uring the course of those negotiations, I argued that the names of the children who abused other children should not be disclosed to the adjudicators in the IAP process. The reason I argued this was because I knew myself from my own community and other aboriginal communities across Canada that both abusers and abused lived in the same communities and that there would be ongoing trauma within an entire community if these individuals were identified by name.
>
> The solution to this and other problems was the confidentiality of the IAP process to ensure that no person could identify a perpetrator by name outside of the IAP process and everybody had to agree to that at the beginning of the IAP process. Furthermore, nobody except the survivor would have access to the story of the survivor. The IAP hearings were to be held in the strictest confidence.
>
> **Reference:** Affidavit of Larry Philip Fontaine, sworn May 1, 2014 ("Fontaine Affidavit") at paras. 15-16
>
> Shapiro Affidavit at para. 9

21. Peter Dinsdale, the Chief Executive Officer of the Assembly of First Nations, shares Mr. Fontaine's view of the Settlement Agreement. As a result of these privacy concerns, the AFN "supports the outright destruction of all IAP applications, information, transcripts and decisions."

> **Reference:** Affidavit of Peter Dinsdale, sworn May 6, 2014 at paras. 61-62

22. The IAP serves a fundamentally different purpose than the TRC, which is a separate component of the Settlement Agreement. The TRC was itself designed and empowered, in the words of Mr. Fontaine, "to ensure that the history of the Residential Schools tragedy would be known and protected for future generations and never repeated."

Reference: Fontaine Affidavit at para. 18

23. Like many others, Mr. Fontaine submitted an application to the IAP on the understanding that his story would be kept confidential. Claimants were and remain at liberty to approach the TRC and provide a witness statement for the purpose of making their story public. However, as explained by Mr. Fontaine:

> In negotiating the TRC it was always understood that the individual stories of survivors would only become part of that record if survivors themselves decided to speak to the TRC and advise that they wished their story to be made public.
>
> **Reference:** Fontaine Affidavit at para. 19

24. It is notable that despite Mr. Fontaine's public leadership role in speaking out about the abuse that occurred at residential schools, he himself has consciously chosen to keep his personal story private.

25. The chance that IAP records may be archived has caused considerable anxiety to claimants who participated in that process. As explained by the claimant D.W.:

> I oppose that my file be provided to any organisation regardless of the measures that could be taken to protect my identity. I did not give any consent to this effect and I always understood that my application, the mandatory documents, and the recording and transcripts of my testimony would not serve any purpose other than those of the IAP.
>
> I particularly fear the possibility of being identified by mistake, negligence or a leak of information and therefore permitting individuals to learn facts that concern only me.
>
> **Reference:** Affidavit of D.W. sworn May 1, 2014 at paras. 22-23

26. These concerns are echoed in the affidavit of G.C.:

> At the time that I had my IAP hearing, no one told me that there was even a remote chance that the information would be held in an archive that could be accessed by the public at some time in the future. I would never have participated in the IAP if I would have known that this was possible. I am deeply upset knowing that there is [a] chance that others, including my descendants, might have access to it.
>
> **Reference:** Affidavit of G.C. sworn April 22, 2014 at para. 26

27. Privacy and confidentiality were also essential to the defendants negotiating the Settlement Agreement, as in doing so they gave up the right to test the allegations made through the IAP. As explained in the affidavit of Sister Bonnie MacLellan:

> When entering into the Settlement Agreement, the Congregation and its members gave up a number of their fundamental rights which would normally be used to test the veracity of abuse claims in a court of law. These rights included the right to face the accusers, the right to cross-examine the accusers and other witnesses and the right to appeal.
>
> In consideration for the loss of said fundamental rights, the Settlement Agreement contemplates that the Independent Assessment Process…, and the documents arising from the IAP, will remain confidential which confidentiality would only be breached with the consent of all interested parties/persons.
>
> **Reference:** Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014 at paras. 12-13

The Chief Adjudicator and the Indian Residential Schools Adjudication Secretariat

28. Dan Ish, QC, was Chief Adjudicator of the IAP from September 2007 until July 2013, at which point he was succeeded by Daniel Shapiro, QC, who continues to perform that function. The appointment of the Chief Adjudicator was subject to court approval by the Supervising Courts.

> **Reference:** Affidavit of John Trueman, sworn May 15, 2014 ("Second Trueman Affidavit"), Exhibit "A" at p. 4

29. The Chief Adjudicator supervises the IAP and the IAP adjudicators.

30. The Indian Residential Schools Adjudication Secretariat (the "Secretariat") is the administrative body established to support the Chief Adjudicator. The Secretariat is tasked with the administrative and support work necessary to make the IAP function smoothly.

Reference: Ish Affidavit at para. 16

31. The mandate of the Secretariat is to implement and administer the IAP under the direction of the Chief Adjudicator in an independent, objective and impartial manner. The Settlement Agreement provides that "the Secretariat reports to the Chief Adjudicator".

Reference: Settlement Agreement, Schedule "D" at p. 17

Ish Affidavit at para. 17

32. When preparing to implement the IAP, the Government of Canada decided that the most efficient administrative arrangement was to establish the Secretariat as an autonomous branch of Indian Residential Schools Resolution Canada ("IRSRC"), an existing government department. This arrangement was a continuation of those in place for the Alternative Dispute Resolution process in 2003-2007 (the "ADR"). On June 1, 2008, IRSRC was integrated into the Department of Indian Affairs and Northern Development, which is now known as Aboriginal Affairs and Northern Development Canada ("AANDC").

Reference Ish Affidavit at para. 18

33. However, the adjudicative and operational functions of the IAP were deliberately and consistently kept independent from the AANDC. Chief Adjudicator Ish and the Deputy Minister of IRSRC, Peter Harrison, arranged for the Executive Director of the Secretariat to report to the Deputy Minister on the exercise of specific financial and human resources accountabilities, and to report to the Chief Adjudicator on all substantive matters related to the IAP. This agreement was

reaffirmed with the Deputy Minister of AANDC, Michael Wernick, upon the integration of IRSRC into AANDC.

34. Indeed, the independence of the IAP was a necessary condition imposed by Justice Winkler (as he then was) in his endorsement approving the Settlement Agreement.

Reference: Ish Affidavit at para. 20

35. Since implementation of the IAP, the Secretariat's operations have been conducted with considerable independence from AANDC. For example:

(a) Secretariat employees work in separate office space with separately keyed entrances;

(b) the Secretariat does not utilize AANDC's electronic records system; and

(c) the Secretariat maintains separate paper files from AANDC.

Reference: Ish Affidavit at para. 21

B. RECORDS AT ISSUE

36. The RFDs relate to the documents produced to and generated by the IAP.

37. As outlined on the affidavit of John Trueman, it is difficult to ascertain the full volume of the digital records. The "notes" available to Secretariat staff on the Single Access to Dispute Resolutions Enterprise ("SADRE") amount to approximately 45,000 pages of material. There are also many thousands of pages scanned and uploaded. In addition, the Secretariat maintains a secure server that contains transcripts of all IAP hearings held before mid-2011, the audio

recordings of all the hearings held since mid-2011, and electronic copies of transcripts for every hearing that was transcribed since mid-2011.

