SCC File No. 37037

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO)

BETWEEN:

ATTORNEY GENERAL OF CANADA

APPELLANT

AND:

LARRY PHILIP FONTAINE IN HIS PERSONAL CAPACITY AND IN HIS CAPACITY AS THE EXECUTOR OF THE ESTATE OF AGNES MARY FONTAINE, DECEASED, ET AL.

RESPONDENTS

PRIVACY COMMISSIONER OF CANADA, INFORMATION COMMISSIONER OF CANDA, THE COALITION TO PRESERVE TRUTH

INTERVENERS

FACTUM OF THE RESPONDENT (NATIONAL CENTRE FOR TRUTH AND RECONCILIATION)

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

BIRENBAUM LAW
555 Richmond Street W., Suite 1200
Toronto, M5V 3B1

Joanna Birenbaum
Tel: (647) 500-3005
Fax: 416- 968-0325
E-mail: joanna@birenbaumlaw.ca

Counsel for the Respondent, National Centre for Truth and Reconciliation

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Marie France Major
Tel: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Respondent, National Centre for Truth and Reconciliation

Respondents continued

MICHELLINE ARNMAQ, PERCY ARCHIE, CHARLES BAXTER SR., ELIJAH BAXTER, EVELYN BAXTER, DONALD BELCOURT, NORA BERNARD, JOHN BOSUM, JANET BREWSTER, RHONDA BUFFALO, ERNESTINE CAIBAIOSAI-GIDRNARK, MICHAEL CARPAN, BRENDA CYR, DEANNA CYR, MALCOLM DAWSON, ANN DENE,BENNY DOCTOR, LUCY DOCTOR, JAMES FONTAINE IN HIS PERSONAL CAPACITY AND IN HIS CAPACITY AS THE EXECUTOR OF THE ESTATE OF AGNES MARY FONTAINE, DECEASED, VINCENT BRADLEY FONTAINE, DANA EVA MARIE FRANCEY, PEGGY GOOD, FRED KELLY, ROSEMARIE KUPTANA, ELIZABETH KUSIAK, THERESA LAROCQUE, JANE MCCULLUM, CORNELIUS MCCOMBER, VERONICA MARTEN, STANLEY THOMAS NEPETAYPO, FLORA NORTHWEST, NORMAN PAUCHEY, CAMBLE QUATELL, ALVIN BARNEY SAULTEAUX,CHRISTINE SEMPLE, DENNIS SMOKEYDAY, KENNETH SPARVIER, EDWARD TAPIATIC, HELEN WINDERMAN, ADRIAN YELLOWKNEE, PRESBYTERIAN CHURCH IN CANADA, GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, UNITED CHURCH OF CANADA, BOARD OF HOME MISSIONS OFTHE UNITED CHURCH OF CANADA, WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH, BAPTIST CHURCH IN CANADA, LES SOEURS MISSIONNNAIRES DU CHRIST-ROI BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN BAY, CANADA IMPACT NORTH MINISTRIES OF THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (ALSO KNOWN AS THE NEW ENGLAND COMPANY), DIOCESE OF SASKATCHEWAN, DIOCESE OF THE SYNOD OF CARIBOO, FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, THE INCORPORATED SYNOD OF DIOCESE OF HURON, METHODIST CHURCH OF CANADA, MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (ALSO KNOWN AS THE METHODIST MISSIONARY SOCIETY OF CANADA), INCORPORATED SYNOD OF THE DIOCESE OF ALGOMA, SYNOD OF THE ANGLICAN CHURCH OF THE DIOCESE OF QUEBEC, SYNOD OFTHE DIOCESE OF ATHABASCA, SYNOD OFTHE DIOCESE OF BRANDON, ANGLICAN SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, SYNOD OF THE DIOCESE OF CALGARY, SYNOD OF THE DIOCESE OF KEEWATIN, SYNOD OF THE DIOCESE OF QU'APPELLE, SYNOD OF THE DIOCESE OF NEW WESTMINISTER, SYNOD OF THE DIOCESE OF YUKON, TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICE OF THE PRESBYTERIAN CHURCH OF CANADA, WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, SISTERS OF CHARITY, A BODY CORPORATE ALSO KNOWN AS SISTERS OF CHARITY OF ST. VINCENT DE PAUL, HALIFAX, ALSO KNOWN AS SISTERS OF CHARITY HALIFAX, ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX, SOEURS DE NOTRE DAME-AUXILIATRICE, SOEURS DE ST.FRANÇOIS D'ASSISE, INSTITUT DES SOEURS DU BON CONSEIL, SOEURS DE SAINT-JOSEPH DE SAINT-HYACINTHE, SOEURS DE JÉSUS-MARIE, SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE, SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE DE

L'ALBERTA, SOEURS DE LA CHARITÉ DE ST.-HYACINTHE, OEUVRES OBLATES DE L'ONTARIO, RÉSIDENCES OBLATES DU QUÉBEC, CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE JAMES (THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY), CATHOLIC DIOCESE OF MOOSONEE, SOEURS GRISES DE MONTREAL/GREY NUNS OF MONTRÉAL, SISTERS OF CHARITY (GREY NUNS) OF ALBERTA, SOEURS DE LA CHARITE DES T.N.O., HOTEL-DIEU DE NICOLET, GREY NUNS OF MANITOBA INC., SOEURS GRISES DU MANITOBA INC., CORPORATION EPISCOPATE CATHOLIQUE ROMAINE DE LA BAIE D'HUDSON CORPORATION EPISCOPATE, ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY, MISSIONARY OBLATES GRANDIN PROVINCE, OBLATS DE MARIE IMMACULÉE DU MANITOBA, ARCHIEPISCOPAL CORPORATION OF REGINA,SISTERS OF THE PRESENTATION, SISTERS OF CHARITY OF OTTAWA, OBLATES OF MARY IMMACULATE CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE D'HUDSON-ST. PETER'S PROVINCE, SISTERS OF SAINT ANN, SISTERS OF INSTRUCTION OF THE CHILD JESUS, BENEDICTINE SISTERS OF MT. ANGEL OREGON, PÈRES MONTFORTAINS, ROMAN CATHOLIC BISHOP OF KAMLOOPS CORPORATION SOLE, BISHOP OF VICTORIA, CORPORATION SOLE, ROMAN CATHOLIC BISHOP OF NELSON CORPORATION SOLE, ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, CORPORATION EPISCOPATE CATHOLIQUE ROMAINE DE GROUARD, ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, CORPORATION ARCHIPISCOPALE CATHOLIQUE ROMAINE DE ST. BONIFACE - MISSIONNAIRES OBLATES SOEURS DE ST. BONIFACE, MISSIONARY OBLATES SISTERS OF ST. BONIFACE, ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT, ROMAN CATHOLIC BISHOP OF THUNDER BAY, IMMACULATE HEART COMMUNITY OF LOS ANGELES, CA, ARCHDIOCESE OF VANCOUVER- ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER, ROMAN CATHOLIC DIOCESE OF WHITEHORSE, CATHOLIC EPISCOPATE CORPORATION OF MACKENZIE- FORT SMITH, ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, EPISCOPAL CORPORATION OF SASKATOON, OMI LACOMBE CANADA INC., MT. ANGEL ABBEY INC., NATIONAL CENTRE FOR TRUTH AND RECONCILIATION, SISTERS OF ST. JOSEPH OF SAULT STE. MARIE, ASSEMBLY OF FIRST NATIONS, INDEPENDENT COUNSEL, INUIT REPRESENTATIVES AND CHIEF ADJUDICATOR OF THE INDIAN RESIDENTIAL SCHOOLS ADJUDICATION SECRETARIAT

RESPONDENTS
(Respondents)

ATTORNEY GENERAL OF CANADA
50 O'Connor Street, Suite 500
Ottawa, Ontario K1P 5E1

Alexander Pless
Tel: (613) 670-6290
Fax: (514) 283-8767
Email: christopher.rupar@justice.gc.ca
alexander.pless@justice.gc.ca

Counsel for the Appellant, The Attorney General of Canada

DEPUTY ATTORNEY GENERAL OF CANADA
50 O'Connor Street, Suite 500
Ottawa, Ontario K1P 5E1

Christopher Rupar
Tel: (613) 670-6290
Fax: (514) 283-8767
Email: christopher.rupar@justice.gc.ca

Agent for counsel of the Appellant, The Attorney General of Canada

FARRIS, VAUGHAN, WILLS & MURPHY LLP
700 West Georgia Street, 25th Floor
Vancouver, BC V7Y 1B3

Joseph J. Arvay, Q.C.
Tel: (604) 684-9151
Fax: (604) 661-9349
E-mail: jarvay@farris.com

