



SUPREME COURT OF CANADA

CITATION: Canada (Attorney General) v. Fontaine,
2017 SCC 47

APPEAL HEARD: May 25, 2017
JUDGMENT RENDERED: October 6, 2017
DOCKET: 37037

BETWEEN:

Attorney General of Canada
Appellant

and

**Larry Philip Fontaine in his personal capacity and in his capacity as the
executor of the estate of Agnes Mary Fontaine, deceased, et al.**
Respondents

- and -

**Privacy Commissioner of Canada, Coalition to Preserve Truth and Information
Commissioner of Canada**
Intervenors

CORAM: McLachlin C.J. and Karakatsanis, Wagner, Gascon, Côté, Brown and
Rowe JJ.

JOINT REASONS FOR JUDGMENT: Brown and Rowe JJ. (McLachlin C.J. and Karakatsanis,
(paras. 1 to 64) Wagner, Gascon and Côté JJ. concurring)

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Attorney General of Canada

Appellant

v.

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, Adrian Yellowknee, Presbyterian Church in Canada, General Synod of the Anglican Church of Canada, United Church of Canada, Board of Home Missions of the United Church of Canada, Women's Missionary Society of the Presbyterian Church, Baptist Church in Canada, Board of Home Missions and Social Services of the Presbyterian Church in Bay, Canada Impact North Ministries of the Company for the Propagation of the Gospel in New England (also known as the New England Company), Diocese of Saskatchewan, Diocese of the Synod of Cariboo, Foreign Mission of the Presbyterian Church in Canada, Incorporated Synod of the Diocese of Huron, Methodist Church of Canada, Missionary Society of the Anglican Church of Canada, Missionary Society of the Methodist Church of Canada (also known as the Methodist Missionary Society of Canada), Incorporated Synod of the Diocese of Algoma,

**Synod of the Anglican Church of the Diocese of Quebec,
Synod of the Diocese of Athabasca, Synod of the Diocese
of Brandon, Anglican Synod of the Diocese of British Columbia,
Synod of the Diocese of Calgary, Synod of the Diocese
of Keewatin, Synod of the Diocese of Qu'Appelle,
Synod of the Diocese of New Westminster, Synod of the Diocese
of Yukon, Trustee Board of the Presbyterian Church in Canada,
Board of Home Missions and Social Service of the Presbyterian
Church of Canada, 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, Soeurs de Notre-Dame-Auxiliatrice,
Soeurs de St-François D'Assise, Institut des Soeurs
du Bon Conseil, Soeurs de Saint-Joseph de Saint-Hyacinthe,
Soeurs de Jésus-Marie, Soeurs de l'Assomption de la Sainte Vierge,
Soeurs de l'Assomption de la Sainte Vierge de l'Alberta,
Soeurs Missionnaires du Christ-Roi,
Soeurs de la Charité de St-Hyacinthe, Oeuvres Oblates de l'Ontario,
Résidences Oblates du Québec, Corporation Épiscopale Catholique
Romaine de la Baie James (the Roman Catholic Episcopal
Corporation of James Bay), Catholic Diocese of Moosonee,
Soeurs Grises de Montréal/Grey Nuns of Montréal,
Sisters of Charity (Grey Nuns) of Alberta,
Soeurs de la Charité des T.N.-O., Hôtel-Dieu de Nicolet,
Grey Nuns of Manitoba Inc. — Soeurs Grises du Manitoba Inc.,
Corporation Épiscopale Catholique Romaine de la Baie d'Hudson —
Roman Catholic Episcopal Corporation of Hudson's Bay,
Missionary Oblates — Grandin Province,
Oblats de Marie Immaculée du Manitoba,
Archiepiscopal Corporation of Regina,
Sisters of the Presentation, Sisters of St. Joseph of Sault
Ste. Marie, Sisters of Charity of Ottawa,
Oblates of Mary Immaculate — St. Peter's Province,
Sisters of Saint Ann, Sisters of Instruction of the Child Jesus,
Benedictine Sisters of Mt. Angel Oregon,
Pères Montfortains, Roman Catholic Bishop of Kamloops,
Corporation Sole, Bishop of Victoria, Corporation Sole,
Roman Catholic Bishop of Nelson, Corporation Sole,
Order of the Oblates of Mary Immaculate in the Province
of British Columbia, Sisters of Charity of Providence
of Western Canada, Corporation Épiscopale Catholique Romaine
de Grouard, Roman Catholic Episcopal Corporation of Keewatin,
Corporation Archiépiscope Catholique Romaine
de St-Boniface, Missionnaires Oblates Soeurs de St-Boniface —**

**Missionary Oblates Sisters of St. Boniface,
Roman Catholic Archiepiscopal Corporation of Winnipeg,
Corporation Épiscopale Catholique Romaine de Prince Albert,
Roman Catholic Bishop of Thunder Bay,
Immaculate Heart Community of Los Angeles CA,
Archdiocese of Vancouver — Roman Catholic Archbishop
of Vancouver, Roman Catholic Diocese of Whitehorse,
Catholic Episcopal Corporation of Mackenzie-Fort Smith,
Roman Catholic Episcopal Corporation of Prince Rupert,
Episcopal Corporation of Saskatoon, OMI Lacombe Canada Inc.,
Mt. Angel Abbey Inc., National Centre for Truth and Reconciliation,
Assembly of First Nations, Independent Counsel,
Inuit Representatives and Chief Adjudicator of the Indian
Residential Schools Adjudication Secretariat**

Respondents

and

**Privacy Commissioner of Canada,
Coalition to Preserve Truth and
Information Commissioner of Canada**

Interveners

Indexed as: Canada (Attorney General) v. Fontaine

2017 SCC 47

File No.: 37037.

2017: May 25; 2017: October 6.

Present: McLachlin C.J. and Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

Civil procedure — Class proceedings — Settlement — Administration — Settlement agreement resolved class actions by Aboriginal persons who attended residential schools — Agreement provided for Independent Assessment Process for serious claims of abuse — Two parties to settlement agreement requested directions from supervising judge as to post-decision disposition of records generated by Independent Assessment Process — Whether records are court records or government records subject to federal privacy, access to information, and archiving legislation — Whether supervising judge erred in concluding that settlement agreement allowed for destruction of records — Whether supervising judge’s order that records must be destroyed following 15-year retention period was appropriate.

From the 1860s to the 1990s, more than 150,000 First Nations, Inuit, and Métis children were required to attend Indian Residential Schools operated by religious organizations and funded by the Government of Canada. Thousands of these children were abused physically, emotionally, and sexually while at residential schools. A number of individual and class actions were brought by survivors of residential schools. In 2006, an agreement was reached and class actions in nine provinces and territories were consolidated into a single action. The Indian Residential Schools Settlement Agreement (“IRSSA”), which is a comprehensive settlement of that class action, sought to achieve a fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools and to promote healing, education, truth and reconciliation and commemoration by, among other things, financially compensating former students of residential schools.

The IRSSA provided two forms of financial compensation to former students of residential schools. First, the Common Experience Payment provided eligible claimants with financial compensation based on the amount of time they were at the schools. Second, former students who were victims of abuse and wrongful acts resulting in serious psychological consequences could also bring a claim under the Independent Assessment Process (“IAP”). To initiate a claim under the IAP, claimants must submit an application form to the Indian Residential Schools Adjudication Secretariat, which entails disclosure by claimants of acutely sensitive particulars for examination by an adjudicator. This information is recorded in application forms, hearing transcripts, medical reports, reasons for decisions and other documents (collectively, the “IAP Documents”), copies of which are held by the Government of Canada.

During the IAP, the Chief Adjudicator of the Indian Residential Schools Adjudication Secretariat and the Truth and Reconciliation Commission (“TRC”) brought requests for directions to the Ontario Superior Court of Justice on the disposition of the IAP documents at the conclusion of the IAP and, if necessary, on the development of a notice program to inform claimants of the possibility of voluntarily archiving some of their IAP Documents at the National Centre for Truth and Reconciliation.