Reference: Affidavit of John Trueman, sworn April 7, 2014 ("First Trueman Affidavit") at paras. 15-25, 57

38. In terms of paper records, these are held out of an office in Regina and a separate office in Ottawa. The storage facility in Regina holds approximately 9,548 linear inches of shelving space housing approximately 21,000 IAP files, plus an additional 2310 linear inches of shelving space housing approximately 1540 hearing transcript files that could not be housed in the main file room. In addition, the storage facility holds 6444 linear inches of shelving space housing approximately 5380 ADR files and 2880 linear inches of shelving space housing 110 boxes of closed financial files.

Reference: First Trueman Affidavit at para. 63

39. The documents at issue generally fall into seven categories:

(a) Applications submitted by the claimants to initiate the process;

(b) Witness statements submitted to the Secretariat;

(c) Documentary evidence produced by the parties;

(d) Transcripts and recordings of the hearings;

(e) The "mandatory documents" obtained in relation to the claimants; and

(f) Expert and medical reports generated in relation to the claimants

(g) Decisions of the Adjudicators and any appeals.[1]

a) Applications Submitted by the Claimants

40. A claimant initiates the process by submitting an Application Form to the Secretariat.

41. In the application, the claimant is asked to list the claims made and identify the alleged perpetrator(s), where possible.

42. The claimant must also provide a signed narrative in the first person, and must indicate the level of compensation sought.

Reference Ish Affidavit at para. 32

43. The Application Form requires the claimant to undertake to respect the private nature of the proceedings. A declaration in Section 7 of the Application Form states:

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

Reference: Application Form, Section 7, Ish Affidavit, Exhibit "C".

44. The Application is forwarded to the Government and any church entity affiliated with the Indian Residential School in question. The Government and the church entities are instructed by the Settlement Agreement to only share the Application with those who need to see it to assist in the defence of the claim, or for insurance coverage. Further, Schedule "D" of the Settlement Agreement provides that:

---

[1] The affidavit of Dan Ish refers to six categories, though it may be best to consider the mandatory documents as a seventh independent category.

> Each person with whom the application is shared, including counsel for any party, must agree to respect its confidentiality. Church entities will use their best efforts to secure the same commitment from any insurer with whom it is obliged to share the application;
>
> Copies will be made only where absolutely necessary, and all copies other than those held by the Government will be destroyed on the conclusion of the matter, unless the Claimant asks that others retain a copy, or unless counsel for a party is required to retain such copy to comply with his or her professional obligations**.**

Reference: Settlement Agreement, Schedule "D" at p. 19

45. Alleged perpetrators are provided only with extracts of the Application outlining the allegations made against them, and these must be returned at the end of the process. The alleged perpetrator is not provided with the claimant's contact information, or information regarding the impacts of the alleged abuse.

Reference: Ish Affidavit at para. 43

b) Witness statements submitted to the Secretariat

46. The parties may call any witness with relevant evidence (other than expert witnesses), provided they serve a witness statement of the witness's anticipated evidence two weeks in advance. An alleged perpetrator may provide a witness statement should he or she elect to participate in the hearing. If the alleged perpetrator refuses to provide such a statement, counsel for any party may interview the alleged perpetrator.

Reference: Ish Affidavit at para. 45

c) Documentary Evidence Submitted by the Parties

47. The parties are required to collect and submit relevant documents relevant to the Secretariat.

48. The Government is required to search for and report on which dates the claimant attended a residential school. The Government must also search for documents relating to the alleged perpetrators named in the Application Form. In addition, the Government is required to provide the Secretariat with the following documents:

(a) documents confirming the Claimant's attendance at the school(s);

(b) documents about the person(s) named as abusers, including those persons' jobs at the residential school, the dates they worked or were there, and any sexual or physical abuse allegations concerning them;

(c) a report about the residential school(s) in question and the background documents; and,

(d) any documents mentioning sexual abuse at the residential school(s) in question.

Reference: Ish Affidavit at para. 56

d) Transcripts and recordings of the hearings

49. The Settlement Agreement mandates that the hearings are closed to the public. It further provides that 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."

Reference: Settlement Agreement, Schedule "D" at p. 15

50. Adjudicators commonly provided assurances to claimants and alleged perpetrators at the outset of hearings about the confidentiality of their evidence.

Reference: Ish Affidavit at para. 59

51. The Settlement Agreement provides that 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 will be "given the option of having the transcript deposited in an archive developed for the purpose." As described below, the TRC has blocked the Secretariat's efforts to establish the consent programme required for such an archive.

Reference: Settlement Agreement, Schedule "D" at p. 15

e) The "mandatory documents" obtained in relation to the Claimants

52. Appendix VII to the Schedule "D" of the Settlement Agreement lists the mandatory documents that must be submitted by claimants if they are claiming certain levels of consequential harm, loss of opportunity or need for future care. Claimants in these cases may be required to submit records related to their treatment and health, Workers' Compensation, correctional history, education, tax and employment insurance.

Reference: Settlement Agreement, Schedule "D", Appendix VII at pp. 28-29

53. A report prepared by Secretariat staff on the IAP records uploaded to SADRE as of February 3, 2014 indicates there were 795,038 unique documents in the system. Information from this report regarding the mandatory documents contained in the SADRE is listed in the table below.

#	Type	Count of doc type in SADRE	Count of cases with this doc type	Average number of documents per case with this doc type	% of all cases in SADRE (35,536) with at least one of this doc type
36	Medical	106,892	24,555	5.36	69.10%

#	Type	Count of doc type in SADRE	Count of cases with this doc type	Average number of documents per case with this doc type	% of all cases in SADRE (35,536) with at least one of this doc type
37	Workers Compensation	21,143	17,519	1.21	49.30%
38	Income Tax	31,168	24,309	1.28	68.41%
40	Employment Insurance	7,483	6,483	1.15	18.24%
41	Canada Pension Plan	14,730	11,847	1.24	33.34%
42	Corrections	48,709	22,502	2.16	63.32%
43	Education	42,422	22,055	1.92	62.06%
Total		272,547			
% of all documents in SADRE		34.28%			

Reference: First Trueman Affidavit at paras. 19-21

54. As noted by Dr. David Flaherty, "[r]arely, if ever, in Canadian history has such a broad range of extremely sensitive records been demanded from so many claims as part of a class action suit or a comparable compensation or evirations inquiry."

Reference: Affidavit of David Flaherty, sworn May 2, 2014 ("Flaherty Affidavit") at para. 13

f) Expert and medical reports generated in relation to the claimants

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

Reference: Ish Affidavit at paras. 61-63

g) Decisions of the Adjudicators and any appeals

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

57. Between September 19, 2007 and August 25, 2013, approximately 14,744 IAP decisions and 1,924 ADR decisions have been rendered. Apart from the limited categories of decisions posted to the IAP decisions database, these decisions are only minimally redacted to remove the name of the alleged perpetrator from the claimant's copy of the decision. Unredacted versions, which are provided to counsel for the parties, are also kept by the Secretariat.

Reference: Affidavit of Daniel Shapiro, sworn September 26, 2013 ("Shapiro Affidavit") at para. 16

58. The Settlement Agreement provides that the claimants will receive a copy of the decision, "redacted to remove identifying information about any alleged perpetrators." The balance of the decision provided to claimants is not redacted and contains extensive personal information. Claimants are "free to discuss the outcome of their hearing, including the amount of any compensation they are awarded."