Counsel for the Respondent, the Chief Adjudicator

DENTONS CANADA LLP
1420 - 99 Bank Street
Ottawa, ON K1P 1H4

K. Scott McLean
Tel: (613) 783-9665
Fax: (613) 783-9690
E-mail: scott.mclean@dentons.com

Agent for the Respondent, the Chief Adjudicator

ASSEMBLY OF FIRST NATIONS
55 Metcalfe Street, Suite 600
Ottawa, ON K1P 6L5

Stuart Wuttke
Tel: (613) 241-6789 Ext: 228
Fax: (613) 241-5808
Email: swuttke@afn.ca

Counsel for the Respondent, Assembly of First Nations

SUPREME LAW GROUP
900 – 275 Slater Street
Ottawa, ON K1P 5H9

Moira Dillon
Tel: (613) 691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

Agent for the Respondent, Assembly of First Nations

MCKERCHER LLP
374 Third Avenue South
Saskatoon, SK S7K 1M5

Michel G. Thibault
Tel: (604) 684-9151
Fax: (604) 661-9349
Email: m.thibault@mckercher.ca

Counsel for the Respondents, 16 Catholic Parties

GOWLING WLG (CANADA) LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Jeffrey Beedell
Tel: (613) 786-0171
Fax: (613) 788-3587
Email: jeff.beedell@gowlingwlg.com
Agent for the Respondents, 16 Catholic Parties

LAVERY, DE BILLY
1, Place Ville-Marie, bureau 4000
Montréal, QC H3B 4M4

Pierre Baribeau
Tel: (514) 871-1522
Fax: (514) 871-8977
Email: pbaribeau@lavery.ca

Counsel for the Respondents, 9 Catholic Entities

NOËL & ASSOCIÉS
111, rue Champlain
Gatineau, Quebec J8X 3R1

Pierre Landry
Tel: (819) 771-7393
Fax: (819) 771-5397
Email: p.landry@noelassocies.com

Agent for the Respondents, 9 Catholic Entities

VINCENT DAGENAIS GIBSON LLP
600 - 325 Dalhousie Street
Ottawa, ON K1N 7G2

Charles M. Gibson
Tel: (613) 241-2701
Fax: (613) 241-2599
Email: charles.gibson@vdg.ca

Counsel for the Respondent, Sisters of St. Joseph of Sault Ste. Marie

GRANT HUBERMAN, BARRISTERS & SOLICITORS
1620 - 1075 W. Georgia Street
Vancouver, BC V6E 3C9

Peter R. Grant
Tel: (604) 685-1229
Fax: (604) 685-0244
E-mail: pgrant@grantnativelaw.com

Counsel for the Respondents, Independent Counsel

SUPREME LAW GROUP
900 - 275 Slater Street
Ottawa, ON K1P 5H9

Moira Dillon
Tel: (613) 691-1224
Fax: (613) 691-1338
E-mail: mdillon@supremelawgroup.ca

Agent for the Respondent, Independent Counsel

LEGAL OPINION NORTH
192 Stanley Ave., Unit B
Ottawa, ON K1M 1P3

Hugo Prud'homme
Tel: (613) 983-1150
Fax: (866) 488-3201
E-mail: hprudhomme@legalopinionnorth.ca

Counsel for the Respondent, Inuit Representatives

OFFICE OF THE PRIVACY COMMISSIONER OF CANADA
30 Victoria Street
Gatineau, Quebec
K1A 1H3

Kate Wilson
Regan Morris
Telephone: (819) 994-5878
FAX: (819) 994-5424
E-mail: kate.wilson@priv.gc.ca

Counsel for the Intervener, Privacy Commissioner of Canada

DEVLIN GAILUS WATSON
Barristers & Solicitors
2nd Floor, 736 Broughton Street
Victoria, BC V8W 1E1

Christopher G. Devlin
Nicole D. Bresser
Tel: (250) 361-9469
Fax: (250) 361-9429
Email: christopher@dgwlaw.ca

Counsel for the Intervener, The Coalition To Preserve Truth

SUPREME ADVOCACY LLP
100 - 340 Gilmour Street
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.
Marie-France Major
Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
E-mail: mfmajor@supremeadvocacy.ca
emeehan@supremeadvocacy.ca

Counsel for the Intervener, The Coalition To preserve Truth

GOWLING WLG (CANADA) LLP
2600 - 160 Elgin Street
P.O. Box 466, Stn D
Ottawa, Ontario
K1P 1C3

Richard G. Dearden
Nancy Bélanger
Adam Zanna
Diane Therrien
Telephone: (613) 786-0135
FAX: (613) 788-3430
E-mail: Richard.Dearden@gowlingwlg.com

Counsel for the Intervener, Information Commissioner of Canada

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, Ontario
K1P 1C3

Guy Régimbald
Telephone: (613) 786-0197
FAX: (613) 563-9869
E-mail: guy.regimbald@gowlingwlg.com

Counsel for the Intervener, Information Commissioner of Canada

TABLE OF CONTENTS

PAGE

PART I- OVERVIEW AND STATEMENTS OF FACTS

OVERVIEW

1. The Indian Residential School Settlement Agreement ("IRSSA" or the "Agreement") settled the largest class action in the history of Canada.[1] It is widely recognized as a positive step towards redressing the attempted cultural genocide[2] of Indigenous peoples in Canada through the Indian Residential School (IRS) system. The Agreement has profound significance for reconciliation and for the future of this country, whether it is considered to have the spirit of a treaty, is an agreement subject to public law, or is a uniquely important private law contract.

2. The overarching goals of the Agreement, as set out in the *Preamble*, are "a fair, comprehensive and lasting resolution to the legacy of Indian Residential Schools" and "the promotion of healing, education, truth and reconciliation, and commemoration." That is what is at stake in this appeal: the integrity of the Agreement as a lasting resolution and the comprehensive documentation of IRS abuses to educate future generations and promote healing. The dissenting Justice in the Court below correctly stated that "reconciliation requires knowledge, not destruction of our past."[3]

3. The Independent Assessment Process (the "IAP") was established to resolve claims and provide compensation for sexual abuse, serious physical abuse and other wrongful acts causing serious psychological consequences. Its work is ongoing. The process of healing within families, communities and nations, and between Indigenous peoples and non-Indigenous Canadians, is still in its early stages. The wounds are raw.

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[1] This Court's decision in *Blackwater v. Plint* 2005 SCC 58 provided an important foundation for the class actions and for the eventual settlement.

[2] Speech by Chief Justice Beverely McLachlin, *Reconciling University and Diversity in the Modern Era: Tolerance and Intolerance*, delivered at the Aga Kahn Museum, Toronto, (May 28, 2015), downloaded at: http://www.theglobeandmail.com/news/national/unity-diversity-and-cultural-genocide-chief-justice-mclachlins-complete-text/article24698710/

[3] *Fontaine v. Canada (Attorney General)* 2016 ONCA 241 at para.255 ("ONCA Judgment"), Appellant's Record ("AR") Vol. I, Tab 3, p.156.

4. The courts below ordered that, subject to individual survivor consent with respect to a narrow set of redacted documents, the entire record of the IAP claim compensation process must be destroyed. This record includes not only the transcripts of survivor testimonies, but also adjudicated decisions relating to 38,000 claims for compensation and possibly also research reports and policy and strategic records of the Indian Residential Schools Adjudication Secretariat (the "Secretariat"). The destruction order is irreversible and will reverberate for generations. We cannot know or fully anticipate today the far-reaching negative impacts the order will have on healing and reconciliation.

5. The compensation decisions rendered by IAP adjudicators and the summaries of survivor testimony contained in those decisions, comprise the most comprehensive record of the horrors and the travesty of the IRS system. They hold many of the deepest and most profound stories of survivors. The testimonies gathered by the Truth and Reconciliation Commission (the "Commission") only partially record the magnitude and scale of the abuse and ongoing intergenerational impacts experienced by students at IRSs. Most of the extreme and severe abuses have only been documented as a consequence of the IAP process.

6. As a State Party responsible for attempted cultural genocide of Indigenous peoples through the IRS, and for the systemic abuse of Indigenous children for over a century, Canada has an internationally recognized duty to preserve the collective history of that abuse. There is no express term in the Agreement which would abrogate this foundational duty. To the contrary, Schedule D to the Agreement states expressly that Canada will <u>not</u> destroy various records. Moreover, the IAP Guide states that records may be preserved in *Library and Archives Canada* and may only be destroyed by the National Archivist.

7. Canada, therefore, has a dual responsibility to preserve the records of mass human rights abuse pursuant to the express terms of the Agreement, balanced against the corresponding duty to treat the sensitive IAP claim compensation records as private and confidential in accordance with federal law.

