



**SUPREME COURT OF CANADA**

**CITATION:** J.W. v. Canada (Attorney General), 2019 SCC 20

**APPEAL HEARD:** October 10, 2018

**JUDGMENT RENDERED:** April 12, 2019

**DOCKET:** 37725

**BETWEEN:**

**J.W. and REO Law Corporation**  
Appellants

and

**Attorney General of Canada, Chief Adjudicator of the Indian  
Residential Schools Adjudication Secretariat and Assembly of  
First Nations**  
Respondents

- and -

**Independent Counsel and K.B.**  
Interveners

**CORAM:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown and  
Rowe JJ.

**REASONS:** Abella J. (Wagner C.J. and Karakatsanis J. concurring)  
(paras. 1 to 55)

**CONCURRING REASONS:** Côté J. (Moldaver J. concurring)  
(paras. 56 to 174)

**DISSENTING REASONS:** Brown J. (Rowe J. concurring)  
(paras. 175 to 196)

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J.W. v. CANADA (ATTORNEY GENERAL)

**J.W. and REO Law Corporation**

*Appellants*

v.

**Attorney General of Canada,  
Chief Adjudicator of the Indian Residential  
Schools Adjudication Secretariat and  
Assembly of First Nations**

*Respondents*

and

**Independent Counsel and K.B.**

*Interveners*

**Indexed as: J.W. v. Canada (Attorney General)**

**2019 SCC 20**

File No.: 37725.

2018: October 10; 2019: April 12.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA

*Civil procedure — Class proceedings — Settlement — Administration and implementation — Settlement agreement resolving class actions brought by former Aboriginal students for harms suffered at residential schools — Agreement providing procedure for settling individual claims through adjudicative process — Whether courts can intervene in relation to adjudication decisions where internal review mechanisms exhausted — Appropriate scope of judicial recourse.*

The *Indian Residential Schools Settlement Agreement* (“Agreement”) represents the negotiated settlement of thousands of individual and class action lawsuits relating to the operation of residential schools. Nine provincial and territorial superior courts approved the Agreement. The Agreement includes a procedure for settling individual claims through an adjudicative process — the Independent Assessment Process (“IAP”). The IAP describes which harms are compensable. The Agreement also includes a system of internal reviews. There is no right of appeal to the courts. However, supervising judges from each province oversee the administration and implementation of the Agreement.

W brought a claim for compensation in accordance with the IAP, alleging that an incident he suffered while attending a residential school constituted compensable sexual abuse within the meaning of the IAP. W’s claim was rejected by the initial adjudicator because, despite the fact that she believed W’s account of what transpired, she was not satisfied that the perpetrator acted with a sexual purpose,

which she concluded was an essential element in order to demonstrate that the incident was compensable. W was entitled to two levels of internal review, both of which were unsuccessful. Having exhausted his internal remedies, W brought a Request for Directions (“RFD”) to a supervising judge, pursuant to the Agreement. The supervising judge found errors in the adjudicator’s interpretation of the IAP warranting judicial intervention and remitted W’s claim for re-adjudication. A reconsideration adjudicator allowed W’s claim, and awarded him compensation. Before the reconsideration decision was implemented, Canada appealed the supervising judge’s decision. The Court of Appeal found that there was no basis upon which the supervising judge could intervene, and overturned his decision.

*Held* (Brown and Rowe JJ. dissenting): The appeal should be allowed and the reconsideration adjudicator’s compensation award reinstated.

*Per* Wagner C.J. and **Abella** and Karakatsanis JJ.: Judicial intervention was necessary in the face of an unauthorized modification of the Agreement, contrary to the intentions of the parties. This is precisely the type of compensable claim contemplated by the parties to the Agreement. Failure to correct the initial adjudicator’s errors in this case would unacceptably undermine the whole purpose of the Agreement.

The appellate authorities have indicated that courts may intervene in relation to IAP adjudications when exceptional circumstances are present. There are compelling reasons for setting a high bar for judicial intervention in the IAP context.

The parties went to significant lengths to make the Agreement a complete code, by including levels of internal review and choosing not to include any provision granting court access.

On the other hand, the necessity of ongoing judicial supervision was recognized when the Agreement was approved by the courts. There is a foundational link between judicial supervision and the Agreement. The existence of the Agreement was contingent on judicial approval, and judicial approval, in turn, was contingent on ongoing judicial supervision. Given the goals of the Agreement, significant and ongoing judicial supervision was necessary. Without ongoing judicial supervision, the Agreement would not have been recognized. In overseeing the administration and implementation of the Agreement, courts have a duty to ensure that the claimants receive the benefits they bargained for. While the parties do not have a broad right to judicial intervention, they do have a right to the implementation of the terms of the settlement.

As to when judges, exercising their supervisory role, should intervene in an IAP adjudication, there is an ongoing duty to supervise the administration and implementation of the Agreement, including the IAP. In exercising this supervisory role, judges can intervene if there has been a failure to apply and implement the terms of the Agreement. In determining whether this failure exists, judges will focus on the words of the Agreement, so that the benefits promised to the claimants are delivered. Interpreting this role too narrowly prevents any meaningful judicial supervision of

IAP decisions. It is paramount that the agreed-upon terms of the IAP are applied and implemented in a way that is consistent with the parties' intentions.

In this case, the initial adjudicator's decision constituted an unauthorized modification of the IAP. By substituting the wording of the IAP with her own and by adding a requirement of the perpetrator's sexual intent unsupported by the language of the IAP, the adjudicator relied on additional requirements that were not agreed to by the parties. These errors were compounded by her misinterpretation of the case law with respect to sexual assault, which contributed to an unauthorized modification of the IAP. This amounted to a failure to apply or implement the terms of the Agreement, warranting judicial intervention to ensure that the benefits promised in the Agreement were delivered. In intervening, the supervising judge in this case did not usurp the role assigned to IAP adjudicators by re-weighing factual findings. Instead, he properly identified a failure to apply the Agreement in the adjudication of W's claim.

*Per Moldaver and Côté JJ.:* Judicial review under an administrative law analysis is not applicable to IAP decisions. As the purpose of judicial review is to ensure the legality of state decision making, it is available only where there is an exercise of state authority that is of a sufficiently public character. The Agreement is, at its root, a contract. It was not created by any act of the executive or the legislature, but is a contractual settlement of private law tort claims, to which effect has been given by court orders. IAP adjudicators exercise powers granted by contract and have

no statutory authority. The courts' general supervisory jurisdiction allows them to ensure that the Agreement's contractual commitment is fulfilled, but this does not mean that IAP adjudicators are state actors. Nor does this analysis change just because Canada is one of the parties to the Agreement. The availability of judicial review depends on the source of the decision maker's authority, not the identity of the parties. In this case, the IAP adjudicators' authority was conferred by the parties to the Agreement, not by an act of the legislature or the exercise of prerogative powers. Moreover, the fact that the contract was approved by court order does not transform the operation of this private settlement into a public act.

While the parties do not have the option of seeking judicial review of IAP decisions, they can file RFDs with the supervising courts to resolve issues relating to the implementation and administration of the Agreement, after fully exhausting the internal review mechanisms in the Agreement. Authority for recourse to the supervising courts can be found in the Agreement, the Approval and Implementation Orders, and provincial class proceedings legislation. The Agreement contemplates recourse to the supervising courts in certain specific circumstances — i.e., where losses may exceed the maximum compensation available under the IAP or where the evidence is overly complex. This creates an alternative avenue for dealing with claims that would otherwise be heard by IAP adjudicators but does not permit the courts to intervene in IAP decisions. The supervising courts' jurisdiction is also grounded in the Approval and Implementation Orders. These orders state the courts' powers in broad terms. Finally, provincial class proceedings legislation grants broad

supervisory jurisdiction to ensure that a class action proceeds in a fair and efficient manner. However, these broader conferrals of authority are given form and content by the facts of particular class proceedings. In the context of the supervision of a settlement agreement, the terms of the agreement are determinative. While supervising judges are not free to approve an agreement that fully ousts their supervisory jurisdiction, their authority is limited and shaped by the terms of the agreement.

While it is clear that the courts retain supervisory powers pursuant to the Agreement itself, the Approval and Implementation Orders and class proceedings legislation, a distinction must be drawn between providing directions respecting the implementation and administration of the Agreement, on the one hand, and reviewing adjudicators' interpretations of the IAP, on the other. Only the former falls within the jurisdiction of the courts. Parties may seek judicial recourse only in cases where the IAP adjudicator failed to apply the terms of the Agreement, as this constitutes a failure to comply with the Agreement and the IAP. As long as it can be said that an adjudicator has turned his or her mind to the compensation category raised by the claimant, then the adjudicator has applied the terms of the Agreement. Since the parties have expressed a clear intention to grant IAP adjudicators exclusive jurisdiction to interpret the terms of the Agreement and the IAP, it must be accepted that an adjudicator who has interpreted these terms, even if a court considers the interpretation unreasonable, has not failed to apply the terms. The test for judicial

recourse is therefore whether there has been a failure by the IAP adjudicator to apply the terms of the IAP, which accounts to a failure to enforce the Agreement.

The weight of the authorities supports a high jurisdictional threshold for supervising courts considering IAP decisions. The cases highlight several reasons why access to judicial recourse in respect of IAP decisions should be construed narrowly. First, this approach honours the intentions of the parties to the Agreement. Second, in entering into the Agreement, claimants relinquished their right to have their claims resolved by the courts in favour of a process with various compensatory and non-compensatory benefits; as such, disagreement with the conclusions reached by adjudicators, whether on matters of fact or on the interpretation of the terms of the IAP, should be addressed through the review procedures provided for in the IAP and, if necessary, by approving binding instructions to adjudicators. Third, the scheme need not be infallible. Fourth, to open IAP decisions to intervention by the courts would be contrary to the objective of efficient and timely resolution of disputes with finality. Fifth, a broad right to judicial recourse in respect of IAP decisions would allow Canada, and not only claimants, to challenge adjudicators' conclusions with which it disagreed. Sixth, under a broader interpretation of the judicial oversight function, supervising judges would be engaging in the same exercise as reviewing adjudicators under the IAP.

While the parties' intentions in creating the Agreement and the IAP must be honoured, circumstances will inevitably arise that were not foreseen by the parties

and are therefore not provided for in the Agreement. Should a situation arise which was not contemplated by the parties, courts must have the power to intervene to ensure that the parties receive the benefits of the Agreement, i.e., what they bargained for. The courts have the jurisdiction to ensure that the Agreement provides both procedural and substantive access to justice. Should a situation arise which is not provided for in the Agreement and which might affect the outcome of a claim, it would be inconsistent with the purpose of the settlement to deny relief to the claimant. However, parties are not automatically entitled to have a claim reopened if they are able to point to a procedural gap in the IAP. A case-by-case analysis is required, and a variety of factors may have to be considered, including whether some prejudice to the party requesting judicial intervention has been shown. Cases in which a claim can be reopened will be rare. Ultimately, a balance must be struck between resolving claims efficiently and obtaining a sense of finality for the parties, on the one hand, and ensuring fair and just outcomes, on the other.

In this case, the supervising judge erred in scrutinizing the initial adjudicator's interpretation of the IAP and substituting his own. The supervising judge was entitled only to determine whether the adjudicator had considered the correct terms. Instead, he engaged in the same analysis that the parties assigned to IAP adjudicators and came to a different result. While the adjudicator interpreted the sexual abuse category of the IAP differently, this does not amount to a failure to apply the terms of the IAP. The choice to deny W's claim was based on a deliberate interpretation of and engagement with the sexual abuse category of the IAP. The

adjudicator had regard to and applied the factors in that category, and her decision was upheld, in keeping with the review mechanism contained in the IAP. While the supervising judge may have disagreed with the outcome, this was not a basis for finding that the adjudicator had failed to apply the terms of the IAP. The supervising judge exceeded his jurisdiction by substituting his own interpretation of the IAP and directing that the claim be reconsidered in accordance with that interpretation.

However, while the supervising judge erred in his analysis, this is an exceptional case in which reconsideration is appropriate. W's claim has given rise to a unique dilemma for which the Agreement provides no internal recourse, and which therefore requires the Court to craft a remedy. Certain concessions made at the hearing before the Court exposed a gap in the Agreement's provisions. Specifically, the Chief Adjudicator of the Indian Residential Schools Adjudication Secretariat conceded that the decisions of the initial and review adjudicators in this case were aberrant, and that he has no authority to reopen W's claim despite this conclusion. The Chief Adjudicator's inability to remedy such an error in IAP decisions is clearly inconsistent with the role conferred upon him by the parties — i.e., the parties intended that the Chief Adjudicator should represent the final level of review in order to ensure consistency across all IAP decisions. The practical effect of this situation is that W did not receive the benefits bargained for. As there is no remedy within the four corners of the Agreement that is available to either W or the Chief Adjudicator, the courts must step in to fill this gap. It is particularly appropriate that the Court intervene in light of the fact that the Agreement is a settlement of a class action, and it

can be assumed that all similarly situated individuals are entitled to the same treatment under the scheme.

This is a situation in which the courts can step in to provide a remedy that is consistent with the Agreement's objective of promoting a fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools. The appeal should be allowed and the order made by the supervising judge that W's claim be sent back to a first-level IAP adjudicator for reconsideration should be reinstated. Given that W's claim has already been reconsidered and that the Chief Adjudicator is satisfied that the reconsideration adjudicator properly applied the IAP, the compensation award should be reinstated, with interest.

*Per Brown and Rowe JJ. (dissenting):* The appeal should be dismissed. Côté J. correctly states the law for a majority of the Court regarding the jurisdiction of the supervising courts in respect of IAP decisions. Where there is a gap in the Agreement, a court might fill it in accordance with the parties' intentions. However, as no gap exists here, there is no basis for rewriting the terms of the Agreement.

The Agreement is a contract. Interpreting its terms therefore requires a court to discern the parties' intentions. In this case, it was the parties' intention that the Chief Adjudicator not have the authority to respond to incorrect interpretations of the IAP by reopening claims. Instead, the Chief Adjudicator has a right of final review of IAP decisions and is empowered to remedy incorrect interpretations of the

IAP on a prospective basis by preparing instructions for the IAP Oversight Committee.

The Agreement expressly precludes judicial intervention, even where the IAP has been incorrectly interpreted and applied. It is a complete code that limits access to the courts, preserves the finality of the IAP and respects the expertise of IAP adjudicators. The adjudication of IAP claims is limited to one in-person hearing and two levels of internal review without any judicial recourse. Given the finality promised by the IAP, the parties would have seen prolonged litigation of IAP claims in the courts to be undesirable. The internal mechanisms of review in the Agreement have clearly been designed to allow for judicial recourse in specific situations. But this does not include incorrect interpretations of the IAP.

Where the parties have failed in their contract to address a particular situation arising in the course of their relationship, a court may imply a contractual term. This does not permit a court to imply a term which is contrary to the parties' clearly expressed intentions. Straining to find a gap in the Agreement so as to open space for judicial recourse where the parties clearly intended to preclude it defeats the intentions of the parties and undermines the integrity of the process that they settled upon. Merely because the Agreement does not contain certain terms does not mean that there is a gap waiting to be filled by judges. There is a difference between failing to grant authority and deciding not to grant such authority. A review of the Agreement reveals that the absence of a term authorizing the Chief Adjudicator to

reopen claims clearly represents an instance of the latter. In addition, the Chief Adjudicator's concession in this case does not expose any gap in the Agreement, much less any basis for judicial intervention to fill it. In any event, the Chief Adjudicator did not clearly agree that such a gap existed here. The denial of compensation to W was not the result of any gap which required judicial recourse so as to reopen the claim; instead, it resulted from the Chief Adjudicator failing to properly discharge his final review obligations.

### **Cases Cited**

By Abella J.

**Explained:** *R. v. Chase*, [1987] 2 S.C.R. 293; **considered:** *Fontaine v. Duboff Edwards Haight & Schachter*, 2012 ONCA 471, 111 O.R. (3d) 461; **referred to:** *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481; *Fontaine v. Canada (Attorney General)*, 2017 ONCA 26, 137 O.R. (3d) 90; *N.N. v. Canada (Attorney General)*, 2018 BCCA 105, 6 B.C.L.R. (6th) 335; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330.

By Côté J.

**Distinguished:** *Canada (Attorney General) v. Fontaine*, 2017 SCC 47, [2017] 2 S.C.R. 205; **considered:** *Fontaine v. Canada (Attorney General)*, 2016 BCSC 2218, [2017] 1 C.N.L.R. 104; *Fontaine v. Duboff Edwards Haight &*

*Schachter*, 2012 ONCA 471, 111 O.R. (3d) 461; *N.N. v. Canada (Attorney General)*, 2018 BCCA 105, 6 B.C.L.R. (6th) 335; *Fontaine v. Canada (Attorney General)*, 2017 ONCA 26, 137 O.R. (3d) 90; **referred to:** *Fontaine v. Canada (Attorney General)*, 2016 ONCA 241, 130 O.R. (3d) 1; *Fontaine v. Canada (Attorney General)*, 2014 ONSC 4024, [2014] 4 C.N.L.R. 67; *R. v. Chase*, [1987] 2 S.C.R. 293; *Fontaine et al. v. Canada (Attorney General) et al.*, 2014 MBQB 200, 311 Man. R. (2d) 17; *Fontaine v. Canada (Attorney General)*, 2015 ABQB 225, [2015] 4 C.N.L.R. 69; *Fontaine v. Canada (Attorney General)*, 2016 ONSC 4326, [2016] 4 C.N.L.R. 40; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 26; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *Fontaine et al. v. Canada (Attorney General) et al.*, 2014 MBCA 93, 310 Man. R. (2d) 162; *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283, [2014] 2 C.N.L.R. 86; *Fontaine v. Canada (Attorney General)*, 2017 BCSC 946; *Baxter v. Canada (Attorney General)* (2006), 83 O.R. 481; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331.