Reference: Settlement Agreement, Schedule "D" at p. 15

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

C. EFFORTS TO ESTABLISH A CONSENT PROGRAMME

60. As noted above, Schedule "D" to the Settlement Agreement provides that "Claimants will also be given the option of having the transcript deposited in an archive developed for the purpose".

61. Secretariat staff made considerable and repeated efforts to develop a framework for such consent to be solicited and obtained from claimants. The Secretariat drafted several proposed consent forms, all of which were rejected by the TRC.

62. The first draft consent form was prepared by John Trueman on June 1, 2010, at the direction of then Executive Director, Jeffrey Hutchinson. On June 2, 2010, Mr. Hutchinson approved a set of draft principles to govern the sharing of claimant information with the TRC. The consent was revised repeatedly to match the consent forms that the TRC used for statement taking purposes.

Reference: First Trueman Affidavit at paras. 91-97

63. Despite the efforts made over a period of months to craft a consent form that was agreeable to the TRC, no such agreement was ever reached.

64. On October 25, 2010, Justice Murray Sinclair, Chair of the TRC, wrote Dean Mayo Moran, Chair of the IAP Oversight Committee. Mr. Justice Sinclair requested "that the IAP provide all of its records to the TRC to assist with the overall goals of the Settlement Agreement to achieve truth, healing and reconciliation". He also requested "that the IAP recognize the TRC as 'an archive developed for the purpose' of receiving claimant transcripts".

Reference: First Trueman Affidavit at para. 101

65. On January 11, 2011, Dean Moran responded on behalf of the Oversight Committee. In her reply, Dean Moran offered to "facilitate the collection of historical information in so far as it is possible to do so and remain faithful to the confidentiality requirements of the IAP and the trust reposed by claimants in the IAP". However, she underlined that "the IAP creates both a moral and legal duty to protect the confidentiality of individual claimant records." Dean Moran further stated that the Chief Adjudicator has consistently taken the position that IAP documents are documents of the Courts. Dean Moran also sought the co-operation of the TRC for the development of a consent programme.

Reference: First Trueman Affidavit at para. 102

66. It appears that the TRC's foremost concern at that time was that the consent form may create a barrier to the TRC being able to access all of the IAP's records at a later date. The TRC saw the form as a promise of confidentiality to those who did not sign. Consequently, the Secretariat and the TRC could not make any headway on the consent program.

Reference: First Trueman Affidavit at para. 111

67. Mr. Trueman again redrafted the consent materials and sent them by e-mail to Mr. McMahon on April 4, 2011. The conversation ended on April 8, 2011, when Mr. McMahon advised that "I have reviewed the documents. My feeling is that I cannot respond to you, even for editing, until I get some instructions from the Chair. I will try to get some time from him for that purpose". This was the end of discussions with the TRC about a consent program for the sharing of claimant information with the TRC. No further work has been done since late 2011 to implement a consent program for claimants to share their personal information with the TRC.

Reference: First Trueman Affidavit at paras. 115-117

D. HISTORICAL VALUE OF THE RECORDS

68. IAP records are not required for the TRC to achieve its mandate. As noted by Dr. Flaherty, "journalists, historians, political scientists, and other scholars write about the legacy of residential schools in Canada without access to more than 38,000 claims files". This is particularly so in light of the fact that the TRC may still obtain statements from claimants on a voluntary basis. Indeed, the TRC has obtained 7,000 such statements from survivors, and notably 40 percent of these have chosen to remain anonymous.

Reference: Flaherty Affidavit at paras. 55-56

Affidavit of Gregory Juliano, sworn March 26, 2014 at paras. 19, 80

69. Moreover, Library and Archives Canada performed a preliminary assessment of the records in the possession of the IAP, and determined that very few of the documents in the IAP's possession were of "enduring value". Library and Archives Canada wanted only material related to strategy, policy, and decision-making related to adjudication and overall management of the IAP and ADR processes. It also asked for "copies of each decision for the IAP and ADR".

Reference: Flaherty Affidavit at para. 81

70. Library and Archives Canada advised that "[a]ll other information resources related to adjudication are not to be transferred". In 2014, LAC advised that it now considered the recordings and transcripts of the hearing to be of enduring historical value".

Reference: First Trueman Affidavit, Exhibit "J2" at paras. 84-85

71. The archiving and public dissemination of the materials held by the IAP would undermine some of the core objectives of the Settlement Agreement. In his affidavit, Mr. Fontaine

provides a poignant example of what would occur to aboriginal communities if the names of alleged perpetrators in student-on-student abuse cases became publically known:

> If any of this information is placed into an archive, even if it is sealed for ten years, fifty years, a hundred years or longer, the identities of these perpetrators and their victims will someday become available to their descendants or researchers who may publish information. Within our communities, such knowledge even in future generations would continue the legacy of disfunction and trauma that was created by the Residential Schools.
>
> **Reference:** Fontaine Affidavit at para. 26

PART III - ISSUES AND LAW

72. The Chief Adjudicator submits as follows:

(a) The records in the possession of the IAP are Court records;

(b) All the records in the possession of the IAP should be destroyed following the completion of the process, with the exception of the redacted memorialization transcripts of the IAP, which may only be archived if the claimant consents; and

(c) The IAP records that are in the possession of the parties and participants to the IAP may not be published or provided to anyone else, including the TRC, unless consent is obtained from all "affected individuals."

73. These points are developed below.

A. The Records in the Possession of the IAP are Court Records

74. As this Court recently held, the IAP is a form of litigation under the oversight of the Supervising Courts. It follows that the records of the IAP are court records, and are not in the possession or control of the Government of Canada.

Reference: *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283 at para. 72, Authorities, Tab 2

75. The Settlement Agreement was implemented by nine Court orders entered in courts from coast to coast to coast. As a result, the Settlement Agreement has the force of a Court order. Moreover, the IAP conducts individual assessments for the purpose of administering the Settlement Agreement. The IAP undertakes a process that would otherwise be undertaken under the direct supervision of the Court under subs. 25(1) of the *Class Proceedings Act*.

Reference: *Class Proceedings Act*, s. 25(1)

76. The orders approving the settlement of the class proceedings that gave rise to the IAP explicitly sanctioned the Settlement Agreement and the IAP process contemplated under it. The Ontario approval order, for example, provides expressly as follows:

> 12. THIS COURT ORDERS that the Agreement, which is attached hereto as Schedule "A", and which is expressly incorporated by reference into this judgment, including the definitions included therein, is hereby approved and shall be implemented, in accordance with this judgment and any further order of this Court.

Reference: *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283 at para. 44, Authorities, Tab 2

77. Moreover, the independence of the IAP was a necessary component of this Court's approval of the Settlement Agreement. In his endorsement approving the Settlement Agreement, Justice Winkler underlined that the Court would retain jurisdiction over the IAP under the *Class Proceedings Act*:

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

Reference: *Baxter v. Canada (Attorney General)*, [2006] O.J. No. 4968 (S.C.J.) (*"Baxter v. Canada"*) at para. 12; see also para. 79, Authorities, Tab 3

78. Justice Winkler insisted that the IAP ultimately be supervised by the Courts and not by the Government of Canada, as the latter is a defendant in the underlying class action:

> The potential for conflict for Canada between its proposed role as administrator and its role as continuing litigant is the first issue that must be addressed. […] In order to satisfactorily achieve this requisite separation, the administrative function must be completely isolated from the litigation function with an autonomous supervisor or supervisory board reporting ultimately to the courts. This separation will serve to protect the interests of the class members and insulate the government from unfounded conflict of interest claims. […] Rather, the requisite independence and neutrality can be achieved by ensuring that the person, or persons, appointed by Canada with authority over the administration of the settlement shall ultimately report to and take direction, where necessary, from the courts and not from the government.