8. The courts below ordered destruction of all IAP records in order to protect the "absolute" confidentiality of the personal information contained in them. The National Centre for Truth and Reconciliation (NCTR) opposes the decision in the courts below because it does not strike the appropriate balance between the fundamental duties and interests at play. Rather, the NCTR supports the position of Canada in this appeal as follows:

- the records of Canada (as Defendant and Administrator under the Agreement) are records under the control of a government institution, subject to federal law;
- the implied undertaking rule does not apply to the IAP Records and, in particular, to the body of law of adjudicated decisions;
- the express terms of the Agreement contemplate preservation by Canada and not destruction;
- the inherent jurisdiction of the Court cannot properly be invoked in this case to order destruction of historic records of systemic human rights violations; and
- the records can and will be respectfully and confidentially preserved by Canada.

9. The NCTR supports the findings of the dissenting Justice Sharpe in the court below. The records of the Settlement Agreement Operations Branch (SAO) of Indigenous and Northern Affairs Canada (INAC) are properly characterized as government records subject to federal access, privacy and national archiving laws. The NCTR further argues that the records of the Secretariat are also records under the control of a government institution.

10. Much of the argument in favour of destruction of the records rests on the submission that preservation would violate the limited consent offered by claimants. The reality is somewhat different: apart from the language in the IAP Guide advising that records may be preserved, survivors were never told by the Secretariat what would happen to their records, one way or the other. They were not told that the records of their experiences of abuse might be destroyed and forever lost. They were never given the option to archive their transcripts. They were told only that the IAP hearing process was

confidential. Wholesale destruction does not respect survivor choice or control for thousands of deceased survivors who were never given a choice.

11. What this means is that this Court will be overriding the wishes of individual members of the class of survivors whether it orders destruction or preservation. As such, this Court must instead look to the spirit, intent, and terms of the Agreement. The Agreement promised confidentiality in the IAP process, not destruction.

FACTS

a. The National Centre for Truth and Reconciliation

12. Unlike any other party to this appeal, the NCTR's singular and enduring mandate is to advance reconciliation through stewardship of the IRS records. Promoting knowledge, understanding and discussion of both residential schools and the intergenerational effects of the IRS is the exclusive focus and work of the NCTR.[4]

13. Schedule "N" to the IRSSA, under which the Commission and the NCTR were established, recognizes that "reconciliation is an ongoing individual and collective process."[5] It is also a long-term process. For this reason, the Agreement established the NCTR as the permanent and enduring 'national memory'[6] for the Indian Residential School system and legacy.

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[4] Affidavit of Gregory Juliano, paras.12-17, 93-05, AR Vol. VIII, Tab 30, pp.5-7, 30 and Exhibits A and B.

[5] Schedule "N" of the Agreement, *Principles,* AR Vol III, Tab 20, p.50.

[6] "**We are creating a national memory here**…Because we know, if we do not do that, then it will be just a matter of two or three generations from now that most Canadians will not only be able to forget that this occurred, but they will be able to deny that it occurred. And that can never happen, that must never happen, because this is part of what Canada is all about"; remarks of Justice Murray Sinclair at the National Centre for Truth and Reconciliation Signing Ceremony, June 21, 2013, available at: http://www.umanitoba.ca/about/media/Justice_Sinclair_remarks_at_NRC_signing_ceremony_21_June_2013.pdf.

14. The NCTR is an Indigenous Archive. The NCTR's governance structure includes a Governing Circle, the majority of whose members are Indigenous, and a Survivors Circle, comprised of survivors of the Indian Residential School system, their families or their descendants.[7]

15. As part of its mandate, governance, and physical and digital design, the NCTR is dedicated to 'reconciliation archiving', recognizing Indigenous peoples as co-creators of the IRS record through co-curation and participatory archiving. To this end, the NCTR engages in education and outreach, supports researchers and archivists (and specifically Indigenous researchers and archivists), supports survivors (by ensuring their voices are heard and shared), and employs staff who are expert in the IRS history. The NCTR offers expertise in national and international research and archiving principles, protocols, guidelines and best practices for Indigenous and human rights research and archiving, including:

- Aboriginal principles of Ownership, Control, Access and Possession ("OCAP"); Ownership, Control, Access and Stewardship ("OCAS"); and Qaujimajatuqangit ("IQ", Inuit Qaujimajatuqangit);
- Protocols for Native American Archival Materials; and
- *Tri-Council Policy Statement: Ethical Conduct of Research Involving Humans* (particularly the chapter on First Nations, Inuit and Métis peoples of Canada).[8]

16. The NCTR is hosted by the University of Manitoba, which has expertise in managing, storing and protecting extremely sensitive data, personal information and personal health information. The University of Manitoba safely and securely stores hundreds of millions of records containing sensitive and confidential information. Personal information and personal health information routinely stored by the University of Manitoba include: medical, psychiatric and counseling (including trauma counseling)

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[7] Affidavit of Gregory Juliano, para.17, AR Vol. VIII, Tab 30, p.7.

[8] Affidavit of Gregory Juliano, paras.12-17, 64, 84-85, 93-05, AR Vol. VIII, Tab 30, pp.5-7, 21, 27-28, 30; see also University of Manitoba, Framework for Research Engagement with First Nations, Metis and Inuit Peoples, available at: https://umanitoba.ca/faculties/health_sciences/medicine/media/UofM_Framework_Report_web.pdf

health information; biogenetic data; patents pending; tax, SIN, and financial information; grades, student and staff discipline proceedings; and responses to sexual harassment complaints. [9] The NCTR is subject to provincial access and privacy laws.[10]

17. The NCTR was formally established in June of 2013. At the time the IRSSA was signed, it was not possible for the Agreement to contain any term pursuant to which IAP records designated by the National Archivist as having enduring historical value might devolve directly to the Indigenous Archive under federal law.[11]

18. The Ontario Court of Appeal expressed concern that if the records are preserved by Canada in Library and Archives Canada ("LAC"), they would be in the hands of the party that funded and supervised the IRS.[12] This concern fails to consider that Canada simultaneously bears responsibility for the abuse and for preserving the records of that abuse. If the decision in the court below is overturned, however, the IAP records need not be stewarded over the long-term by Canada directly.

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[9] Affidavit of Gregory Juliano, paras.12-17, 64, 84-85, 93-05, AR Vol. VIII, Tab 30, pp.5-7, 21, 27-28, 30.

[10] The NCTR is subject to stringent access and privacy laws and university policies, protocols and procedures, including under the *National Centre for Truth and Reconciliation Act,* C.C.S.M, c.N20, *Freedom of Information and Protection of Privacy Act*, C.C.S.M., c. F175; and *Personal Health Information Act*, C.C.S.M. c.P33.5; for a discussion of the university policies, protocols and procedures, see Affidavit of Gregory Juliano at paras. 27-33, 35-75, 80, AR Vol VIII pp.10-24.

[11] It is noted that the AFN's position at the trial level and in Peter Dinsdale's Affidavit was that if the IAP records are preserved, a copy should be held in an Indigenous archive/the NCTR, see Dinsdale Affidavit at paras. 54 & 64, AR Vol X, pp. 126, 128.

[12] ONCA Judgment, para. 222, AR Vol I, p.145.

b. The Importance of the IAP Records

19. The IAP Records, preserved confidentially and respectfully, are integral to reconciliation and to ensuring that this terrible history is never repeated, diminished or denied. As Justice (now Senator) Murray Sinclair wrote in his letter to the IAP Oversight Committee on October 25, 2010:

> Future generations will never know what went on in the schools if those records are lost. It will be easy to dismiss second and third hand accounts of that history without the first hand accounts to add their weight of truth. Would anyone today believe what Nazis did to the Jews of Europe during the Holocaust if their accounts were destroyed? With each passing generation the ability and willingness to believe diminishes but the record never does.[13]

20. Even today, hardly a year following the release of the Commission's Final Report[14], there are individuals and groups – some in the highest positions of trust and authority - who deny the extent of the harms experienced by children in the Indian Residential Schools. There are also those who claim that survivors exaggerated or even fabricated their IAP claims for financial gain.

21. The approximately 7,000 statements provided by survivors to the Commission do not duplicate or replace the record of experiences told in the IAP process. Many survivors who participated in the IAP process did not make additional statements about their experiences of abuse to the Commission, as explained by Justice Sinclair:

> We consider it unnecessary, impractical and contrary to the goal of treating Survivors in a respectful way that protects their health and safety, to ask Survivors who have made IAP claims to repeat their statements to us. Indeed, many have declined to do so because of the trauma that doing so causes them each time.[15]

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[13] AR, Vol VII, p.33
[14] The TRC Final Report was released on December 15, 2015.
[15] AR, Vol VII, p.34

c. Records at Issue in this Appeal

22. It is helpful to separate IAP records that, pursuant to the order in the court below, may be subject to destruction and/or that are "court records" (outside of government control), into two categories:

a. those that contain personally identifying information of survivors and alleged perpetrators; and

b. those that do not contain personally identifying information and which relate to the administration and operation of the Secretariat (and, nevertheless, may not be subject to federal law pursuant to the orders of the courts below).