By Brown J. (dissenting)

*Fontaine v. Canada (Attorney General)*, 2017 ONCA 26, 137 O.R. (3d) 90; *Canada (Attorney General) v. Fontaine*, 2017 SCC 47, [2017] 2 S.C.R. 205; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619;

*Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711; *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085; *Fontaine v. Canada (Attorney General)*, 2016 BCSC 2218, [2017] 1 C.N.L.R. 104; *N.N. v. Canada (Attorney General)*, 2018 BCCA 105, 6 B.C.L.R. (6th) 335; *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283, [2014] 2 C.N.L.R. 86; *Fontaine v. Canada (Attorney General)*, 2018 ONSC 103; *Spencer v. Continental Insurance Co.*, [1945] 4 D.L.R. 593.

### **Statutes and Regulations Cited**

*Class Proceedings Act*, C.C.S.M., c. C130, s. 12.

*Court of Queen's Bench Act*, C.C.S.M., c. C280, Part XIV.

### **Treaties and Agreements**

*Indian Residential Schools Settlement Agreement* (2006), preamble, arts. 1.01, 4.11, 5, 5.09, 6, 6.03, 7.01, 12.01, 13.08, Sch. D, arts. I, II, III, App. V, IX, X, XII, XIII.

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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/rppi\\_apo\\_pdf\\_1322167347706\\_eng.pdf](https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/rppi_apo_pdf_1322167347706_eng.pdf); archived version: [http://www.scc-csc.ca/cso-dce/2019SCC-CSC20\\_2\\_eng.pdf](http://www.scc-csc.ca/cso-dce/2019SCC-CSC20_2_eng.pdf)).

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APPEAL from a judgment of the Manitoba Court of Appeal (Monnin, Beard and leMaistre JJ.A.), 2017 MBCA 54, 413 D.L.R. (4th) 521, [2017] 3 C.N.L.R. 85, [2017] AZ-51399218, [2017] M.J. No. 163 (QL), 2017 CarswellMan 247 (WL Can.), setting aside a decision of Edmond J., 2016 MNQB 159, [2016] 4 C.N.L.R. 23, [2016] M.J. No. 232 (QL). Appeal allowed, Brown and Rowe JJ. dissenting.

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*Mitchell R. Taylor, Q.C.*, and *Dayna Anderson*, for the respondent the Attorney General of Canada.

*Joseph J. Arvay, Q.C.*, *Susan E. Ross* and *David W. L. Wu*, for the respondent the Chief Adjudicator of the Indian Residential Schools Adjudication Secretariat.

*Stuart Wuttke and Julie McGregor*, for the respondent the Assembly of First Nations.

*David Schulze, Maryse Décarie-Daigneault and David P. Taylor*, for the intervener the Independent Counsel.

*Karim Ramji*, for the intervener K.B.

The reasons of Wagner C.J. and Abella and Karakatsanis JJ. were delivered by

ABELLA J. —

[1] The years of sustained abuse committed in Residential Schools represent a profoundly shameful era in Canada's history. The legacy of the harms committed there consists of deep wounds not only to those who were forced to attend, but also to our national psyche. The recovery process, when it is possible, is slow and painful. But at least there is a process, one that pays respectful tribute to the enduring character of the harm and the need to address it. The *Indian Residential Schools Settlement Agreement* (2006) is part of that healing process.

[2] When J.W. was a young boy at a Residential School a nun touched his genitals over his clothing. He was standing in line waiting for a shower. He was wearing what he described as a "little apron".

[3] In 2014, J.W. brought a claim for compensation in accordance with the Independent Assessment Process (IAP), the adjudicative component of the Agreement, alleging that this incident fell within the following category of abuse:

Any touching of a student, including touching with an object, by an adult employee or other adult lawfully on the premises which exceeds recognized parental contact and violates the sexual integrity of the student.

(art. II)

[4] J.W.'s claim proceeded in Manitoba. The Hearing Adjudicator concluded that the "sexual" intent of the nun was an element that had to be shown by the claimant. Despite the fact that she accepted that the incident had occurred as J.W. described, the Hearing Adjudicator denied his claim because he was unable to prove the nun's sexual intent.

[5] The issue in this appeal is whether J.W. was entitled to judicial recourse.

### Background

[6] The Agreement represents the negotiated settlement of thousands of individual and class action suits filed against a number of defendants, including the Government of Canada and various churches, relating to the operation of Residential Schools.

[7] The Agreement includes a procedure for settling individual claims through an adjudicative process; provides for support services for former students; sets out a national procedure for healing, education and reconciliation through the Truth and Reconciliation Commission; and creates a scheme for the general implementation of public programs to recognize and commemorate the significant and lasting harms caused by the Residential Schools system.

[8] While not admitting liability, the defendants acknowledged that harms and abuses were committed against Indigenous children at these schools. The individuals in the various classes of plaintiffs and potential claimants could opt out of the Agreement and pursue their own litigation through the courts, but they could not take this route if they accepted compensation pursuant to the Agreement.

[9] Two avenues to compensation are available under the Agreement: the “common experience” payment received by all eligible former students, and individual payments awarded to claimants who establish specific compensable harms. These individual claims are adjudicated through the IAP. The rules governing these adjudications are set out in Schedule D to the Agreement.

[10] The Schedule describes which harms are compensable, what must be established by the claimant, and sets out a compensation scale. It includes both standard and complex track claims. Certain complex track claims may be referred to the courts by the Chief Adjudicator of the Indian Residential Schools Adjudication Secretariat who is generally responsible for guiding, training and assisting the

adjudicators. This is the only category of claims which provides a mechanism for court access.

[11] There is a system of internal reviews. If the alleged error in an adjudicative decision is a palpable and overriding factual one, the scheme allows for one level of internal review. If the error alleged is a failure to apply the IAP Model to the facts, there are two levels of internal review available.

[12] J.W.'s claim is a standard track claim. That entitled him to an in-person hearing and the possibility of two levels of internal review. There is, however, no right of appeal to the courts.

[13] Because the Agreement constitutes the settlement of ongoing actions, judicial approval was required. The parties brought the proposed settlement to the superior courts for approval, and between December 2006 and January 2007, nine provincial and territorial superior courts approved the Agreement through Approval Orders.

[14] Ontario was the first jurisdiction to approve the Agreement, subject to certain conditions, in December 2006. In *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.), the decision accompanying the first Approval Order, Winkler R.S.J. emphasized the enduring, harmful legacy of Residential Schools which ultimately led to the Agreement:

For over 100 years, Canada pursued a policy of requiring the attendance of Aboriginal children at residential schools, which were largely operated by religious organizations under the supervision of the federal government. The children were required to reside at these institutions, in isolation from their families and communities, for varying periods of time. This policy was finally terminated in 1996 with the closing of the last of the residential schools and has now been widely acknowledged as a seriously flawed failure. *In its attempts to address the damage inflicted by, or as a result of, this long-standing policy, the settlement is intended to offer a measure of closure for the former residents of the schools and their families.*

The flaws and failures of the policy and its implementation are at the root of the allegations of harm suffered by the class members. Upon review by the Royal Commission on Aboriginal Peoples, it was found that the children were removed from their families and communities to serve the purpose of carrying out a “concerted campaign to obliterate” the “habits and associations” of “Aboriginal languages, traditions and beliefs”, in order to accomplish “a radical re-socialization” aimed at instilling the children instead with the values of Euro-centric civilization. *The proposed settlement represents an effort to provide a measure of closure and, accordingly, has incorporated elements which provide both compensation to individuals and broader relief intended to address the harm suffered by the Aboriginal community at large.* [Emphasis added; paras. 2-3.]

[15] As Winkler R.S.J. emphasized, given the goals of the Agreement, significant and ongoing judicial supervision was necessary. As he said, supervising courts must “ensur[e] that the administration and implementation of the settlement are done in a manner that delivers the promised benefits to the class members . . . . Once the court is engaged, it cannot abdicate its responsibilities” (*Baxter*, at para. 12). Additionally, “the court must be in a position to effectively evaluate the administration and the performance of the administrator and, further, be empowered to effect any changes that it finds necessary to ensure that the benefits promised under the settlement are being delivered” (para. 51).

[16] Winkler R.S.J. stressed that, as in all class actions, the courts must strive to protect the class members and ensure that the benefits they agreed to are actually delivered. In order to deliver efficient, coordinated judicial supervision of the multi-jurisdictional Agreement, he suggested that each supervising court approve a Court Administration Protocol.

[17] The Approval Orders in all other provinces were substantially similar, and stated that superior court judges were entitled to hear “Requests for Directions” with respect to the ongoing administration and implementation of the Agreement. Paragraph 31 of the Manitoba Approval Order, for example, states:

**THIS COURT DECLARES** that the Representative Plaintiffs, Defendants, Released Church Organizations, Class Counsel, the National Administration Committee, or the Trustee, or such other person or entity as this Court may allow, *after fully exhausting the dispute resolution mechanisms contemplated in the Agreement, may apply to the Court for directions in respect of the implementation, administration or amendment of the Agreement* or the implementation of this judgment on notice to all affected parties, all in conformity with the terms of the Agreement. [Emphasis added.]

The inclusion of the Requests for Directions provision in the Approval Orders contemplates that recourse to the courts is possible in circumstances where all internal mechanisms have been exhausted and directions are needed about the implementation of the Agreement.

[18] The effect of the Approval Orders in the provinces was the certification of the actions as a class proceeding, subject to certain changes being made to the Agreement.

[19] By March 2007, all nine provincial and territorial jurisdictions implicated by the Agreement took the next step and implemented the Agreement by court orders. These Implementation Orders incorporated the Agreement and addressed issues relating to its administration.

[20] Notably, the Manitoba Implementation Order concludes by stating that “the Courts shall supervise the implementation of the Agreement and this order and, without limiting the generality of the foregoing, may issue such further and ancillary orders, from time to time, as are necessary to implement and enforce the provisions of the Agreement” (para. 23).

[21] As proposed by Winkler R.S.J. in *Baxter*, a Court Administration Protocol was appended to each province’s Implementation Order, stating that two Administrative Judges would be appointed to work in conjunction with the Supervising Judges from each province to oversee the administration and implementation of the Agreement. The Protocol stated that each Request for Directions brought by a party would be first made to one of the two Administrative Judges, who would then direct it to a Supervising Judge for a hearing if necessary.

[22] Supplemented by the applicable class proceedings regime in each affected province and territory, and the inherent jurisdiction of the superior courts, the Approval and Implementation Orders gave the courts broad supervisory and administrative authority in overseeing the application and implementation of the Agreement. This authority was integral to the Agreement's goal of addressing the serious harms caused by Residential Schools and was a fundamental precondition to judicial endorsement. Ongoing judicial supervision was seen to be necessary to ensure that the benefits promised to the claimants — benefits for which they relinquished their litigation rights — were delivered in accordance with the terms of the Agreement (*Baxter*, at paras. 12 and 51).

[23] This history demonstrates the foundational link between judicial supervision and the Agreement. The existence of the Agreement was contingent on judicial approval, and judicial approval, in turn, was contingent on ongoing judicial supervision.

[24] The Ontario Court of Appeal explained how this ongoing judicial supervision should be exercised in *Fontaine v. Duboff Edwards Haight & Schachter* (2012), 111 O.R. (3d) 461 (*Schachter*). The decision concerned a legal fee dispute, which came to the courts by way of a Request for Directions. While concluding that judicial review in the administrative law sense was unavailable, the Court of Appeal described the appropriate scope of judicial recourse. Rouleau J.A. acknowledged that adjudicators “cannot ignore” the provisions of the Implementation Orders, and that

they must apply the relevant factors in the Agreement. But in his view, “[i]n the perhaps unlikely event that the final decision of the Chief Adjudicator reflects a failure to consider the terms of the [Agreement] and implementation orders . . . then, in my view, the parties to the [Agreement] intended that there be some judicial recourse” (para. 53). He found that this judicial recourse was necessary to ensure that the bargain the parties agreed to was respected, a critical consideration given the vulnerability of the claimants. However, he held that judicial recourse was limited to “very exceptional circumstances” because the parties intended that the implementation of the Agreement be expeditious and the Agreement aimed to achieve finality.

[25] The Ontario Court of Appeal returned to the scope of the courts’ supervisory jurisdiction in *Fontaine v. Canada (Attorney General)* (2017), 137 O.R. (3d) 90, and concluded that the “exceptional circumstances” threshold applied to IAP adjudicative decisions. Writing for the court, Sharpe J.A. held that Supervising Judges should not conduct “a detailed review of the factual findings made by the adjudicator” because that would allow judges to usurp the role of IAP review adjudicators (para. 55). Disagreement with the result reached does not amount to a failure to apply or enforce the Agreement.

[26] The British Columbia Court of Appeal also adopted the “exceptional circumstances” threshold in *N.N. v. Canada (Attorney General)* (2018), 6 B.C.L.R. (6th) 335. In that case, the majority concluded that exceptional circumstances exist if

there is a “gap” in the Agreement. The inability of adjudicators to reopen concluded claims in circumstances where there was new, material evidence was one such “gap”, and therefore an “exceptional circumstance” warranting judicial intervention.

[27] The appellate authorities in Ontario and British Columbia have thus indicated that courts may intervene in relation to IAP adjudications when exceptional circumstances are present, a threshold which is met if there is either a failure to apply the terms of the Agreement, including the Approval and Implementation Orders, or if there is a “gap” in the Agreement.

[28] I agree that there are compelling reasons for setting a high bar for judicial intervention in the IAP context. The parties went to significant lengths to make the Agreement a “complete code”, with specialized training for adjudicators, levels of internal review, the creation of an IAP Oversight Committee responsible for monitoring the implementation of the IAP and the absence of any provision granting court access in the context of standard track IAP decisions.

[29] On the other hand, the necessity of ongoing judicial supervision was recognized when the Agreement was approved, as noted by Winkler R.S.J. in *Baxter*.

[30] Without ongoing judicial supervision, the Agreement would not have been recognized. In overseeing the administration and implementation of the Agreement, therefore, courts have a duty to ensure that the claimants receive the benefits they bargained for. The provisions of the Approval and Implementation

Orders contemplate ongoing recourse to the courts, with judges supervising the Agreement to ensure that the implementation and administration of the Agreement take place in the way the parties agreed.

[31] While the parties do not have a broad right to judicial intervention, they do have a right to the implementation of the terms of the settlement they bargained for. Judicial supervision plays a critical role in ensuring that the claimants receive the benefits that they were promised. The obligations in the Agreement must be read in light of the Agreement's spirit — to address the “damage inflicted by, or as a result of, [Canada's] long-standing [Residential Schools] policy” (*Baxter*, at para. 2).

### Analysis

[32] The question in this appeal is when judges, exercising their supervisory role, should intervene in an IAP adjudication. *Schachter* provides a useful starting point — judges should intervene when there is a failure to apply or implement the terms of the Agreement. Unauthorized modifications of the Agreement are encompassed by this threshold. If an adjudicator changes the terms or requirements of the plain language of the Agreement, this will amount to a failure to apply or implement the terms of the Agreement.<sup>1</sup> Courts have a *duty* to ensure that the Agreement is implemented in accordance with the intentions of the parties as reflected in the Agreement's terms. In determining whether an adjudicative decision

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<sup>1</sup> Adjudicators are bound by the standard for compensable wrongs and for the assessment of compensation as defined in the IAP (art. II).

rises to this threshold, Supervising Judges should be guided by the plain language of the Agreement, viewed in light of its remedial, benefit-conferring objectives.

[33] Given the purposes of the Agreement and the ongoing supervisory powers built into the settlement, I do not, with respect, agree with the Manitoba Court of Appeal's decision in this case that so long as the adjudicator *refers* to the relevant sections of the IAP, there is no basis upon which a Supervising Judge can intervene, regardless of *how* these sections are interpreted or applied. Reading "apply" and "implement" so narrowly prevents any *meaningful* judicial supervision of IAP decisions. In light of the purposes of the Agreement, which include achieving "a fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools" and a "promotion of healing, education, truth and reconciliation and commemoration"<sup>2</sup>, such an approach reduces judicial supervision to a search for ensuring that the right section of the IAP is applied, rather than ensuring that the rights promised by the section are being delivered.

[34] While finality and expediency are important goals, it is also crucial to recognize that claimants agreed to forfeit their litigation rights by not opting out of the Agreement. Given this trade-off, it is paramount that the agreed-upon terms of the IAP Model are applied and implemented in a way that is consistent with the parties' intentions. The courts' supervisory power must permit intervention when it is necessary to ensure that the benefits promised are delivered.

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<sup>2</sup> See B and C in the recitals of the Agreement.

[35] Judges, in short, have an ongoing duty to supervise the administration and implementation of the Agreement, including the IAP. In exercising this supervisory role in the Requests for Directions context, judges can intervene if there has been a failure to apply and implement the terms of the Agreement. In determining whether this failure exists, Supervising Judges will focus on the words of the Agreement, so that the benefits promised to the class members are delivered.

[36] In this case, J.W.'s claim fell under the IAP category "SL1.4", which is defined in the Agreement as:

Any touching of a student, including touching with an object, by an adult employee or other adult lawfully on the premises which exceeds recognized parental contact and violates the sexual integrity of the student.

[37] J.W.'s claim was rejected by the Hearing Adjudicator because, despite the fact that she believed J.W.'s account of what transpired, she was not satisfied on a balance of probabilities that the perpetrator acted with a sexual purpose when committing the act in question. This was fatal to J.W.'s case because IAP adjudicators "must be satisfied in regard to any allegation of sexual abuse that what took place was done for a sexual purpose" (para. 24). In so holding, the Hearing Adjudicator relied on this Court's decision in *R. v. Chase*, [1987] 2 S.C.R. 293. Sexual purpose, she held, was a technical requirement of SL1.4.