Reference: *Baxter v. Canada*, *supra* at para. 38

79. It is essential to bear in mind the context in which these documents were produced and generated. The IAP was established to resolve court claims specifically in which the Government of Canada was a primary defendant. Under the circumstances, it would be perverse to define these documents are the property of that same defendant. Simply put, the parties intentionally designated the IAP as "independent".

Reference: *Baxter v. Canada, supra* at para. 38

80. For this reason, the IAP records cannot be under the control of AANDC and are not subject to either the *Privacy Act* ("*PA*") or the *Library and Archives Canada Act* ("*LACA*"). Such a designation would be at odds with the very purpose of the IAP, and contrary to Justice Winkler's decision in *Baxter*.

The Chief Adjudicator is an Officer of the Court

81. The Chief Adjudicator is an officer of the Court. The Chief Adjudicator was appointed by court order in order to administer an essential component of the Court-approved settlement of the underlying class action.

82. In the Request for Directions brought by the Chief Adjudicator and Duboff, Edwards, Haight & Schachter, Chief Justice Winkler held that the decisions of the Chief Adjudicator are not subject to judicial review since he is an officer of the court, and not exercising a statutory power of decision:

> The reality is that the Chief Adjudicator, in conducting a paragraph 19 review, is acting pursuant to the terms of orders issued by nine superior courts. The courts issued those orders through the exercise of jurisdiction arising from the pertinent statutes, rules of court and, as stated by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton* (200l SCC 46 at para. 34) the "inherent power to settle the rules of practice and procedure as to disputes brought before them ... ". Judicial review may be available where a statutory power of decision has been exercised by an inferior tribunal, but a superior court does not judicially review its own order. Here, where the Chief Adjudicator is acting pursuant to a term of the orders issued by superior courts, he cannot be said to be exercising a statutory power of decision subject to judicial review.
>
> **Reference:** *Fontaine v. Duboff, Edwards Haight & Schaefer***,** Second Trueman Affidavit, Exhibit "E" at para. 19

83. This view was confirmed on appeal:

> As the Administrative Judge explained, the Chief Adjudicator is not exercising a statutory power of decision, but rather renders his fee review appeal decision pursuant to the authority derived from the implementation orders, as approved by the relevant provincial and territorial superior courts.
>
> […] Judicial review is not available to review the exercise of authority by a judicially created body, which has been given certain duties as provided by the terms of the S.A. and the implementation orders. The office of the Chief Adjudicator was created by order of the courts in approving the negotiated terms of settlement of class action litigation. The authority of

> that office is exercised in relation to those class members who have elected to advance claims through the IAP and their counsel.
>
> **Reference:** *Fontaine v. Duboff Edwards Haight & Schachter*, 2012 ONCA 471 at paras. 51-52, Authorities, Tab 4

84. As noted by this Court in *Johnston v. Sheila Morrison Schools*, the role of the Chief Adjudicator is akin to that of claims administrators, which are commonly employed in class proceedings to facilitate the distribution of settlement proceeds in complex cases.

> **Reference:** *Johnston v. Sheila Morrison Schools*, 2013 ONSC 1528 at para. 25, Authorities, Tab 5

85. Section 25(1) of the *Class Proceedings Act* specifically contemplates the delegation of authority by the Courts to an individual or individuals in order to conduct references. As noted by Justice Brockenshire in *Webb v. K-Mart Canada Ltd. et al.*:

> Section 25(1)(b) specifically authorizes the court, in a class proceedings, to appoint, "one or more persons" to conduct a reference under the Rules of Court and report back to the court. That broad reference to persons, instead of to a limited list as under Rule 54, in my view, is sufficient in itself to authorize the court, in a class proceedings, to name any person to conduct a reference.
>
> **Reference:** *Webb v. K-Mart Canada Ltd. et al.*, [1999] O.J. No. 3285 (S.C.J.) at para. 30, Authorities, Tab 6

86. The functions of the Chief Adjudicator are at least as connected with the bringing into effect of a Court order as the functions of a Court-appointed receiver. It has long been recognized that a Court-appointed receiver is an officer of the Court.

> **Reference:** *Re Page* (2002), [2002] O.J. No. 4345 (S.C.J.) at paras. 12-14, Authorities, Tab 7
>
> *Re Transglobal Communications Group Inc*., 2009 ABQB 195 at para. 56, Authorities, Tab 8
>
> *N.A.P.E. v. Newfoundland & Labrador (Minister of Justice)*, 2004 NLSCTD 54 at para. 113, Authorities, Tab 9

87. Canadian Courts have long held that property in the possession of a Court-appointed receiver is not possessed by such person in his or her own right, but is rather deemed to be property in the custody of the Court.

Reference: *Re Jenny Lind Candy Shops Ltd.*, [1935] O.J. No. 196 (H.C.J.) at paras. 4-6, Authorities, Tab 10

88. As regards the Court's control over the conduct of its officers, it has long been accepted that interference with the duties of a Court-appointed receiver is contempt of Court and punishable as such. Given this fact, very clear statutory language would be required to conclude that the records in the possession of the Secretariat on behalf of the Chief Adjudicator could be regarded as subject to the control of AANDC. As held by the Supreme Court of Canada in *National Trust Co. v. Christian Community of Universal Brotherhood Ltd*:

> On general principles any attempt to interfere with the possession of the receiver would constitute contempt of Court. In the absence of some statute to the contrary effect, the Supreme Court would not permit even an action to be brought against the receiver in respect of his receivership, unless leave of the Court were first obtained. Blair v. Maidstone Palace of Varieties, [1909] 2 Ch. 283, at p. 286, 78 L.J. Ch. 739 ; Russell v. East Anglian Ry. Co. (1850), 3 Mac. and G. 104, at p. 120, 20 L.J. Ch. 257, 42 E.R. 201; Coleman v. Glanville (1871), 18 Gr. 42, at pp. 43 and 44, per Strong V.C.
>
> This, of course, is well-known law. Whatever may be the effect of the general language of the enactment which purports to give to the County Court exclusive jurisdiction in bankruptcy, such general language cannot, in my opinion, be read as giving to the County Court any control over the assets of the respondent company, in the hands of the receiver, which could be exercised without the consent of the Supreme Court. Only the most precise language would justify one in ascribing such an intention to the Legislature; and it seems necessarily to follow that it would be within the jurisdiction of the Supreme Court to ascertain by an examination of the facts (if such a claim were made) whether or not the purported proceedings under the statute were competent proceedings, — whether or not, in other words, the County Court had acquired exclusive jurisdiction in relation to the debtors' assets by force of the statute.

Reference: *National Trust Co. v. Christian Community of Universal Brotherhood Ltd*, [1941] S.C.R. 601 at p. 8, Authorities, Tab 11

89. The IAP is *sui generis* such that the general stipulations of federal legislation applicable to records under the control of a government institution must be applied with due regard to the unique circumstances of the Settlement Agreement process. AANDC cannot be regarded as controlling records where the exercise of any control could interfere with the actions of a Court officer.

