

**CITATION:** Fontaine v. Canada (Attorney General), 2015 ONSC 4061  
**COURT FILE NO.:** 00-CV-192059  
**DATE:** 20150623

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

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

Plaintiffs

- and -

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

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**COUNSEL:**

- *Fiona Campbell* and *Ben Piper* for the Applicants
- *Stuart Wuttke* for the Assembly of First Nations
- *Catherine A. Coughlan* and *Brent Thompson* for the Attorney General of Canada

**HEARING DATE:** June 9, 2015

**PERELL, J.**

## **REASONS FOR DECISION**

### **A. INTRODUCTION AND OVERVIEW**

[1] The Applicants are former students of St. Anne’s IRS (Indian Residential School) and Bishop Horden IRS, who have made or are making claims for compensation under the Independent Assessment Process (“IAP”) of the Indian Residential Schools Settlement Agreement (“IRSSA”). They have filed a Request for Directions (“RFD”). In their RFD, they assert that Canada has not complied with its report writing obligations under the IRSSA, including its obligation to update reports following this court’s January 14, 2014 order for the production of documents about a criminal investigation of activities at St. Anne’s IRS: see *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283. More particularly, the Applicants submit that having regard to the thousands of documents disclosed, Canada has not provided an adequate School Narrative or Person of Interest Reports (“POI Reports”) for claims involving St. Anne’s IRS. The Applicants also assert that publically available documents should not be redacted and that IAP adjudicators should receive unredacted documents.

[2] The Applicants request Orders that: (1) Canada revise the School Narrative and POI Reports for St. Anne’s IRS and for Bishop Horden IRS in a manner that makes the source documents useable by Claimants and adjudicators in IAP hearings; and (2) Canada provide an unredacted copy of source documents for St. Anne’s IRS and for Bishop Horden IRS to the Indian Residential Schools Adjudication Secretariat (“Secretariat”) for use by IAP adjudicators and, upon request, to Applicants or their Counsel.

[3] The Applicants’ RFD was supported by the Assembly of First Nations (“AFN”) and the St. Anne’s Survivors’ Association, whose spokesman, Edmund Metatawabin, made oral submissions at the hearing of the RFD.

[4] For the reasons that follow, I grant the RFD - in part. I order Canada to:

- (1) revise its School Narrative and POI Reports for St. Anne’s IRS to provide a two-column chart that lists in one column those documents that report an incident or allegation of physical or sexual abuse at St. Anne’s IRS and that describe in the second column the allegation or incident of physical or sexual abuse.
- (2) provide unredacted copies of any court records, including transcripts and pleadings, that were at any time publicly available to the Secretariat and, upon request, to Claimants or their lawyers for IAP hearings about St. Anne’s IRS or Bishop Horden IRS.

[5] At the hearing Canada consented to the second part of the Order.

[6] I set out a draft of the Order as Schedule “A” to these Reasons for Decision.

[7] I dismiss the Applicants’ request for an order that Canada provide the Secretariat, Claimants, and Claimants’ Counsel with unredacted copies of other documents gathered for the School Narrative and POI Reports. I also dismiss the Applicants’ request that Canada update its reports for Bishop Horden IRS.

[8] To foreshadow the discussion below, the determination of this RFD is a matter of contract interpretation. In my opinion, as a matter of interpretation, under the IRSSA Canada is obliged to: (1) provide updated Narratives for St. Anne’s IRS; (2) provide unredacted copies of any court records, including transcripts and pleadings that were at any time publicly available; and (3) provide redacted copies of other documents gathered for the IAP.

## **B. FACTUAL BACKGROUND**

### **1. The IRSSA and the IAP**

[9] The IRSSA is a settlement of numerous individual and class actions against Canada, which established the Indian Residential Schools policy, and against the numerous Anglican, Baptist, Episcopal, Methodist Presbyterian, Roman Catholic, and United churches, charities, and missionary societies that operated the schools and whose teachers, sisters, and brothers committed the atrocities that occurred at the schools.

[10] The judges charged with administering the IRSSA have described its background in numerous decisions, including some of my own.

[11] See: *Baxter v. Canada (Attorney General)*, 83 O.R. (3d) 481; *Fontaine v. Canada (Attorney General)*, 2012 BCSC 839; *Fontaine v. Canada (Attorney General)*, 2012 BCSC 1671; *Fontaine v. Canada (Attorney General)*, 2013 BCSC 1955; *Fontaine v. Canada (Attorney General)*, 2013 ONSC 684; *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283; *Fontaine v. Canada (Attorney General)*, 2014 ONSC 4585; *Fontaine v. Canada (Attorney General)*, 2015 ONSC 3611.