23. The first category of records relate to individual claim compensation and include:

- IAP Applications submitted by IAP claimants;
- Witness statements submitted to the Secretariat;
- Documentary evidence produced by the Claimant (the "mandatory documents"), which may include corrections records, income tax returns, workers' compensation claims, educational records, Canada Pension Plan records and medical records;
- Documentary evidence produced by Canada, such as research about the claimant and alleged perpetrator reports ("POI reports") and school narratives;
- Audio recordings and transcripts of IAP hearings;
- Expert medical reports; and
- Adjudicators' decisions on first instance, on review, and on re-review.[16]

24. The SAO Branch, as a defendant to the claim, receives copies of the above records and maintains them, primarily in electronic form. Generally speaking, the SAO Branch will not have transcripts of hearings, although these may be provided to the

[16] Affidavit of David Russell, para. 16, AR Vol X, pp.70-71.

parties at an IAP hearing for the purposes of review, in which case the transcript will also be added to the SAO case file.[17]

25. It is important to note that, while many of the "mandatory" documents (defined above) are already provincial or federal government records and as such already subject to provincial or federal access and privacy laws, these records are not identified as having enduring historical value by the National Archivist and are not slated for preservation in LAC.

26. The focus of the appeal, and of the NCTR's submissions, will therefore be on the claim compensation applications, transcripts/audio recordings of the IAP hearings, and the adjudicated decisions. For the purposes of this appeal, the most significant additional set of IAP records maintained by the Secretariat that contain personally identifying information are the audio recordings and hearing transcripts.

27. The second category of records relate to operational, strategic and policy records of the Secretariat which, pursuant to the reasons and orders in the Courts below, appear to be court records that may fall within the broad scope of the destruction order or are otherwise court records. These records either contain no personal information, or contain records in which the personal information has been removed. For example, the Secretariat's IAP Decision Database contains:

- 2,161 redacted decisions (as at February 2014), available to all claimant counsel and adjudicators, from which all personal identifying information of survivors, alleged perpetrator or other person, had been removed. The current number of redacted decisions available to lawyers and adjudicators who have no relationship with the individual claimant or the claim, has increased since that date;

- Resources for lawyers and adjudicators identified as "noteworthy documents";

- A Master List of Canada's admissions of staff knowledge of student-on-student abuse, which is updated every two months and which "does not contain personally identifying information."
- Archived copies of Chief Adjudicator's updates to adjudicators (of which there were 25 as of March 25, 2014)(available only to adjudicators);

[17] Affidavit of David Russell, para. 21, AR Vol X p.72.

- Resources for adjudicators including forms, templates, and administrative tools (available only to adjudicators).[18]

28. As will be argued below, the nature and scope of the records created in the delivery of the Secretariat's mandate, such as the records listed above, demonstrate that the Secretariat was a government agency delivering a government program under the supervision of the Court.

d. The Library and Archives Canada Records Disposition Authority

29. In early 2011, LAC conducted an appraisal of the records of the Secretariat to determine which records relating to the Independent Assessment Process were of enduring historical value. Pursuant to *Records Disposition Authority* No. 2011/010, dated August 7, 2012 (the "RDA"), the National Archivist determined that the following IAP records be transferred to LAC:

> **"For the sub-activity, <u>Independent Assessment Process</u> (including Alternative Dispute Resolution Process), transfer the following:**
>
> 1. All electronic copies of the Notices of Decision and Settlement Package for each IAP and ADR case;
>
> 2. Information relating to the strategic aspects of the IAP and/or ADR (strategic analysis and decisions regarding approaches to IAP), including records of decision, planning and development of policies and procedures contained in briefing notes, reports, or other document-types; and
>
> 3. Information resources related to ADR Pilot Projects, including ADR pilot project case files.[19]

30. Following the signing of the RDA in August 2012, LAC indicated that it intends to re-open the appraisal of the IAP records to include hearing audio recordings and transcripts.[20] It has not yet done so, however, pending the determination of this appeal.

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[18] Affidavit of John Trueman, paras. 32-35, AR Vol VI, pp.12-13.
[19] Affidavit of Tim Eryou, paras.26-34, and Exhibits E and F, AR Vol IX, pp.166-169.
[20] Affidavit of John Trueman, paras, 84 and 85, AR Vol. VI p.26.

31. In his dissenting opinion, Justice Sharpe states at para.271 that the category of strategic and policy documents of the Secretariat "is uncontroversial and falls outside the class of documents with which we are concerned on this appeal." While perhaps uncontroversial, these records (as noted above) are held by the Secretariat, and not the SAO, and as such it is not clear that they can in fact be transferred to LAC pursuant to the RDA if the Secretariat's records are court records, and not government records.

32. If the courts below are correct, and all of the Secretariat records are court records, and not federal government records, many questions remain unanswered about access to the large body of Secretariat records that are not slated for destruction pursuant to Justice Perell's order and about retention and/or disposition of the Secretariat's administrative and operational records. For persons seeking access to non-identifying policy or strategic documents relating to the administration of the Secretariat and the adjudication process, must they seek an order of the court? Will these court records be subject to applicable provincial archiving legislation in one or more of the nine jurisdictions which approved the Agreement?[21] And if so, which jurisdiction? If the records are court records, on what basis (if any) can LAC appraise and archive these records?

e. The Language of the Agreement – No Express or Implied Term for Destruction of IAP Records by Canada

33. Schedule "D" to the Agreement sets out the process by which claims for compensation for abuse are determined and confirms the confidential nature of the

[21] See for example s.2(2)(a)(i) of the Archives and Recordkeeping Act, 2006, S.O. 2006, c. 34, Sched. A , which includes records that "relate to" the "activities" of a "court" as records that have "archival value", and pursuant to which statute bench books, police criminal investigation records, crown attorney files and other records are archived, see for example: Archives of Ontario, *Criminal Justice Records at the Archives of Ontario, 233 Research Guide* (January 2013) http://www.archives.gov.on.ca/en/access/documents/research_guide_233_criminal_justice.pdf .

process. Paragraph O(i) of Schedule D provides that "hearings are closed to the public" and that parties and the alleged perpetrator (if participating) must sign agreements to keep information disclosed at the hearing confidential. Claimants maintain the right to freely discuss their own evidence outside of the hearing process, although each survivor's undertaking not to disclose any additional information learned in the course of the IAP process may constrain many survivors because of the often central role of Canada's historical research and production to the evidentiary record.

34. An alleged perpetrator has no right to participate in the IAP hearing as a party, but may choose to be a witness with certain specified rights. Pursuant to Schedule D, Appendix III(v) an alleged perpetrator who chooses to participate in a hearing will receive "extracts from the application outlining the allegations made against them" (with personal information of the claimant removed, including the impacts of the abuse on the survivor). These extracts are "to be returned at the conclusion of the process." The Affiant for the Secretariat, John Trueman, notes that he "is not aware of whether or how this "return" takes place." Alleged perpetrators are entitled to know the results of the hearing with respect to the allegations made against them, but not the amount of any compensation awarded.[22]

35. The Government of Canada is a party to every claim and receives a copy of all records filed, including mandatory documents and adjudicator's decisions, as do any Church entities that participate as a party. Both Canada and the Church entities who are parties to a hearing receive copies of the application subject to various conditions of confidentiality as set out in Appendix II(iv), including that the application "will only be shared with those who need to see it" to assist with the defence. Persons with whom the application is shared, including counsel, must agree to respect its confidentiality. In addition, Church entities must use "best efforts" to obtain a commitment to respect confidentiality from any third party insurers.[23]

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[22] Schedule "D", Appendix III (v), (xii), AR Vol III, pp.20-21; Affidavit of John Trueman, para. 75, AR, Vol. VI, p.25.
[23] Schedule D, Appendix II (ii),(iv), AR Vol. III, p. 19.

36. The only mention of destruction of records in the Agreement is found in Schedule D, Appendix II (iv), which confirms that copies of the application will be made "only where absolutely necessary" and "all copies **other than those held by the Government will be destroyed on the conclusion of the matter, unless the Claimant asks that others retain a copy…**"[24] It is submitted that, contrary to the majority decision in the Court below, the Agreement was clear that Canada would maintain copies of IAP records, subject to confidentiality provisions, and was not under an obligation to destroy them.

37. There is no evidence in the record the Secretariat took any steps to ensure that the Church entities destroyed the copies of the IAP records received by them. Nor is there any evidence of instructions to claimants' legal counsel to destroy their records.