[38] J.W. applied for a review of the Hearing Adjudicator's decision. The Review Adjudicator concluded that the Hearing Adjudicator did not misapply SL1.4 by requiring J.W. to establish the perpetrator's sexual purpose. J.W.'s request for re-review was similarly unsuccessful. The Re-Review Adjudicator held that the Review Adjudicator had not misapplied the IAP Model. Having exhausted his internal remedies, J.W. brought a Request for Directions to the Supervising Judge, Edmond J.

[39] The Supervising Judge, Edmond J. described his role in the following terms:

. . . I have the power to review the decision of the Re-Review Adjudicator to determine whether she failed to apply the terms of the [Agreement] and specifically the IAP Compensation Rules. I accept that this is a limited form of curial review, reserved for exceptional cases, and that I must ensure that I do not engage in rewriting the [Agreement] by effectively giving the Requestors a right of appeal and/or review for which they did not bargain. (para. 35)

Edmond J. went on to describe the standard of review for a Request for Directions as "ensuring that the Re-Review Adjudicator did not endorse a legal interpretation that is so unreasonable that it amounts to a failure to properly apply the IAP to the facts of a particular case" (para. 40).

[40] Edmond J. found three errors warranting judicial intervention: the Hearing Adjudicator replaced the words "any touching" in SL1.4 with the words "sexual touching"; the Hearing Adjudicator imported a requirement of sexual intent on the part of the perpetrator, contrary to the plain language of SL1.4; and, the

Hearing Adjudicator incorrectly interpreted this Court's decision in *Chase* as requiring a sexual purpose as a necessary element of proving an act of sexual abuse.

[41] The Hearing Adjudicator described the question before her as “whether or not the incident was *sexual* touching which exceeded recognized parental conduct”. As Edmond J. correctly noted, there is no requirement for the impugned touching to be “sexual” in SL1.4. He also properly noted that the formulation relied upon by the Hearing Adjudicator leads to the illogical proposition that there could be sexual touching which does *not* exceed the parameters of recognized parental conduct.

[42] I agree with Edmond J. that the Hearing Adjudicator's added requirement of “sexual” touching amounted to an unauthorized amendment to the IAP, and the improper addition of a new threshold in the language of SL1.4. This constituted a failure to apply and implement the Agreement.

[43] In describing what J.W. needed to establish in order to demonstrate that the touching violated the sexual integrity of the student, the Hearing Adjudicator also stated that “[i]n this process an adjudicator must be satisfied in regard to any allegations of sexual abuse that what took place was done for a sexual purpose”. As Edmond J. observed, nothing in the plain language of SL1.4 indicates that the sexual intent of the perpetrator is relevant and that “[c]learly, and on a simple plain-language analysis, a child's sexual integrity can be violated without a perpetrator having any sexual intent whatsoever” (para. 47).

[44] The effect of these two errors is the same: the Hearing Adjudicator's decision constituted an unauthorized modification of SL1.4. By substituting the phrase "any touching" with "sexual touching" and by adding a requirement of sexual intent unsupported by the language of the provision, the Hearing Adjudicator relied on additional requirements that were not agreed to by the parties. The unauthorized modifications of the IAP Model amounted to a failure to apply or implement the terms of the Agreement, warranting judicial supervisory intervention to ensure that the benefits promised in the Agreement were delivered.

[45] These errors were compounded by the Hearing Adjudicator's misinterpretation of this Court's decision in *Chase*, the third and final error identified by Edmond J. *Chase* dealt with the meaning of "sexual assault" in the *Criminal Code*, R.S.C. 1985, c. C-46. The Court stated that "[s]exual assault is an assault . . . which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated" (p. 302).

[46] The facts of *Chase* were as follows. The accused was a neighbour of the complainant, a fifteen-year-old girl. He entered the complainant's home, where she was playing pool with her eleven-year-old brother, grabbed her around her shoulders and arms, and grabbed her breasts. Eventually, the complainant and her brother were able to call another neighbour for help.

[47] The accused was convicted of sexual assault in Provincial Court. His appeal to the Court of Appeal of New Brunswick was dismissed, but a conviction of

common assault was substituted for the sexual assault conviction. In making this substitution, the Court of Appeal held that the word “sexual” in sexual assault should be understood as referring to specific parts of the body — genitalia in particular. Body parts with “secondary sexual characteristics” — like breasts — were not encompassed by this definition.

[48] McIntyre J., writing for this Court, rejected the view that sexual assault was confined to “contact with specific areas of the human anatomy” and concluded that the test for sexual assault should be objective:

Applying these principles and the authorities cited, I would make the following observations. Sexual assault is an assault within any one of the definitions of that concept in s. 244(1) of the *Criminal Code* which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. *The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one:* “Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer” (*Taylor, supra, per Laycraft C.J.A., at p. 269*). The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant (see S. J. Usprich, “A New Crime in Old Battles: Definitional Problems with Sexual Assault” (1987), 29 *Crim. L.Q.* 200, at p. 204.) The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances. [Emphasis added; p. 302.]

[49] Applied to the facts of the case, McIntyre J. concluded that there was ample evidence upon which the trial judge could have concluded that a sexual assault was committed: “[v]iewed objectively in light of all the circumstances, it is clear that the conduct of [Mr. Chase] in grabbing the complainant’s breasts constituted an assault of a sexual nature” (p. 303).

[50] *Chase*, therefore, stands for the proposition that the sexual nature of the assault is determined *objectively*. The Crown is not required to prove the accused had any *mens rea* with respect to the sexual nature of his or her behaviour (see also *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 25, per Major J.). The Hearing Adjudicator in J.W.’s case, however, improperly interpreted *Chase* as requiring the complainant to prove sexual intent. She relied upon *Chase* to read in a *mens rea* requirement that does not exist in either *Chase* or in the SL1.4 category of the IAP.

[51] I agree with Edmond J. that case law may be helpful, but it is the plain language of the Agreement that must guide an adjudicator’s reasoning process. Case law cannot be used to modify the language of the IAP, as the Hearing Adjudicator did in this case. The Hearing Adjudicator’s inaccurate interpretation of *Chase* thereby contributed to an unauthorized modification of the IAP Model. As former Chief Adjudicator Ish rightly concluded in another IAP adjudication review decision, “there is no requirement in the IAP that the actor possessed a sexual intent before liability can be found for a sexual assault”.

[52] The Agreement was entered into to address the abuses caused by the Residential Schools system and the courts' ongoing supervision of the settlement must allow judges to intervene where necessary so as to ensure that the benefits promised by the settlement are actually delivered. In my view, Edmond J. properly identified a failure to apply the IAP Model in the adjudication of J.W.'s claim. These failures were confirmed on review and re-review. In intervening, Edmond J. did not usurp the role assigned to IAP adjudicators by re-weighing factual findings. Instead, in the face of a failure to apply the terms of the Agreement as agreed to by the parties, he intervened, remitting J.W.'s claim for re-adjudication. As such, I respectfully disagree that recourse to a "gap" in the Agreement is necessary in this case. Rather, judicial intervention was necessary in the face of an unauthorized modification of the Agreement, contrary to the intentions of the parties.

[53] The nun's conduct in touching J.W.'s genitals not only objectively "violates the sexual integrity of the student", contrary to the definition of sexual abuse in category SL1.4 of the Agreement, it "exceeds recognized parental contact". J.W.'s claim is therefore compensable within the meaning of SL1.4. This is the only tenable conclusion in light of the factual findings made by the Hearing Adjudicator. I note that the same conclusion was reached by a Reconsideration Adjudicator who re-heard — and allowed — J.W.'s claim before the Manitoba Court of Appeal's decision was made.

[54] J.W.'s is precisely the type of compensable claim contemplated by the parties to the Agreement. Failure to correct the Hearing Adjudicator's interpretation in this case would unacceptably undermine the whole purpose of the Agreement.

[55] I would allow the appeal with costs and reinstate the decision of the Reconsideration Adjudicator allowing J.W.'s claim, plus interest.

The reasons of Moldaver and Côté JJ. were delivered by

CÔTÉ J. —

## I. Introduction

[56] Between the 1860s and the 1990s, more than 150,000 First Nations, Inuit and Métis children attended Indian Residential Schools operated by religious organizations and funded by the Government of Canada. As Canada acknowledged in its official apology, this system was intended to “remove and isolate children from the influence of their homes, families, traditions and cultures” (“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 experienced physical, emotional, and sexual abuse while at residential schools (*Canada (Attorney General) v. Fontaine*, 2017 SCC 47, [2017] 2 S.C.R. 205 (“*SCC Records Decision*”), at para. 1).

[57] The *Indian Residential Schools Settlement Agreement* (“IRSSA”)<sup>3</sup> was signed on May 8, 2006. It settled numerous class actions brought by former students against the Government of Canada and various religious organizations for the harms suffered at residential schools. Its purpose was to achieve a “fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools” (IRSSA, preamble). In 2006 and 2007, the IRSSA was approved by courts in nine provinces and territories, which issued Approval and Implementation Orders providing for ongoing court supervision of its implementation and administration.

[58] The IRSSA is a multifaceted agreement. In addition to provisions intended to further healing, education, and reconciliation, it includes an Independent Assessment Process (“IAP”) to settle individual claims through specialized adjudication that takes place outside of the court system. Although the IAP Model contains an internal review mechanism, it does not provide a right of appeal to the courts from the decisions of IAP adjudicators.

[59] This appeal concerns the ability of the courts to review final decisions of adjudicators under the IAP Model. J.W.’s claim was denied by the initial IAP Hearing Adjudicator, and that decision was upheld at two levels of internal review. However, the supervising judge tasked with responding to a Request for Direction (“RFD”) arising from the IAP decision on J.W.’s claim disagreed with the adjudicators’ conclusions, substituted his own interpretation of the IAP Model, and remitted the

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<sup>3</sup> A complete list of all acronyms used in these reasons can be found in the attached Appendix.

matter to a first-level adjudicator for reconsideration. The Manitoba Court of Appeal overturned that decision, finding that judicial review of IAP decisions is not available and that recourse to the supervising courts is available only where there has been a failure to apply the terms of the IAP Model. J.W. and his counsel (collectively the “appellants”) now appeal that result to this Court. They are asking this Court to find that decisions of IAP adjudicators are subject to judicial review pursuant to the principles of administrative law. In the alternative, they submit that the courts’ supervisory power over the implementation of the IRSSA includes the jurisdiction to review IAP decisions, and that this jurisdiction extends to the interpretation of the IAP.

[60] I would allow the appeal and reinstate the supervising judge’s order remitting J.W.’s claim for reconsideration (and I would reinstate the Reconsideration Adjudicator’s decision allowing J.W.’s claim and awarding him compensation), but for reasons that differ from those relied upon by the supervising judge. Indeed, I disagree with the supervising judge’s decision to substitute his own interpretation of the IAP Model for that of the IAP adjudicators, and I would therefore endorse the Manitoba Court of Appeal’s approach in limiting the scope of judicial recourse in respect of IAP decisions. While the courts’ supervisory jurisdiction over the implementation of the IRSSA requires them to ensure that IAP adjudicators make decisions in accordance with the terms of the IAP, the parties clearly intended the interpretation of those terms to fall within the adjudicators’ exclusive jurisdiction. Judges cannot take on the role the parties have assigned to those adjudicators.

[61] This case involves a unique situation for which the IRSSA makes no provision. The Chief Adjudicator, Indian Residential Schools Adjudication Secretariat (“Chief Adjudicator”), concedes that J.W.’s claim was wrongly decided and that the decisions made by the adjudicators in this case are “aberrant”. Despite the fact that the Chief Adjudicator represents the final level of review under the IAP scheme, he is unable to reopen the claim himself and fulfill his role under the IRSSA of ensuring consistency in the application of the IAP. It is therefore appropriate for this Court to step in, not to provide its own interpretation of the IAP Model, but to fill this procedural gap and ensure a fair outcome for J.W. that is in keeping with the purpose of the IRSSA.

## II. Context

### A. *Overview of the IRSSA*

#### (1) Indian Residential Schools Settlement Agreement

[62] The IRSSA provides for two compensation schemes: the Common Experience Payment (“CEP”) and the Independent Assessment Process. The CEP is a compensatory payment available to all eligible former students based on the number of years they attended an Indian Residential School (“IRS”). Compensation under the CEP process does not require proof of physical, sexual, or emotional harm (IRSSA, art. 5). The IAP, by contrast, is an adjudicative process created to resolve “continuing claims” for serious proven physical or sexual abuse, or other wrongful acts committed

against individual students of an IRS (IRSSA, art. 6 and Sch. D; R.F. (Attorney General), at para. 9).

(2) Independent Assessment Process

[63] Schedule D of the IRSSA sets out the IAP Model. There are three categories of compensable continuing claims under the IAP: (1) sexual and physical assaults committed by adult employees of the government or a church entity that operated the residential school or other adults lawfully on school premises; (2) sexual or physical assaults committed by one student against another on school premises; and (3) any other wrongful act or acts committed by adult employees or other adults lawfully on school premises (Sch. D, art. I). Continuing claims are dealt with in detail in the IAP's Compensation Rules (art. II) and Instructions for Adjudicators (App. IX). Adjudicators are bound by the standards for compensable wrongs and for the assessment of compensation defined for the IAP (art. III). SL1.4, the provision under which J.W. brought his claim, is the first level of sexual assault under the IAP compensatory structure (art. II).

[64] IAP claims can proceed within either the standard track or the complex issues track, and all claimants are entitled to a hearing before a specially trained adjudicator (art. III(n) and (s); see also App. V). The hearing takes place in a location of the claimant's choice, and costs are paid so that the claimant can bring a support person. Counselling services are available, and cultural ceremonies are incorporated

at the claimant's request (art. III(c)). These features, among others, distinguish the IAP adjudication process from a court hearing.

[65] In *Fontaine v. Canada (Attorney General)*, 2016 BCSC 2218, [2017] 1 C.N.L.R. 104 (“*Bundled RFD*”), at para. 11, Brown J., the supervising judge for British Columbia, aptly described the IAP as: “(a) a post-litigation claims assessment process, (b) a contractual component of the IRSSA, arising from the parties’ negotiations, and (c) a closed adjudicative process, operating under the purview of independent adjudicators without any rights of appeal or judicial review”.

### (3) Role of IAP Adjudicators

[66] The IAP is intended to be an inquisitorial process, requiring adjudicators to manage the hearing, draw out and test the evidence of witnesses, caucus with the parties on proposed lines of questioning, and make any factual and legal findings necessary to resolve the claim. Only adjudicators can ask claimants questions and test evidence where necessary (art. III(e)). They are empowered to make binding findings on credibility, determine whether a claim has been proven, and award compensation where appropriate (art. III(a)). The IAP Model sets out in detail the procedures to be followed by adjudicators, claimants, and counsel (art. III(e) to (g)). Adjudicators are required to render a decision within 30 days for standard track hearings and within 45 days for complex track hearings. The decision must have a specific format, which is set out in App. XII of Sch. D; in particular, it must outline key factual findings and

provide a rationale for the adjudicator's findings and for the compensation assessed, if any (Sch. D., art. III).

[67] Adjudicators are chosen by the unanimous agreement of a selection board appointed by the IAP Oversight Committee and composed of one representative of each of former students, plaintiffs' counsel, church entities and government (App. XIII). Recognizing that the role of adjudicator requires a unique combination of skills, the parties to the IRSSA agreed that all adjudicators must have a law degree or a combination of related training and significant experience, knowledge of and sensitivity to Aboriginal culture and history, and sexual and physical abuse issues, the ability to work with staff and participants from diverse backgrounds, knowledge of personal injury law and damages assessment, as well as a variety of competencies generally required of decision makers in adjudicative and administrative contexts (App. V; *Bundled RFD*, at para. 17). Adjudicators receive training approved by the IAP Oversight Committee and ongoing mentoring by the Chief Adjudicator and other senior adjudicators (Sch. D., art. III(s); R.F. (Chief Adjudicator), at para. 22).

[68] In addressing matters arising from the IAP, supervising and appellate courts have commented extensively on the expertise of IAP adjudicators. As the Ontario Court of Appeal observed in *Fontaine v. Canada (Attorney General)*, 2016 ONCA 241, 130 O.R. (3d) 1, at p. 15, “[a]djudicators are specially trained to conduct the hearing in a way that is respectful to the claimant and conducive to obtaining a full description of his or her experience”. In *Fontaine v. Duboff Edwards Haight &*

*Schachter*, 2012 ONCA 471, 111 O.R. (3d) 461 (“*Schachter*”), the Ontario Court of Appeal recognized the Chief Adjudicator’s “broad discretion” and “relative expertise” in overseeing the IAP (paras. 54 and 78). Brown J. held in *Bundled RFD* that the IAP creates “exclusive jurisdiction for independent adjudicators to manage IAP hearings, find facts, and assess IAP claims, which in turn fosters their considerable expertise” (para. 20). I would agree with Perell J., the Eastern Administrative Judge, that “[u]nder the IRSSA, the adjudicators are — as their name suggests — exercising a judicial function in accordance with the terms of the IRSSA” (*Fontaine v. Canada (Attorney General)*, 2014 ONSC 4024, [2014] 4 C.N.L.R. 67, at para. 15).

(4) Internal Review of IAP Decisions

[69] Schedule D of the IRSSA provides that a party who is dissatisfied with an IAP adjudicator’s decision is entitled to a review on two grounds (see art. III(1)). First, the party may seek a review on the basis that the IAP adjudicator’s decision contains a palpable and overriding error. While claimants may seek a review on this ground in respect of decisions made in either the standard track or the complex issues track, defendants may seek such a review only in respect of those made in the complex issues track. Second, any party may ask the Chief Adjudicator or his designate to determine whether an adjudicator’s decision (in either track) properly applied the IAP Model.