The supervising judge found that the IAP records must be destroyed following a 15-year retention period during which individual IAP claimants could

elect to have the records in their own file preserved. This order was substantially upheld by the majority of the Ontario Court of Appeal. The Attorney General of Canada appeals to this Court, arguing that the IAP documents are “under the control of a government institution” within the meaning of the *Access to Information Act*, the *Privacy Act* and the *Library and Archives of Canada Act*, and that the supervising judge had no jurisdiction to order their destruction.

Held: The appeal should be dismissed.

Judges of the provincial and territorial superior courts who certified the class action and approved the IRSSA were designated as supervising judges, and play a vital role under the IRSSA. They have administrative and supervisory jurisdiction over the implementation and administration of the IRSSA and can, among other things, hear requests for directions. In this case, the supervising judge correctly found that he had authority to make orders as to the disposition of the IAP Documents. The courts’ supervisory role in implementing the IRSSA allows them to make orders regarding the disposition of the IAP documents regardless of whether or not they are government records.

The supervising judge concluded, without palpable and overriding error, that the IRSSA allowed for the destruction of the IAP Documents. Both the text of the IRSSA and the surrounding circumstances support the supervising judge’s interpretation. The IRSSA’s express terms provided that the IAP Documents would be treated as highly confidential, subject to the very limited prospect of disclosure

during a retention period, and then be destroyed. The main components to the IRSSA include provisions bearing on the IAP and on the TRC in Schs. D and N. Schedule D, which deals with the IAP, does not expressly state whether federal legislation will apply to documents created or uncovered by the IAP, but it does refer to the intended treatment of various types of information and documents. Schedule N, which details the mandate and process of the TRC, provides that the truth and reconciliation process is committed to the principle of voluntariness with respect to individuals' participation. The supervising judge's findings that the negotiators of the IRSSA intended the IAP to be a confidential and private process, that claimants and perpetrators relied on the confidentiality assurances and that, without such assurances, the IAP could not have functioned were inescapable.

The references to federal access, privacy, and archiving legislation in the "Guide to the Independent Assessment Process Application" should not be given interpretive weight. It does not form part of the IRSSA, and it prominently states that, in the event of any differences between the Guide and Sch. D, the official document will prevail. Moreover, its provisions regarding privacy seem completely unmoored from the text of Sch. D and were apparently reproduced from a similar document used in the former alternative dispute resolution process. The supervising judge therefore committed no error by omitting to import the Guide's references to federal access, privacy, and archiving legislation into the IRSSA. The application of this legislation to the IAP Documents would clearly run counter to the principles of confidentiality and voluntariness upon which the IAP was founded.

Finally, the order crafted by the supervising judge was an appropriate exercise of his discretionary power to administer the IRSSA. His order, as modified by the Court of Appeal, strikes a balance between preserving confidentiality and the need to memorialize and commemorate, all the while respecting the choice of survivors to share their stories, and charts an appropriate course between potentially unwanted destruction and potentially injurious preservation. During the 15-year retention period, claimants may choose to have their IAP Documents preserved and archived, and that choice will be brought to their attention through a notice program administered by the Chief Adjudicator. While this order may be inconsistent with the wishes of deceased claimants who were never given the option to preserve their records, the destruction of records that some claimants would have preferred to have preserved works a lesser injustice than the disclosure of records that most expected never to be shared.

Cases Cited

Referred to: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481; *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283, [2014] 2 C.N.L.R. 86; *Fontaine v. Canada (Attorney General)*, 2013 ONSC 684, 114 O.R. (3d) 263; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Coco v. A.N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41; *Endean v. British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 162; *R. v. Rose*, [1998] 3 S.C.R. 262; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *Heritage Capital*

Corp. v. Equitable Trust Co., 2016 SCC 19, [2016] 1 S.C.R. 306; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23; *Lavier v. MyTravel Canada Holidays Inc.*, 2013 ONCA 92, 359 D.L.R. (4th) 713; *P. (W.) v. Alberta*, 2014 ABCA 404, 378 D.L.R. (4th) 629; *Balogun v. Pandher*, 2010 ABCA 40, 474 A.R. 258; *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801; *Reza v. Canada*, [1994] 2 S.C.R. 394; *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26.

Statutes and Regulations Cited

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

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

Library and Archives of Canada Act, S.C. 2004, c. 11, preamble, ss. 2, 12.

Privacy Act, R.S.C. 1985, c. P-21, ss. 3 “personal information”, 7 to 10, 8(2)(j), 12.

Treaties and Agreements

Indian Residential Schools Settlement Agreement (2006), preamble, arts. 4.06(g), 5.02, 7.01, Sch. D, arts. I, III(o), App. II, items (i), (iv), VII, VIII, Sch. N, arts. 1, 2(c), 4(b), 11.

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Hall, Geoff R. *Canadian Contractual Interpretation Law*, 2nd ed. Markham, Ont.: LexisNexis, 2012.

Indian Residential Schools Adjudication Secretariat. *Guide to the Independent Assessment Process Application*, updated April 4, 2013 (online: <http://www.iap-pei.ca/media/information/publication/pdf/pub/iapg-v3.2-20130404-eng.pdf>; archived version: http://www.scc-csc.ca/cso-dce/2017SCC-CSC47_1_eng.pdf).

The Right Honourable Stephen Harper on behalf of the Government of Canada. “Statement of Apology — to former students of Indian Residential Schools”, Ottawa, June 11, 2008 (online: https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/rqpi_apo_pdf_1322167347706_eng.pdf; archived version: http://www.scc-csc.ca/cso-dce/2017SCC-CSC47_2_eng.pdf).

APPEAL from a judgment of the Ontario Court of Appeal (Strathy C.J., Sharpe and MacFarland J.J.A.), 2016 ONCA 241, 130 O.R. (3d) 1, [2016] 3 C.N.L.R. 72, 397 D.L.R. (4th) 243, 346 O.A.C. 321, [2016] O.J. No. 1658 (QL), 2016 CarswellOnt 4938 (WL Can.), substantially affirming a decision of Perell J., 2014 ONSC 4585, 122 O.R. (3d) 1, [2014] 4 C.N.L.R. 72, [2014] O.J. No. 3638 (QL), 2014 CarswellOnt 10756 (WL Can.). Appeal dismissed.

Christopher Rupar and Alexander Pless, for the appellant.

Janine L. Lavoie-Harding, David M. Stack, Q.C., and C. Kelsey O'Brien, for the respondents 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, Oeuvres Oblates de l’Ontario, Résidences Oblates du Québec, Soeurs Grises de Montréal/Grey Nuns of Montréal, Sisters of Charity (Grey Nuns) of Alberta, Soeurs de la Charité des T.N.-O., Hôtel-Dieu de Nicolet, Grey Nuns of Manitoba Inc. — Soeurs Grises du Manitoba Inc., Missionary Oblates — Grandin Province, Oblats de Marie Immaculée du Manitoba, Oblates of Mary Immaculate — St. Peter’s Province,

Sisters of Saint Ann, Sisters of Instruction of the Child Jesus, Order of the Oblates of Mary Immaculate in the Province of British Columbia, Sisters of Charity of Providence of Western Canada and Roman Catholic Archiepiscopal Corporation of Winnipeg.

Raymond Doray and Pierre-L. Baribeau, for the respondents Soeurs de Notre-Dame-Auxiliatrice, Soeurs de St-François D'Assise, Institut des Soeurs du Bon Conseil, Soeurs de Saint-Joseph de Saint-Hyacinthe, Soeurs de Jésus-Marie, Soeurs de l'Assomption de la Sainte Vierge, Soeurs de l'Assomption de la Sainte Vierge de l'Alberta, Soeurs Missionnaires du Christ-Roi and Soeurs de la Charité de St-Hyacinthe.

Joanna Birenbaum, Naomi Andrew and Lynne Hiebert, for the respondent National Centre for Truth and Reconciliation.

Stuart Wuttke, Julie McGregor and Kathleen Mahoney, Q.C., for the respondent Assembly of First Nations.

Peter R. Grant, Diane Soroka and Sandra Staats, for the respondent Independent Counsel.

Hugo Prud'homme, for the respondent Inuit Representatives.