38. The IAP Application Form includes a Declaration signed by the claimants which set out how their personal information would be used. The Application Form refers the claimant to the "Guide to the Independent Assessment Process" (the "Guide").[25]

39. Appendix B to the Guide very explicitly stated, under the heading, "**Keeping your Records":**

> The Privacy Act requires the government to keep your personal information for at least two years. Currently the government keeps this information in the National Archives for 30 years, but this practice can change at anytime. Only the national Archivist can destroy government records.[26]

40. The Guide was prepared by representatives of the parties to the Agreement and was finalized prior to the implementation date of September 19, 2007.[27]

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[24] Schedule D, Appendix II(iv), AR Vol. III, p. 19.
[25] IAP Application Form, AR Vol. III, pp.106-177, the Guide is referred to on pp. 107, 109,110, 112, 113, 114, 117, 118, 121, 122, 123, 124, 126.
[26] IAP Guide, at p.29, AR Vol. III, p.90.
[27] See Schedule U of the IRSSA, http://www.residentialschoolsettlement.ca/Schedule_U-IAPWorkingGroupMembers.PDF and correspondence dated July 21, 2006, from Doug

41. The Guide was not formally part of the package of materials put before the Courts for the approval order. It is important to remember, however, that the Guide and the above paragraph on "Keeping your Records" specifically, long pre-dated the Agreement. Former Chief Adjudicator Daniel Ish states in his Affidavit that "these statements are substantially the same as those in the Guide to the former ADR process, which was first published in 2003."[28]The parties can be taken to have been aware of this language at the time the Agreement was signed.

42. Further, the IAP Guide was revised and updated a number of times following 2007. The language of the Guide with respect to "Keeping Your Records" was not modified or changed.

f. Information Provided to Survivors

43. In April 2012, Chief Adjudicator Ish issued a direction to adjudicators indicating that the scope and extent of assurances of confidentiality given to survivors in the hearing process "may be inaccurate," that "iron-clad assurances" should not be given, and participants should be told their information "is protected by law." The Chief Adjudicator issued the memo after the Commission raised concerns about the Secretariat adjudicators' over-promises of confidentiality to survivors.[29] The evidence is that no discussions were had with survivors as to the ultimate disposition of the records.[30]

44. The majority decision in the Court below is correct that the information (or lack of information) provided to survivors by the Secretariat is not relevant to the legal

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Ewart, member of the IAP working group, attaching the Guide intended to be the final version which was in the record in the Court below.

[28] Affidavit of Daniel Ish, paras. 38, 39 AR Vol.III, pp.161.

[29] Affidavit of Daniel Ish, para. 59, AR Vol. III, pp.166-167.

[30] At para.103 of John Trueman's Affidavit he notes that a "key stumbling block" to a consent program was advising claimants "what would happen to their information if they did not consent to sharing it with the TRC", AR Vol VI, p.31.

question of whether the IAP records held by the Secretariat and the SAO are in the possession and/or control of government.

g. Survivors' Right to Archive their IAP Records in the NCTR

45. Schedule D to the Agreement provides that Claimants are entitled to copies of their own IAP claim applications, transcripts of hearings, and redacted decisions. D(O)(ii) to the Agreement clearly provides that survivors have the right to: (a) obtain a copy of their transcript of their own evidence for memorialization; and (b) be made aware of their right to archive their IAP transcript:

> Proceedings will be recorded and will be transcribed for these purposes, as well as if a Claimant requests a copy of their own evidence for memorialization. **Claimants <u>will</u> also be given the option of having the transcript deposited in an archive developed for the purpose.** (emphasis added)[31]

46. There is no question that survivors were not given this option. The Ontario Court of Appeal held at para.51: "As the Supervising Judge found, that never happened for the roughly 38,000 survivors who had submitted applications for the IAP, about 30,000 of which had been resolved at the time of his decision." This reality is also referred to at para.10 of Canada's factum: "claimants were to be given the option, which has yet to be formally offered."[32]

47. Canada offers a "simple" notice plan, as a solution to the failure (over a ten-year period between 2007 and the present) to inform survivors of their right to memorialize their IAP records in an archive developed for the purpose.

48. A complicating factor in terms of the effectiveness of a Notice Plan (whether "simple" or robust) is the age and failing health of survivors. In 2006, Justice Winkler in *Baxter v. Canada (Attorney General)* recognized that "the evidence is that the class

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[31] Schedule D, O(ii), AR Vol.III, p.15
[32] See also para. 126 of John Trueman's Affidavit, AR Vol. VI, p.41.

members are elderly and dying at a rate of approximately 1,000 per year."[33] This statement was made eleven years ago. Having regard to the age and compromised health of many survivors, the rate can only have increased in the intervening decade.

49. If the destruction order is upheld, the IAP records of thousands of survivors who have already passed will be destroyed without their express consent and, further, these survivors will have been denied any opportunity to choose to archive their records in the archive developed specifically for the purpose of honouring survivor experiences and preserving the IRS records. The order will similarly result in the destruction of records, without express consent, of thousands of survivors who are not reached by (or for various reasons do not respond to, or are unable to respond to) any proposed notice plan.

50. The ONCA relied on the fact that Schedule D(O)(ii) provides survivors an option to memorialize their transcripts in "an archive developed for the purpose", to support its conclusion that none of the IAP records were intended to be archived by government.[34] Survivors' option to archive their transcripts in the NCTR, however, does not lead to this conclusion. The decision with respect to which IAP records would be archived following a records appraisal, at all times lay with the National Archivist. In fact, the current RDA only preserves the adjudicated decisions, and not the transcripts. Further, archiving by LAC will only commence after the records no longer have operational value or, in the case of the Secretariat, after the Secretariat has wound down. It will likely be many years still before the records are transferred to and accessioned by LAC (and notably years after the completion of the Commission's research and release of its Final Report). Moreover, if IAP records are archived at LAC, they may not be accessed unless they are proactively disclosed (if possible subject to *Privacy Act* restrictions), there is a formal *Access to Information Act* (ATIA)[35] request or if the National Archivist exercises his discretion to permit researcher access[36], which access may be denied or subject to stringent conditions.

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[33] *Baxter v. Canada (Attorney General),* 2006 CanLII 41673 (ON SC) at para. 46.
[34] ONCA Judgment at para. 223., AR Vol. I, p.145.
[35] *Access to Information Act*, R.S.C. 1985, c.A-1
[36] See for example *Privacy Act* R.S.C. 1985, c.P-21 ("Privacy Act"), s.8(2)(j) and ss.7 and 8, *Library and Archives Canada Act* S.C. 2004, c.11.

51. The option for survivors to archive their transcripts stands separate and apart from the preservation of the aggregate set of IAP decisions (and possibly other IAP records) in LAC. The option to archive the IAP transcript: provided certainty to the survivor that the transcript would be preserved; facilitated survivors to share their stories immediately in a culturally safe location; clarified that such preservation was permitted separately from any consent to provide the record of their IAP experiences to the Commission under Schedule N(11) of the Agreement; and gave survivors the option of archiving their story in a form in which the survivor might choose to be personally identified, including during their lifetime.

52. Simply put, the option for survivors to have their IAP transcript in an archive developed for the purpose, does not oust the application of federal archiving law to the whole of the IAP records, nor constitute express or implied language for destruction of all other IAP records.

PART II – STATEMENT OF ISSUES

53. The issues before this Court are whether the majority of the Court of Appeal:

(1) erred in finding that records of state perpetrated human rights abuse, including the records of the state's mechanisms to address that abuse, are not government records subject to access, privacy and national archiving law;

(2) erred in finding that, on the basis of the doctrine of inherent jurisdiction, the implied undertaking rule, and principles of contract interpretation, the Court had jurisdiction to order the retention and destruction of the IAP records held by the SAO and the Secretariat; and

(3) was correct in ordering an enhanced Notice Plan developed by the Chief Adjudicator, on the terms set out in Justice Perell's reasons and Order.

54. In response to the Issues as identified by the Government of Canada in its factum, the NCTR agrees that the Court erred as set out by Canada, with the exception that the courts below did <u>not</u> err or improperly "unilaterally rectify" the Settlement Agreement in ordering a Notice Plan to give effect to Schedule D(O)(ii) of the Agreement.