[12] Without repeating what was said in those decisions, I rely on them for a more fulsome account of the factual background that recounts the history of events that led to the negotiation, signing, and court approval of the IRSSA. I also rely on those judgments as a resource for explaining the operation of the various elements of the IRSSA and the roles played by the numerous participants to the administration of the IRSSA. For the present purposes of explaining my Reasons for Decision, it is sufficient to emphasize from the historical background (contractual nexus) that one major component of the IRSSA was the IAP, under which Class Members who suffered physical or sexual abuse at an IRS may claim compensation commensurate with the seriousness of their injuries. The IAP is unique and complex. It was designed to be something uniquely different from the adversarial system. The IAP Claimants, who had been Class Members and Plaintiffs in individual actions under the adversarial system, became Applicants in a different dispute resolution system in which their claims would be adjudicated.

[13] I also rely on certain of those decisions for the principles of contractual interpretation that have informed my analysis in this case.

[14] Schedule “D” to the IRSSA provides that an individual IAP Claimant may receive compensation of up to \$525,000.00; a maximum of \$275,000.00 in relation to sexual and physical assaults and other wrongful acts and up to a further \$250,000.00 for “proven actual income loss”. Canada’s liability to fund the IAP is uncapped.

[15] The IAP is described as inquisitorial in nature and is expressly different than the adversarial system of dispute resolution, but the IAP is a *sui generis* type of litigation. At the

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

[16] Canada's role in respect of the IAP is multifarious and apparently conflicted, unless it is understood that the IRSSA built in safeguards, including elements of independence and autonomy for the adjudicators and a separation of functions for different manifestations of Canada's legal personality through various ministries and departments.

[17] To oversimplify:

- Canada, through its Department of Justice, is entitled to participate directly in the IAP to test the legitimacy of the Applicants' claims for compensation for sexual and physical assaults.
- The Secretariat for the adjudicators is a separate manifestation of Canada's role. The Secretariat provides secretarial and administrative support for the Chief Adjudicator. Its mandate is to implement and administer the IAP under the direction of the Chief Adjudicator.
- Although independent and autonomous, the adjudicators are a different and separate manifestation of Canada's role.
- The Secretariat is a branch of Aboriginal Affairs and Northern Development Canada ("AANDC"), the department of Canada with responsibility for policies relating to Aboriginal peoples in Canada; however, save for specific financial, funding, auditing and human resource matters, the Secretariat is under the direction of the Chief Adjudicator and independent from the AANDC.
- AANDC has been assigned the task of providing several different types of reports for the purposes of facilitating the work of the IAP adjudicators in deciding claims.

[18] The tasks assigned to AANDC are at the heart of this RFD.

[19] For present purposes, the parts of the IRSSA that are most significant to resolving this RFD are Appendices VIII and X of Schedule "D" of the IRSSA.

[20] Appendix VIII of Schedule "D" states that:

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

The government will also search for, collect and provide a report about the persons named in the Application Form as having abused the Claimant, including information about those persons' jobs at the residential school and the dates they worked or were there, as well as any allegations of physical or sexual abuse committed by such persons, where such allegations were made while the person was an employee or student. Upon request, the Claimant or their lawyer will receive copies of the documents located by the government, but information about other students or other persons named in the documents (other than alleged perpetrators of abuse) will be blacked out to protect each person's personal information, as required by the *Privacy Act*.

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

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

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

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

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

[21] In *Fontaine v. Canada*, 2014 ONSC 283 at para. 217, I clarified that the paragraph concerning POI Reports should in fact be read as follows:

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

[22] Here it may be noted that although the part of Schedule "D" that deals with Narratives refers only to "sexual abuse", it was common ground between the Applicants and Canada that School Narratives are intended also to include information about historical allegations of physical abuse perpetrated by staff or students.

[23] Appendix X of Schedule "D" of the IRSSA requires Canada to disclose documents to adjudicators for their review. Appendix X provides as follows:

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

##### INTRODUCTION

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

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

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

### 1. Orientation Materials Provided to Adjudicators

Adjudicators will be supplied with orientation materials on the residential school system and its operations, as well as on child abuse and its impacts. If any of the orientation materials are specifically identified as containing uncontested facts or opinions, they may be used as follows:

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

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

Where the material is used in coming to a finding of fact, or drawing an inference, it should be cited and its relevance and the rationale for its use set out in the decision. Where orientation information provided to adjudicators does not represent uncontested facts or opinions, it may be used by adjudicators as follows:

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

....