Joseph J. Arvay, Q.C., Catherine J. Boies Parker and Susan E. Ross, for the respondent Chief Adjudicator of the Indian Residential Schools Adjudication Secretariat.

No one appeared for the other respondents.

Written submissions only by *Barbara McIsaac, Q.C., Kate Wilson, Regan Morris and James Nowlan*, for the intervener Privacy Commissioner of Canada.

Christopher G. Devlin, Nicole Bresser and John Gailus, for the intervener Coalition to Preserve Truth.

Richard Dearden and Adam Zanna, for the intervener Information Commissioner of Canada.

The judgment of the Court was delivered by

BROWN AND ROWE JJ. —

I. Introduction

[1] From the 1860s to the 1990s, more than 150,000 First Nations, Inuit, and Métis children were required to attend Indian Residential Schools operated by religious organizations and funded by the Government of Canada. As Canada has acknowledged, this system was intended to “remove and isolate children from the influence of their homes, families, traditions and culture” (“Statement of Apology to former students of Indian Residential Schools” of the Right Honourable Stephen Harper on behalf of Canada, June 11, 2008 (online)). Thousands of these children were abused physically, emotionally, and sexually while at residential schools.

[2] Under the *Indian Residential Schools Settlement Agreement* (2006) (“IRSSA”), survivors of residential schools could seek compensation through the specially designed Independent Assessment Process (“IAP”).¹ This entailed disclosure by claimants of acutely sensitive particulars — both of the abuse suffered, and of its consequences — for examination by an adjudicator. This information is recorded in application forms, hearing transcripts, medical reports, reasons for decisions and other documents (collectively, the “IAP Documents”), copies of which are held by Canada.

[3] This appeal concerns the fate of the digital and physical records generated by this process. In particular, this Court must determine whether the IAP Documents should be destroyed, or retained and eventually archived at Library and Archives Canada. In response to requests for directions to the Ontario Superior Court of Justice

¹ Our reasons for judgment unavoidably employ a large number of acronyms, a complete list of which is attached hereto as an appendix.

from various parties to the IRSSA, the supervising judge found that these records must be destroyed following a 15-year retention period during which individual IAP claimants could elect to have the records in their own file preserved. This order was substantially upheld by the majority of the Ontario Court of Appeal. The Attorney General of Canada now appeals that result to this Court.

[4] We would dismiss the appeal and uphold the supervising judge's order as varied by the Court of Appeal. In our view, the supervising judge's order is not, as the Attorney General of Canada claims, precluded by the operation of the *Library and Archives of Canada Act*, S.C. 2004, c. 11, or any other legislation. Moreover, it was an appropriate exercise of the supervising judge's discretionary power to administer the IRSSA.

II. Overview of Facts and Proceedings

A. *Background*

[5] In the late 1990s and early 2000s, a number of individual and class actions were brought by survivors of residential schools. In November 2003, the Government of Canada established a voluntary alternative dispute resolution (“ADR”) process to compensate survivors. In 2006, an agreement was reached and class actions in nine provinces and territories were consolidated into a single action.²

² The class action was, in effect, nationwide. The Superior Court of Justice of Ontario had jurisdiction over the claims of residents of Nova Scotia, New Brunswick, Prince Edward Island and

The IRSSA is a comprehensive settlement of that class action, and was the product of extensive negotiations among the plaintiffs and their representatives, the Government of Canada, and various religious organizations which had operated these schools. It seeks to achieve a “fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools” and aims to promote “healing, education, truth and reconciliation and commemoration” (IRSSA, preamble), by:

- (1) financially compensating former students of residential schools;
- (2) establishing a truth and reconciliation commission;
- (3) providing an endowment to healing programs; and
- (4) resolving all outstanding litigation regarding residential schools.

[6] Compensation under the IRSSA may take two forms. First, the Common Experience Payment (“CEP”) provides \$10,000 to eligible claimants who resided at an Indian Residential School for one school year or part thereof, and an additional \$3,000 for every additional year or part thereof (IRSSA, art. 5.02). The second manner by which claimants may be compensated — and this is the process giving rise to this appeal — is through the IAP. It allows former students who were survivors of sexual abuse, serious physical abuse, and other wrongful acts resulting in serious

psychological consequences to bring claims forward, in addition to any claim they might bring under the CEP. The deadline for applying to the IAP was September 19, 2012. As of June 2014, 37,716 IAP claims had been initiated, of which 25,800 had been resolved.

[7] To initiate a claim under the IAP, a claimant must submit an application form to the Indian Residential Schools Adjudication Secretariat. The process then unfolds as described by the Ontario Superior Court of Justice:

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

(Fontaine v. Canada (Attorney General), 2014 ONSC 283, [2014] 2 C.N.L.R. 86, at para. 76)

[8] As found by the supervising judge, “for a claimant to complete the application form, he or she will disclose the most private and most intimate personal information, including a first-person narrative outlining his or her request for compensation” (2014 ONSC 4585, 122 O.R. (3d) 1, at para. 176). Applications are then forwarded to Canada and to the church entity that operated the residential school in question. If the claim is not settled at this stage, it will proceed to a hearing before an adjudicator, supervised by the Chief Adjudicator of the Indian Residential Schools Adjudication Secretariat. The Settlement Agreement Operations Branch (“SAO”), a

branch within Aboriginal Affairs and Northern Development Canada (“AANDC”), represents Canada as a defendant to these claims. The Secretariat’s website at the time of the requests for directions represented that IAP hearings are private: “The hearing is held in private. The public and the media are not allowed to attend. Each person who attends the hearing must sign a confidentiality agreement. This means that what is said at the hearing stays private” (supervising judge’s reasons, at para. 184).

[9] IAP hearings serve two purposes: testing the credibility of the claimant and assessing the harm suffered. After the hearing, the adjudicator produces a decision outlining key factual findings and, generally, the adjudicator must outline the rationale for finding or not finding that the claimant is entitled to compensation.

[10] It is the post-decision disposition of the records generated by the IAP — the IAP Documents — that is at issue here. As explained by the supervising judge, the IAP Documents comprise seven categories: “(1) applications submitted by the claimants; (2) mandatory documents containing private personal information; (3) witness statements; (4) documentary evidence produced by the parties; (5) transcripts and audio recordings of the hearings; (6) expert and medical reports; and (7) decisions of the adjudicators and any appeals” (supervising judge’s reasons, at para. 205). The Secretariat and the SAO both currently possess thousands of digital and physical copies of these various records pertaining to more than 37,000 claims made under the IAP.

[11] As already noted, beyond its compensation function, the IRSSA also aims to commemorate and memorialize the residential schools system. Article 7.01 of the IRSSA established the Truth and Reconciliation Commission (“TRC”). The TRC is tasked with “creat[ing] a historical record of the residential school system and ensur[ing that] its legacy is preserved and made accessible to the public for future study and use” (supervising judge’s reasons, at para. 5). The National Centre for Truth and Reconciliation (“NCTR”) was to archive and store the records collected by the TRC, along with the historical records regarding residential schools. The tension between that mandate of commemoration and memorialization, and the privacy which IAP claimants were promised, lies at the heart of this appeal.

B. *Judicial History*

(1) Ontario Superior Court of Justice — 2014 ONSC 4585, 122 O.R. (3d) 1

[12] The Chief Adjudicator and the TRC brought requests for directions to the Ontario Superior Court of Justice on the disposition of the IAP Documents and, if necessary, on the development of a notice program to inform claimants of the possibility of voluntarily archiving some of their IAP Documents at the NCTR.

[13] The TRC argued that the IAP Documents were government records under its control, and therefore subject to the *Library and Archives of Canada Act*. Canada and the NCTR generally supported the TRC’s position, arguing that the IAP Documents are essential to preserving the historical record of the residential school

abuses. The Chief Adjudicator, however, submitted that the IAP Documents were court records, not government records. The intention underlying the IRSSA was that the IAP Documents should be destroyed after a retention period to allow for voluntary archival by the claimant. This call for destruction, following a retention period, was generally echoed by the Assembly of First Nations, the Sisters of St. Joseph of Sault Ste. Marie, the Twenty-Four Catholic Entities, the Nine Catholic Entities, and the Independent Counsel.