Reference: *Fontaine v. Canada,* 2014 ONSC 283 at para. 72, Authorities, Tab 2

IAP Records are not Subject to the Privacy Act or Library and Archives of Canada Act

90. The IAP documents are not subject to the *PA* or *LACA* since they are not government records.

91. The *PA* governs collection of and access to personal information in the possession of government institutions, while the *LACA* governs access to such information on behalf of the Librarian and Archivist under that Act. Each statute, however, applies exclusively to information that is "under the control of a government institution".

Reference: *Privacy Act,* R.S.C., 1985, c. P-21 (s. 6-8), Schedule B.

Library and Archives of Canada Act, S.C. 2005, c. 11 (s. 2), Schedule B.

92. The leading authority on whether a document is under government control is *Canada (Information Commissioner) v. Canada (Minister of National Defence)*. The Court in that case adopted a two part test, which asks:

> (1) Do the contents of the document relate to a departmental matter?
>
> (2) Could the government institution reasonably expect to obtain a copy of the document upon request?

Reference: *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306 at para. 50, Authorities, Tab 12

93. The IAP records do not meet either requirement.

(i) The Records do not relate to a departmental matter

94. The records at issue were neither collected nor generated in furtherance of a departmental objective. Rather, this body of records was exclusively collected and generated in order to meet the objectives of the court approved Settlement Agreement.

95. As noted above, the IAP process is structured under and subject to the ongoing supervision of the Court. The duties of both the Chief Adjudicator and the IAP Secretariat have been comprehensively set out in Schedule "D" to the Settlement Agreement.

96. There is no authority to suggest that records held by a court officer for the purposes of discharging that officer's duties as an officer of the Court are under the control of a government institution. Indeed, Justice Winkler in *Baxter* holds that the IAP must remain independent from the Government of Canada because Canada is a defendant in the underlying class action. It cannot have been the intention of Parliament that the *Privacy Act* and the *Library and Archives Canada Act* should operate in relation to property in the custody of the Court.

Reference: *Andersen Consulting v. Canada*, [2001] 2 F.C. 324 (T.D.) at para. 17, Authorities, Tab 13

Baxter v. Canada, *supra* at para. 38

97. Moreover, as part of its inherent jurisdiction and under section 12 of the *Class Proceedings Act*, this Court has the authority to control access to information under its control. Where records are under the control of officers of the Court, the mere fact that they are not in the physical custody of the court does not affect the Court's supervisory jurisdiction over the records.

Given the role of the Chief Adjudicator in fulfilling the Court orders that implemented the Settlement Agreement, the Chief Adjudicator is properly regarded as an officer of the Court in discharging his functions.

(ii) The government institution could not reasonably expect to obtain a copy of the document upon request

98. The Government of Canada could not reasonably expect to have access to the documents in the possession of the IAP, except for the access it gains as a party to the Settlement Agreement.

99. This conclusion flows directly from Justice Winkler's decision in *Baxter*, which held that the independence of the IAP from Canada was a precondition to approval of the Settlement Agreement.

100. The Secretariat and its staff operate as structurally separate from the AANDC. In this regard, the Affidavit of Daniel Ish notes the following concerning the Secretariat:

(a) It is an autonomous branch of Indian Residential Schools Settlement Canada ("IRSRC"), which is integrated into AANDC.

(b) Early in his tenure as Chief Adjudicator, Mr. Ish met with the then Deputy Minister of IRSRC, which meeting produced an agreement that the Executive Director of the Secretariat would report to the Deputy Minister with respect to specific financial and human resources matters but that the Executive Director would report to Mr. Ish on all substantive matters related to the IAP.

(c) Since the implementation of the IAP, the Secretariat has conducted its operations independently of AANDC, in light of the following:

(i) Secretariat employees work in separate office space with separately keyed entrances;

(ii) the Secretariat does not utilize AANDC's electronic records system;

(iii) the Secretariat maintains separate paper files from AANDC.

Reference: Ish Affidavit at paras. 18-21.

B. DISPOSITION OF THE IAP RECORDS

101. The Chief Adjudicator submits that the records in the possession of the IAP be destroyed following the completion of the process, with the exception of the redacted memorialization transcripts of the IAP, which may only be archived if the claimant consents.

102. This disposition of the records flows from both the text and purpose of the Settlement Agreement.

103. To begin with, the IAP is a process governed by the Settlement Agreement. As held by this Court in *Fontaine v. Canada*, the Settlement Agreement "is a contract and as a contract its interpretation is subject to the norms of the law of contract interpretation".

Reference: *Fontaine v. Canada,* 2014 ONSC 283 at para. 51, Authorities, Tab 2

104. The records of the IAP may only be archived if there is authority for doing so under the Settlement Agreement. The only records that the Settlement Agreement contemplates

archiving are the redacted transcripts of the claimant's testimony, provided the claimant consents. Accordingly, there is no lawful authority for the archiving of any other of the records of the IAP.

105. Moreover, by listing only the archiving of the redacted transcripts, the parties must be taken to have intentionally excluded other categories of documents from potential archiving. This is a clear case for application the doctrine of *expressio unius est exclusio alterius*: expression of the one is exclusion of the other.

106. Further, the parties to the Settlement Agreement overtly rejected the application of the open court principle to the IAP:

> Hearings are closed to the public. Parties, an alleged perpetrator and other witnesses are required to sign agreements to keep information disclosed at a hearing confidential, except their own evidence, or as required within this process or otherwise by law.
>
> **Reference:** Settlement Agreement, Schedule "D" at p. 15

107. The Settlement Agreement requires all persons who receive copies of the claimant's application to respect its confidentiality. As stated in Schedule "D":

> Each person with whom the application is shared, including counsel for any party, must agree to respect its confidentiality. Church entities will use their best efforts to secure the same commitment from any insurer with whom it is obliged to share the application;
>
> Copies will be made only where absolutely necessary, and all copies other than those held by the Government will be destroyed on the conclusion of the matter, unless the Claimant asks that others retain a copy, or unless counsel for a party is required to retain such copy to comply with his or her professional obligations.
>
> **Reference:** Settlement Agreement, Schedule "D", Appendix II at p. 19

108. The intention of the parties to the Settlement Agreement is clear: the IAP is a private and confidential process for claimants. The parties overtly opted out of the open-court principle to allow claimants to give evidence in a confidential setting regarding the abuse they suffered in

residential schools. Defendants also insisted upon this condition in exchange for abandoning the ordinary rights of an alleged perpetrator to face their accuser, challenge the allegations against them, and defend their historical reputation.

109. Further, as noted by Professor Flaherty, it is striking "the extent to which various IAP processes already involve the *destruction* of personal information about claimants."

Reference: Flaherty Affidavit at para. 66 (emphasis in original)

110. Moreover, the claimants are and always have been at liberty to provide witness statements to the TRC. Those who have chosen not to exercise this right have decided not to do so. The Settlement Agreement intentionally established the IAP as distinct element of the Settlement Agreement from the TRC. The former is focused on resolving the personal claims of claimants in a confidential environment, while the latter is designed to collect information from those individuals who are prepared to bear public witness to what occurred, with their "express consent." Ordering the production of the IAP's records to the TRC without the consent of even the claimant (let alone other interested individuals) would be contrary to the text and structure of the Settlement Agreement.