[70] A second level of review (“re-review”) is also available on the latter ground and is to be conducted by the Chief Adjudicator or his designate. The adjudicators who conduct this type of review are designated and approved by the IAP Oversight Committee, on the recommendation of the Chief Adjudicator, “to exercise the Chief Adjudicator’s review authority” (Sch. D., art. III(r)(iii)). All such reviews are conducted on the record and without oral submissions (art. III; R.F. (Chief Adjudicator), at paras. 27-30).

[71] Neither Sch. D nor any other part of the IRSSA provides for an appeal to the courts from IAP decisions. This is in contrast with certain provisions of the IRSSA that specifically contemplate access to the courts:

- Article 4.11 provides for the creation and mandate of the National Administration Committee (“NAC”):
  - in the event of any dispute related to the appointment or service of a member of the NAC, the affected group or individual may apply to a supervising court for directions (art. 4.11(6));
  - in the event that a majority of five members of the NAC cannot be reached to resolve a dispute, the dispute may be referred by the NAC to a supervising court (art. 4.11(9));

- the NAC may refer references from the Truth and Reconciliation Commission (“TRC”) to a supervising court for a determination (art. 4.11(12)(j));
  - the NAC must apply to one of the supervising courts for a determination with respect to a refusal to add an institution as set out in art. 12.01 (arts. 4.11(12)(l) and 12.01);
  - the NAC must apply to the supervising courts for orders modifying the IAP as set out in art. 6.03(3) (arts. 4.11(12)(q) and 6.03(3)); and
  - where there is a disagreement between the Trustee under the IRSSA and the NAC with respect to the terms of the Approval Orders, the NAC or the Trustee may refer the dispute to a supervising court (art. 4.11(13)).
- Article 5.09 provides for the appeal procedure for CEP applications:
    - in the event that the NAC denies an appeal from a decision on a CEP application, the applicant may apply to a supervising court for a determination (art. 5.09(2)); and

- in exceptional circumstances, the NAC may apply to a supervising court for an order that the costs of an appeal be borne by Canada (art. 5.09(3)).
- Article 6.03 deals with the resources to be provided to the IAP:
  - in the event that continuing claims are not processed within the timeframes set out in art. 6.03(1), the NAC may apply to the supervising courts for the necessary orders to meet those timeframes (art. 6.03(3)).
- Article 7.01 pertains to truth and reconciliation:
  - where the NAC makes a decision on a dispute arising in respect of the TRC, either or both the implicated church organization and Canada may apply to a supervising court for a hearing *de novo* (art. 7.01(3)).
- Article 13.08 pertains to legal fees:
  - in the event of a disagreement as to disbursement amounts, the Federal Representative must refer the matter to a supervising court (art. 13.08(4)).

[72] Clearly, the parties did intend that there be access to the courts in specific circumstances. It is particularly noteworthy that the IRSSA provides for appeals from determinations made on CEP applications, but not from decisions under the IAP Model.

[73] The IRSSA does, however, permit IAP claimants to have their claims resolved by the courts in limited circumstances. The IAP Model provides as follows:

At the request of a Claimant, access to the courts to resolve a continuing claim may be granted by the Chief Adjudicator where he or she is satisfied that:

- there is sufficient evidence that the claim is one where the actual income loss or consequential loss of opportunity may exceed the maximum permitted by this IAP;
- there is sufficient evidence that the Claimant suffered catastrophic physical harms such that compensation available through the courts may exceed the maximum permitted by this IAP; or,
- in an other wrongful act claim, the evidence required to address the alleged harms is so complex and extensive that recourse to the courts is the more appropriate procedural approach.

In such cases, the Approval Orders will exempt the continuing claims from the deemed release, and thereafter the matter shall be addressed by the courts according to their own standards, rules and processes.

(Sch. D, art. III(b)(iii))

[74] It is important to note that this provision of the IRSSA does not allow the courts to intervene in decisions of IAP adjudicators. Rather, a claimant may opt to have his or her claim resolved by the courts *instead of* through the IAP adjudication

process where the claim is particularly complex or merits compensation exceeding the maximum permitted by the IAP.

[75] In sum, the IAP creates a closed process for the determination of claims, with one in-person hearing and two levels of internal review (*Bundled RFD*, at para. 23; *N.N. v. Canada (Attorney General)*, 2018 BCCA 105, 6 B.C.L.R. (6th) 335, at para. 78; *Fontaine v. Canada (Attorney General)*, 2017 ONCA 26, 137 O.R. (3d) 90 (“*Spanish IRS C.A.*”), at para. 53).

(5) Oversight of the IAP

[76] While the parties to the IRSSA did not provide for appeals from IAP decisions to the supervising courts, they did agree that guidance on the interpretation and application of the IAP Model can be provided by the parties themselves through the IAP Oversight Committee (R.F. (Chief Adjudicator), at para. 32). The Committee is established under Sch. D and consists of a chairperson and eight other members, including former students (designated by the Assembly of First Nations and the Inuit Representatives), plaintiffs’ counsel, church entities, and government. The Committee considers proposed instructions provided by the Chief Adjudicator, prepares its own instructions, monitors the implementation of the IAP, and makes recommendations to the NAC on changes to the IAP as necessary. Instructions are subject to approval by the NAC prior to publication (IRSSA, art. 1.01; Sch. D, art. III(r)).

[77] The Chief Adjudicator is also tasked with overseeing the administration of the IAP. He is appointed by the IAP Oversight Committee, and the appointment is approved by court order. The full list of the Chief Adjudicator's duties can be found in art. III(s) of Sch. D and includes assisting in the selection of adjudicators, ensuring consistency among IAP decisions by implementing training programs and administrative measures, and preparing proposed instructions for consideration by the IAP Oversight Committee to better give effect to the provisions of the IAP (art. III(s)). The Chief Adjudicator possesses broad discretion and "relative expertise" under the IAP Model and is monitored and guided by the IAP Oversight Committee (*Schachter*, at paras. 54 and 78; *Bundled RFD*, at para. 19; *N.N.*, at para. 81).

(6) Current Status of the IAP

[78] As of October 31, 2018, 26,669 IAP hearings had been held, or 99.95% of all anticipated hearings. Of the more than 38,000 claims filed, 99% had been resolved. There were still 199 claims in progress, with 36 hearings scheduled for a later date, 1 hearing remaining to be scheduled, 34 claims expected to be resolved through other means and 128 claims awaiting decision. Over \$3.1 billion had been paid to successful claimants, and close to 90% of IAP claims that had gone to hearing or been settled had resulted in an award in favour of the claimant (Indian Residential Schools Adjudication Secretariat, *Independent Assessment Process (IAP) Statistics* (online)).

(7) Role of the Supervising Courts

[79] In December 2006, courts in nine provinces and territories concurrently issued reasons to certify a single national class action arising out of the residential schools system and to approve the IRSSA as a proposed settlement. The provincial and territorial superior court judges who certified the class action were designated as supervising judges. In 2007, Approval and Implementation Orders were entered in each of the nine supervising courts to give effect to the settlement (A.R., vol. I, at pp. 85-97 (“Schulman Approval Order”); A.R., vol. I, at pp. 98-107 (“Schulman Implementation Order”). The Approval Orders incorporate by reference the terms of the IRSSA and provide that the applicable provincial and territorial class proceedings law shall apply to the supervision, operation, and implementation of the IRSSA. They further provide that the courts will supervise the implementation of the IRSSA and “may issue such orders as are necessary to implement and enforce the provisions of the Agreement and this judgment” (Schulman Approval Order, at para. 13). The Implementation Orders incorporate a Court Administration Protocol, under which an RFD may be made to a supervising court in respect of the implementation, administration, or amendment of the IRSSA or the implementation of the orders (Schulman Implementation Order, Sch. A).

[80] As this Court held in *SCC Records Decision*, the broad powers of supervising judges are both administrative and supervisory in nature and are supported by class action legislation, which provides the courts with “generous discretion to make orders and impose terms as necessary to ensure a fair and expeditious resolution of class actions” (paras. 31-32).

B. *Facts*

[81] The facts that gave rise to J.W.’s claim are not contested. In 2014, J.W. applied for compensation pursuant to the IAP, alleging that when he was a student at an IRS, a nun had touched his genitals over his clothing while he was waiting in line to take a shower. He argued that this incident fell within category SL1.4 of the IAP, which provides compensation for harm caused by:

Any touching of a student, including touching with an object, by an adult employee or other adult lawfully on the premises which exceeds recognized parental contact and violates the sexual integrity of the student.

(Sch. D, art. II)

III. IAP Adjudication and Judicial History

A. *Decision of the Hearing Adjudicator*

[82] J.W.’s claim was heard on May 26, 2014, and the Hearing Adjudicator rendered her decision on April 7, 2015. While she accepted J.W.’s testimony and found that the incident had happened as described, she denied the claim as she was not satisfied on a balance of probabilities that the nun had acted with a “sexual purpose” when committing the act in question (A.R., vol. I, at p. 4). She found that IAP adjudicators “must be satisfied in regard to any allegations of sexual abuse that what took place was done for a sexual purpose” (*ibid.*), relying on *R. v. Chase*, [1987] 2 S.C.R. 293. In that case, which involved an accused charged with sexual assault for

grabbing a girl's breasts, this Court identified the following factors to consider in determining whether the impugned conduct has the requisite sexual nature:

Sexual assault is an assault . . . which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "Viewed in the light of all of the circumstances, is the sexual or carnal context of assault visible to a reasonable observer". The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force would be relevant. [Emphasis added; pp. 293-94.]

[83] In applying *Chase*, the Hearing Adjudicator acknowledged that the penis is a sexual organ but was not satisfied on a balance of probabilities that there was a sexual purpose associated with the nun's conduct, given the context in which the touching had occurred and J.W.'s failure to point to any evidence or circumstance to suggest such a purpose (A.R., vol. I, at pp. 4-5). Ultimately, she interpreted SL1.4 as including sexual purpose as one of its "technical requirements" and found that J.W. had not met the burden of proof in this regard (p. 5).

#### B. *Decision of the Review Adjudicator*

[84] The appellants applied for a review of the Hearing Adjudicator's decision. In a decision dated July 5, 2015, the Review Adjudicator concluded that the Hearing Adjudicator had not misapplied the IAP by requiring J.W. to prove sexual purpose and that the decision therefore fell within a range of reasonable outcomes (A.R., vol. I, at p. 11). In his analysis, the Review Adjudicator purported to apply the

decision rendered by former Chief Adjudicator Ish in another similar IAP claim, which I shall refer to as the “B” decision and which is considered to be a seminal decision in the IAP context (Transcript, at pp. 74, 76 and 82). In applying that decision, the Review Adjudicator stated that “the former Chief Adjudicator determined that both of these categories of SL1 abuse require an objective analysis of the effect on the victim . . . and an objective analysis of the intent of the actor to commit a sexual assault” (A.R., vol. I, at p. 9 (emphasis in original)). Viewing the claim through this lens, the Review Adjudicator found that the Hearing Adjudicator had properly applied the *Chase* factors and had not misapplied the IAP Model by evaluating the perpetrator’s sexual motivation or lack thereof (p. 10).

C. *Decision of the Re-Review Adjudicator*

[85] The appellants sought a review of the Review Adjudicator’s decision. On November 22, 2015, the Re-Review Adjudicator upheld the review decision, finding that the Review Adjudicator had conducted his review correctly and had not misapplied the IAP Model (A.R., vol. I, at p. 18). She found that the Review Adjudicator had properly considered the question of whether sexual purpose should be taken into consideration when assessing claims under SL1.4: “[t]he Reviewing Adjudicator correctly noted that former Chief Adjudicator Ish found that both the first and fourth categories of SL1 abuse require an objective analysis of the effect of the touching upon the victim and as well as an objective analysis of the intent of the perpetrator” (p. 16 (footnote omitted)). She ultimately found no fault with the Review

Adjudicator's application of the IAP Model, concluding that he had completed a "thorough and thoughtful review" of the Hearing Adjudicator's decision (p. 18).

D. *Manitoba Court of Queen's Bench (Edmond J.)*, 2016 MBQB 159, [2016] 4 C.N.L.R. 23

[86] The appellants subsequently filed an RFD with the Manitoba supervising court under the IRSSA Court Administration Protocol, taking the position that "J.W. was wrongly denied compensation in the IAP as a result of the failure of adjudicators in the IAP to enforce the provisions of the [IRSSA]" (A.R., vol. II, at p. 2).

[87] Faced with the appellants' RFD, Edmond J., the supervising judge for Manitoba, observed that his ongoing supervisory jurisdiction over IAP adjudication decisions was based on: (1) the inherent jurisdiction of a superior court; (2) Manitoba's class proceedings legislation; (3) the Manitoba Court of Queen's Bench's Approval Order and Implementation Order of March 2007; and (4) the express terms of the IRSSA itself (Man. Q.B. Reasons, at para. 25). Edmond J. also accepted that the principles laid down by the Ontario Court of Appeal in *Schachter* were the starting point in considering the jurisdiction of the courts to review decisions of re-review adjudicators under the IAP.

[88] After discussing *Schachter* and subsequent jurisprudence dealing with the scope of the review powers afforded to supervising courts, Edmond J. concluded that IAP adjudicators "have a duty to enforce the terms of the IRSSA and in doing so,

they do not have jurisdiction to apply an unreasonable interpretation to the terms of the IRSSA in determining whether a compensable claim has been made out” (para. 33). He considered *Fontaine et al. v. Canada (Attorney General) et al.*, 2014 MBQB 200, 311 Man. R. (2d) 17, *Fontaine v. Canada (Attorney General)*, 2015 ABQB 225, [2015] 4 C.N.L.R. 69, and *Fontaine v. Canada (Attorney General)*, 2016 ONSC 4326, [2016] 4 C.N.L.R. 40 (“*Spanish IRS S.C.*”), and came to the following conclusion regarding his jurisdiction to review IAP decisions (at para. 35):

. . . I have the power to review the decision of the Re-Review Adjudicator to determine whether she failed to apply the terms of the IRSSA and specifically the IAP Compensation Rules. I accept that this is a limited form of curial review, reserved for exceptional cases, and that I must ensure that I do not engage in rewriting the IRSSA by effectively giving the Requestors a right of appeal and/or review for which they did not bargain.

[89] Edmond J. identified the standard of review on an RFD concerning an IAP decision as “ensuring that the Re-Review Adjudicator did not endorse a legal interpretation that is so unreasonable that it amounts to a failure to properly apply the IAP to the facts of a particular case” (para. 40). In applying this standard, Edmond J. determined that, in this case, “the fact finding process used by the Adjudicator involved a failure to apply the IRSSA’s terms and those of the IAP” and that thereafter there had been “a failure to correct that non-compliance through review or re-review” (para. 42). In his view, the Hearing Adjudicator’s interpretation of the compensable sexual abuse provision in the IRSSA was “fundamentally inconsistent” with the plain language of the provision and with the general criminal law jurisprudence regarding sexual assault, and the Review Adjudicator and Re-Review

Adjudicator had erred in upholding that interpretation. Thus, Edmond J. found that the interpretation was “simply not reasonable”, for three reasons (para. 44). First, the Hearing Adjudicator had replaced the words “any touching” in SL1.4 with the words “sexual touching”, which was not a reasonable formulation of the test to be applied (para. 45). Second, she had imported a requirement of sexual purpose on the part of the perpetrator, contrary to the plain language of SL1.4 (para. 46). Finally, she had incorrectly interpreted *Chase* as requiring a sexual purpose as a necessary element of proving an act of sexual abuse (para. 47).

[90] As a result, Edmond J. ordered that J.W.’s claim be sent back to a first-level IAP adjudicator for reconsideration.

E. *Decision of the Reconsideration Adjudicator*

[91] On September 30, 2016, the Reconsideration Adjudicator decided in J.W.’s favour (A.R., vol. II, at pp. 143-61). In evaluating J.W.’s claim, she relied on the decision rendered by Adjudicator Ross in File No. T-12783, a claim involving similar facts. She stated the following, at para. 46:

. . . [Adjudicator Ross] correctly pointed out that in *Chase*, the test was determined to be an objective one which considers general intent. That is, while a perpetrator’s sexual gratification may be taken into account, neither carnal intent or sexual gratification are necessary criteria in order to prove the sexual assault . . .

[92] The Reconsideration Adjudicator also referred to Chief Adjudicator Ish's "B" decision mentioned earlier, particularly his conclusion that "both fondling and violation of sexual integrity categories of SL1 are measured on an objective basis and may not rely on the subjective feelings of the claimant or the subjective intent of the perpetrator" (A.R., vol. II, at p. 153, fn. 12). After considering the *Chase* factors and the analysis conducted by Adjudicator Ross in her decision in File No. T-12783 (including her reliance on Chief Adjudicator Ish's decision), the Reconsideration Adjudicator found that J.W. had proven on a balance of probabilities that the requirements of SL1.4 had been met, and awarded him \$12,720 in compensation (p. 161).

[93] Before the reconsideration decision was implemented, the Attorney General of Canada ("Attorney General") appealed the supervising judge's decision to the Manitoba Court of Appeal, and obtained an order from the supervising judge staying the original order sending J.W.'s claim back for reconsideration (A.R., vol. II, at p. 162).