[14] The supervising judge, Perell J., began by reviewing the principles of contractual interpretation applicable to the IRSSA, which entails identifying the intent of the parties at the time they negotiated the contract. He adopted the principles of interpretation applicable to the IRSSA as stated in *Fontaine v. Canada (Attorney General)*, 2013 ONSC 684, 114 O.R. (3d) 263, at para. 68: that the text of the agreement must be read as whole, having regard to the plain meaning of the words used as well as the context provided by the circumstances existing at the time the IRSSA was created. Further, he observed that the IRSSA, while not a treaty, “is at least as important as a treaty” and its interpretation must be informed by the honour of the Crown (para. 88).

[15] On balance, the supervising judge concluded that the court should exercise its jurisdiction to order destruction of the IAP Documents. He identified three reasons for doing so.

[16] First, as a matter of contractual interpretation, destruction is what the parties had bargained for. The IAP was intended to be a confidential process, and both claimants and alleged perpetrators had relied on that assurance of confidentiality in deciding to participate. Archiving the IAP Documents at Library and Archives Canada would not conform to the “high degree of confidentiality that the parties bargained for” (para. 317). Rather, the IRSSA provided that the IAP Documents, including Canada’s copies thereof, would be destroyed following a retention period, during which period they would be governed by the *Access to Information Act*, R.S.C. 1985, c. A-1, and the *Privacy Act*, R.S.C. 1985, c. P-21. In the alternative, destruction of the IAP Documents amounted to an implied term in the IRSSA, because it was necessary to give the agreement “operative efficiency” (para. 325).

[17] Second, the IAP Documents are subject to an implied undertaking, which the court can enforce by ordering their destruction. Notwithstanding Canada’s possession of some IAP Documents, the supervising judge found that the court had jurisdiction to make an order *in rem* that the IAP Documents be destroyed, subject to the rights of claimants to archive them at the NCTR, because “[t]he IAP Documents are a product of an alternative dispute resolution mechanism” (para. 335). Relying on his analysis in *Fontaine*, 2014 ONSC 283, the supervising judge held that the IAP was a form of litigation to which the implied undertaking applied. In his view, this implied undertaking restricted Canada from providing its IAP Documents to the TRC, the NCTR, or Library and Archives Canada, and the court could order destruction of all the IAP Documents to enforce the implied undertaking.

[18] Third, the IAP Documents are subject to the law governing breach of confidence. “A breach of confidence occurs when a confider discloses confidential information to a confidant in circumstances in which there is an obligation of confidentiality and the confidant misuses the confidential information” (para. 357, relying on *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, and *Coco v. A.N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch.)). The supervising judge found that Canada’s agreement to transfer the IAP Documents to Library and Archives Canada amounted to a breach of confidence, and the appropriate remedy was an order providing for destruction after a 15-year retention period.

[19] Finally, the supervising judge concluded that his destruction order should be made subject to a retention period. This would allow for the development and implementation of a notice program, conducted by the TRC or the NCTR, to advise IAP claimants of the rights they have under the IRSSA to share their stories with the NCTR.

(2) Court of Appeal for Ontario — 2016 ONCA 241, 130 O.R. (3d) 1

[20] On appeal, the Sisters of St. Joseph of Sault Ste. Marie, the Twenty-Two Catholic Entities, and the Nine Catholic Entities, supported by the Independent Counsel, argued that the IRSSA expressly provides that archiving requires *their* consent, and not just that of a claimant. Canada, on cross-appeal, supported by the TRC and NCTR, argued that it controls the IAP Documents, which are accordingly

subject to federal privacy, access to information, and archiving legislation. Independent Counsel, in addition to supporting the Catholic Entities' submission regarding consent, argued that the notice program should not be run by either the TRC or NCTR, but by the Chief Adjudicator. Further, the retention period for the IAP Documents should be lowered to two years from 15 years. Finally, the destruction order should include documents from the ADR process.

[21] Writing for the majority, Strathy C.J. dismissed both the appeal and cross-appeal. Nonetheless, he varied Perell J.'s order to give effect to the Independent Counsel's submissions on the notice program (that it should be administered by the Chief Adjudicator) and on the inclusion of the ADR documents.

[22] Regarding the appeal, the majority concluded that the IAP Documents may be archived with the consent of the claimant alone. Schedule D of the IRSSA gives claimants the option of having a transcript from their hearing deposited in an archive for that purpose. The IRSSA permits survivors to disclose their own experiences, despite any claims that others may make with respect to confidentiality and privacy. Requiring consent of other "individuals affected" for archiving of the IAP Documents would "eviscerate" claimants' IRSSA rights to disclose their complaints, to have their evidence archived only with their consent, and to exercise control over their IAP Documents (paras. 111 and 114; Sch. N., art. 11). "By allowing claimants to archive their IAP transcripts, the IRSSA merely provides claimants with

an alternative and expeditious means of preserving their stories as part of the TRC process” (para. 120).

[23] The majority further concluded the notice plan fell within the supervising judge’s administrative discretion, as it was not a material amendment to the IRSSA. Schedule D expressly contemplates that claimants “will . . . be given the option of having the transcript deposited in an archive developed for the purpose”. “[T]he IRSSA gives claimants the right to obtain their IAP documents and a transcript of their evidence, and the right to deposit that material in the institution created to preserve the history of the abuses of residential schools, the NCTR” (para. 126). The notice program does not add to or detract from this right; “it merely ensures that claimants are aware of it and able to exercise it” (para. 127).

[24] On the cross-appeal, the majority found that the IAP Documents are not government records and thus are not subject to the *Library and Archives of Canada Act*; accordingly, “disposal or destruction of the documents is not prohibited by law” (para. 77). “[W]hether the IAP documents are government records . . . turns on whether they are under the control of a government institution” (para. 141). Here, the IAP was not a federal government program. Rather, it was the product of a court-approved settlement. The AANDC, a listed government institution, did not control the IAP Documents through either the Secretariat or the SAO. The Secretariat, which administers the IAP, is independent from AANDC and comes under the direction of the Chief Adjudicator, and therefore the controls of the Chief Adjudicator. While the

SAO is part of the AANDC, it was a litigant in the IAP, representing Canada at the IAP hearings. Accordingly, the SAO's possession and use of the IAP Documents was limited to the purposes for which they were provided. It follows that it did not control them. Strathy C.J. also held that while "the implied undertaking rule is not a precise fit for the IAP documents", the rationale underlying the rule is, given the nature of these documents, "a harmonious exercise of the court's inherent jurisdiction" (para. 183). The SAO could only use the IAP Documents for the purpose of the IAP process, and its possession was always constrained by the court's inherent jurisdiction and the principle underlying the implied undertaking rule. Thus, this reaffirms that the IAP Documents were not under the control of the SAO.

[25] The majority further found the supervising judge's order regarding destruction of all the IAP Documents (other than those in the claimants' possession or archived with their consent) after a 15-year retention period was reasonable. The IRSSA was silent on the disposition of the documents, and the supervising judge was entitled to fill this "gap" by exercising his supervisory authority over the class action (para. 205). As the supervising judge found, "near to absolute confidentiality was a necessary aspect of the IAP" (para. 209). The mere fact that Sch. D did not require Canada to destroy the applications immediately upon conclusion of a given claim does not imply or import a right to retain all the IAP Documents forever. The public record — that is, "the history of residential school and the stories of survivors who have willingly shared them" — will still be preserved through the work of the TRC (para. 219).

[26] The majority, nevertheless, found it was unreasonable for the supervising judge to have ordered the TRC and NCTR to conduct the notice program, and varied the order to direct that it be conducted by the Chief Adjudicator. Furthermore, the majority varied the order to include the ADR documents.