Reference: Settlement Agreement, Schedule "N" at p. 3

111. Concerns about the potential re-victimization of IAP participants further justifies ensuring that participants in the IAP process maintain control over their personal information. The highly sensitive records produced to and generated by the IAP have been produced for a discrete purpose. There is no basis in law for maintaining or disclosing them in furtherance of objectives unrelated to the IAP process that led to their generation.

112. Destruction of the records is also the recommendation made by Dr. David Flaherty, an expert in privacy and a professional historian. As he stated in his affidavit:

> It is not normal in Canada to collate, compile, and link such administrative records about such a large group of specific victims. Having served their administrative purposes to settle claims, there is a strong argument to destroy all of the claimant records to protect the current and historical reputations and privacy interests of the claimants and any third parties identified in the claims records.
>
> […]
>
> The accumulation of so much sensitive information on a stigmatized population is truly extraordinary. My primary recommendation is destruction.
>
> **Reference:** Flaherty Affidavit at paras. 13 and 62

113. Moreover, the mandatory documents collected in the IAP are ordinarily destroyed in other contexts. This point is developed by Dr. Flaherty:

> It is important to remember that most of the administrative records produced about IAP claimants on a mandatory basis would normally be destroyed by the original custodians - and not archived by them - because such routine records are not "of enduring value." This would be true for individual health records, welfare records, social work records, unemployment records, and income tax records. Criminal and correctional records would likely be stored in a manner comparable to court records. Juvenile court records might be preserved but are not normally available to researchers except under very strict controls. Even hospitals generally destroy health records ten years after the last treatment of an adult patient; and they do not normally archive patient records. Would patients ever consult a psychologist or psychiatrist if they were told that records of their treatments would be archived?
>
> **Reference:** Flaherty Affidavit at para. 46

114. Given that destruction is the standard practice, the Settlement Agreement would need to contain the very clearest language expressing that these records were to be archived in any way. No such language exists.

115. Dr. Flaherty's opinion also addresses why the alternatives to destruction are insufficient or impractical.

116. Regarding the total redaction of the records, Dr. Flaherty notes that "there is now a rich literature on how enormously difficult it is to try to anonymize personal information – and that the risks of re-identification are very high." In this connection, Dr. Flaherty notes the work of Professor Latanya Sweeney of Harvard University, who claims to have correctly identified 84 to 97 percent of the anonymous participants in the Personal Genome Project. In short, the concern with anonymization is that an assiduous researcher could use the available information to determine which documents, transcripts and decisions related to individuals such as Mr. Fontaine. The only way to avoid this is to redact the materials so thoroughly that they would be of no value to researchers.

Reference: Flaherty Affidavit at para. 74

117. Further, under the terms of the Settlement Agreement, total redaction does not dispense with the need to obtain consent. Indeed, the memorialization transcripts – the only documents that Schedule "D" contemplates archiving – may only be archived if they are redacted and if the claimant consents. To archive the redacted records without consent would directly contradict the Settlement Agreement.

Reference: Settlement Agreement, Schedule "D" at p. 15

118. Moreover, the total redaction of all IAP records would be extremely time consuming and prohibitively expensive. This additional cost and burden was not contemplated by the parties to the Settlement Agreement, and cannot therefore be imposed by the Court. As held by Justice

Winkler in *Baxter*, the Court must examine whether the cost is out of proportion "when considered against the typical costs of administering a class action settlement."

Reference: *Fontaine v. Canada (Attorney General)*, unreported decision of Justice Brown of the Supreme Court of British Columbia, at para. 26, Authorities, Tab 18

Shapiro Affidavit at para. 15.

Baxter v. Canada, *supra* at para. 42

119. Accordingly, given the logistical difficulties, expense, and the fact there is no authority for doing so in the Settlement Agreement, total redaction of the records is not an option.

120. Archiving the records for 100 years is similarly unsatisfactory. In addition to the fact that there is no authority for doing so under the Settlement Agreement, revealing the records of the IAP to the public in 100 years would risk undermining the very objectives of the IAP. On this point, the words of Mr. Fontaine bear repeating:

> If any of this information is placed into an archive, even if it is sealed for ten years, fifty years, a hundred years or longer, the identities of these perpetrators and their victims will someday become available to their descendants or researchers who may publish information. Within our communities, such knowledge even in future generations would continue the legacy of disfunction and trauma that was created by the Residential Schools.
>
> **Reference:** Fontaine Affidavit at para. 26
>
> Flaherty Affidavit at para. 72

121. Dr. Flaherty also explains why it would unworkable to solicit the consent of claimants to archive all the records related to their claims (as opposed to just the transcripts). To begin with, it is very unlikely the claimants would have an accurate sense in advance of the full scope of the personal information collected as part of the IAP:

> One of the additional ironies and sensitivities of the IAP claimant files is that no individual could ever know in advance about the scope of the personal information about them in these life-long linked files, unless he or she had an amazingly retentive memory. Anyone, for example, who looks at their personal health records held by a family physician for a lengthy period will be astonished at the number of matters, sometimes of great sensitivity, that have left their memory. IAP claimants are also unlikely to see, or have seen, their linked dossiers; only their lawyers, opposing lawyers, adjudicators, and other third parties are in that situation. This makes it especially problematic to ask them for consent to archive their records when they will have only the foggiest notion of what is in them. One can simply pose the question as how many of us have any real memories of the kinds of records that were maintained about each of us during elementary and secondary schooling? It would also be very surprising if residential school students had any idea of the contents of the records that churches, for example, kept about them, since the whole experience of being removed from their homes was so bewildering to them, to say the very least.
>
> **Reference:** Flaherty Affidavit at para 30

122. Moreover, there is also the considerable problem of *who* must provide consent to the archiving of additional IAP records. For instance, Schedule "N" of the Settlement Agreement establishes that "information" from the IAP "may" be transferred to the TRC if agreement is obtained from "affected individuals" and subject to "process requirements." Since the parties to the Settlement Agreement decided to use the term "individuals affected" and not "claimant", as used elsewhere, the category of "affected individuals" should be interpreted to include defendants, witnesses, alleged perpetrators, and all other identifiable individuals along with claimants.

> **Reference:** Settlement Agreement, Schedule N" at pp. 10-11

C. THE RECORDS IN THE POSSESSION OF THE IAP PARTICIPANTS MAY NOT BE PUBLISHED OR PROVIDED TO ANYONE ELSE

123. The Chief Adjudicator also seeks the Court's direction that the documents in the possession of the IAP participants may not be published or provided to anyone else, including the TRC, unless consent is obtained from all "individuals affected." This direction is necessary to protect the privacy inherent in the process. The privacy and confidentiality guarantees given to the

participants would be effaced and rendered nugatory if the other participants could publish or disseminate those documents to non-participants.

124. The basis of this direction is two-fold:

(a) Regarding the TRC, Schedule "N" of the Settlement Agreement specifies that information from the IAP may only be provided to the TRC with the consent of all "individuals affected"; and

(b) Regarding everyone else, the deemed undertaking rule and the confidentiality restrictions in the IAP apply, such that IAP participants are not permitted to use the documents and information for any purpose other than those provided for in the Settlement Agreement.

Application to the TRC

125. The provision of any documents or information between the IAP and the TRC is governed by Schedule "N" of the Settlement Agreement. Accordingly, this Court need not consider how the deemed undertaking rule might apply between the IAP and the TRC. The parties to the Settlement Agreement have contracted for a stricter rule to govern this situation than that at common law.