### 3. Document Collections

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

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

Adjudicators are expected to inform themselves from this material, which may be used as a basis for findings of fact or credibility. Where any of it is so used by adjudicators, it must be cited and its relevance and the rationale for use set out in the report. Because this information is specific to the school in question and is provided in advance, it is expected that adjudicators will be familiar with it before starting a hearing to which it is relevant. Given this, before relying on specific documents to help decide a given case, the adjudicator should seek the consent of the parties, or put the relevant extracts to any witnesses who may be able to comment on them, or whose testimony they may contradict or support. Where there are no such witnesses, or where one or more parties contest the use of the documents, the adjudicator may still use them in his or her decision, but wherever possible should advise the parties of the proposed use of the document so that they may address it in their submissions.

## **2. The 1<sup>st</sup> and 2<sup>nd</sup> RFDs Regarding Documents for the IAP Hearings for St. Anne's IRS**

[24] In September 2013, 60 IAP Claimants delivered what may be labelled the 1<sup>st</sup> St. Anne's RFD. In this RFD, the Applicants sought disclosure from Canada of documents associated with an Ontario Provincial Police ("OPP") criminal investigation of offences committed at St. Anne's IRS. The RFD now before the court may be labelled the 2<sup>nd</sup> St. Anne's RFD, but it also involves Bishop Horden IRS.

[25] On January 14, 2014, I released my Reasons for Decision for the 1<sup>st</sup> St. Anne's RFD. See *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283. I ordered that by June 30, 2014, Canada was to produce: (a) the OPP documents about the sexual and physical assaults at St. Anne's IRS; (b) the transcripts of criminal or civil proceedings in its possession about the sexual and/or physical assaults at St. Anne's IRS; and (c) any other relevant and non-privileged documents in the possession of Canada to comply with the proper reading and interpretation of Canada's disclosure obligations under Appendix VIII of the IRSSA. Further, I ordered Canada to revise its Narrative and POI Reports for St. Anne's IRS by August 1, 2014.

[26] On March 6, 2014, before the release of the documents from the 1<sup>st</sup> St. Anne's RFD, the Chief Adjudicator issued a Notice to Counsel entitled "Court Direction Regarding St. Anne's IRS". The Notice to Counsel commented as follows:

Once all documents (including any additional OPP documents, the revised narrative and alleged perpetrator reports) are provided, counsel will be asked to advise the adjudicator and other parties in advance of the hearing as to which specific documents, including document and page numbers, they intend to rely on, and the purpose for which they intend to rely on such documents. This will likely be done through pre- or post-hearing teleconferences.

[27] On June 30, 2014, the documents from the 1<sup>st</sup> St. Anne's RFD were produced. Counsel for the Applicants received an external hard drive from the Secretariat containing approximately 12,300 electronic documents in .pdf format, including a 313-page index. The documents were Canada's productions in response to my January 14, 2014 Order in the 1<sup>st</sup> St. Anne's RFD. The documents contained redactions.

[28] On July 2, 2014, the Chief Adjudicator released a Notice to Counsel entitled: "Handling of Documents Relating to St. Anne's IRS". The Notice stated that Claimants should identify any documents in the new disclosure that they considered relevant. It added that "Canada's representatives and claimant's counsel are asked to play a proactive role in putting forward particular documents that may have relevance to a claim."

[29] Also on July 2, 2014, the Chief Adjudicator released a Notice to Self-Represented Claimants entitled: "Handling of documents related to St. Anne's Indian Residential School", in which he wrote with respect to the new document disclosure:

You will be expected to identify the documents and tell how you think they will make a difference to your claim. In the same way, Canada's representative will be expected to assist the adjudicator by identifying documents that might be relevant. This information will be exchanged in a telephone conference either before or after the hearing.

[30] In July 2014, Applicants' counsel, Fay Brunning, inquired why documents in the public record, such as transcripts and pleadings had been redacted, and why the Secretariat was only provided with a redacted version of the documents.



[31] Ms. Brunning stated that in her opinion, the revised Narrative and POI Reports did not organize or summarize the documents in a manner that was helpful to IAP Claimants, their counsel, or adjudicators. She asserted that it was difficult, if not impossible, for adjudicators and Claimants to use the new information in any meaningful way in the context of individual IAP claims.