F. *Manitoba Court of Appeal (Monnin, Beard and leMaistre J.J.A.), 2017 MBCA 54, 413 D.L.R. (4th) 521*

[94] The Manitoba Court of Appeal unanimously allowed the Attorney General's appeal on the basis that the supervising judge had exceeded his jurisdiction under the IRSSA. Beard J.A. began by noting that the issue of the supervising judge's jurisdiction over J.W.'s RFD was a question of law to be reviewed on a correctness

standard (para. 24). She endorsed the approach taken in *Schachter* and affirmed that there is no right to appeal or to seek judicial review of IAP decisions. Judicial recourse in relation to the IAP is available only in “very exceptional circumstances” (paras. 36-37). She emphasized the distinction between failure to apply the terms of the IRSSA or the Implementation Orders, on the one hand, and the incorrect or unreasonable interpretation or application of those terms, on the other (para. 42). Only the former falls within those “very limited circumstances in which a party can have recourse to the courts” (*ibid.*).

[95] Beard J.A. went on to find that a supervising judge is not entitled to assume the role of a review adjudicator (para. 43). The mere fact that a supervising judge disagrees with an adjudicator’s decision does not mean that the adjudicator failed to enforce the IRSSA or apply the IAP Model, and as such does not allow the judge to intervene. This reasoning applies regardless of whether there is disagreement with an adjudicator’s findings of fact, interpretation of the terms of the IAP or application of those terms to the facts (*ibid.*). Overall, Beard J.A. agreed with the Attorney General’s position that the IRSSA is a “complete code” that “limits access to the courts”, with no right of appeal or judicial review of any re-review adjudication decision (para. 48).

[96] Applying these principles to J.W.’s claim, Beard J.A. held that the supervising judge in the present case had erred in modifying the scope of the courts’ jurisdiction as set out in *Schachter* by finding that he had jurisdiction to consider

whether the Hearing Adjudicator had erred in her interpretation of the terms of the IAP. While adjudicators cannot refuse or fail to apply the terms of the IRSSA, they are entitled to interpret those terms, which is part of their adjudicative role. Interpreting those terms, “even if unreasonably, does not constitute a failure to consider the IRSSA and the IAP model within the [*Schachter*] parameters of jurisdiction” (para. 51). The supervising judge had erred in carrying out the same function that would be carried out on an appeal from an IAP decision and in focusing on the adjudicator’s interpretation of the IAP rather than on whether the adjudicator had considered the correct terms (paras. 52-53). His interpretation of the supervising courts’ jurisdiction would make judicial intervention available in many, rather than limited or exceptional, cases. Moreover, such an approach would undermine the IRSSA’s objective of ensuring the timely resolution of disputes (para. 62).

[97] Beard J.A. found that the supervising judge’s jurisdiction was limited to determining whether the Hearing Adjudicator had implemented the provisions of the IAP in the narrow sense of determining whether she had considered the correct terms. Once it was determined that the Hearing Adjudicator had considered category SL1.4, Edmond J.’s jurisdiction ended and he should have dismissed the RFD (para. 72). As a result, his order was set aside and the Re-Review Adjudicator’s decision was reinstated (A.R., vol. I, at p. 83).

#### IV. Issues

[98] While the appellants have raised several interrelated questions, the appeal ultimately turns on the following two issues:

- a) Is judicial review of the decisions of IAP adjudicators available?
- b) If judicial review is not available, what is the scope of the judicial recourse available to parties seeking intervention by the supervising courts in decisions rendered under the IAP?

## V. Analysis

[99] To be clear, I would emphasize that there is a distinction between the availability of judicial *review* based on the principles of administrative law and the availability of judicial *recourse* as a result of the courts' ongoing supervisory jurisdiction over the implementation and administration of the IRSSA.

### A. *Availability of Judicial Review*

[100] The appellants submit that the availability of judicial review of IAP decisions is grounded in the court orders approving the IRSSA, the class proceedings statutes applicable to the IRSSA, and the inherent jurisdiction of the superior courts. In my view, these arguments misapprehend the nature of judicial review. I would therefore agree with the respondents, the Attorney General and the Chief Adjudicator,

that judicial review under an administrative law analysis is not applicable to IAP decisions.

[101] Judicial review is the means by which the courts “supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority” (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 28). This Court recently set out the factors to be applied in determining the availability of judicial review in *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750. As the purpose of judicial review is to ensure the legality of state decision making, it is available only where there is “an exercise of state authority” that is “of a sufficiently public character” (para. 14).

[102] The appellants submit that the IAP is a creature of statute (namely provincial class proceedings legislation), agreement and court order (A.F., at paras. 33-35). Respectfully, I disagree. As this Court found in *SCC Records Decision*, the IRSSA is, at its root, a contract (para. 35). It was not created by any act of the executive or the legislature, but is a contractual settlement of private law tort claims, to which effect has been given by court orders. IAP adjudicators exercise powers granted by contract and have no statutory authority. Their appointment and functions are determined by the parties to the contract, and they apply the Compensation Rules agreed to by the parties. The Chief Adjudicator’s authority derives from the parties’ agreement, and he does not exercise any statutory decision-making power or any

power granted by the executive. The distinct roles of the courts and IAP adjudicators under the IRSSA are determined not by the division between the legislative or executive and judicial branches, but rather by the intentions of the parties (R.F. (Chief Adjudicator), at paras. 53, 60 and 62).

[103] The appellants err in suggesting that the courts' supervisory powers include an obligation to ensure that class members receive the promised benefits of the IRSSA and that this entitles the courts to judicially review IAP decisions (A.F., at paras. 41-44). This argument misconstrues the benefits that the parties intended the IRSSA to confer. What the IRSSA and the Implementation Orders promise to individual claimants is "a contractual right to have compensable claims adjudicated under the negotiated IAP" (*N.N.*, at para. 83). The courts' general supervisory jurisdiction allows them to ensure that this contractual commitment is fulfilled, but this does not mean that IAP adjudicators are state actors (R.F. (Chief Adjudicator), at para. 65; R.F. (Attorney General), at para. 86).

[104] As the Chief Adjudicator points out in his written submissions, this analysis does not change just because Canada is one of the parties to the IRSSA. If Canada's participation as a contracting party were enough to trigger judicial review, then any arbitration decision involving Canada would be equally subject to judicial review. The availability of judicial review depends on the *source* of the decision maker's authority, not the *identity* of the parties (R.F. (Chief Adjudicator), at para.

61). In this case, the IAP adjudicators' authority was conferred on them by the parties to the IRSSA, not by an act of the legislature or the exercise of prerogative powers.

[105] Moreover, the fact that the contract was approved by court order does not transform the operation of this private settlement into a public act. Rather, the settlement is the result of lengthy and complex negotiations between private parties, and as the Manitoba Court of Appeal observed in this case, it encompasses "a compensation package that is beyond the jurisdiction of any court to create" (Man. C.A. Reasons, at para. 60). Further, and contrary to the appellants' submissions, the fact that the courts have authority to supervise the implementation of the IRSSA under class proceedings legislation is not relevant to the question of whether judicial review is available. The critical factor is not the source of the courts' authority, but rather the source of the authority of the adjudicators whose decisions are at issue (R.F. (Chief Adjudicator), at para. 63).

[106] This conclusion is consistent with the Ontario Court of Appeal's decision in *Schachter*, in which Rouleau J.A. said the following about whether a legal fee review decision by the Chief Adjudicator is subject to judicial review:

The Administrative Judge also correctly concluded that there is no right to seek judicial review from a legal fee review decision of the Chief Adjudicator. The court's jurisdiction to issue a declaration under s. 2(1)2 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 (the "JRPA") relates only to "the exercise, refusal to exercise or proposed or purported exercise of a statutory power". As the Administrative Judge explained, the Chief Adjudicator is not exercising a statutory power of decision, but rather renders his fee review appeal decision pursuant to the authority

derived from the implementation orders, as approved by the relevant provincial and territorial superior courts.

The appellant further contends that the office of the Chief Adjudicator is a quasi-judicial public body that is subject to judicial review proceedings by way of an application for an order in the nature of *mandamus* or *certiorari* under s. 2(1)2 of the *JRPA*. I do not agree with this assertion. Judicial review is not available to review the exercise of authority by a judicially created body, which has been given certain duties as provided by the terms of the S.A. and the implementation orders. The office of the Chief Adjudicator was created by order of the courts in approving the negotiated terms of settlement of class action litigation. The authority of that office is exercised in relation to those class members who have elected to advance claims through the IAP and their counsel. The terms of the S.A. and the implementation orders set out the process for reviewing decisions of the IAP Adjudicators. Recourse to the courts is only available if it is provided for in the S.A. or the implementation orders. [Emphasis added; paras. 51-52.]

[107] Supervising and appellate courts have followed this reasoning in affirming that judicial review of decisions of IAP adjudicators is not available (see R.F. (Chief Adjudicator), at para. 56, for a list of over 20 cases). The British Columbia Court of Appeal most recently reiterated this principle in *N.N.* (at para. 214). Both the supervising judge (at para. 28) and the Manitoba Court of Appeal (at para. 48) in the instant case correctly held that judicial review was not available to J.W.

[108] Because the purpose of judicial review is to ensure the legality of state decision making (*Highwood Congregation*, at para. 13) and because the powers of IAP adjudicators are not conferred by the state, but are instead derived from a contract, judicial review of IAP decisions is not available.

B. *Availability of Judicial Recourse*

[109] The parties are in agreement that the standard of review applicable to the question of whether judicial recourse is available is correctness. I am of the same view.

[110] The issue on appeal relates to the jurisdiction of a supervising judge in hearing and deciding an RFD. In finding that the correctness standard applies, Beard J.A. compared the IAP to a standard form contract. While individual claimants could opt out of the IAP scheme and have their claim determined by the courts, if they failed to opt out within the mandated time period, they were bound by the terms of the IRSSA and could not negotiate an alternative resolution (Man. C.A. Reasons, at para. 22). Beard J.A. properly applied this Court’s decision in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23. In that case, Wagner J. (as he then was) found that in reviewing the interpretation of standard form contracts, appellate courts are tasked with “ensuring the consistency of the law” (see also *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 51). Where a court’s interpretation of a standard form contract has precedential value beyond the parties to the dispute, that interpretation should be reviewed for correctness (*Ledcor*, at para. 39). He concluded as follows (at para. 46):

... Where, like here, the appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix specific to the particular parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.

[111] The question of the supervising courts' jurisdiction to assess IAP decisions will have precedential value beyond the present case, as it extends to all claims under the IAP. Further, Beard J.A. correctly found that there is no meaningful factual matrix specific to J.W.'s claim that would assist in interpreting the IRSSA to determine the jurisdiction of the supervising courts (Man. C.A. Reasons, at para. 23). While this issue has arisen in the course of the adjudication and review of J.W.'s claim, the facts of the claim have no bearing on the issue.

[112] This case can be distinguished from *SCC Records Decision*, in which this Court found that the standard of review applicable to a supervising judge's interpretation of the IRSSA was whether there was a palpable and overriding error in the decision under review. In that case, the palpable and overriding error standard was applied to the supervising judge's interpretation of the IRSSA to determine whether it allowed for the destruction of IAP documents, not to the question of his jurisdiction to make a destruction order. In the present case, the Court is not reviewing Edmond J.'s interpretation of the IAP Model and its application to the facts of J.W.'s claim. Rather, it is determining whether Edmond J. had the jurisdiction to arrive at his own interpretation of the IRSSA and substitute it for that of the IAP adjudicators. For this reason, the standard of review is correctness.

(1) Sources of the Supervising Courts' Authority

[113] While it is clear that the parties do not have the option of seeking judicial review of IAP decisions, they can file RFDs with the supervising courts to resolve

issues relating to the implementation and administration of the IRSSA. Indeed, after fully exhausting the mechanisms provided for in the IRSSA, certain groups or individuals may apply to the supervising courts for directions in respect of the implementation, administration, or amendment of the IRSSA. Applications are made in accordance with the Court Administration Protocol, which provides that all matters that require orders or directions must be the subject of an RFD (A.R., vol. I, at pp. 93 and 96; R.F. (Attorney General), at paras. 27-28). This Court is tasked with determining the scope of the supervising courts' jurisdiction when responding to RFDs arising from IAP decisions.

[114] Authority for recourse to the supervising courts can be found in the IRSSA, the Approval and Implementation Orders, and provincial class proceedings legislation. I will address each of these sources in turn.

[115] While the IRSSA provides for a comprehensive multi-level process for the resolution of IAP claims, it does contemplate recourse to the supervising courts in certain specific circumstances. As stated above, none of these avenues for judicial recourse would allow the courts to intervene in IAP decisions, and the only provision in the IAP Model under which access to the courts may be granted (that is, where losses may exceed the maximum compensation available under the IAP or where the evidence is overly complex) creates an alternative avenue for dealing with claims that would otherwise be heard by IAP adjudicators. It does not permit the courts to

intervene in IAP decisions (Sch. D., art. III(b); see, for example, *Fontaine et al. v. Canada (Attorney General) et al.*, 2014 MBCA 93, 310 Man. R. (2d) 162).

[116] The supervising courts' jurisdiction is also grounded in the Approval and Implementation Orders. Paragraph 13 of the Schulman Approval Order for Manitoba<sup>4</sup> provides:

**THIS COURT ORDERS AND DECLARES** that this Court shall supervise the implementation of the Agreement and this judgment and, without limiting the generality of the foregoing, may issue such orders as are necessary to implement and enforce the provisions of the Agreement and this judgment. [Emphasis added.]

(A.R., vol. I, at p. 93)

Paragraph 23 of the Schulman Implementation Order similarly provides:

**THIS COURT ORDERS** that the Courts shall supervise the implementation of the Agreement and this order and, without limiting the generality of the foregoing, may issue such further and ancillary orders, from time to time, as are necessary to implement and enforce the provisions of the Agreement, the judgment dated December 15, 2006 and this order. [Emphasis added.]

(A.R., vol. I, at p. 104)

[117] These broad supervisory powers conferred by the orders are in stark contrast to the limited recourse to the courts provided for in the IRSSA. While the IRSSA contemplates a few narrow avenues of recourse to the supervising courts, the orders state the courts' powers in much broader terms. In *SCC Records Decision*, this

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<sup>4</sup> Similar or identical wording can be found in the Approval and Implementation Orders made by all nine supervising courts.

Court described the supervising courts as playing a “vital role” under the IRSSA, as they exercise both administrative and supervisory jurisdiction pursuant to the orders (para. 31).

[118] The final source of the courts’ jurisdiction in overseeing the implementation of the IRSSA is provincial class proceedings legislation. Section 12 of Manitoba’s *Class Proceedings Act*, C.C.S.M., c. C130, provides as follows:

The court may at any time make any order that it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

[119] This provision grants broad supervisory jurisdiction to ensure that a class action proceeds in a fair and efficient manner (*Fontaine v. Canada (Attorney General)*, 2014 ONSC 283, [2014] 2 C.N.L.R. 86 (“*Fontaine 283*”). This Court has observed that class proceedings legislation supports the broad powers conferred on supervising courts by the Approval and Implementation Orders, and that courts must have “generous discretion” to make orders as necessary to ensure a fair and expeditious resolution of class actions (*SCC Records Decision*, at para. 32).

[120] In the abstract, there is an apparent tension between the narrow availability of judicial recourse under the IRSSA, on the one hand, and the broader jurisdiction conferred on the courts by the Approval and Implementation Orders and class proceedings legislation, on the other. However, these broader conferrals of authority are given form and content by the facts of particular class proceedings. In

the context of the supervision of a settlement agreement, the terms of the agreement are determinative. While supervising judges are not free to approve an agreement that fully ousts their supervisory jurisdiction, their authority is limited and shaped by the terms of the agreement, once it is approved and determined to be fair, reasonable and in the best interests of the class.

[121] My colleague Abella J. emphasizes that, in the case of the IRSSA, the RFD process arose as a condition of settlement approval, suggesting that the terms of the agreement on their own are not determinative in ascertaining the jurisdiction of a supervising judge in relation to a particular IAP decision (Abella J. Reasons, at para. 17). However, one should be mindful of the reasons why conditions were imposed when considering their impact. The concerns regarding the IRSSA and the IAP raised by Winkler J. in the decision approving the IRSSA in Ontario, *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.), did not relate to the specific terms under which claims were to be adjudicated, reviewed and resolved, but to whether there would be independence in the executive oversight of the settlement and whether sufficient resources would be committed to ensure that the claims would be resolved in a timely manner, as promised to an aging class. I would also note that Winkler J. stated that “[t]he changes the court requires to the settlement are neither material nor substantial in the context of its scope and complexity” (*Baxter*, at para. 85). As no conditions were imposed or recommended with respect to the specific mechanics of the claims resolution procedures, those procedures should be understood to have the approval of the courts.

[122] While it is clear that the courts retain broad supervisory powers pursuant to the Approval and Implementation Orders and class proceedings legislation, a distinction must be drawn between providing directions respecting the implementation and administration of the IRSSA, on the one hand, and reviewing adjudicators' interpretations of the IAP Model, on the other. As I explain in further detail below, only the former falls within the jurisdiction of the courts.

(2) Judicial Recourse is Available Only Where the Adjudicator Failed to Apply the Terms of the IAP

[123] On the question of the supervising courts' jurisdiction to consider errors in the interpretation of the IAP, I would affirm the approach taken by the Manitoba Court of Appeal. Parties may seek judicial recourse only in cases where the IAP adjudicator failed to apply the terms of the IRSSA, as this constitutes a failure to comply with the IRSSA and the IAP Model (Man. C.A. Reasons, at para. 51; *Schachter*, at paras. 53 and 57; *Bundled RFD*, at para. 183). While an adjudicator's decision is reviewable where he or she applied an inapplicable term or failed to apply an applicable term, the interpretation of the terms falls squarely within the adjudicator's adjudicative role (Sch. D, art. III(a)(v) and App. X).

[124] Put another way, as long as it can be said that an adjudicator has turned his or her mind to the compensation category raised by the claimant, then the adjudicator has applied the terms of the IRSSA. Since the parties have expressed a clear intention to grant IAP adjudicators exclusive jurisdiction to interpret the terms

of the IRSSA and the IAP, it must be accepted that an adjudicator who has interpreted these terms, even if a court considers the interpretation unreasonable, has not failed to apply the terms (Man. C.A. Reasons, at para. 51).