Reference: *Fontaine v. Canada*, 2014 ONSC 283 at para. 185, Authorities, Tab 2

126. Section 11 of Schedule "N" to the Settlement Agreement provides that the information from the IAP may not be provided to the TRC without the consent of all affected individuals.

Reference: Settlement Agreement, Schedule "N", pp. 10-11

127. Accordingly, no one party may choose to provide its copies of the documents to the TRC, or be compelled to do so by a Court, without complying with the express requirements of the Settlement Agreement. Further, the TRC is not permitted to accept such documents without first satisfying itself that the requisite consent has been obtained.

Documents and information bound by deemed undertaking and Settlement Agreement

128. The participants in the IAP are bound by the deemed undertaking rule as well as the confidentiality guarantees in the Settlement Agreement, and thus cannot use the documents from the IAP for any purpose outside of those provided in the Settlement Agreement.

129. Accordingly, Canada is not permitted to place the documents it obtained as a party to the IAP in its own archive, nor is any other party or participant.

130. To the extent that the parties and participants were provided with copies of IAP records as part of the IAP, these are held by the parties and participants subject to the deemed undertaking rule. As noted by Dr. Flaherty, "there are serious risks of privacy breaches occurring from the mere existence of these records in multiple locations, creating not only legal liability for future class action suits, but also significant harms to the reputations and even safety of the survivors, real or alleged perpetrators, and other third parties".

Reference: Flaherty Affidavit at para. 35

131. In *Goodman v. Rossi*, the Ontario Court of Appeal identified an implied undertaking rule at common law prior to the codification of the deemed undertaking in Rule 30.1 of the *Rules of Civil Procedure*. The Court held that documents obtained pursuant to the discovery process could only

be used by the litigants in the proceeding, and for no other purpose. In identifying the rule, the Court of Appeal grounded its analysis in the protection of privacy:

> The primary rationale for the imposition of the implied undertaking is the protection of privacy. Discovery is an invasion of the right of the individual to keep his own documents to himself. It is a matter of public interest to safeguard that right. The purpose of the undertaking is to protect, so far as is consistent with the proper conduct of the action, the confidentiality of a party s documents. It is in general wrong that one who is compelled by law to produce documents for the purpose of particular proceedings should be in peril of having those documents used by the other party for some purpose other than the purpose of the particular legal proceedings and, in particular, that they should be made available to third parties who might use them to the detriment of the party who has produced them on discovery. A further rationale is the promotion of full discovery, as without such an undertaking the fear of collateral use may in some cases operate as a disincentive to proper discovery. The interests of proper administration of justice require that there should be no disincentive to full and frank discovery.
>
> **Reference:** *Goodman v. Rossi* (1995), 24 O.R. (3d) 359 (C.A.) at p. 10, quoting Matthews and Malek's Discovery (1992) at p. 253, Authorities, Tab 14

132. Rule 30.1 echoes the common law's implied undertaking rule, which provides that evidence compelled during pre-trial discovery from one party to civil litigation can only be used by the parties for the purpose of the litigation in which it was obtained.

> **Reference:** *Juman v. Doucette*, 2008 SCC 8, [2008] 1 S.C.R. 157 (*"Juman v. Doucette")* at para. 1, Authorities, Tab 15

133. In *Kitchenham v. AXA Insurance (Canada*), the Ontario Court of Appeal linked the implied undertaking rule to the importance of privacy:

> The prohibition is drawn in very wide terms. Those terms are consistent with the scope of the common law implied undertaking that prohibited use for any purpose other than the conduct of the litigation in which the compelled disclosure occurred: The privacy rationale underlying the Rule also warrants extending the protection of the Rule to requests for disclosure of the information covered by the Rule in the course of discoveries in subsequent proceedings. Disclosure on discovery

> compromises the residual privacy interest of the party from whom the material was obtained by compelled disclosure in the earlier proceeding.
>
> **Reference:** *Kitchenham v. AXA Insurance (Canada*), 2008 ONCA 877 at para. 52, Authorities, Tab 16

134. The statutory and common law rules prohibit use of materials or information obtained in discovery for an ulterior or collateral purpose. Although the rules have chiefly been used to guard against misuse in a secondary but related proceeding, the scope of ulterior or collateral purposes extends to the circulation of materials publicly.

> **Reference:** *D.P. v. Wagg*, [2004] O.J. No. 2053 (C.A.) at paras. 35-36, Authorities, Tab 17

135. In *Andersen Consulting v. Canada*, the Federal Court held that Canada's obligations under the deemed undertaking rule trumped any obligations under *LACA*:

> Lawyers for the Crown do not have the option of refusing to give the implied undertaking: by accepting the documents they are bound towards the Court to deal with them only in the way permitted by the undertaking. That condition is imposed upon the solicitors and upon the department and the government they serve prior to the documents ever coming into their possession. Furthermore, the undertaking extends not only to the documents themselves but, much more significantly, to all information obtained as a result of the discovery process, e.g. through answers to oral questions. The Court in extracting the undertaking is concerned not so much with the documents as pieces of paper but rather, and significantly, with the information they may contain.
>
> **Reference:** *Andersen Consulting v. Canada*, [2001] 2 F.C. 324 (T.D.) at para. 17, Authorities, Tab 13

136. The participants were provided access to certain documents exclusively for the purpose of advancing the ends of the Settlement Agreement. Indeed, the participants were required to provide undertakings of confidentiality as part of the IAP before being provided with the documents.

137. The privacy guarantees surrounding the IAP and inherent in its very structure and purpose would be illusory if the participants were permitted to use the documents received in that process in an unrestricted manner. Indeed, a failure to apply the deemed undertaking rule to the IAP would compromise one of the essential pillars of the Settlement Agreement, and risk re-victimizing the claimants who came forward and testified on the promise that they would be protected by confidentiality.

CONCLUSION

138. The IAP is a private and confidential process. Claimants were induced to come forward and testify about some of the most painful experiences in their lives by promises that their testimony and documentation would not be used in any way outside of their private IAP hearing. The defendants agreed to surrender certain procedural rights in the IAP in exchange for these privacy and confidentiality guarantees.

139. There is no basis in the Settlement Agreement for now transferring that documentation to the TRC. Indeed, doing so without the consent of all affected individuals is expressly forbidden by the Settlement Agreement.

140. Transferring the documents of the IAP to the TRC or to any other archive is contrary to the rights and wishes of the claimants and other participants, and may be, in the words of Dr. Flaherty, "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."

Reference: Flaherty Affidavit at para. 81

141. The TRC will continue with its important work of soliciting statements from survivors who are prepared to speak publicly about their experiences at Indian Residential Schools. To date, it has collected 7,000 such statements. However, if the claimants in the IAP are unwilling to make statements to the TRC, that decision must be respected by the TRC and by this Court.

PART IV - RELIEF SOUGHT

142. The Chief Adjudicator seeks:

(a) an Order that all the records in the possession of the IAP be destroyed following the completion of the process, with the exception of the redacted memorialization transcripts of the IAP, which may only be archived if the claimant consents, and

(b) a Declaration that the IAP records in the possession of the parties and participants in the IAP may not be published or provided to anyone else, including the TRC, unless consent is obtained from all "affected individuals."

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of June, 2014.