[32] Catherine Coughlin, counsel for Canada, responded to Ms. Brunning's inquiries, and stated that Canada had complied with the IRSSA and the court's January 14, 2014 Order in the 1<sup>st</sup> St. Anne's RFD. Canada's position is that the Narrative for St. Anne's IRS has been adequately and properly updated in light of the disclosure of documents.

[33] On December 8, 2014, Canada reversed its position with respect to a subset of the transcripts of criminal proceedings having determined that they were publicly available, which Canada self-defined as "currently accessible by and available to the general public." For this subset only, Canada provided transcripts to the Secretariat in unredacted form. Canada's position was that only these currently accessible court records could be produced in unredacted form to the Secretariat. Canada reversed this position at the hearing of the RFD and has consented to the production of any documents that were or had been available to the general public.

[34] Canada's concession narrowed the dispute to two issues: (1) whether Canada should update the Narratives and POI Reports; and (2) whether, in respect of documents other than court records, Canada should provide unredacted versions to the Secretariat while providing redacted versions to Claimants and their lawyers.

### **3. The St. Anne's IRS Narrative and POI Reports**

#### **(a) The Updated Narrative and POI Reports**

[35] For the 2<sup>nd</sup> St. Anne's RFD, Canada provided an affidavit from Eric Guimond. He is the Director of the National Research and Analysis Directorate ("NRA") within the Settlement Agreement Operations Branch of AANDC. Mr. Guimond was cross-examined.

[36] The evidence for the 2<sup>nd</sup> St. Anne's RFD revealed how Canada dealt with the OPP documents from the 1<sup>st</sup> St. Anne's RFD and how the AANDC went about preparing School Narratives and POI Reports. He advised that the task of updating the Narrative for St. Anne's IRS was done by a single consultant who would determine the document's relevance, completeness and reliability for inclusion in a school narrative.

[37] Mr. Guimond revealed that Canada manually coded the 12,213 OPP documents and entered the information into a database. The coding allowed Canada to search the database and retrieve documents about claimants, persons of interest, and alleged perpetrators. Mr. Guimond stated that POI Reports should show information about allegations against the person of interest or alleged perpetrator based on source documents available in NRA's document collection. When asked how specifically the types of allegations would be summarized in a POI Report, Mr. Guimond stated that a POI Report would simply indicate if there were allegations of physical or sexual assault. For details about the type of physical or sexual assault, it was necessary to consult the documents.

[38] Mr. Guimond refused to provide the complete list of fields or codes that were applied to source documents in the IAP, or to produce the instructions given to the consultants who coded the source documents.

[39] Mr. Guimond accepted that not all of the events referred to in the source documents are included in the Narrative. He stated that the summary of allegations of abuse in a POI Report does not pinpoint a specific incident but refers to the types of allegations that are found in the documentation, and then it points to documents in which these allegations are further detailed.

[40] The evidentiary record for the 2<sup>nd</sup> St. Anne's RFD included the updated School Narrative for St. Anne's IRS and three updated POI Reports following the disclosure of OPP documents; namely: (1) POI Report for Sister Anna Wesley; (2) POI Report for Reverend Father Jules Leguerrier; and (3) POI Report for Reverend Father Arthur Lavoie.

[41] Applicant's counsel undertook the task of reviewing the documents associated with each POI Report.

[42] The updated Narrative for St. Anne's IRS mentions the extensive OPP investigation into St. Anne's IRS, and the Narrative states that the investigation lasted over four years and involved 900 interviews with approximately 700 people. The Narrative mentions various convictions for assault by former staff at St. Anne's IRS with the convictions being registered between 1997 and 1999. The Narrative references as source documents the Certificates of Conviction and the Transcripts of Proceedings. It lists some incidents of sexual and physical assaults with reference to source documents from the OPP investigation, but without naming the criminally convicted persons.

[43] The updated St. Anne's IRS School Narrative notes that an unnamed IRS staff member was convicted of common assault and administering a noxious substance. The Narrative states that:

Documents from the OPP investigation indicate that additional allegations against this former IRS staff member were reviewed, but did not result in criminal charges. The allegations included the following: common assault, assault causing bodily harm, intimidation, forcible confinement, and sexual assault.

[44] The School Narrative for St. Anne's does not state that children were forced to eat vomit, nor does it indicate or categorize the source documents that relate to the convictions for administering a noxious substance.