PART III – STATEMENT OF ARGUMENT

a. The IRSSA is more than a Private Contract

55. The Settlement Agreement is not "simply a private contract that should be governed only by private law concepts like privity."[37] As the various supervising courts have held, the Agreement: "is at least as important as a treaty;"[38] "is much more than the settlement of a tort-based class action. It is a Political Agreement;" [39] "has an overwhelmingly public law flavor" and "has very significant implications for Canada" and Aboriginal peoples in Canada.[40]

56. Having regard to the public law aspects of the Agreement and its immense importance for the future of Canada's reconciliation with Indigenous Peoples and the country as a whole, both domestic and international human rights principles, as well as standards and expectations of Canada as a state party to gross human rights abuse, must inform the Court's analysis and approach to the questions on appeal.

b. State Obligation to Preserve Records of Systemic Human Rights Violations

57. In his Affidavit on behalf of the AFN, Peter Dinsdale refers to and relies on the following human rights principles, expressed by various United Nations human rights bodies: the "personal and collective right to know," " a right to justice" and "the state's duty to remember."[41] Mr. Dinsdale notes that the destruction of records pertaining to human rights abuses and Canada's "uneven record in preserving documents" related to

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[37] *Fontaine v. Canada* 2013 ONSC 684 at para. 56 and cited with approval in ONCA Judgment Dissent at para.294, AR Vol I. pp.170-171.
[38] *Fontaine v. Canada*, 2014 ONSC 4585 (CanLII) at para. 88 ("Trial Judgment"), AR Vol I, p.27; *Fontaine v. Canada (Attorney General)*, 2015 ONSC 3611 (CanLII), at para. 53; and cited with approval in ONCA Judgment, dissent at para. 294, AR Vol I. pp.170-171.
[39] *Fontaine v. Canada* 2006 YKSC 63 at paras. 8; ONCA Judgment, dissent at para. 294.
[40] ONCA Judgment, dissent, para. 294, AR Vol I. pp.170-171.
[41] Affidavit of Peter Dinsdale, para. 47, AR Vol. X, pp.123-124.

Indian Residential Schools, were of concern to the AFN when it negotiated the Agreement in 2006.[42]

58. United Nations human rights bodies have repeatedly recognized the "right to know" and the "right to truth" in relation to state perpetrated human rights violations and the critical importance of preserving records in fulfillment of these rights. In 1997, the United Nations Commission on Human Rights adopted a set of principles developed by Louis Joinet on "the right to know" as an aid to combat government impunity for human rights violations.[43] An update, drafted by Diane Orentlicher, was adopted in 2005.[44] These principles are referred to as the "Joinet/Orentlicher principles."

59. Principle 2 of the Joinet/Orentlicher principles is the "inalienable right to the truth", which affirms that "every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systemic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations."

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[42] Affidavit of Peter Dinsdale, para. 49, AR Vol. X, p. 124.

[43] United Nations. (1997) Economic and Social Council. Commission on Human Rights. Sub-Commission on Prevention of Discrimination and Protection of Minorities . Forty-ninth session. Item 9 of the agenda. The administration of justice and the human rights of detainees: question of the impunity of perpetrators of human rights violations (civil and political). Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119. E/CN.4/Sub.2/1997/20/Rev.1. 2 October 1997. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G97/129/12/PDF/G9712912.pdf?OpenElement

[44] United Nations. (2005) Economic and Social Council. Commission on Human Rights. Sixty-first session. Item 17 of the provisional agenda . Promotion and Protection of Human Rights. Impunity. Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher. Addendum: Updated Set of principles for the protection and promotion of human rights through action to combat impunity. E/CN.4/2005/102/ Add.1: 8 February 2005. Available online at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement. It is noted that the Joinet/Orentlicher principles are referred to in Recommendations 69 and 70 of the Truth and Reconciliation Commission's call to action, at: http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf.

60. It is submitted that it is not an "administrative deficiency"[45] that there is no mention of destruction of IAP records (operational or related to claims-adjudication) in the Agreement. The above principles and norms were well established when the Agreement was negotiated.

61. The 2009 Annual Report of the Office of the High Commissioner for Human Rights, dedicated to the "Right to the Truth", summarizes the Joinet/Orentlicher principles as follows: "The Principles emphasize that a person has a right to know the truth about what happened to him/her **and that society as a whole has both a right to know and a responsibility to remember"** (emphasis added).[46] The State must ensure preservation of, and access to, archives concerning violations of human rights, with such access being subject to privacy protections for persons named in the records.

62. In 2012, the United Nations Human Rights Council issued a Resolution on the "Right to Truth," which emphasizes the importance of "preserving historic memory relating to gross human rights violations" and of ensuring that records relating to "decision-making processes" of Governments be preserved and made accessible.[47]

63. With respect to future scrutiny of the Agreement generally, and the "decision-making process" of the IAP claims adjudication specifically, para.43 of the United Nations Declaration on the Rights of Indigenous Peoples[48] ("UNDRIP") guarantees "just and fair procedures" for the resolution of conflicts. It is difficult to imagine how the "right to know" can be met, and a "just and fair procedure" provided, if the entire record of that procedure is eradicated.

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[45] ONCA Judgment para. 204, AR Vol.I, p.140.
[46] Report of the High Commissioner for Human Rights, A/HRC/12/19 at para.5, Exhibit "M" to the Affidavit of Peter Dinsdale, AR Vol. XI, p.38.
[47] United Nations Human Rights Council, Resolution A/HRC/21/L.16, *Preamble*; Exhibit "N" to Affidavit of Peter Dinsdale, AR Vol. XI, p.58.
[48] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, available at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

64. Finally, as recognized and affirmed in UNDRIP and under s.35 of the *Canadian Charter of Rights and Freedoms*, Indigenous people simultaneously hold collective and individual rights. At all times, whether as a treaty, a contract with a public law component, or a political accord, the Agreement must be understood through this foundational lens. The Agreement sought to achieve collective as well as individual goals, for the benefit of current and future generations. This is true for all components of the Agreement: truth and reconciliation, healing, commemoration and compensation. The Agreement was intended to be comprehensive and enduring in all four components. It forms the foundation for current and future generations' efforts to redress the IRS experience and legacy, and equips future generations with the tools for healing.

65. While some of the above human rights instruments (such as UNDRIP) were in the process of being finalized in 2006 when the Agreement was signed, these well-established human rights principles assist in understanding the balance which Canada as the State Party to the Agreement was required to fulfill in respecting the collective right to know of present and future generations, while at the same time protecting the privacy of individual survivors and alleged perpetrators through the confidential nature of the IAP process and the application of federal access and privacy legislation.[49] The Agreement should be understood in a manner harmonious with the above international human rights principles and with Canada's obligations as a State Party that has now adopted (without qualification) the UNDRIP.[50]

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[49] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess., Supp. No. 49 Vol. III, UN Doc. A/61/49 (2007).
The United National General Assembly adopted UNDRIP in September 2007. The TRC Final Report concluded that the first principle for reconciliation is that: "The United Nations Declaration on the Rights of Indigenous Peoples is the framework for reconciliation at all levels and across all sectors of Canadian society", at p.16, Truth and Reconciliation Commission Final Report (Volume 6), http://www.myrobust.com/websites/trcinstitution/File/Reports/Volume_6_Reconciliation_English_Web.pdf The UNDRIP is identified as a framework for reconciliation repeatedly in the TRC's Calls to Action, see recommendations: 24, 27, 28, 42-45, 48, 50, 57, 67, 69, 86, 92; and as noted above, refers to the Joinet/Orentlicher principles in recommendations 69 and 70.

[50] For the principle that statutes should be interpreted in a manner harmonious with Canada's international obligations see for example *R. v. Appulonappa*, [2015] 3 SCR

c. Destruction Inconsistent with the Rule of Law

66. The Courts below relied on the inherent jurisdiction of the Court to order destruction of the IAP records. Canada challenges the inherent jurisdiction of the Court to oust the federal legislative regime and legislative determination of when a record is under government control.[51] If the Court can exercise its inherent jurisdiction to remove the records from the federal legislative regime, however, it cannot be exercised in a manner contrary to the rule of law.

67. The Court below held that a superior court has inherent jurisdiction to "protect the rule of law and preserve the integrity of the administration of justice" (citing this Court's ruling in *R. v. Cunningham*) and concluded that the court always maintains control of information and documents obtained through court processes in order to "ensure access to justice, protect the rule of law and preserve the integrity of the administration of justice."[52]

754, 2015 SCC 59 at paras. 40, 45; see also *Baker v. Canada* (Minister of Citizenship and Immigration), [1999] 2 SCR 817 at para.69-71 (re the "important role" of international human rights law as an aid in interpreting domestic law, even where a Convention has not been implemented domestically); to the extent possible, an approach to the IRSSA which embodies UNDRP and the international human rights principles requiring state preservation of records of abuse, is preferred, see *Simon v. Canada (Attorney General)*, 2013 FCC 1117 (CanLii) at para. 121; UNDRIP was also referred to with approval by this Court prior to its adoption by Canada, in *R v. Mitchell v. M.N.R.* 2001 SCC 33 at paras. 81-83; international precedent (such as ILO expert committee reports and decisions) has been referred to by this Court to assist in the interpretation of *Charter* rights, such as in *Dunmore v.* Ontario [2001] 3 S.C.R. 1016 at p.1041 and *Saskatchewan Federation of Labour v. Saskatchewan* 2015 SCC 4 at paras. 69, 71 and 75; further, the modern contextual approach to statutory and contractual interpretation as set out in *Manulife Bank of Canada v. Conlin* [1996] 3 SCR 415 at para.41, suggests that the above international principles and expectations known to the parties at the time the IRSSA was negotiated, inform the interpretation of and approach to the Agreement.

[51] Factum AGC, at para. 104.