[27] Justice Sharpe, while agreeing that the appeal should be dismissed, would have allowed the cross-appeal on the ground that the IAP Documents are “government records” (para. 250) which, as such, cannot be destroyed. The SAO is a government institution that has physical possession of copies of the IAP Documents in its capacity as the department of government responsible for carrying out Canada’s functions as a defendant in the IAP. This amounts to government control. The legal doctrines relied on by the supervising judge — the implied undertaking rule and breach of confidence — therefore have no application, and do not affect the status of the IAP Documents as government records. Resort should not be had “to a residual, discretionary and exceptional doctrine to justify the destruction of decisions that are central to the legitimacy of the very process the court is administering” (para. 290).

[28] Justice Sharpe also found that express language in the IRSSA shows that the parties intended that the IAP Documents would be archived. Schedule D, App. II, item (iv) provides that copies of applications “other than those held by the Government will be destroyed”. Appendix B of the Guide to the Independent Assessment Process Application (2013) (online) provides that only the National Archivist can destroy government records. The Guide states that personal information

will be handled in accordance with the *Access to Information Act* and *Privacy Act*. In the result, assurances of confidentiality, relied upon by the supervising judge, cannot justify the exclusion of documents from the statutory scheme. IAP adjudicators could not promise that the laws of Canada would not apply, and Canada could not promise a level of confidentiality that would take the IAP Documents outside the reach of the legislation.

III. Analysis

A. *The Supervising Judge's Jurisdiction to Make the Order*

[29] At its core, this appeal concerns an order made by the supervising judge regarding what was to be done with the IAP Documents under the terms of the IRSSA. The first question before this Court is therefore whether the supervising judge had authority to make that order. This question is distinct from the appropriateness of the order.

[30] Canada argues that the IAP Documents currently in the possession of the SAO and the Secretariat are “under the control of a government institution”, within the meaning of the *Access to Information Act*, the *Privacy Act*, and the *Library and Archives of Canada Act*. Broadly speaking, these statutes regulate the retention, disclosure, and eventual archiving of records that are under the control of federal government institutions. In Canada's view, the supervising judge had no jurisdiction to order destruction of the IAP Documents, because s. 12 of the *Library and Archives*

of *Canada Act* provides that “[n]o government or ministerial record . . . shall be disposed of, including by being destroyed, without the written consent of the Librarian and Archivist or of a person to whom the Librarian and Archivist has, in writing, delegated the power to give such consents.” In other words, Canada’s position is that, given the government’s putative “control” over these documents, the Librarian and Archivist of Canada (or his or her delegate) alone has authority over the disposition of the IAP Documents retained by the SAO and the Secretariat, and so the supervising judge could not order their destruction.

[31] As we have already noted, nine provincial and territorial superior courts certified the class action and approved the IRSSA (see, e.g., *Baxter*). Judges of these courts were designated as supervising judges, and play a vital role under the IRSSA. Supervising judges, significantly, have *administrative and supervisory jurisdiction* over the implementation and administration of the IRSSA and can, among other things, hear requests for directions. If, therefore, the proper administration and implementation of the IRSSA necessitates direction on the handling of the IAP Documents, supervising judges are empowered to give that direction.

[32] These broad powers are conferred upon supervising judges by the orders which approved and implemented the IRSSA (see, e.g., supervising judge’s reasons, at paras. 157-59). They are also supported by class action legislation, which provides that courts must have generous discretion to make orders and impose terms as necessary to ensure a fair and expeditious resolution of class actions (see, e.g., *Class*

Proceedings Act, 1992, S.O. 1992, c. 6, s. 12; *Endean v. British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 162, at para. 38). It follows, particularly given the nature of the IAP and the IAP Documents, that the supervisory role in implementing the terms of the IRSSA included making directions regarding disposition of the IAP Documents at the conclusion of the IAP.

[33] This supervisory role, moreover, existed irrespective of whether the IAP Documents are “under the control of a government institution” within the meaning of the *Library and Archives of Canada Act* and other relevant federal legislation (*Library and Archives of Canada Act*, ss. 2 and 12; *Privacy Act*, ss. 7 to 10 and 12; *Access to Information Act*, s. 4). Further, in any instance where the scope of superior courts’ powers granted by class action legislation does not expressly contemplate certain supervisory functions, superior courts retain residual supervisory powers under their inherent jurisdiction. Removing the inherent jurisdiction of superior courts requires “clear and precise statutory language” (*R. v. Rose*, [1998] 3 S.C.R. 262, at para. 133; see also *Endean*, at paras. 24, 56 and 60). It is far from clear that the express language of s. 12 of the *Library and Archives of Canada Act* is directed at limiting the inherent jurisdiction of superior courts, or their supervisory jurisdiction over class actions. The *Library and Archives of Canada Act* does not mandate the retention of government records, nor does it prevent the courts from making orders regarding the disposition of government records. In sum, the supervising judge correctly found that he had authority to make orders as to the disposition of the IAP Documents.

[34] In light of this conclusion, it is unnecessary to determine whether the IAP Documents are under the control of a government institution, as Canada argues. The courts' supervisory role in implementing the IRSSA allows them to make orders regarding the disposition of the IAP documents regardless of whether or not they are government records. We therefore turn to consider the basis for the supervising judge's order itself — that is, his interpretation of the IRSSA — and whether, in light of that interpretation, the order for destruction of the IAP Documents was appropriate.

B. *The Supervising Judge's Order*

(1) Standard of Review

[35] The interpretation of the IRSSA is a question of mixed fact and law reviewable for palpable and overriding error. Contractual interpretation generally involves questions of mixed fact and law subject to appellate deference (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 50-51 and 55; *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306, at para. 21). This rule is not absolute. It does not apply, for example, to the interpretation of a standard form contract, where its interpretation has precedential value, and there is no meaningful factual matrix specific to the particular parties to assist the interpretation process (*Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 46). In our view, however, the general rule stated in *Sattva* applies here, such that the palpable and overriding error standard governs appellate review of the supervising judge's interpretation of

the IRSSA. While the IRSSA undoubtedly has “very significant implications for Canada and our aboriginal peoples” (C.A. reasons, at para. 294), it is at root a contract, the meaning of which depends on the objective intentions of the parties. As the majority at the Court of Appeal observed, the question of impact is distinct from precedential value. While the supervising judge’s interpretation of the IRSSA will impact thousands of IAP claimants, it will have no significant precedential value outside of the IAP due to the IRSSA’s *sui generis* nature. And, as shall become apparent below, the factual matrix looms large in ascertaining the meaning of this particular contract.

[36] As for the supervising judge’s decision to order destruction of the IAP Documents held by Canada following a 15-year retention period, a deferential standard is also appropriate. As explained above, supervisory courts have wide discretion to make appropriate orders to ensure the fair and expeditious determination of class proceedings. Such decisions are afforded deference on review (*Lavier v. MyTravel Canada Holidays Inc.*, 2013 ONCA 92, 359 D.L.R. (4th) 713, at para. 20). As regards the exercise of discretion, “[a]ppellate intervention is warranted only if the judge has clearly misdirected himself or herself on the facts or the law, proceeded arbitrarily, or if the decision is so clearly wrong as to amount to an injustice” (*P. (W.) v. Alberta*, 2014 ABCA 404, 378 D.L.R. (4th) 629, at para. 15; *Balogun v. Pandher*, 2010 ABCA 40, 474 A.R. 258, at para. 7). As this Court has said, where the judge at first instance has given sufficient weight to all relevant considerations and the exercise of discretion is not based on an erroneous principle, appellate reviewers must

generally defer (*Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801, at para. 95; *Reza v. Canada*, [1994] 2 S.C.R. 394, at p. 404; *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, at para. 52).

(2) Does the Supervising Judge’s Interpretation of the IRSSA Warrant Appellate Intervention?

[37] Interpretation of written contractual provisions must be grounded in the text and read in light of the entire contract (*Sattva*, at para. 57, relying on G. R. Hall, *Canadian Contractual Interpretation Law* (2nd ed. 2012), at pp. 15 and 30-32). Surrounding circumstances, including “knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting”, may be considered in interpreting the terms of a contract, although they may not overwhelm the contract’s express words (*Sattva*, at para. 58).

(a) *The Text of the IRSSA*

[38] The supervising judge concluded that the express terms of the IRSSA provided that the IAP Documents “would be treated as highly confidential but subject to the very limited prospect of disclosure during a retention period and then the documents, including Canada’s copies, would be destroyed” (para. 322).