[45] The School Narrative for St. Anne's includes a list of the referenced source documents. The list is 10-pages in length. The Narrative includes an Appendix "A" that lists other documents that "pertain to criminal proceedings, civil litigation, and the OPP investigation." The list of documents in Appendix "A" extends for 300 pages and includes 12,213 documents.

[46] Applicants' counsel's review of the documents revealed that they contain, in graphic and horrific detail, descriptions of numerous incidents in which students were forced by Sister Anna Wesley to eat their own vomit.

[47] The School Narrative for St. Anne's IRS does not mention the use of a whip, strap, or cat of nine tails on children at the school. Applicants' counsel's review of the documents revealed that they contain in graphic and horrific detail descriptions of numerous incidents in which students were whipped by Sister Wesley and Father Leguerrier.

[48] The Narrative mentions the allegation at the Keykaywin Conference in 1992, that some participants spoke of being forced to sit in an electric chair for punishment. The Narrative, however, does not indicate or compile the source documents that relate to that allegation. The POI Reports for Anna Wesley, Father Jules Leguerrier and Father Lavoie do not mention the use of this electric chair or the source documents that would relate to that allegation.

[49] Applicants' counsel's review of the documents about Father Leguerrier revealed that they contain, in graphic and horrific detail, descriptions of numerous incidents involving the electric chair.

**(b) The POI Report for Sister Anna Wesley**

[50] In the POI Report for Sister Anna Wesley, the summary portion of the Report is two pages long. The summary indicates her biographical information and the dates of her employment at St. Anne's IRS. It notes that she was convicted of various offences, as follows:

On April 26, 1999, the Staff Member was convicted of three counts of administering a noxious substance and five counts of common assault on students of St. Anne's IRS which took place during the years 1951 to 1962, and was given a conditional sentence of 11 and a half months in prison, to be served in the community.

[51] The Wesley POI Report notes that "additional allegations of physical and sexual abuse against the Staff Member were reviewed, but did not result in criminal charges." The summary does not indicate the nature of the allegations against her that did not lead to convictions.

[52] As source documents, the Wesley POI Report lists the Certificates of Conviction, a Sentencing Document and Proceedings at Trial. The list of documents in Appendix "A" to the Report extends for 60 pages and the source document collection accompanying the Wesley POI Report numbers 6,804 pages.

**(c) The POI Report for Reverend Father Jules Leguerrier**

[53] In the POI Report for Reverend Father Jules Leguerrier, the summary portion of the Report is one page long. It indicates Father Leguerrier's biographical information, the dates during which he was employed at St. Anne's IRS, and some additional information concerning his subsequent employment.

[54] The Leguerrier POI Report does not mention any allegations of physical or sexual abuse. Appendix "A" to the Report provides a list of documents extending for 46 pages and the document collection accompanying the Leguerrier POI Report has 3,191 pages.

**(d) The POI Report for Reverend Father Arthur Lavoie**

[55] In the POI Report for Reverend Father Arthur Lavoie, the summary portion of the Report is two pages long. It lists his biographical information, the dates during which he was employed at St. Anne's IRS and various "additional information", which includes brief notes about his residency and a note to "See Appendix A".

[56] The Lavoie POI Report does not mention any allegations of physical or sexual abuse. Appendix "A" to the Lavoie POI Report, listing the source documents produced from the OPP investigation, extends for 36 pages. The documents in the list have 2,472 pages.

[57] The Lavoie POI Report does not mention any allegations of abuse. A review of the source documents indicates that Father Lavoie was a serial sexual abuser of children at St. Anne's IRS.

## **C. DISCUSSION AND ANALYSIS**

### **1. The Applicants' and AFN's Position and Submissions**

[58] The Applicants submit that the St. Anne's IRS Narrative summarizes a selection of the allegations of physical and sexual abuse made against former staff and students but it is far from being a comprehensive representation of the allegations found in the attached source documents. The Applicants submit that it is unclear from the summary which POIs are responsible for any of the allegations found in the summary.

[59] The Applicants plead that the updated Narrative and POI Reports do not comply with the terms or spirit of the IAP nor the expedited and expediency goals of advance disclosure to adjudicators for an inquisitory hearing process because: (a) the Narrative does not provide an adequate or useful summary for adjudicators or Claimants of the thousands of documents that have been added to the source documents, nor does it categorize the source documents in a manner that would be useable by adjudicators, Claimants or Claimants' Counsel in each IAP hearing; (b) source documents for the Narrative and for the POI Reports, including documents that are in the public record, are heavily redacted; and (c) the POI Reports do not provide an adequate or useful summary of the contents of each source document, leaving thousands of pages of new source documents to be reviewed by the adjudicators and by Claimants and their counsel to determine if the document is relevant to the IAP hearing.