William C. McDowell

Jonathan Erik Laxer

June 9, 2014

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP
Barristers
Suite 2600
130 Adelaide Street West
Toronto ON M5H 3P5

William C. McDowell (28554G)
Tel: (416) 865-2949
Fax: (416) 865-2850
Email: wmcdowell@litigate.com
Jonathan Erik Laxer (60765I)
Tel: (416) 865-2893
Fax: (416) 865-2978
Email: jlaxer@litigate.com

Lawyers for the
Chief Adjudicator of the Indian Residential Schools
Adjudication Secretariat

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Fontaine v. Canada (Attorney General)*, 2006 YKSC 63

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

3. *Baxter v. Canada (Attorney General)*, [2006] O.J. No. 4968 (S.C.J.)

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

5. *Johnston v. Sheila Morrison Schools*, 2013 ONSC 1528

6. *Webb v. K-Mart Canada Ltd. et al*., [1999] O.J. No. 3285 (S.C.J.)

7. *Re Page* (2002), [2002] O.J. No. 4345 (S.C.J.)

8. *Re Transglobal Communications Group Inc*., 2009 ABQB 195

9. *N.A.P.E. v. Newfoundland & Labrador (Minister of Justice)*, 2004 NLSCTD 54

10. *Re Jenny Lind Candy Shops Ltd*, [1935] O.J. No. 196 (H.C.J.)

11. *National Trust Co. v. Christian Community of Universal Brotherhood Ltd*, [1941] S.C.R. 601

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

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

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

15. *Juman v. Doucette*, 2008 SCC 8

16. *Kitchenham v. AXA Insurance (Canada)*, 2008 ONCA 877

17. *D.P. v. Wagg*, [2004] O.J. No. 2053 (C.A.)

18. *Fontaine v. Canada (Attorney General)*, unreported decision of Justice Brown of the Supreme Court of British Columbia.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Privacy Act, RSC 1985, c P-21, ss. 6-8.

6. (1) Personal information that has been used by a government institution for an administrative purpose shall be retained by the institution for such period of time after it is so used as may be prescribed by regulation in order to ensure that the individual to whom it relates has a reasonable opportunity to obtain access to the information.

(2) A government institution shall take all reasonable steps to ensure that personal information that is used for an administrative purpose by the institution is as accurate, up-to-date and complete as possible.

(3) A government institution shall dispose of personal information under the control of the institution in accordance with the regulations and in accordance with any directives or guidelines issued by the designated minister in relation to the disposal of that information.

7. Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be used by the institution except

> (a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; or
>
> (b) for a purpose for which the information may be disclosed to the institution under subsection 8(2).

8. (1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.

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

> (a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;
>
> (b) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;
>
> (c) for the purpose of complying with a subpoena or warrant issued or order made by a court, person or body with jurisdiction to compel the production of information or for the purpose of complying with rules of court relating to the production of information;
>
> (d) to the Attorney General of Canada for use in legal proceedings involving the Crown in right of Canada or the Government of Canada;

(e) to an investigative body specified in the regulations, on the written request of the body, for the purpose of enforcing any law of Canada or a province or carrying out a lawful investigation, if the request specifies the purpose and describes the information to be disclosed;

(f) under an agreement or arrangement between the Government of Canada or an institution thereof and the government of a province, the council of the Westbank First Nation, the council of a participating First Nation — as defined in subsection 2(1) of the First Nations Jurisdiction over Education in British Columbia Act —, the government of a foreign state, an international organization of states or an international organization established by the governments of states, or any institution of any such government or organization, for the purpose of administering or enforcing any law or carrying out a lawful investigation;

(g) to a member of Parliament for the purpose of assisting the individual to whom the information relates in resolving a problem;

(h) to officers or employees of the institution for internal audit purposes, or to the office of the Comptroller General or any other person or body specified in the regulations for audit purposes;

(i) to the Library and Archives of Canada for archival purposes;

(j) to any person or body for research or statistical purposes if the head of the government institution

(i) is satisfied that the purpose for which the information is disclosed cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates, and

(ii) obtains from the person or body a written undertaking that no subsequent disclosure of the information will be made in a form that could reasonably be expected to identify the individual to whom it relates;

(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

(ii) disclosure would clearly benefit the individual to whom the information relates.

(3) Subject to any other Act of Parliament, personal information under the custody or control of the Library and Archives of Canada that has been transferred there by a government institution for historical or archival purposes may be disclosed in accordance with the regulations to any person or body for research or statistical purposes.

(4) The head of a government institution shall retain a copy of every request received by the government institution under paragraph (2)(e) for such period of time as may be prescribed by regulation, shall keep a record of any information disclosed pursuant to the request for such period of time as may be prescribed by regulation and shall, on the request of the Privacy Commissioner, make those copies and records available to the Privacy Commissioner.

(5) The head of a government institution shall notify the Privacy Commissioner in writing of any disclosure of personal information under paragraph (2)(m) prior to the disclosure where reasonably practicable or in any other case forthwith on the disclosure, and the Privacy Commissioner may, if the Commissioner deems it appropriate, notify the individual to whom the information relates of the disclosure.

(6) In paragraph (2)(k), "Indian band" means

(a) a band, as defined in the Indian Act;

(b) a band, as defined in the Cree-Naskapi (of Quebec) Act, chapter 18 of the Statutes of Canada, 1984;

(c) the Band, as defined in the Sechelt Indian Band Self-Government Act, chapter 27 of the Statutes of Canada, 1986; or

(d) a first nation named in Schedule II to the Yukon First Nations Self-Government Act.

(7) The expression "aboriginal government" in paragraph (2)(k) means

(a) Nisga'a Government, as defined in the Nisga'a Final Agreement given effect by the Nisga'a Final Agreement Act;

(b) the council of the Westbank First Nation;

(c) the Tlicho Government, as defined in section 2 of the Tlicho Land Claims and Self-Government Act;

(d) the Nunatsiavut Government, as defined in section 2 of the Labrador Inuit Land Claims Agreement Act;

(e) the council of a participating First Nation as defined in subsection 2(1) of the First Nations Jurisdiction over Education in British Columbia Act;

(f) the Tsawwassen Government, as defined in subsection 2(2) of the Tsawwassen First Nation Final Agreement Act; or

(g) a Maanulth Government, within the meaning of subsection 2(2) of the Maanulth First Nations Final Agreement Act.

(8) The expression "council of the Westbank First Nation" in paragraphs (2)(f) and (7)(b) means the council, as defined in the Westbank First Nation Self-Government Agreement given effect by the Westbank First Nation Self-Government Act.

***Library and Archives of Canada Act*, SC 2004, c 11, s. 2.**

2. The definitions in this section apply in this Act.

[…]

"government record" means a record that is under the control of a government institution.

Court File No. 00-CV-192059

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

-and-

THE ATTORNEY GENERAL OF CANADA et al.

Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE CHIEF ADJUDICATOR

LENCZNER SLAGHT ROYCE
SMITH GRIFFIN LLP
Barristers
Suite 2600
130 Adelaide Street West
Toronto ON M5H 3P5

William C. McDowell (28554G)
Tel: (416) 865-2949
Fax: (416) 865-2850
Email: wmcdowell@litigate.com

Jonathan Erik Laxer (60765I)
Tel: (416) 865-2893
Fax (416) 865-2978
Email: jlaxer@litigate.com

Lawyers for the
Chief Adjudicator of the Indian Residential Schools
Adjudication Secretariat