[39] The preamble to the IRSSA states that it aims to provide “a fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools” and to promote “healing, education, truth and reconciliation and commemoration”. There are several main components to the IRSSA, including provisions bearing on the IAP (in Sch. D) and on the TRC (in Sch. N). Schedule D requires hearing participants to sign confidentiality agreements, confirming that the evidence disclosed is confidential. While Sch. D does not expressly state whether federal legislation will apply to documents created or uncovered by the IAP, it does refer to the intended treatment of various types of information and documents:

- (1) Article III(o) restricts disclosure of information from hearings and the use of audio recordings and transcripts, subject to the claimant’s option to deposit the transcript in an archive:

o. Privacy

- i. Hearings are closed to the public. Parties, an alleged perpetrator and other witnesses are required to sign agreements to keep information disclosed at a hearing confidential, except their own evidence, or as required within this process or otherwise by law. Claimants will receive a copy of the decision, redacted to remove identifying information about any alleged perpetrators, and are free to discuss the outcome of their hearing, including the amount of any compensation they are awarded.
- ii. Adjudicators may require a transcript to facilitate report writing, especially since they are conducting questioning. A transcript will also be needed for a review, if requested. Proceedings will be recorded and will be transcribed for these purposes, as well as if a Claimant requests a copy of their own evidence for

memorialization. Claimants will also be given the option of having the transcript deposited in an archive developed for the purpose.

(2) Appendix II, item (i) requires claimants to sign a declaration which includes confidentiality provisions as part of their application form:

- i. The Secretariat will admit claims to the IAP as of right where the application is complete and sets out allegations which if proven would constitute one or more continuing claims, and where the Claimant has signed the Declaration set out in the application form, including the confidentiality provisions in the Declaration.

(3) Appendix II, item (iv) restricts the use of IAP applications:

- iv. The following conditions apply to the provision of the application to the Government or a church entity:
 - The application will only be shared with those who need to see it to assist the Government with its defence, or to assist the church entities with their ability to defend the claim or in connection with their insurance coverage;
 - . . .
 - 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.

(4) Appendix VII imposes document production requirements upon claimants upon filing an IAP application and upon the claimant having

been accepted into the IAP. Specifically, the claimant must produce (or explain the absence of) documents to prove elevated levels of consequential harm and loss of opportunity. These documents may include records relating to treatment, corrections, tax, and education, as well as workers' compensation records.

(5) Appendix VIII imposes document production requirements upon the federal government. It must seek, collect and report the dates a claimant attended a residential school, and must report on the persons named in the application as having abused the claimant. Claimants have a right to request copies of documents containing this information, although information about other persons named in the documents (other than alleged perpetrators) are to be “blacked out . . . as required by the Privacy Act”. This is the lone express reference, within Sch. D, to the *Privacy Act* or related federal legislation.

[40] Schedule N of the IRSSA details the mandate and process of the TRC. It identifies the TRC's work as built on principles which include being “victim-centered”; providing “confidentiality (if required by the former student)”, and “do[ing] no harm”. Generally, the TRC is tasked with creating a complete historical record of the residential schools system, and promoting awareness and public education of Canadians about the residential schools system and its impacts (Sch. N, art. 1.)

[41] Another principle — that survivors’ stories will be shared only when done so *voluntarily* — is frequently emphasized in Sch. N. Article 2(c) provides that the TRC cannot “compel . . . participation”. Article 4(b) states that “the truth and reconciliation process is committed to the principle of voluntariness with respect to individuals’ participation”. Article 11 provides that, “[i]nsofar as agreed to by individuals affected and as permitted by process requirements, information from the [IAP] . . . may be transferred to the [TRC] for research and archiving purposes”. Federal privacy, access to information, and archiving legislation are expressly stated to apply to records held by the TRC.

(b) *The Surrounding Circumstances*

[42] After an extensive review of the evidence submitted on the requests for directions, the supervising judge found that the negotiators of the IRSSA intended the IAP to be a confidential and private process, that claimants and alleged perpetrators relied on the confidentiality assurances and that, without such assurances, the IAP could not have functioned. In our view, these findings are not only free of palpable and overriding error, they are simply inescapable in light of the evidence submitted.

[43] The National Chief of the Assembly of First Nations at the time of the IRSSA’s negotiation emphasized that strict confidentiality of the IAP was intended as part of the agreement so that “nobody except the survivor would have access to the story of the survivor” (Affidavit of Larry Philip Fontaine, A.R. vol. IX, at p. 97). This view was echoed by IAP claimants who tendered affidavits attesting to their

understanding that information disclosed within the IAP would not be shared outside of that process.

[44] Confidentiality was also crucial to the participation of the church defendants. For example, the Chancellor of the Archdiocese of Halifax-Yarmouth stated that the assurance of confidentiality of all the IAP Documents was a vital inducement to his archdiocese entering the agreement. The former General Superior of the Congregation of the Sisters of St. Joseph of Sault Ste. Marie emphasized that, by participating in the IAP, her congregation relinquished the right to seek to preserve its reputation and that of its members by challenging the allegations of accusers in court, adding that it would not have done so were there the slightest possibility that information disclosed within the IAP information could become public.

[45] There is also evidence that the IAP would not have achieved its purpose but for the promise of absolute confidentiality. The current Chief Adjudicator stated that confidentiality is a central concern to participants and is often the “key factor” in whether a claim proceeds (Affidavit of Daniel Shapiro, A.R. vol. III, at pp. 139-41). Claimants have said that they would not have participated in the IAP without assurances of complete confidentiality. This was confirmed by the director of Settlement Agreement Operations West, who stated that claimants were often reticent to disclose all allegations due to feelings of shame and embarrassment, and that those concerns were allayed by assurances of confidentiality (Affidavit of David Russell, A.R. vol. X, at pp. 74-75). Assurances of confidentiality were also important to

securing the participation of alleged perpetrators in IAP claims (Affidavit of F. Mark Rowan, A.R. vol. IX, at pp. 101-3).

[46] The high premium placed on confidentiality by the participants in the IAP becomes readily apparent when one considers the nature of the information disclosed during this process. As was made plain by the submissions of the Inuit Representatives before this Court, that information is — to put it mildly — of the most sensitive and private nature. As set out in art. I of Sch. D, the amount of compensation depends on the number of “Compensation Points” applicable to proven acts of abuse and the resulting harm that they establish. At the lower range of the spectrum of abuse are acts such as “One or more incidents of fondling or kissing”, and “One or more incidents of masturbation”. At the top of the table of compensable acts of abuse are “Repeated, persistent incidents of anal or vaginal intercourse” and “Repeated, persistent incidents of anal/vaginal penetration with an object”. The highest level of compensable harm is “Continued harm resulting in serious dysfunction”, which may be evidenced by “psychotic disorganization, loss of ego boundaries, personality disorders, pregnancy resulting from a defined sexual assault or the forced termination of such pregnancy or being required to place for adoption a child resulting therefrom, self-injury, suicidal tendencies, inability to form or maintain personal relationships, chronic post-traumatic state, sexual dysfunction, or eating disorders”. The lowest level of compensable harm under the IAP is “Modest Detrimental Impact” which is evidenced by “anxiety, nightmares, bed-wetting, aggression, panic states, hyper-vigilance, retaliatory rage, depression, humiliation,

loss of self-esteem”. Additional compensation points can be allocated to proven harm if certain “Aggravating Factors” are present, such as humiliation or degradation.