[60] The AFN's position and submissions are similar to those made by the Applicants.

### **2. Canada's Position**

[61] Canada disputes the submission that its Narrative and POI Reports for St. Anne's IRS are inadequate. It submits that Appendix VIII provides general guidance, but does not lay out any specific criteria for the organization of the information. It submits that the IRSSA allows Canada significant discretion in how it structures and compiles the Reports. It argues that for School Narratives, Canada need not summarize every document relating to St. Anne's or create an inventory of allegations categorized by alleged perpetrator. Canada points to privacy concerns that prevent it from naming in School Narratives alleged perpetrators who were not convicted.

[62] Regarding POI Reports, Canada argues that the IAP does not set out which details of allegations ought to be included in the POI Reports, but speaks only of sexual and physical abuse allegations. It submits that in the absence of information about convictions or charges against a POI who is referred to in the OPP documents, the index to the POI Report is intended to provide information about other allegations of sexual and physical abuse, particularly by reference to the relevant source documents.

[63] Canada explains that it used legal language to categorize the basic content of allegations (e.g. "administration of a noxious substance", rather than "force to eat vomit") in order to take a "neutral" rather than an "editorial" approach. Replying on privacy concerns,

Canada says it has reasonably opted not to “decontextualize” or “speculate” on allegations, “which would have the effect of distorting the personal information of former students and staff.” According to Canada, the source documents can speak for themselves.

[64] Canada emphasizes the role of Claimants’ Counsel under the IAP and argues that the Applicants’ complaints about the Narrative and POI Reports stem from their misunderstanding of the role of Claimants’ Counsel in the IAP. According to Canada, the increased volume of documents for St. Anne’s creates a special context requiring additional efforts from all parties. Canada asserts that to the extent that any document (source or otherwise) benefits a Claimant’s case, it is the Claimant and their counsel that bears the onus of producing that document.

### **3. Analysis – The School Narratives and the POI Reports**

[65] The language of Appendices VIII and X to Schedule “D” and the factual nexus at the time of the signing of the IRSSA support the Applicants’ and AFN’s interpretation that both the Narratives and the POI Reports must identify all of the allegations or incidents of physical or sexual abuse at the school in a meaningful way that facilitates and makes it easier for Claimants, not all of whom will be represented by lawyers, to advance their claims and that makes it more efficient for the adjudicators to decide claims.

[66] Making it easier for Claimants, who are not relieved of the burden of proving their claims, and making it more efficient for the adjudicators to decide their claims, and putting a burden on Canada to prepare School Narratives and POI Reports was not an act of generosity or a magnanimous gesture by the Defendants settling the class actions and the numerous individual actions; it was a bargained-for term of the IRSSA.

[67] The bargained-for-term reflected the facts that: (a) Canada had already done a great deal of work in collecting historical material; (b) there was little doubt that atrocities had occurred; (c) the events had happened over many years; (d) the survivors were aging with memories that would be diminishing; and (e) in any event, the survivors’ memories would be extremely painful for them to revive.

[68] Canada is not doing a favour in providing School Narratives and POI Reports; it is a performing a hard-bargained contractual promise.

[69] Canada’s obligations are not affected or shifted when a survivor retains a lawyer to assist in the prosecution of his or her claim. While the IAP is litigious, it is a *sui generis* system of adjudication, and under it, Canada has an obligation to produce meaningful reports summarizing documents that speak about incidents of physical or sexual abuse by persons named in an Application Form as abusers and by persons other than those named in an Application as having abused a Claimant. The information from these documents is to be added to the Narrative. In the documents, the names of persons other than alleged perpetrators of abuse (i.e. other students or persons at the school) are to be blacked out to protect their personal information.

[70] Appendix VIII requires Canada to write a Narrative summarizing documents about each residential school. Appendix VIII requires Canada to add to that Narrative information from documents that mention sexual abuse by individuals other than those named in an Application. In respect of POI Reports, Appendix VIII contemplates that the Reports will include any allegations of physical or sexual abuse by such persons. There is nothing in Appendix VIII that draws a distinction between allegations that led to a conviction and

allegations that did not lead to a conviction.