[125] The weight of the authorities supports a high jurisdictional threshold for supervising courts considering IAP decisions. I find the following cases to be instructive on this point.

[126] In *Schachter*, the Ontario Court of Appeal heard an appeal from a supervising judge's decision on an RFD concerning the provisions of the IAP and the Implementation Order relating to legal fees. Rouleau J.A. stated that the IRSSA confers neither a right to appeal nor a right to seek judicial review of IAP decisions (at paras. 50-52), and provided the following explanation of the parties' right to obtain directions from the supervising courts:

... The terms of the S.A. and the implementation orders set out the process for reviewing decisions of the IAP Adjudicators. Recourse to the courts is only available if it is provided for in the S.A. or the implementation orders.

I turn now to whether a process, other than an appeal or judicial review, is available to review a decision by the Chief Adjudicator. The Administrative Judge properly confirmed that the IAP Adjudicators "cannot ignore" the provisions of the implementation orders and that "it remains necessary for Adjudicators to apply the required factors" when conducting a legal fee review at first instance. In the perhaps unlikely event that the final decision of the Chief Adjudicator reflects a failure to consider the terms of the S.A. and implementation orders, including the factors set out in para. 18 of the implementation orders, then, in my view, the parties to the S.A. intended that there be some judicial recourse. Having said that, I emphasize my agreement with the

Administrative Judge's comment, at para. 22 of his reasons, that "there is no implicit right to appeal each determination made within the context of the claims administration or assessment process as an incident of the judicial oversight function". As I will go on to explain, the right to seek judicial recourse is limited to very exceptional circumstances.

The parties intended that implementation of the S.A. be expeditious and not mired in delay and procedural disputes. As noted by the Chief Adjudicator, there are already many checks and balances in place to ensure that the process is administered fairly and in accordance with the terms of the S.A. The Chief Adjudicator is granted broad discretion by the terms of the S.A. [Emphasis added; paras. 52-54.]

[127] The "very limited circumstances" in which judicial recourse is available would include cases in which the Chief Adjudicator upholds an adjudicator's decision as fair and reasonable even though the adjudicator failed to apply the appropriate factors under the IRSSA in arriving at the decision (paras. 57, 66 and 78). Such an approach attempts to reconcile the "conflicting purposes" of the IRSSA and the IAP:

Before leaving this issue, I note that I agree with the Chief Adjudicator's submission that allowing a party to request directions when it is *alleged* that the Chief Adjudicator's decision reflects a failure to apply the terms of the implementation orders raises concerns about finality, efficiency and has the potential to overburden the Administrative Judges. However, I am satisfied that these concerns are alleviated by the clear limits on when such a request is available. Moreover, the Administrative Judges who hear such requests are well aware of the concerns that led to the adoption of the implementation orders, namely, the need to protect vulnerable claimants and the need for timely resolution of disputes in light of the advanced age of many claimants: see *Baxter*, at paras. 74 and 85. [Emphasis added; para. 58.]

[128] The Ontario Court of Appeal similarly found in *Spanish IRS C.A.* that the supervising judge had exceeded the limits of his authority by overturning findings of fact and by awarding compensation and costs to the claimant rather than remitting the

matter to the Chief Adjudicator. Sharpe J.A. found that a supervising judge who engages in “a detailed review of the factual findings made by the adjudicator” assumes “a role the IAP specifically assigns to the review adjudicator” (para. 55). He rejected the idea that *Schachter* created a “general curial jurisdiction” in relation to the IAP (para. 52). He further held that “disagreement with the result reached does not equate to a failure to enforce the IRSSA agreement or to apply the IAP model, thereby justifying judicial intervention. If it did, all IAP decisions would be appealable to the courts, the very thing *Schachter* forbids” (para. 55).

[129] In *Bundled RFD*, Brown J. heard RFDs from five claimants dissatisfied with the results of their IAP claims. She confirmed that the appropriate test for judicial recourse is that set out in *Schachter* (at para. 7) and explained the rationale behind this hands-off approach to IAP fact finding: “[d]espite my years of administering the IRSSA, it would be impossible for me to know better than those who have been immersed in the IAP . . . The Courts are simply not well-placed to make findings of fact” (para. 180). She stated the following about the availability of judicial recourse:

The principles governing RFDs . . . from IAP decisions have been coalesced in a number of recent court decisions. These decisions are the progeny of the Ontario Court of Appeal’s decision in *Fontaine v. Duboff Edwards Haight and Schachter*, 2012 ONCA 471. They all reinforce the view that the IAP was intended by the parties to be a “complete code”. Allowing ready access to the courts for appeal or judicial review would seriously compromise the finality of the IAP and fail to pay appropriate heed to the expertise of IAP adjudicators. As such, judicial recourse is restricted to “very exceptional” cases, where the IAP decision in question reflects a “patent disregard” of the IAP Model.

At the risk of stating the obvious, this is a very onerous standard. This high threshold reflects at least two factors. The first is a realization of the jurisdictional limitations of the court when dealing with an IAP decision. As I noted in the so-called “Bundled RFD” decision, fundamentally, the IRSSA is a contract. It is outside of the purview of the court to create another level of review of these decisions that is not captured by the language of that agreement. The court must respect the parties’ intention to create an adjudicative process with a sense of finality.

The second factor is a policy preference (that was formalized into the terms of IRSSA and the IAP process itself) for granting deference to the IAP Adjudicators. This policy is the same as that which encourages deference to trial judges and administrative tribunals. Simply put, these bodies which make decisions at first instance are best positioned to make certain determinations and have an expertise that a reviewing court may lack . . . [Emphasis added; footnotes omitted.]

*(Fontaine v. Canada (Attorney General), 2017 BCSC 946, at paras. 65-67 (CanLII))*

[130] These cases highlight several reasons why access to judicial recourse in respect of IAP decisions should be construed narrowly. First, this approach honours the intentions of the parties to the IRSSA. The parties went to great lengths to ensure that the IAP would be a complete code. The IAP Model clearly sets out the roles and responsibilities of adjudicators and parties, the procedures they must follow and the expertise and competencies required of adjudicators. Adjudicators must undergo specialized training and are empowered to make binding and final findings on credibility, liability, and compensation. The parties provided for a clear and comprehensive internal review mechanism and made no provision for appeals to the supervising courts. These actions clearly demonstrate their intent to retain control over this specialized process and to grant adjudicators exclusive jurisdiction to

interpret the terms of the IAP (R.F. (Chief Adjudicator), at para. 39). As Brown J. observed in *Bundled RFD* (at para. 178):

. . . Fundamentally, the IRSSA is a contract. The IAP is a negotiated process, and a complete code. To put it plainly, when the IAP Model was negotiated, the parties called “Done!” at re-review by the Chief Adjudicator or his or her delegate. The court must honour the parties’ intentions. By limiting access to the courts, finality is preserved and the expertise of the Chief Adjudicator and those under his supervision is recognized.

[131] Because the IAP is a closed process, any disagreement with respect to the interpretation of its terms should be dealt with internally. The parties foresaw the need to resolve such disputes by providing for the creation of the IAP Oversight Committee, which is specifically designed to monitor the implementation of the IAP and make changes to the process as necessary, subject to the NAC’s approval. Should interpretive direction be required, the parties entrusted this function to the IAP Oversight Committee, not to the supervising courts.

[132] Second, in entering into the IRSSA, claimants relinquished their right to have their claims resolved by the courts in favour of a process with various compensatory and non-compensatory benefits. Claimants are entitled to closed hearings at a location of their choice, attendance costs for both themselves and a support person, the incorporation of cultural traditions, and access to counselling (Man. C.A. Reasons, at para. 47; *Bundled RFD*, at para. 14). As Beard J.A. observed, there are also litigation benefits for claimants, including having an inquisitorial rather than an adversarial hearing, which avoids cross-examination, and having the alleged

perpetrator excluded while they are testifying. Should an adjudicator decide a claim without considering the terms of the IAP scheme, the claimant would be denied the benefit of the IRSSA. However, disagreement with the conclusions reached by adjudicators, whether on matters of fact or on the interpretation of the terms of the IAP, should be addressed through the review procedures provided for in the IAP and, if necessary, by approving binding instructions to adjudicators as set out in Sch. D (R.F. (Chief Adjudicator), at para. 115). These are the features of the IAP Model for which the parties bargained.

[133] Third, none of the parties to the IRSSA can argue that the scheme should be, to use the word employed by counsel for the Chief Adjudicator, “infallible” (Transcript, at p. 83). As Winkler J. stated in *Baxter*, at para. 21:

... Although not perfect in every respect, or perhaps in any respect, perfection is not the standard by which the settlement must be measured. Settlements represent a compromise between the parties and it is to be expected that the result will not be entirely satisfactory to any party or class member . . . .

[134] Fourth, to open IAP decisions to intervention by the courts would be contrary to the objective of efficient and timely resolution of disputes with finality (Man. C.A. Reasons, at para. 63; *Spanish IRS C.A.*, at paras. 51, 53 and 60; *Bundled RFD*, at para. 12 and 178; *Schachter*, at para. 58). More than 150,000 students attended an IRS. As of 2008, approximately 80,000 were still living. Several years of negotiations preceded the finalization of the IRSSA. Many of the students were elderly by that time and passed away prior to receiving their settlements (Man C.A.

Reasons, at para. 62). To use J.W.'s case as an example, the IAP adjudication process began in 2014 and the Hearing Adjudicator's decision was not released until April 2015. It took a further 7.5 months for the claim to make its way through the review and re-review processes. It is now 2019, and the outcome of J.W.'s claim has remained uncertain as the IAP decisions are subjected to continued scrutiny by the courts. This type of delay cannot be what the parties intended when they carefully negotiated the IAP (*Bundled RFD*, at paras. 3, 10 and 12).

[135] Moreover, the statistics cited above clearly indicate that the IAP Model has been largely successful in resolving these claims in a timely and efficient manner, with over 99% of claims resolved and close to 90% of admitted claims resulting in compensation for survivors. The IRSSA is the largest and most complex class action settlement in Canada and can serve as a model for future class litigants (*Bundled RFD*, at para. 3). Overriding the parties' intentions in negotiating the IAP could have a chilling effect on the potential for future class action settlements of this nature (R.F. (Attorney General), at para. 71).

[136] Fifth, a broad right to judicial recourse in respect of IAP decisions would allow Canada, and not only claimants, to challenge adjudicators' conclusions with which it disagreed. This would further undermine the efficiency and finality of the IAP, and place an additional burden on claimants by requiring them to battle Canada through multiple levels of court to confirm their right to compensation (R.F. (Chief

Adjudicator), at para. 3). This would surely be contrary to the intentions of the parties in creating a non-adversarial process to resolve IAP claims.

[137] Beard J.A. put it well when she stated the following (Man C.A. Reasons, at para. 64):

When the objective of providing compensation to individual claimants is considered in light of the entire IRSSA, the very extensive and specialized adjudication and two-step review process under the IAP, and the objective of having an expeditious process for resolving the claims, I am of the view that the limited right to judicial recourse as described in [*Schachter*] and the Perell appeal should continue to be interpreted narrowly.

[138] Sixth, if this Court were to accept the appellants' interpretation of the judicial oversight function, supervising judges would be engaging in the same exercise as reviewing adjudicators acting under the IAP's review provisions, resulting in an additional layer of review outside what the parties clearly intended to be a closed process. For this reason, a supervising judge should not substitute his or her own decision for that of an IAP adjudicator. Even if a court were to find that an IAP adjudicator made a decision without regard to the terms of the IAP, the appropriate remedy would be to set aside the decision and send it back for reconsideration in accordance with the criteria set out in the IAP (R.F. (Chief Adjudicator), at para. 39).

[139] The courts' broad supervisory authority would, however, allow a supervising judge to order remedies that lie outside the exclusive jurisdiction of IAP adjudicators should they be necessary to ensure that the IAP is administered fairly.

For example, in *N.N.*, which will be discussed in greater detail below, the British Columbia Court of Appeal held that because the IRSSA is silent as to the admission of new evidence after a claim has been heard, the supervising court had the jurisdiction to reopen the claim and order that the evidence be admitted and considered by the Chief Adjudicator (para. 195).

[140] Before moving on, I pause for a moment to discuss the concept of “exceptional circumstances”. At various points in both the written and the oral submissions, the phrase “exceptional circumstances” has been referred to as a “threshold” or “test”. I would note that the phrase appears only once in *Schachter*, at para. 53: “. . . the right to seek judicial recourse is limited to very exceptional circumstances.” In making this statement, the Ontario Court of Appeal was not setting out a test for judicial recourse under the IAP. Rather, Rouleau J.A. was simply clarifying that cases in which judicial intervention is warranted will be rare. It is not helpful to employ the idea of “exceptional circumstances” as a test, threshold, or standard, as it merely describes the limited nature of judicial recourse in respect of IAP decisions. To reiterate, I would adopt the test for judicial recourse articulated by the Manitoba Court of Appeal in this case, namely failure by the IAP adjudicator to apply the terms of the IAP Model, which amounts to failure to enforce the IRSSA (Man. C.A. Reasons, at paras. 42 and 51; *Schachter*, at para. 53; *Spanish IRS C.A.*, at paras. 55 and 59-60).

- (3) Where the IRSSA Provides No Internal Remedy, Recourse Can Be Sought from the Supervising Courts to Fill this Gap

[141] While the parties' intentions in creating the IRSSA and the IAP must be honoured, it must also be acknowledged that circumstances will inevitably arise that were not foreseen by the parties and are therefore not provided for in their agreement. As the Chief Adjudicator observes, the parties did anticipate that court involvement might be necessary, not to interpret the IAP Model, but to ensure that adjudicators can in fact implement the IAP to achieve the intended results (R.F. (Chief Adjudicator), at para. 100). As stated above, the parties have clearly turned their minds to the question of whether a right to appeal or to seek review of IAP decisions is available. However, should a situation arise which was not contemplated by the parties, courts must have the power to intervene to ensure that the parties receive the benefits of the agreement, i.e., what they bargained for.

[142] A clear example of the courts' supervisory authority being utilized to fill a gap in the IRSSA arose recently in *N.N.*, a decision of the British Columbia Court of Appeal. In that case, one of the claimants requested a re-review after her claim was denied by the initial adjudicator and that decision was upheld on review. After filing a request for re-review, counsel for the claimant became aware of new information relating to the claim and provided that evidence to the re-review adjudicator. The re-review adjudicator found that while the information might have resulted in a favourable decision for the claimant had it been available at the hearing, all reviews are conducted on the record and no new evidence is permitted. As he found that he lacked the authority to address this issue, he stated that the claimant should apply to the supervising court for directions, since supervising courts have the authority to

reopen claims on a case-by-case basis (*N.N.*, at paras. 122-26). The claimant subsequently filed an RFD with the supervising court. The supervising judge found that the new information was not sufficient to warrant judicial recourse, but her decision was overturned by the British Columbia Court of Appeal.

[143] While reaffirming that courts should not be engaging in detailed reviews of findings of fact made by IAP adjudicators, MacKenzie J.A. found that where new information comes to a court's attention, it will be necessary for that court to determine whether the claim must be remitted for reconsideration (*N.N.*, at para. 157).

This approach is consistent with the objectives of the IRSSA:

. . . I note that in *Schachter* at para. 57, Justice Rouleau described an exceptional circumstance as being “*where the final decision of the Chief Adjudicator reflects a failure to comply with the terms of the [IRSSA] or the implementation orders*” (emphasis added). . . .

Any consideration of an exceptional circumstance must include a consideration of the objectives of the negotiated IRSSA, reflected in the preamble, to achieve a “fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools” that seeks to promote “healing, education, truth and reconciliation and commemoration”.

In my view, it may be necessary for a court on judicial recourse to consider new information, and to determine whether a claim must be remitted to the Chief Adjudicator for reconsideration, but this will only be appropriate in very rare and exceptional cases. [Emphasis in original; paras. 155-57.]

[144] MacKenzie J.A. adopted the approach taken in *Fontaine 283* by Perell J., who found that supervising courts have the jurisdiction to direct the reopening of settled IAP claims on a case-by-case basis (*N.N.*, at para. 164; *Fontaine 283*, at

para. 225). Though Perell J. made the following statements in the context of a breach of Canada's disclosure obligations, I would adopt his reasoning as well:

... the Applicants' RFD raises the question of whether the court may direct the re-opening of settled IAP claims on the grounds of Canada's breach of its disclosure obligations.

In my opinion, the answer to this question is yes. The court does have the jurisdiction to re-open settled claims but that jurisdiction must be exercised on a case-by-case basis.

If truth and reconciliation is to be achieved and if nous le regrettons, we are sorry, nimitataynan, niminchinowesamin, mamiattugut, is to be a genuine expression of Canada's request for forgiveness for failing our Aboriginal peoples so profoundly, the justness of the system for the compensation for the victims must be protected. The substantive and procedural access to justice of the IRSSA, like any class action, must also be protected and vouched safe. The court has the jurisdiction to ensure that the IRSSA provides both procedural and substantive access to justice.

...

Thus, I conclude that the court does have the jurisdiction to re-open a settled IAP claim but whether a claim should be re-opened will depend upon the circumstances of each particular case. [Emphasis added; paras. 224-32.]

[145] Should a situation arise which is not provided for in the IRSSA and which might affect the outcome of a claim, it would be inconsistent with the purpose of the settlement to deny relief to the claimant. This was clearly the case in *N.N.*, where the IAP Model did not provide any procedure for the admission of new evidence on review, and the evidence in question could have had an impact on the result.