[47] At the risk of understatement, the reluctance of claimants to undergo questioning by an adjudicator on these topics without assurances of absolute confidentiality is fully understandable. “Rarely, if ever, in Canadian history has such a broad range of extremely sensitive records been demanded from so many claimants as part of a class action suit or a comparable compensation or reparations inquiry” (Affidavit of David H. Flaherty, A.R. vol. IX, at p. 125). As explained by the Inuit Representatives, a dossier created in an IAP claim amounts to “a very dark and very partial biography” of a claimant’s life “from a very young age to the time of the hearing” (transcript, at p. 136). And, as the spectrum of actions and harms that we have just recounted should make excruciatingly clear, disclosure of information contained in the IAP Documents could be devastating to claimants, witnesses, and families. Further, disclosure could result in deep discord within the communities whose histories are intertwined with that of the residential schools system — a concern which was made plain in the evidence before the supervising judge:

According to AANDC data, approximately 32% of all claims include allegations of student-on-student abuse. Attached and marked as **Exhibit “B”** is a map obtained from the AANDC web-site, summarizing student-on-student claims to December 31, 2012. While the Secretariat and I take the confidentiality interests of all claimants and alleged perpetrators very seriously, the circumstances of student-on-student claims raise unique and heightened privacy and serious safety risks within First Nations communities if the confidential information were to be released, or even if there is a perception that the information *may* be released. It is not uncommon for such claims to be made against individuals from

claimants' own community. The potential for violence within communities and serious distress, including self-harm is heightened in these cases. [Underlining added.]

(Affidavit of Daniel Shapiro, at p. 141)

I know that within my community as well as other aboriginal communities if there were cases where survivors are alleged to have abused other children in the residential school, and their identities became public or accessible to any person, this would have long term devastating consequences in our communities. This would not only devastate these individuals but also their grandchildren and great grandchildren if this information came out at a future date.

It was for this reason that I strongly argued that in cases of student on student abuse the names of alleged perpetrators never be made public to any person. The assurance that this information would never be disclosed outside of the IAP process and the guarantees in the Settlement Agreement were the protections that we obtained as a compromise in the Settlement Agreement. 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 some day become available to their descendants or researchers who may publish information. Within our communities, such knowledge even in future generations would continue the legacy of dysfunction and trauma that was created by the residential schools. [Emphasis added.]

(Affidavit of Larry Philip Fontaine, at pp. 99-100)

Another claimant stated that her community is “so small and close” that she could be easily identified even were her name omitted (Affidavit of Jane Doe, A.R. vol. IX, at p. 70).

(c) *The IAP Guide*

[48] In addition to the text of the IRSSA and surrounding circumstances, the Guide was referred to by the supervising judge as extrinsic evidence in his

interpretation of the IRSSA. Its utility, however, was contested by the various parties before this Court. The Guide is a document intended to aid parties in understanding if they qualify for the IAP, and to help parties fill out the IAP application form. It does not form part of the IRSSA, and indeed it displays at the outset a prominent disclaimer stating that the IAP is governed by Sch. D of the IRSSA and that, in the event of any differences between the Guide and Sch. D, the official document will prevail.

[49] Appendix B of the Guide, titled “Protection of your personal information” purports to explain how federal privacy, access, and archiving legislation applies to personal information adduced in an IAP claim. The pertinent provisions include:

Definition of personal information

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

Level of security

We will treat your *Application Form* with care and confidentiality. This means that security rules are in place to protect your *Application Form*. The Government of Canada uses the “Protected B” security level for sensitive and personal information. Once you submit it, we will treat your *Application Form* as a “Protected B” document.

Privacy and information laws

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

The *Access to Information Act* is the federal law that allows access to government information. However, it protects certain kinds of information, including personal information.

We will deal with personal information about you and other people you identify in your claim privately and confidentially. We will do so in accordance with *Access to Information Act*, the *Privacy Act*, and any other applicable law, or we will ask your permission to share information.

In certain situations, the government may have to give personal information to certain authorities. For example, in a criminal case before the courts, the government may have to give information to the police if they have a search warrant. Another example is when the government has to give information to child welfare authorities or the police if the government finds out that a child needs protection. The government will also share personal information with people involved in resolving your claim, as we describe in the section “Sharing your personal information with others” on the next page.

...

Collection of personal information

Personal information in your *Application Form* and all documents we gather for your claim are collected **only** so we can (1) operate and administer the Independent Assessment Process and (2) resolve your residential school claim.

Use of your personal information

We will review the personal information you give in your *Application Form* and all documents we gather for your claim. This review lets us find out whether we can admit your claim into this Independent Assessment Process. If your Application can be admitted into this process, we will use the information to research your attendance at the residential school(s) and to find documents relevant to you and your claim.

Sharing your personal information with others

If a church organization is participating in the resolution of your claim, we will share some of your personal information confidentially with church representatives.

If you ask for counseling support and you give your permission, we will give Health Canada information about your participation in this Independent Assessment Process so that you can receive counseling support.

If the government finds the person who you claim abused you, we will share some of the personal information you have given us with him or her. This will include details of any claims you’ve made against them. This is necessary to give the person a chance to answer your claim. We

will also share some of your personal information with witnesses participating in the resolution of your claim. In both situations, we will share only information necessary to answer your claim. We will not share information that identifies your address.

The Adjudicator will receive your personal information before the hearing. This will let him or her review your claim, question you and other witnesses, and decide whether to provide you compensation and, if so, how much.

Keeping your records

The *Privacy Act* requires the government to keep your personal information for at least two years. Currently, the government keeps this information in the National Archives for 30 years, but this practice can change at any time. Only the National Archivist can destroy government records. [Underlining added; pp. 28-29.]

As is readily seen, the Guide explicitly refers to the application of the *Privacy Act* and the *Access to Information Act* to the IAP Documents, and notes the prospect of their archival in the National Archives. That said, it also refers to disclosure by the government in certain specific circumstances. We shall return to the Guide below.

(d) *The Intended Disposition of the IAP Documents*

[50] In the light of the foregoing, we would not disturb the supervising judge's finding that the IRSSA provided for the destruction of the IAP Documents.

[51] With respect to the disposition of the IAP Documents, the direction contained in the text of IRSSA is less than clear. As explained above, art. III(o) of Sch. D provides that information disclosed at an IAP hearing is confidential, but may be disclosed "as required within this process or otherwise by law". Transcripts and

recordings may only be used for limited purposes, all of which are specific to the IAP claim, except for the claimant's option to deposit the transcript in an archive. Appendix II, item (iv) of Sch. D states that all copies of applications "other than those held by the Government will be destroyed on the conclusion of the matter".

[52] Canada points to two bases for the application of federal privacy, access, and archives legislation in Sch. D: the reference in art. III(o) to disclosure of information disclosed at IAP hearings as required "otherwise by law"; and the proviso in App. II, item (iv) to the effect that Canada's copies of applications will not be destroyed at the conclusion of the matter. The supervising judge turned his mind to both of these provisions, concluding that they refer to the potential use of such information in criminal or child welfare proceedings, and that Canada's copies of the application forms should be held during a retention period for this purpose. In light of the text of the IRSSA and the circumstances surrounding it, the supervising judge's finding does not evidence a palpable and overriding error. In our view, it is unlikely that the drafters intended these words as a trail of breadcrumbs implicitly linking the IRSSA to federal privacy, access, and archiving legislation — especially since the *Privacy Act* is explicitly referred to in connection with federal government disclosure obligations in App. VIII of Sch. D, and since privacy, access to information, and archives legislation are also explicitly referred to in Sch. N.

[53] We note that the IRSSA does not expressly provide a disposition for IAP decisions, beyond stating that claimants will receive a redacted copy. In our view, the

necessary implication of this is that other copies of the decisions will not be preserved or eventually archived. The purpose of restricting the use and disclosure of the IAP application forms and the information adduced at hearings would be defeated were IAP decisions, which necessarily replicate a substantial part of that information, not subjected to similar restrictions.

[54] The significance of the Guide was hotly contested before this Court. While the Guide does mention expressly the application of the federal privacy, access, and archival legislation to the IAP Documents, it also appears to guarantee an exhaustive set of circumstances where personal information is disclosed, which circumstances are markedly narrower than the rights of access under the federal legislation. Given the clear disclaimer at the outset of the Guide, the fact that its provisions regarding privacy seem completely unmoored from the text of Sch. D, and that its drafters apparently reproduced the privacy provisions from a similar document used in the former ADR process that was published three years before the IRSSA (Affidavit of Daniel Ish, A.R. vol. III, at p. 161), we ascribe no interpretive weight to the Guide. It follows that the supervising judge committed no error by omitting to import the Guide's references to federal access, privacy, and archiving legislation into the IRSSA.