[52] *R. v. Cunningham* 2010 SCC 10 (CanLII); ONCA Judgment paras. 184 and 189, AR Vol I. p.134

68. The rule of law is "a fundamental principle of our Constitution" and a "fundamental postulate of our constitutional structure."[53] The rule of law "requires the creation and maintenance of an actual order of positive laws."[54] A deprivation of legal order 'transgresses' the rule of law.[55] The rule of law "envelops and sustains Canadian society"[56] and was engaged when Canada negotiated and settled the largest class action in Canadian history to redress a century of discriminatory legislative, policy and practices to assimilate and eradicate Indigenous cultures and ways of life.

69. The Court must not exercise its inherent jurisdiction in a manner that offends or transgresses the integrity of the rule of law.

70. Permanent destruction of the IAP records means that there will never be any accountability for the record – effectively a quasi-judicial body of law - that is the over 24,000 decisions, determined in the context of processing almost 38,000 compensation claims by over one hundred adjudicators across the country. If these records are destroyed, the consistency and independence of the adjudicated decisions can never be examined. There will be no record of what claims were accepted and why; and what claims were denied and why. The issues and themes that emerged across those decisions and the hundreds of decision-makers can never be scrutinized. There will be no record of the administration of one of the key pillars (compensation) of the Agreement.

71. Schedule D to the Agreement provided very limited recourse to the Courts from decisions made by IAP Adjudicators (whether initial, review or re-review). From the few reported decisions, we know that various important issues of law arose in the 24,000 decisions, including:

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[53] *Reference re Manitoba Language Rights*, [1985] 1 SCR 721, at pp.748 and 750; see also *Reference re Secession of Quebec*, 1998 CanLii 793 (SCC) at paras. 32, 70, 71.
[54] *Reference re Manitoba Language Rights*, at pp.749.
[55] *Reference re Manitoba Language Rights* at p.753.
[56] *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 SCR 3, 1997 CanLII 317 (SCC) at para. 99.

- whether claims were substantiated or dismissed on the basis that the claimant (a former student) was a resident employee and not a student of the school at the time of the abuse;[57]

- errors made by adjudicators with respect to requiring proof that the touching in question "was for a sexual purpose";[58] and

- issues with respect to eligibility for compensation depending on whether Canada was responsible for the residential school in the period in question or had transferred responsibility administratively to another agency (the "administrative split" argument).[59]

72. There are also ongoing important questions which continue to be litigated (including as this Supreme Court of Canada appeal is being heard), for example with respect to the provision of updated school narratives and other production by Canada in respect of claims made by St. Anne's Residential School survivors.[60]

73. The history of the IAP process also sadly includes unscrupulous and predatory behavior by persons purporting to assist survivors, including "form-fillers" and various legal counsel.

74. As Justice Sharpe concluded in his judgment: "Past wrongs may fester even after we think we have dealt with them. Sometimes errors are made that need to be

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[57] *Fontaine v. Canada* 2014 MBQB 200

[58] *Fontaine v. Canada* 2016 MBQB 159 (CanLII)

[59] *Fontaine v. Canada* 2015 ABQB 225 (CanLii) and cited at para. 318 of the ONCA decision AR Vol I. p.181; see also reports by APTN on "administrative split" and other cases: http://aptnnews.ca/2016/10/05/ottawa-mulls-review-of-how-its-lawyers-handled-indian-residential-school-cases/

[60] In *Fontaine v. Canada* 2016 ONSC 4328 (CanLII) at para. 2, Justice Perell referred to the issues of document production in the St. Anne's claims as "bedeviling"; there have been multiple requests for direction with respect to the adjudication of compensation claims and Canada's failure to produce relevant documents, see also for example *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283 (CanLII); *Fontaine v. Canada (Attorney General)*, 2017 ONCA 26 (CanLII) (re Spanish Boys' IRS); and https://www.thestar.com/news/canada/2017/04/07/ottawa-to-release-long-sought-st-annes-residential-school-documents.html

corrected…While the country moves forward in the hope that we have closed the door on the Residential School travesty, it is impossible to say that the interests of justice will never demand a re-examination of the IAP process."[61]

75. The IAP process provided compensation to survivors as a component of Canada's and the Churches' commitment to reconciliation. The respectful retention of the record of that process is part of the project of reconciliation and advances both the rule of law and the integrity of the administration of justice. The destruction of the record will 'do harm', in the sense that it will forever sow the seeds of mistrust and suspicion of the process and will fatally undermine its legitimacy and integrity. Destruction will irreparably taint the political achievement that is the Settlement Agreement.

d. The Implied Undertaking Rule does not Apply

76. The Court below held that the Secretariat's records were not under the "control" of government because the approval order isolated the Secretariat from Canada, making the Secretariat under the control of the Court. This ruling will be addressed in the next section below.

77. With respect to the SAO Branch, the court ruled the SAO is a government institution but that the IAP records are not under SAO's "control" because SAO's use of the records is limited by operation of the implied undertaking rule and the court's inherent jurisdiction to limit the use of records generated in the IAP process.

78. The NCTR agrees with the dissenting reasons of Justice Sharpe that the implied undertaking rule does not apply to the IAP Records.

79. In *Andersen Consulting v. Canada* the court noted that under archiving legislation, Parliament's intention was to ensure "that archives should contain those

[61] ONCA Judgment, dissent, para.318, AR Vol. I, p.181.

documents relating to the actual operations of government as such rather than to government in its incidental role as plaintiff or defendant in civil litigation."[62]

80. Canada's role as defendant and administrator under the IRSSA is neither "incidental" to its core function as government in redressing the IRS and its legacy, nor is Canada a traditional litigant in the sense of government *qua* defendant responding to a private commercial or contractual dispute. As submitted above, the IRSSA is a political accord and a matter of public as well as private law. The administration of the IRSSA required Canada to establish a large government department staffed by over two hundred employees,[63] which department has now been in existence for a decade, and with thousands of claims yet to adjudicate. Moreover, when the Secretariat was created, it was established as a branch of government (of Indian Residential School Resolution Canada), which structure represented "a continuation of the arrangements that had been in place for the Alternative Dispute Resolution process" from 2003-2007.[64] Accordingly, while the government department was supervised by the Court in order to avoid a conflict of interest, the Secretariat cannot be seen to be an entirely court-created entity incidental to government.

81. Appendix II(iv) of Schedule D explicitly provides that the pleadings – the compensation applications – will <u>not</u> be destroyed by government at the <u>end</u> ("conclusion") of the process.[65] This language cannot be clearer and runs directly counter to the purposes and principles underlying the deemed undertaking rule. The Agreement created a process under which Canada was expressly <u>not</u> required to return or destroy the application following the final determination of the claim. An implied undertaking to the Court by Canada of absolute and permanent confidentiality following the conclusion of the hearing cannot be imposed on these facts. Justice Perell dealt with this difficulty in interpreting the language of the Agreement which permits Canada to retain the application, by ruling that Canada could only retain the record for fifteen years

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[62] *Andersen Consulting v. Canada* [2001], 2 F.C.R. 324 (T.D.) at para. 16.
[63] Affidavit of Tom McMahon, para. 66, AR Vol IV, p.20.
[64] Affidavit of Daniel Ish, para. 18, AR Vol. III, p.156.
[65] AR, Vol. III, p.19

following the conclusion of the matter. This ruling is in error. The plain language of the Agreement does not support the Court reading-in such a time limit.

82. The inappropriateness of the implied undertaking rule comes into particularly sharp focus when applied to the adjudicated decisions. The decisions are not court compelled documents nor are they generated for "use" in the IAP process.[66] They are records of the ultimate determination of that process and document procedural fairness and justice.

83. Moreover, the decisions contain information that was provided not only by survivors, but also by Canada and, in some cases, Church defendants and alleged perpetrators. If the parties to each IAP claim were deemed to have given an undertaking to the court that any use of IAP records, including the decisions, be limited to the purpose of litigating the IAP claim, it is unclear how redacted decisions can be used by survivors as they see fit. The implied undertaking rule does not apply asymmetrically. The intention of the Agreement, instead, was that pursuant to Schedule D, survivors were entitled to share the outcome of their hearing freely, while Canada had an obligation to maintain the confidentiality of that decision in accordance with federal law.

84. Justice Sharpe correctly concluded that IAP applications, transcripts and decisions most closely resemble a statement of claim, evidence, and final decision -- all of which fall *outside* of the implied undertaking rule.[67] The bargain entered into in the Agreement was that the IAP hearing process would not be adversarial and that hearings would be closed. Personal information of survivors and alleged perpetrators would be protected in

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[66] The NCTR agrees with and relies on the reasoning of the ONCA Dissenting Judgment at paras.274-282; The implied undertaking rule that the "law imposes on the parties to civil litigation an undertaking *to the court* not to use document or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled"(*Juman v. Doucette* 2008 SCC 8 at para.27) does not apply to the decisions that emerge from an "independent assessment process."