[71] The purpose of the Narrative and POI Reports is to assist adjudicators and the parties, particularly Claimants, to prepare for a hearing involving a particular school and POI to facilitate an expeditious process. In my opinion, providing specific references to the source documents is consistent with this objective, whereas simply listing all source documents together in an appendix is not, particularly when those documents number in the thousands.

[72] The release of thousands of documents for St. Anne's IRS required the updating of the Narrative and the POI Reports.

[73] I agree with the arguments of the Applicants and AFN that the Narratives for St. Anne's IRS and the POI Reports for St. Anne's IRS do not comply with the requirements of the IRSSA.

[74] The Order that is attached as Schedule "A" to these Reasons for Decision is designed to make it clear what is required to comply with the IRSSA.

[75] It may be noted that the Order is silent about the Narratives and POI Reports for Bishop Horden IRS. These Reports were not in the record on this RFD, and therefore it was not proven that there are any problems with these Reports.

#### **4. The Redaction of Documents for School Narratives and for POI Reports**

##### **(a) Introduction and Canada's Preliminary Objection to the RFD**

[76] As noted above, there is a dispute between the parties about the extent to which Canada must provide copies of documents without redactions to the Secretariat and to IAP Applicants.

[77] The AFN and the Applicants submit that for the purposes of the IAP, Canada must produce unredacted documents to the Secretariat for use by adjudicators. Canada disagrees and it also raises a preliminary objection to the Applicants' standing to raise this issue.

[78] Canada submits that this RFD is essentially a request made for the benefit of the Secretariat, a separate entity that administers the IAP. Canada submits that the Applicants should raise the matter of redactions on evidentiary motions before the independent adjudicators.

[79] Canada's preliminary submission is without merit. The Applicants are not bringing their RFD on behalf of adjudicators or the Secretariat. They obviously have an interest in the proper function of the IAP and they are obviously affected by the redacted or unredacted information in the documents made available to the adjudicators.

##### **(b) Canada's Position**

[80] Canada has provided redacted versions of all of the documents referred to in the Narratives and the POI Reports to the Secretariat. It submits that this is what the IRSSA expressly mandates and is consistent with the IRSSA's intense privacy safeguards.

[81] Canada rejects the Applicants' and AFN's reading of the IRSSA that would support providing unredacted documents, at least, to the adjudicators. Canada argues that the proposal is unfeasible and would raise a host of fairness issues in the adjudication of IAP claims, particularly the prospect that the Claimants would not know what information the adjudicator

might rely on to make an IAP determination.

[82] Canada's only exceptions to the delivery of redacted documents are pleadings and transcripts of court proceedings where documents are "publicly available," which Canada self-defined as "currently accessible by and available to the general public."

[83] As noted above, this exception has, on consent, been extended to documents that are or were publically available.

**(c) The AFN's and the Applicants' Position**

[84] The AFN supports the Applicants' position.

[85] The AFN and the Applicants submit that the Secretariat (and through it, the adjudicators) should receive unredacted documents. (Presumably, this would leave it to the Secretariat to decide whether to produce unredacted documents to the Applicants and their lawyers.) They argue that while Schedule "D" contemplates redactions in documents provided to Claimants and their Counsel, there is no similar language for the Secretariat or adjudicators. They submit that providing an unredacted set of documents to the Secretariat and to adjudicators is consistent with their role as neutral parties within the IAP.

**(d) Analysis**

[86] Once again, the resolution of this issue is a matter of contract interpretation. This time, I agree with the arguments of Canada, and I do not agree with the arguments of the Applicants and the AFN.

[87] The redaction of documents was another major item in the negotiations and required a balancing of disclosure necessary for the adjudication of claims and sensitivity to the privacy of Claimants and also POIs.

[88] In regard to the redaction of documents, it must be noted that many physical and sexual assaults that will result in compensation under the IAP did not lead to investigations and criminal charges. Sadly, it must also be recalled that in the toxic environment of the Indian Residential Schools, there were incidents of student-on-student assaults. These incidents, too, may result in compensation under the IAP. Protection of privacy and the redaction of documents were matters of serious and substantial negotiation, and the language of the provisions of the IRSSA dealing with the IAP procedure does not make an exception for the adjudicators to receive unredacted documents.

[89] For the purposes of deciding the 2<sup>nd</sup> St. Anne's RFD, it is not necessary to join the debate among the parties about whether allowing the adjudicators but not the Claimants to have unredacted documents would yield a fairer or less fair or truer or less true adjudication of the claims. As a matter of interpretation, there simply is no basis for the interpretation advanced by the Applicants and the AFN.