[55] Our conclusion regarding the supervising judge's interpretation of the text of the IRSSA is affirmed by the intent of the parties themselves. Application of the *Privacy Act* to the IAP Documents clearly runs counter to the principles of

confidentiality and voluntariness upon which, as we have explained, the IAP was founded. The *Privacy Act* protects personal information from disclosure, but only for 20 years after the death of the relevant individual. Even during the protection period, disclosures of personal information contained in these documents may occur. For example, the *Privacy Act* provides individuals to a right of access to their personal information, which is defined to include “the views or opinions of another individual about the individual” (s. 3 “personal information”). As pointed out by the Privacy Commissioner of Canada, this might allow an alleged perpetrator to seek information about their accusers. Under s. 8(2)(j) of the *Privacy Act*, personal information may be disclosed at any time for research or statistical purposes.

[56] Further, retention in the National Archives, whose purposes include the accessibility and diffusion of knowledge (*Library and Archives of Canada Act*, preamble), is inconsistent with the absolute level of confidentiality that the parties intended for these documents. As the supervising judge found, the federal access, privacy, and archiving statutory scheme does not conform to the “high degree of confidentiality that the parties bargained for” (para. 317). Nor does archival of the IAP Documents in the National Archives, coupled with their potential disclosure, conform to the principle of voluntariness governing the disclosure by survivors of their stories.

[57] This principle of voluntary disclosure deserves particular consideration here. It emerges from several of the IRSSA’s provisions. In Sch. D, art. III(o)(i) and

(ii) provide that claimants are *free* to discuss the outcome of their hearing and may *choose* to retain a copy of their evidence for memorialization and to have their transcript archived. Appendix II, item (iv) allows claimants to *choose* to share copies of their applications with others. The principle of voluntariness further emerges from arts. 2(c), 4(b) and 11 of Sch. N which, taken together, provide that participation by IAP claimants in the TRC’s project of commemoration is entirely *at the discretion of the claimants*.

[58] The position taken by the TRC, and later by the NCTR, that these documents should be transferred to the National Archives and eventually shared with the NCTR, would defeat the principle of voluntariness underlying the IAP. Irrespective of the claimants’ intentions or wishes, *their* stories — which, it bears reiterating, include accounts of abuse ranging from the monstrous to the humiliating, and of harms ranging from the devastating to the debilitating — would in time be disclosed to the NCTR (and, by extension, to the public), to be applied to its project of commemorating and memorializing the residential schools system. In other words, highly sensitive and private experiences would be conscripted to serve the cause of public education. But this is plainly not what the parties bargained for. We agree with the majority at the Court of Appeal that “the IRSSA put the survivors, not Canada and not anyone else, in control of their own stories” (para. 228).

[59] The NCTR’s position is prompted by its stated concern that destruction of the IAP Documents would “deny future generations . . . the collective knowledge and

history essential to healing” (R.F., at para. 119). In its view, we are not now in a position to know how important the IAP Documents may be to “future healing”, since the concerns over the potential negative ramifications of disclosure were expressed at a time when the wounds inflicted by residential schools are still “raw” (transcript, at pp. 59-60). This submission, whether meritorious or not, has no bearing on the interpretation of the IRSSA. To this, however, the NCTR says the IRSSA and the IAP are “flawed” (transcript, at p. 66). But, with respect, the supervising judge was tasked with interpreting the IRSSA as it was agreed to, not as the NCTR would have had the parties agree to. It is not for this Court to conscript the stories of survivors, where confidentiality and solely voluntary disclosure had been agreed to.

[60] We accept Canada’s and the NCTR’s submission that, in addition to the provision of compensation through the CEP and the IAP, public commemoration of the residential schools system is also a core objective of the IRSSA. That does not mean, however, that each component of the IRSSA must equally contribute to each of those objectives. The IAP is, above all, a method for compensating for abuse and consequent harm. The supervising judge weighed the evidence and found that this core compensatory function would be compromised were the information to be disclosed without claimants’ consent. We defer to the fact-finder on that point. Further, because of the past work of the TRC and the ongoing work of the NCTR, we do not doubt that the objective of commemoration is being met. Residential schools survivors have already given more than 7,000 statements to the TRC detailing their experiences (Affidavit of David H. Flaherty, at para. 56). And, under the terms of the

supervising judge's order, IAP claimants will still have the possibility to archive their records with the NCTR if they wish to do so.

[61] Finally, Canada also argued that the destruction of the IAP documents would impede its ability to defend itself against future claims. In view of the plain language of the release in favour of Canada contained in the IRSSA (art. 4.06(g)), which operates irrespective of whether the class members availed themselves of the IAP and of whether they received compensation, we are not satisfied that this is the case.

(3) Was the Order an Appropriate Exercise of the Court's Supervisory Jurisdiction?

[62] Having concluded, without palpable and overriding error, that the IRSSA allowed for the destruction of the IAP Documents, the supervising judge then had to craft an appropriate order. In doing so, he had to strike a balance between competing concerns: preserving confidentiality and the need to memorialize and commemorate, all the while respecting the choice of survivors to share (or not share) their stories. The supervising judge's order, as modified by the majority of the Court of Appeal, charts an appropriate course between the Scylla of potentially unwanted destruction and the Charybdis of potentially injurious preservation. The destruction order is subject to a 15-year retention period, during which claimants may choose to have their IAP Documents preserved and archived. That choice will be brought to the attention of claimants through a notice program administered by the Chief

Adjudicator. We recognize that this order may be inconsistent with the wishes of deceased claimants who were never given the option to preserve their records. A perfect outcome here is, in these circumstances, simply not possible. In our view, however, the destruction of records that some claimants would have preferred to have preserved works a lesser injustice than the disclosure of records that most expected never to be shared. The supervising judge's order, as varied by the majority of the Court of Appeal, was an appropriate exercise of his discretion.

[63] That variation was, moreover, entirely appropriate in the circumstances of this case. The notice program should be carried out by the Chief Adjudicator, as it does not fall within the mandate of either the TRC or the NCTR, and as it would be inconsistent with a confidential process to provide them with the information necessary for the program. Further, we support the direction of the Court of Appeal that the orders should include documents developed in the ADR process. As the intent of the IRSSA was to consolidate existing litigation into the IAP, consistency and fairness require that the records resulting from that litigation should be treated in the same manner as the IAP Documents.

IV. Conclusion and Disposition

[64] We would dismiss the appeal, with costs to the Independent Counsel. We also endorse the entreaties of the courts below that the Chief Adjudicator conduct the notice program without delay and with full cooperation from the parties, in order to give effect to the express wishes of the greatest number of IAP claimants possible.

APPENDIX

AANDC	Aboriginal Affairs and Northern Development Canada
ADR	Alternative Dispute Resolution
CEP	Common Experience Payment
IAP	Independent Assessment Process
IRSSA	Indian Residential Schools Settlement Agreement
NCTR	National Research Centre for Truth and Reconciliation
SAO	Settlement Agreement Operations Branch
TRC	Truth and Reconciliation Commission

Appeal dismissed with costs to the respondent Independent Counsel.

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Solicitors for the respondent Assembly of First Nations: Assembly of First Nations, Ottawa; Kathleen Mahoney Professional Corporation, Calgary.

Solicitors for the respondent Independent Counsel: Grant Huberman, Vancouver; Diane Soroka Avocate Inc., Westmount, Quebec; Sandra Staats Law Corporation, Prince George, British Columbia.

Solicitors for the respondent Inuit Representatives: Legal Opinion North, Ottawa.

Solicitors for the respondent Chief Adjudicator of the Indian Residential Schools Adjudication Secretariat: Arvay Finlay, Vancouver; Susan E. Ross, Saskatoon.

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Solicitors for the intervener Coalition to Preserve Truth: Devlin Gailus Watson, Victoria.

Solicitors for the intervener Information Commissioner of Canada: Gowling WLG (Canada), Ottawa; Office of the Information Commissioner of Canada, Gatineau.