[146] This is not to say that parties will automatically be entitled to have a claim reopened if they are able to point to a procedural gap in the IAP Model or provide new information that was not before the IAP adjudicator(s). A case-by-case analysis is required, and a variety of factors may have to be considered, including whether some prejudice to the party requesting judicial intervention has been shown (*Fontaine* 283, at para. 228). Cases in which a claim can be reopened will be rare. In *N.N.*, for example, MacKenzie J.A. undertook a detailed review of the new evidence and its significance and took into consideration the fact that the claimant was not at fault for the late disclosure, nor was she seeking additional compensation as a result (paras. 171-87).

[147] In his factum, the Chief Adjudicator acknowledges the need for supervising courts to “fill in the gaps” left by IAP provisions and states that this would be an appropriate use of the courts’ supervisory authority (para. 95). The outcome in *N.N.* did not hinge on the supervising judge assuming the role of adjudicator or embarking on an interpretive exercise with respect to the provisions of the IRSSA or the IAP. The British Columbia Court of Appeal saw its role as determining whether the claim should be reopened in light of new information, not whether the adjudicator had committed a palpable and overriding error (*N.N.*, at para. 152).

[148] Ultimately, a balance must be struck between resolving claims efficiently and obtaining some sense of finality for the parties, on the one hand, and ensuring fair

and just outcomes, on the other (*N.N.*, at para. 167). This approach gives effect to the parties' intention that the IRSSA promote a "fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools" by ensuring compliance with the rules of natural justice.

C. *Application to the Instant Case*

(1) The Supervising Judge Erred in Substituting His Own Interpretation of SL1.4

[149] As noted above, Edmond J. stated that his jurisdiction was limited to "ensuring that the Re-Review Adjudicator did not endorse a legal interpretation that is so unreasonable that it amounts to a failure to properly apply the IAP to the facts of a particular case" (Man. Q.B. Reasons, at para. 40). He went on to conduct a detailed review of the Hearing Adjudicator's decision, identifying what he interpreted to be errors in her analysis of SL1.4. After finding that these errors were unreasonable, he held that the failure of the Review Adjudicator and the Re-Review Adjudicator to correct them was a sufficient basis for setting aside the re-review decision and ordering a reconsideration of the claim.

[150] I agree with the Manitoba Court of Appeal that Edmond J. erred in scrutinizing the Hearing Adjudicator's interpretation of SL1.4 and substituting his own. Edmond J. could not concern himself with the proper interpretation of SL1.4, but was entitled only to determine whether the Hearing Adjudicator had considered

the correct terms. Instead, he engaged in the same analysis that the parties assigned to IAP adjudicators and came to a different result (R.F. (Chief Adjudicator), at para. 107). In *Spanish IRS S.C.*, the supervising judge, Perell J., undertook a similar exercise in reviewing an IAP decision. The appellants and the Assembly of First Nations rely on the approach taken by Perell J. in that case. However, the Ontario Court of Appeal overturned his decision, and Sharpe J.A. made the following comments:

The administrative judge appears to have taken the view that if, in his judgment, M.F. was entitled to compensation, any other conclusion necessarily reflected a failure to apply the IAP model. In my respectful opinion, that approach reflects a failure to follow the strictures imposed in *Schachter* on recourse to the courts from IAP decisions, and one that, if accepted, could significantly undermine the finality and integrity of the IAP.

(*Spanish IRS C.A.*, at para. 60)

[151] My colleague Abella J. correctly observes that the Hearing Adjudicator described the question before her as “whether or not the incident was sexual touching which exceeded recognized parental conduct” and that SL1.4 uses the phrase “any touching”, without the word “sexual” (paras. 36 and 41). She argues that the addition of a requirement that the touching be sexual constituted a failure to apply and implement the IRSSA. Respectfully, I disagree. The Hearing Adjudicator turned her mind to the requirements of SL1.4, as evidenced in her detailed analysis. While she interpreted the category differently than Edmond J., this does not amount to a failure to apply SL1.4. Moreover, the RFD arose from the Re-Review Adjudicator’s decision, which correctly referred to SL1.4 as requiring “any touching” and did not

add the word “sexual” (A.R., vol. I, at pp. 14 and 16). The Re-Review Adjudicator expressly agreed with the assessment carried out by the Review Adjudicator in finding that the Hearing Adjudicator had correctly applied the IAP Model, demonstrating that the choice to deny J.W.’s claim was based on a deliberate interpretation of and engagement with the SL1.4 category (p. 18).

[152] The Hearing Adjudicator in the instant case had regard to and applied the factors in the SL1.4 category, and her decision was upheld by the Review Adjudicator and the Re-Review Adjudicator, in keeping with the mechanism contained in the IAP Model. While the supervising judge may have disagreed with the outcome, this was not a basis for finding that the adjudicators had failed to apply the terms of the IRSSA. Once he determined that the adjudicators had applied the appropriate terms and provisions of the IAP (i.e., SL1.4), and once he agreed that the Hearing Adjudicator was “entitled to give context and interpretation to the language used in the IAP” (para. 56), his jurisdiction ended, and he ought not to have ruled on whether the Hearing Adjudicator’s interpretation was reasonable. As Beard J.A. of the Manitoba Court of Appeal concluded in this case, Edmond J. exceeded his jurisdiction by substituting his own interpretation of SL1.4 and directing that the claim be reconsidered in accordance with that interpretation.

- (2) The Chief Adjudicator Concedes That J.W. is Entitled To Relief, But He Lacks a Remedy Under the IRSSA

[153] While I am in agreement with the Manitoba Court of Appeal that the supervising judge erred in his analysis, I believe this to be an exceptional case in which reconsideration is appropriate. I am not basing this conclusion on Edmond J.'s reasoning, which would require the courts to reinterpret the IAP. Rather, J.W.'s claim has given rise to a unique dilemma for which the IRSSA provides no internal recourse, and which therefore requires this Court to craft a remedy. Certain concessions made by the Chief Adjudicator at the hearing before this Court have exposed a gap in the IRSSA's provisions. Specifically, the Chief Adjudicator has no authority to reopen J.W.'s claim despite his conclusion that the decisions on the claim are "aberrant". The Chief Adjudicator's inability to remedy such an error in IAP decisions is clearly inconsistent with the role conferred upon him by the parties of ensuring consistency in the application of the IAP. This is certainly a situation in which the courts can step in to provide a remedy that is consistent with the IRSSA's objective of promoting a "fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools" (see B in the recitals of the IRSSA).

[154] To reach this conclusion, it is necessary to consider the sequence of events that revealed this gap in the IRSSA.

[155] In their written submissions, neither the Attorney General nor the Chief Adjudicator directly addressed the substance of the IAP adjudicators' decisions or the proper interpretation of SL1.4. Rather, each of them argued that courts should not weigh in on the interpretation of the IAP's terms, as the parties intended this task

to be within the exclusive jurisdiction of IAP adjudicators. At the hearing, however, the Attorney General appeared to defend the merits of the Hearing Adjudicator's decision, arguing that her interpretation of SL1.4 fell within the range of possible outcomes. The Attorney General relied on former Chief Adjudicator Ish's "B" decision in another similar IAP claim discussed earlier, arguing that it supports the position that sexual purpose should be taken into consideration (Transcript, at pp. 55-58; Condensed Book (Attorney General), at pp. ii-iii).

[156] In response to these submissions, the Chief Adjudicator directed the Court to former Chief Adjudicator Ish's decision, which states: "I find there is no requirement in the IAP that the actor possessed a sexual intent before liability can be found for a sexual assault" (A.R., vol. II, at p. 70 (emphasis added)). At the hearing before this Court, the Chief Adjudicator expressed the view that the decisions of the Hearing Adjudicator, the Review Adjudicator and the Re-Review Adjudicator in this case are "aberrant" and that their interpretation of SL1.4 does not reflect a systemic problem within the IAP:

**Mr. Arvay, Q.C.:** These decisions are aberrant.

**Madam Justice Karakatsanis:** Are there other aberrant decisions? . . .

. . .

**Mr. Arvay, Q.C.:** The best I can answer is this way. After Justice Edmond's decision there was a reconsideration decision and it went the other way. And that of course that decision was stayed when it

went to the Court of Appeal. To our knowledge there has never been another decision like this one here in the future because it has been — the reconsideration decision recognized the correctness, the proper interpretation as set out by Mr. Ish.

**Madam Justice Karakatsanis:** So there aren't other claimants out there who have been denied for the same reason, the same interpretation, that you are aware of? . . .

**Mr. Arvay, Q.C.:** There are seven other [outstanding] claimants who fall within the category SL1.4. To our knowledge — or to my knowledge anyway — none of those involve in this particular issue.

(Transcript, at pp. 75-77)

[157] I would also highlight the following exchange, in which the Chief Adjudicator agreed that there is no mechanism in the IRSSA that enables him to reopen a matter where he disagrees with the outcome:

**Madam Justice Karakatsanis:** I accept that, but the Chief Adjudicator, once something comes to the Chief Adjudicator's attention. And my question to you is, there is a responsibility under the schedule to try and ensure consistency, is there no recourse for the Chief Adjudicator? Can you not go to the committee and get an interpretation? Is there nothing the Chief Adjudicator can do to ensure that claimants who are entitled to compensation under the terms they agreed to get it?

**Mr. Arvay, Q.C.:** It's all future looking, Justice Karakatsanis.

. . .

**Mr. Justice Moldaver:** It's even more egregious, it seems to me, when you are sitting there conceding that this man's case should have been heard and now you are telling us they got no remedy.

**Mr. Arvay, Q.C.:** Right . . . That happens. In a scheme that allows for 38,000 adjudications, mistakes may be made for which there is no remedy.

(Transcript, at pp. 84-87)

[158] The Chief Adjudicator also agreed that where the IRSSA contains no internal remedy, the courts may intervene to fill the gap:

**Mr. Justice Moldaver:** . . . If as a result of working [the interpretative problems] out [within the four corners of the agreement] we reach — we have a hiatus, we have a gap, we have an inability to do justice in a particular case —

**Mr. Arvay, Q.C.:** Yes.

**Mr. Justice Moldaver:** — then you should be able to go to the court to fill that gap.

**Mr. Arvay, Q.C.:** I agree.

(Transcript, at p. 92; see also, R.F. (Chief Adjudicator), at para. 95)

[159] Given the Chief Adjudicator's role within the IAP scheme, I attach significant weight to these statements. As set out above, the Chief Adjudicator is tasked under the IRSSA with ensuring consistency among the decisions of adjudicators in the interpretation and application of the IAP Model by implementing training programs and administrative measures (Sch. D, art. III(m)). He can also propose instructions to the IAP Oversight Committee in order to better give effect to the provisions of the IAP (Sch. D, art. III(r)).

[160] In addition to these “future looking” mechanisms, the Chief Adjudicator ensures consistency in the application of the IAP through his role in the internal review process. As stated above, the final level of review (re-review) is conducted by the Chief Adjudicator or his designate. While in this case the re-review was conducted by a designate and not by the Chief Adjudicator himself, “designates” are identified in the scheme as being approved by the IAP Oversight Committee to exercise what the IAP refers to as “the Chief Adjudicator’s review authority”. It is evident that the scheme places the Chief Adjudicator at the apex of the review process and gives him the authority to ensure that adjudicators are properly applying the IAP Model.

[161] The Chief Adjudicator has conceded that the decisions of the adjudicators in this case were “aberrant” and did not reflect the direction provided by former Chief Adjudicator Ish. As my colleague Brown J. observes, the Chief Adjudicator did not go so far as to concede that there is a gap in this case that would warrant intervention by the courts (Brown J. Reasons, at paras. 194-95). This is, however, not determinative of the appeal. In light of the Chief Adjudicator’s role and responsibilities under the IAP scheme, his statement that the re-review resulted in an “aberrant” decision is a significant concession. It indicates that the scheme has broken down such that the Chief Adjudicator was not able to ensure that the terms of the IAP were properly applied in this case.

[162] Furthermore, the Chief Adjudicator is not actually a party to the IRSSA or the IAP, but is instead, as my colleague Brown J. observes, a creation of that scheme (para. 190). Therefore, while the Chief Adjudicator's concession that an IAP claim was wrongly decided has great significance, the Chief Adjudicator's opinion as to whether this results in a "gap" has no bearing on the Court's interpretation of the parties' intentions in this regard. As my colleague Abella J. points out, courts have a duty to ensure that the claimants receive the benefits they bargained for (Abella J. Reasons, at para. 30). In my view, the sequence of events in this case has exposed a gap in the IRSSA, and it is the role of this Court to step in to fill that gap.

[163] The "gap" in this case does not arise as a result of a finding by this Court that J.W. is entitled to compensation based on its own interpretation of the IAP. Rather, the gap arises as a result of the parties' intention that adjudicators decide which claimants receive compensation and that the Chief Adjudicator should represent the final level of review in order to ensure consistency across all IAP decisions. The precise unfairness which this Court must address stems from the fact that, despite the Chief Adjudicator's opinion that an error has been made on this final review, there is no mechanism for reopening a claim or otherwise providing relief to a claimant.

[164] Given that the IAP dictates that the Chief Adjudicator should have the final word under the review mechanism, the practical effect of this situation is that J.W. did not receive the benefits bargained for. As there is no remedy within the four

corners of the agreement that is available to either J.W. or the Chief Adjudicator, the courts must step in to fill this gap. It is particularly appropriate that this Court intervene in light of the fact that the IRSSA is a settlement of a class action, and it can be assumed that all similarly situated individuals are entitled to the same treatment under the scheme. It is clearly consistent with the scheme to find that there is unfairness when the Chief Adjudicator concedes before this Court that a claimant was improperly denied a claim based on “aberrant” decisions or an isolated error by the adjudicators.

[165] This conclusion is not, as my colleague Brown J. would find, inconsistent with the provision stating that *stare decisis* does not apply to the IAP (Sch. D, App. X, s. 5; Brown J. Reasons, at para. 185). The initial hearing adjudicator in any claim is not prevented from declining to follow a prior decision and adopting his or her own interpretation of the IAP, and it is open to the Chief Adjudicator to agree or disagree with the adjudicator’s conclusion on re-review. In this way, the IAP scheme allows IAP adjudicators to come to an independent conclusion and see that justice is done in each case, while at the same time allowing the Chief Adjudicator to carry out his mandate to ensure consistency across all IAP decisions. The problem in this case stems not from the fact that the adjudicators did not follow precedent, but from the Chief Adjudicator’s admission that J.W. was wrongly denied compensation at the final level of review in what the Chief Adjudicator conceded was an “aberrant” decision.

[166] As was the case in *N.N.*, this gap in the IRSSA has caused significant prejudice to J.W. He was denied any compensation, despite the Chief Adjudicator's acknowledgment at the hearing before this Court that this result is inconsistent with the proper application of the IAP Model. I recognize that neither the supervising judge nor the Manitoba Court of Appeal had the benefit of the concessions made by the Chief Adjudicator in his oral submissions before this Court. It is unfortunate that this acknowledgment came about only at the hearing before this Court. Had the Chief Adjudicator expressed his disagreement with the Re-Review Adjudicator's decision on J.W.'s claim at an earlier stage of the proceedings and perhaps sought a remedy from the supervising judge, J.W. might have been spared the significant delay and the hardship associated with litigating this issue through multiple levels of court. However, to deny a remedy for J.W. in the face of these circumstances would result in a clear injustice, and this Court must therefore intervene.

[167] I would clarify that while I find that J.W.'s claim should be remitted for reconsideration, I would not do so on the basis on which the supervising judge made his order. Edmond J. erred in applying his own interpretation of the IAP Model.

## VI. Remedy

[168] For the reasons stated above, I would reinstate the order made by Edmond J. on August 3, 2016 that J.W.'s claim be sent back to a first-level IAP adjudicator for reconsideration (A.R., vol. I, at pp. 48-51).

[169] Given that J.W.'s claim has already been reconsidered and that the Chief Adjudicator is satisfied that the Reconsideration Adjudicator properly applied the IAP Model, I would give effect to the Reconsideration Adjudicator's decision (A.R., vol. II, at pp. 143-61). The compensation award of \$12,720 is reinstated, with interest calculated from the date of the Reconsideration Adjudicator's decision. The appropriate interest rate is to be determined in accordance with the applicable provincial rules, which in this case are to be found in Part XIV of Manitoba's *Court of Queen's Bench Act*, C.C.S.M., c. C280.

## VII. Costs

[170] I would award costs to J.W. per the usual rule. However, I note that J.W. seeks costs on a solicitor-client basis in this Court and in the courts below. He submits that this case raises issues of public interest relating to the implementation of the IRSSA. The Attorney General submits that costs should be awarded to the appellants but opposes the request for costs on a solicitor-client basis, arguing that the appellants have not established any reason to deviate from the normal rule as to party-party costs.

[171] In *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, this Court identified two considerations that can help guide the exercise of a judge's discretion on a motion for special costs in a case involving the public interest:

... First, the case must involve matters of public interest that are truly exceptional. It is not enough that the issues raised have not previously been resolved or that they transcend the individual interests of the successful litigant: they must also have a significant and widespread societal impact. Second, in addition to showing that they have no personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds, the plaintiffs must show that it would not have been possible to effectively pursue the litigation in question with private funding. In those rare cases, it will be contrary to the interests of justice to ask the individual litigants (or, more likely, pro bono counsel) to bear the majority of the financial burden associated with pursuing the claim [Emphasis added; para. 140.]

[172] In my view, neither of these considerations supports the awarding of special costs to J.W. First, the issue raised in this appeal is not “truly exceptional”. While the issues relating to the implementation of the IRSSA will have an impact on the parties to that agreement and the courts tasked with supervising its implementation, they do not have a sufficiently significant and widespread societal impact to justify granting solicitor-client costs. Given the *sui generis* nature of the IRSSA, the guidance provided by this Court regarding the scope of judicial oversight of the IAP will have little impact outside of this narrow context. With respect to the second consideration, J.W. clearly has a “personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds”, as his entitlement to compensation under the IAP is at the core of these proceedings.