**D. CONCLUSION**

[90] For the above reasons, the parties should take out the Order found in Schedule "A" to these Reasons for Decision.

[91] Canada shall pay costs to the Applicants and the AFN. If the parties cannot agree about

the matter of costs, they may make submissions in writing beginning with the submissions of the Applicants and AFN within 20 days of the release of these Reasons for Decision followed by Canada's submissions within a further 20 days.

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Perell, J.

Released: June 23 2015



**Schedule "A"**

Court File No. 00-CV-192059

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE ) \_\_\_\_\_, THE \_\_\_\_\_  
JUSTICE PERELL ) DAY OF JUNE, 2015

**BETWEEN:**

[style of cause]

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

**ORDER**

ON THE REQUEST FOR DIRECTIONS, ALSO KNOWN AS THE RETURN OF THE REQUEST FOR DIRECTIONS REGARDING ST. ANNE'S INDIAN RESIDENTIAL SCHOOL, made by approximately 50 Independent Assessment Process ("IAP") claimants who are former students of St. Anne's Indian Residential School ("St. Anne's IRS") or Bishop Horden Hall Indian Residential School ("Bishop Horden IRS") (the "Applicants"), heard on June 9, 2015, at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

ON READING the records (including "Questions on Written Cross-Examination on Affidavit" and the transcript of the cross-examination of Neil Shamsuzzoha) and factums filed by the Applicants, the respondent the Attorney General of Canada ("Canada") and the Assembly of First Nations ("AFN").

AND ON HEARING the submissions of counsel for the Applicants, Canada and the AFN, and of Edmund Metatawabin on behalf of the St. Anne's Survivors' Association.

1. THIS COURT ORDERS that Canada shall revise each of the following reports required by the Indian Residential Schools Settlement Agreement ("IRSSA"), Schedule "D", Appendix VIII, namely, the reports summarizing documents about St. Anne's IRS (the "**School Narrative**"), and the reports about the persons named in claimants' IAP application forms for St. Anne's IRS as having abused a claimant (the "**POI Reports**"), by including in each report a chart comprised of the following two columns:

- a) a column, organized in chronological order with relevant dates indicated, that summarizes all available information as to alleged physical or sexual assaults or other wrongful acts (including available information as to who was involved, what occurred, and when and where it occurred), that

- i. in the case of a School Narrative, were alleged to have occurred at St. Anne's IRS, or
    - ii. in the case of a POI Report, were allegedly committed by a person identified in that POI Report while the person was an employee or student of St. Anne's IRS; and
  - b) a corresponding column that lists in chronological order with relevant dates indicated, all documents identifying, describing or otherwise relating to sexual or physical assaults or other wrongful acts that,
    - i. in the case of the School Narrative, were alleged to have occurred at St. Anne's IRS, or
    - ii. in the case of a POI Report, were allegedly committed by a person identified in that POI Report while the person was an employee or student of St. Anne's IRS.
2. THIS COURT FURTHER ORDERS that for inclusion in the evidentiary packages or supplemental evidentiary packages for IAP claims not yet resolved, Canada shall provide to the Indian Residential Schools Adjudication Secretariat (the "Secretariat") unredacted copies of court records (including, but not limited to transcripts and pleadings) that
  - a) relate to criminal offences that were alleged to have occurred at either St. Anne's IRS or Bishop Horden IRS, and
  - b) were previously made available to the Secretariat in redacted form.
3. THIS COURT FURTHER ORDERS that the Applicants' request for an order that Canada provide the Secretariat with unredacted copies of all source documents for hearings involving St. Anne's IRS or Bishop Horden IRS is dismissed.
4. THIS COURT FURTHER ORDERS that Canada shall pay costs to the Applicants and the AFN in the sum that is fixed by the Court following receipt of submissions from the parties beginning with the submissions of the Applicants and AFN within 20 days of today's date followed by Canada's submissions within a further 20 days.

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**JUSTICE PERELL**

**CITATION:** Fontaine v. Canada (Attorney General), 2015 ONSC 4061  
**COURT FILE NO.:** 00-CV-192059  
**DATE:** 20150623

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

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

Plaintiffs

**- and -**

THE ATTORNEY GENERAL OF CANADA et  
al.

Defendants

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**REASONS FOR DECISION**

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Perell, J.

Released: June 23, 2015