[173] I am therefore not persuaded that it would be appropriate to grant J.W.’s request for solicitor-client costs.

## VIII. Conclusion

[174] For these reasons, I would allow the appeal and reinstate the Reconsideration Adjudicator's award of \$12,270, with interest calculated in accordance with Part XIV of Manitoba's *Court of Queen's Bench Act*, and with costs to J.W. per the usual rule.

The reasons of Brown and Rowe JJ. were delivered by

BROWN J. —

[175] I would dismiss the appeal. Paragraphs 56-138, 140 and 149-52 of the reasons of my colleague Côté J. correctly state the law for a majority of this Court with respect to the jurisdiction of the supervising courts. I therefore concur with my colleague on this point, and would find that Edmond J. erred in scrutinizing the interpretation of SL1.4 (*Indian Residential Schools Settlement Agreement* (2006), Sch. D, art. II ("IRSSA")) undertaken by the Hearing Adjudicator and substituting his own (Côté J. Reasons, at para. 150). I do not, however, agree that any "gap" exists in the IRSSA to allow this Court to remit J.W.'s claim for reconsideration. While my colleague Côté J. has striven admirably to justify landing where she does, the parties to the IRSSA did not agree to a particular interpretation of a contractual term, but to a particular *process*, which my colleague's reasons undermine by her disposition of this appeal.

[176] The IRSSA expressly precludes our intervention in the Independent Assessment Process (“IAP”), even where we might be of the view that it has been incorrectly interpreted and applied. It is “‘a complete code’ that limits access to the courts, preserves the finality of the IAP process and respects the expertise of IAP adjudicators” (*Fontaine v. Canada (Attorney General)*, 2017 ONCA 26, 137 O. R. (3d) 90 (“*Spanish IRS C.A.*”), at para. 53). Straining to find a “gap” in the IRSSA so as to pry open a little space for judicial recourse where the parties clearly intended to preclude it defeats the intentions of the parties and — I repeat — undermines the integrity of the process that they settled upon.

[177] To support having found this supposed gap, Côté J. points to the Chief Adjudicator’s concession that (1) J.W.’s claim was wrongly decided by the Hearing Adjudicator (“aberrant”) and wrongly confirmed by two review adjudicators, and (2) that he has no authority to reopen J.W.’s claim (para. 153). It follows, my colleague says, that courts may step in to furnish a remedy. As I explain below, however, the Chief Adjudicator’s concession does not expose any “gap” in the IRSSA, much less any basis for judicial intervention to fill it — such judicial intervention being contrary to the express intentions of the parties. My colleague simply has no basis for rewriting the terms of the IRSSA.

#### I. Rewriting the Terms of the IRSSA

[178] The IRSSA is a contract (*Canada (Attorney General) v. Fontaine*, 2017 SCC 47, [2017] 2 S.C.R. 205 (“*SCC Records Decision*”), at para. 35. Interpreting its

terms therefore requires a court to discern the contracting parties' intentions, and to enforce the bargain to which they committed (G. R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at p. 174; *SCC Records Decision*, at para. 35).

[179] It is of course true that, where the parties have failed in their contract to address a particular situation arising in the course of their relationship, a court may imply a contractual term (*M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, at para. 27, citing *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711, at p. 775). This is not, however, an unlimited power. More to the point, it does not permit a court to rewrite a contract or to imply a term which is contrary to the clearly expressed intentions of the parties (Hall, at pp.180-83; *M.J.B. Enterprises*, at para. 29; and *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085, at p. 1097).

[180] A degree of circumspection in implying a term permitting judicial recourse is particularly important here. Given the finality promised by the IAP, it is easy to appreciate why the parties might have seen prolonged litigation of IAP claims in the courts to be undesirable (see *Spanish IRS C.A.*, at paras. 51, 53 and 60; Côté J. Reasons, at para. 134). It is therefore worth scrutinizing where my colleague Côté J. sees her opening for prolonging this litigation: in the absence of any authority for the Chief Adjudicator under the terms of the IRSSA to reopen J.W.'s claim, despite his conclusion that J.W.'s claim resulted in an error which is "aberrant". But merely because the IRSSA does not contain certain terms does not mean that there is a "gap"

waiting to be filled by judges (see A. Swan, J. Adamski and A. Y. Na, *Canadian Contract Law* (4th ed. 2018), at p. 793). It depends on why the terms were not included. There is a difference between *failing* to grant authority that the parties would have granted (a true “gap”), and *deciding not* to grant such authority. And, in my respectful view, a review of the terms of the IRSSA reveals that the absence of a term authorizing the Chief Adjudicator to reopen claims clearly represents an instance of the latter.

[181] The IAP is intended to be a “closed adjudicative process, operating under the purview of independent adjudicators without any rights of appeal or judicial review” (Côté J. Reasons, at para. 65, citing *Fontaine v. Canada (Attorney General)*, 2016 BCSC 2218, [2017] 1 C.N.L.R. 104, at para. 11 (emphasis added)). As a result, the adjudication of IAP claims is limited to one in-person hearing and two levels of internal review *without any judicial recourse* (Sch. D, art. III(1); Côté J. Reasons, at paras. 69 and 75). This can be contrasted with the Common Experience Payment review process, which clearly provides for judicial recourse where a claim has been denied (IRSSA, art. 5.09).

[182] Nor is the IRSSA silent on the circumstances in which recourse *can* be had to the courts under the IAP. It provides that the Chief Adjudicator may permit the claimant to access the courts where the value of the harm or loss exceeds the compensation limits, or where the evidence is overly complex (Sch. D, art. III(b)(iii); Côté J. Reasons, at paras. 73-74). The internal mechanisms of review in the IRSSA

have clearly been designed to allow for judicial recourse in specific situations, which do not include incorrect interpretations of the IAP.

[183] That it was the parties' intention that the Chief Adjudicator *not* have the authority to respond to incorrect interpretations of the IAP by reopening claims is also demonstrated by how the IRSSA *does* empower the Chief Adjudicator to respond to incorrect interpretations. Although the Chief Adjudicator cannot reopen claims where there has been an incorrect interpretation of the IAP, he (or his designate) does have, as Côté J. acknowledges, a right of final review of IAP decisions (Côté J. Reasons, at paras. 69-70 and 160). This final "review authority" empowers the Chief Adjudicator to correct an interpretative error in applying the IAP made by either the hearing or review adjudicator. As stated in Sch. D to the IRSSA:

...[A]ny party may ask the Chief Adjudicator or designate to determine whether an adjudicator's, or reviewing adjudicator's, decision properly applied the IAP Model to the facts as found by the adjudicator, and if not, to correct the decision, and the Chief Adjudicator or designate may do so.

(art. III(1)(i) (emphasis added))

[184] Further, and even where the Chief Adjudicator or his designate has (as here) failed to exercise his final review authority to correct an error in interpreting the IAP, he is empowered to remedy *on a prospective basis* such incorrect interpretations of the IAP as are brought to his attention. Specifically, he is authorized to prepare instructions for the IAP Oversight Committee's consideration with the goal of assisting adjudicators in better giving effect to the provisions of the IRSSA (Sch. D,

art. III(s)). While, as I say, this operates only prospectively in that any resulting instructions will bind only those participants who have had at least two weeks' notice of the instructions before their hearing (Sch. D, art. III(r)(iii)), this power, coupled with the Chief Adjudicator's final review authority, nonetheless affirms that the parties to the IRSSA had turned their minds to the powers of the Chief Adjudicator in respect of incorrect interpretations of the IAP. And, in so doing, they declined to confer those powers which my colleague Côté J. would now in effect bestow.

[185] Further, by providing that *stare decisis* does not apply to IAP decisions (Sch. D, App. X, item 5), the IRSSA clearly contemplates that the various IAP adjudicators will provide inconsistent and even incorrect interpretations of the IAP. As the Chief Adjudicator observed before this Court, the parties to the IRSSA did not bargain for an infallible scheme. With 38,000 adjudications and 80,000 applicants, "no one would have imagined that the scheme was going to result in error-free decisions" (Transcript, at p. 83).

[186] Both my colleagues Abella J. (at paras. 26-27) and Côté J. (at paras. 139 and 141-48) point to the majority decision at the British Columbia Court of Appeal in *N.N. v. Canada (Attorney General)*, 2018 BCCA 105, 6 B.C.L.R. (6th) 335, at paras. 83-85, in support of the proposition that courts can intervene to fill in "gaps" where the IRSSA is silent. With great respect, and putting aside his use of the threshold of "exceptional circumstances" (in respect of which I agree with the reasons

of Côté J., at para. 140), I prefer the dissenting reasons given in that appeal by Hunter J.A., who stated (at para. 227):

. . . [J]udicial intervention by a supervising judge may occur only in very exceptional circumstances when there has been a failure by the Chief Adjudicator or his designate to apply the terms of the IRSSA or the implementation orders. The purpose of such intervention is not to review the merits of the underlying decision, but rather to ensure that the dispute resolution process agreed upon by the parties is followed.

[187] My colleague Côté J. leans heavily (at paras. 144-46), as did the majority in *N.N.*, on the decision of Perell J. of the Ontario Superior Court of Justice in *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283, [2014] 2 C.N.L.R. 86, as suggesting that settled claims can be reopened on a “case-by-case” basis. But as Hunter J.A. points out (at para. 260 of *N.N.*), Perell J. later acknowledged, in *Fontaine v. Canada (Attorney General)*, 2018 ONSC 103, at paras. 51 and 170 (CanLII), that “much of what I said about reopening IAP claims was overruled three years later in [*Spanish IRS C.A.*]” and that “judicial recourse is available only where a decision of the Chief Adjudicator or his designate reflects a patent failure to apply the IAP Model.” More particularly, Perell J. acknowledged (at para. 170) that “[s]upervising [j]udges do not have jurisdiction to perform an appellate or error correcting function in respect of IAP decisions.”

[188] It is therefore clear that, by imposing a process to which the parties did not agree (and which — going by what they *did* include in the IRSSA — they would have rejected), my colleague Côté J. is rewriting the IRSSA. Clear textual and

contextual direction that she cannot do so is met with invocations of “natural justice” (at para. 148) without explaining just how it is implicated here — except to say that denying a remedy to J.W. would result in “clear injustice” such that “this Court must . . . intervene” (para. 166). But I reject the premise that my colleague is remedying “injustice”. Remedying injustice — that is, doing justice — does not mean arriving at the most palatable result. In this case, justice is served by respecting and enforcing the terms of a voluntary agreement between the parties, including the procedural and substantive rules and the jurisdictional boundaries upon which they agreed (*Spanish IRS C.A.*, at para. 63).

## II. The Chief Adjudicator’s Concession

[189] I now turn to the concession which my colleague Côté J. seizes upon as grounds for rewriting the parties’ contract. In oral argument, counsel to the Chief Adjudicator noted that the Hearing Adjudicator and review adjudicators interpreted SL1.4 in a manner that contradicted a previous decision made by former Chief Adjudicator Ish. Counsel for the Chief Adjudicator stated that this was “aberrant” — that is, as an error that departed from an accepted interpretation of SL1.4. As I have already canvassed, this leads my colleague to her “gap”, since the Chief Adjudicator has no authority under the IRSSA to provide a remedy for claimants where he discovers an error in the final review (Côté J. Reasons, at para. 163).

[190] I observe, preliminarily, that the Chief Adjudicator is not a party to the IRSSA, but rather a creation of it (Sch. D, art. III(s)). Any concession on his part as to

the scope of his authority is therefore of limited value to a judicial determination of what *the parties* intended that power to be.

[191] Further, and as I have already recounted, the Chief Adjudicator *does* have authority to respond to incorrect interpretations of the IAP by exercise of his final review authority. I grant that he did not catch the error here, because his designates failed to notice the Hearing Adjudicator's erroneous interpretation of SL1.4. What this signifies, however, is *not* that the denial of compensation to J.W. was the upshot of any "gap" or "break-down" in the agreement which required judicial recourse so as to reopen the claim (Côté J. Reasons, at paras. 161-62), but that it resulted from the Chief Adjudicator failing to properly discharge his final review obligations under the IRSSA.

[192] That this is so is made plain by the Chief Adjudicator's submission before this Court that the courts *could not* provide a remedy in this case, despite the aberrant interpretation of the IAP:

**Mr. Arvay, Q.C.:** . . . We reject that approach. We reject any approach that will allow a supervising court to set aside a decision of an adjudicator when the point of disagreement is on a matter of interpretation of a provision in the IAP. That doesn't constitute exceptional circumstances that warrants judicial recourse. And I agree with Justice Rowe that that is actually a rather question begging sort of statement.

But we [will] seize on the idea that this judicial recourse should be rare and it should really be limited to cases where, in the words of the Manitoba court of Appeal, there wasn't even a consideration of the terms. Not that there was a bad interpretation or an unreasonable interpretation, or so unreasonable interpretation, or patent disregard interpretation, it's just that there was no consideration. . . . [Emphasis added; pp. 80-81.]

[193] I recognize that, in response to questions from the hearing panel, the Chief Adjudicator went further. The exchange proceeded as follows:

**Mr. Justice Moldaver:** Why are you taking such a technical position on that when you say if it's fresh evidence, you know, we can go back to the court, even though the proceedings are complete. But if it's a fresh view and a right view of the interpretation that would have allowed this man to get his claim off the ground you can't do it.

**Mr. Arvay, Q.C.:** Okay.

**Mr. Justice Moldaver:** Really, with respect, that's an absurd position.

**Mr. Arvay, Q.C.:** Okay. So then maybe I'm wrong. Maybe I'm wrong. Maybe that would allow — that might be allowed, I don't know. That hasn't been done.

...

**Mr. Justice Moldaver:** — and now you are saying nothing can be done. You just backed off of that a little bit and said, "Well, maybe something can be done", which would be going back to the Supervising Judge to get an order, I suppose, to reopen this case.

Are you going to concede that that would be a reasonable solution to the problem?

**Mr. Arvay, Q.C.:** Well, you can tell I seem to be of mixed minds on it.

My first impression, my first reaction was that that just seems to bring back the reasonableness interpretation. I take your point, it might be different. It might be different.

...

**Mr. Justice Moldaver:** . . . If as a result of working [the interpretative problems] out [within the four corners of the agreement] we reach — we have a hiatus, we have a gap, we have an inability to do justice in a particular case —

**Mr. Arvay, Q.C.:** Yes.

**Mr. Justice Moldaver:** — then you should be able to go to the court to fill that gap.

**Mr. Arvay, Q.C.:** I agree. [Emphasis added; pp. 87-88 and 92.]

[194] In short, the Chief Adjudicator acknowledged that “maybe [he is] wrong”, and that he was “of mixed minds”. He also agreed that *where there is a “gap”*, a court might fill it. As to that last proposition, and subject to what I have said about doing so in accordance with the parties’ intentions, I agree. But the Chief Adjudicator did *not* clearly agree that such a gap existed *here*. And, when asked about whether a court could reopen J.W.’s claim to correct the Hearing Adjudicator’s interpretation of SL1.4, the Chief Adjudicator replied that, although such a result might be possible, he was unsure if it was allowed on the terms of the IRSSA.

[195] If this exchange could tenably be said to have left open the possibility of a gap, such possibility was closed immediately thereafter when the Chief Adjudicator appeared to *recoil* from that very suggestion in responding to the next line of questioning from the hearing panel:

**Mr. Justice Rowe:** . . . [T]he circumstances which we are now faced with in this case may constitute exceptional circumstances such that a supervising judge could deal with a highly problematic — a fundamentally troubling application of the agreement that warrants reconsideration, but the only means to bring it back before an adjudicator is through the intervention of a supervising judge?

**Mr. Arvay, Q.C.:** But the difference between what I think you are positing is — that’s not what happened here, right. What I think you are positing is what Justice Moldaver is saying maybe should have happened, which is that there should have been an RFD brought by the Chief

Adjudicator or somebody else bringing to the attention of the court that there was, you know, this. . .

So so I think that's not what happened. What Justice Edmond did, he just re-interpreted himself, he didn't rely on Mr. Ish's decision.

**Mr. Justice Rowe:** So therefore you disagree with his general approach, which is substituting his view, although you seem to be saying that it would be — it would serve the ends of justice if this matter were to be sent back for re-adjudication.

**Mr. Arvay, Q.C.:** Well, I don't know if I would go that far. As Justice Sharpe says, you know, justice in this particular case is following the processes, the boundaries, the terms of this agreement.

**Mr. Justice Brown:** So we have to go back — just to be clear, we are back to the bright line then?

**Mr. Arvay, Q.C.:** We are back to the bright line then. [Emphasis added; pp. 94-95.]

### III. Conclusion

[196] My colleague Côté J. has simply gone too far, with too little. A concession by the Chief Adjudicator that J.W.'s claim was wrongly decided does not support a judicial rewrite of the terms of a complex settlement agreement reflecting the common intentions of the parties, particularly where his concession accompanies a submission that that the IRSSA does not allow for judicial recourse in such circumstances. I appreciate that the plainly incorrect interpretation of SL1.4 adopted by the Hearing Adjudicator and (somehow) affirmed by two review adjudicators is difficult to let pass, but that is the result compelled by law, even if it obliges us to avert our nostrils (*Spencer v. Continental Insurance Co.*, [1945] 4 D.L.R. 593, at p. 609 per Wilson J. (as he then was)).



## APPENDIX

CEP	Common Experience Payment
IAP	Independent Assessment Process
IRS	Indian Residential School
IRSSA	Indian Residential Schools Settlement Agreement
NAC	National Administration Committee
RFD	Request for Direction
TRC	Truth and Reconciliation Commission

*Appeal allowed with costs, BROWN and ROWE JJ. dissenting.*

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