[67] ONCA Dissenting Judgment, paras.279 and 280.

accordance with law. Absent express language in the Agreement to this effect, the process as a whole was not effectively permanently 'sealed.' It cannot be speculated that had these hearings proceeded in open court, the records would necessarily have been sealed as opposed to there being more limited forms of protection such as a publication ban.

85. Finally, having regard to the overarching goals of the Agreement of truth, knowledge, and reconciliation, and compensation, it cannot be said that the confidential preservation of the aggregate set of IAP adjudicated decisions under the Records Disposition Authority is a use or purpose collateral to either the IAP process or the Agreement as a whole. Enabling future generations to be confident that justice and fairness was achieved in the IAP process is consistent with achieving an enduring and lasting Agreement. In keeping with the spirit and intent of the Agreement, the issue instead is the respectful and confidential preservation of these records.

e. The Secretariat is a Government Department Subject to a Time Limited Firewall

86. The SAO and the Secretariat are both branches of Indigenous and Northern Affairs Canada (INAC, formerly AANDC), and are staffed by federal government employees. In order to avoid the real or perceived conflict of interest of Canada acting as both a Defendant/Respondent in the IAP process, and the administrator/adjudicator for the process, the approving Courts adjusted the oversight structure for the Independent Assessment Process in the approval orders, to ensure that Canada's "administrative function" was "isolated from the litigation function." The Court required that the Chief Adjudicator, appointed by Canada, be approved by the Court and accountable to the Court. The Court described these organizational issues as relating to the "executive oversight" role of the administration of the Secretariat.[68]

87. When the Agreement was entered into, the Secretariat was established as a branch of the government of Canada, continued from a pre-existing department under the

[68] *Baxter v. Canada (Attorney General)* 2006 CanLii 41673 (ONSC) at paras. 38-40.

Alternative Dispute Resolution process. The approval order in *Baxter v. Canada* did not change the nature or structure of the Secretariat itself as a government institution, nor the status of the documents generated in or by the Secretariat, as government records. Rather, it ensured that the two arms of government remained distinct for the purposes of the administration and adjudication of the IAP compensation claims while they were being adjudicated.[69] The "clear line of demarcation" between the SAO and Secretariat to prevent a conflict of interest is no longer necessary when the claims compensation process is finally complete. The Court's oversight role for the direction of the Secretariat, the Court's concern about neutrality, and the "demarcation" between Canada as litigant and Canada as administrator under the Agreement, end with the conclusion of the Secretariat's work. The Court's oversight of the separation between these two branches of government was limited in time, nature, and purpose.

f. Privacy Protections

88. Archives are not intended to be locked boxes which are never opened or accessed. On the other hand, highly sensitive information has always been, and continues to be, stored in federal and provincial archives. Such information includes national security, police/RCMP investigation records, corrections, probation and parole records and vital statistics, to name only a few examples.

89. During the lifetime of the survivor or alleged perpetrator, and for 20 years following the individual's death, no personal information about that individual may be disclosed.

90. Even access requests by other persons named in the records during the period of the survivor's life or twenty years following their death, will result in either a refusal to

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[69] The separation of government departments and limited access (for example on computer servers) by staff within and between government departments is in any event routine operation of government.

disclose on the basis that it would be impossible to protect the privacy of the survivor or extremely heavy redaction such that the survivor and his or her personal information would not be disclosed.[70]

91. The serious issue of concern expressed by the parties, including the AFN, is access to the records after the *Privacy Act* protections are lost by virtue of the passage of time following the survivor's death.

92. Section 17 of *ATIA* permits the head of a government institution to refuse to disclose any record requested "that contains information the disclosure of which could reasonably be expected to threaten the safety of individuals." While s.17 of *ATIA* has been somewhat restrictively interpreted to date, the provision may be relied on to refuse access to IAP records for periods longer than 20 years after the death (or 110 years after the birth) of the survivor or alleged perpetrator.[71] Any possible harms that may be associated with disclosure of IAP records (whether in redacted or unredacted form) will evolve over time, as communities heal and repair and as increased education and understanding reduce the stigma and shame associated with being a victim or perpetrator of abuse.

93. In terms of research access at INAC or, more realistically at LAC, whether granted shortly or long after the death of a survivor (or alleged perpetrator), INAC and LAC may impose very stringent undertakings of confidentiality on those who access the records in the future, including providing access only in redacted or de-identified form, or may deny access altogether if necessary to protect privacy. The evidence in the court below was that two thousand IAP decisions have already been redacted to a standard

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[70] By operation of s.8 of the *Privacy Act.*

[71] *Martin v. Canada (Minister of Health),* 2016 FC 796 is an example of a restrictive interpretation of the provision; see also the *Treasury Board Manual: Access to Information*. The NCTR is not aware of any s.17 *ATIA* decision relating to access requests in circumstances analogous to the IAP records.

developed by the Secretariat that is among the highest seen by the Chief Adjudicator's expert[72], to which hundreds of lawyers across the country have already been given access. The NCTR is developing research access protocols culturally appropriate to the IRS records, in consultation with Indigenous experts and knowledge-keepers. LAC can similarly work with Indigenous communities to develop appropriate protocols and agreements for access for this sensitive set of records.

94. If the records are to be preserved, the AFN has proposed that they be preserved in an Indigenous Archive/NCTR and that they be sealed by order of the court for a lengthy period of time.[73] In the court below, the NCTR and the Commission similarly submitted that it was open for the Court to make an order extending the period during which personal information is protected, should the court see fit to do so.[74]

95. If Canada is correct that the Courts have no inherent jurisdiction to make an order that contravenes or ousts the federal access and privacy regimes, however, this Court has no jurisdiction to make an order prohibiting or limiting access (such as only to those who need to maintain the records) for a period of time over and above 20 years after the death or 110 years after the birth of persons named in the records.

96. Nevertheless, this Court is obviously most powerfully situated to provide guidance to Canada, including on the application of existing laws. Canada made a commitment to treat the IAP records as confidential. If survivors and Indigenous

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[72] Flaherty Affidavit, para. 78, AR Vol. IX at p.156

[73] Affidavit of Peter Dinsdale, paragraph 67, AR Vol. XI at p.128. Mr. Dinsdale on behalf of the AFN also recommended, at paragraph 65 of his Affidavit that "redacted documentation or a pseudonym can meet the objective of protecting an IAP Claimant's privacy and confidentiality where IAP records or personal accounts of survivors are transferred to either Canada, the TRC, the NRC or any other entity."

[74] Paragraph 8(1)(b) of the *National Centre for Truth and Reconciliation Act* provides that disclosure of records may be restricted by Court order (unlike the federal access and privacy statutes). This section of the *NCTR Act* was included in the Act specifically to anticipate the NCTR's receipt of sensitive IAP records.

organizations submit the privacy protections under federal law are inadequate, Canada has an obligation to listen. It is open to Parliament to take steps, including enacting/amending applicable statutes or regulations, to treat this class of records differently than other records. In so doing, Canada would abide by its obligations to preserve records of systemic human rights atrocities, while respecting the privacy of the individuals named in them.

97. In considering the ability of Canada to protect the records in the future, it is also important to remember how quickly technology is advancing.

98. In the court below, the Chief Adjudicator adduced an expert opinion from David Flaherty with respect to, among other things, possibilities for "Disposition of the Records."[75] Dr. Flaherty identified a range of options for disposition based on his view of the privacy rights and interests engaged and his interpretation of the Agreement and applicable privacy laws and principles. The NCTR does not endorse the assertions or opinions stated in Dr. Flaherty's Affidavit, but refers to Dr. Flaherty's evidence insofar as it refers to other methods for protection of records.

99. In his discussion of options, Dr. Flaherty canvassed anonymization and reversible anonymization of records. Dr. Flaherty referred, for example, to extensive personal record sets in Sweden which were anonymized to protect personal privacy while preserving the valuable aggregate information contained in the records. It is noted that there was no discussion by Dr. Flaherty, in relation to the example of the anonymized Swedish records, of any privacy breaches or risks of re-identification.[76]

100. One reason why Dr. Flaherty did not recommend reversible anonymization (de-identification) as his preferred recommendation for the IAP records at issue was because, according to his evidence at paragraph 74 of his Affidavit, the "risks of re-identification

[75] Affidavit of David Flaherty, sworn May 2, 2014 ("Flaherty Affidavit"), para. 8(5), AR, Vol. IX, pp.122-123.
[76] Flaherty Affidavit, para. 50, AR Vol. IX at p.145-146.

are very high." In making this assertion, Dr. Flaherty references Dr. Khaled El Emam of the University of Ottawa, the leading expert on de-identification in Canada.[77] Dr. El Emam's recent publications list a "rich literature" with respect to the extensive use of de-identified health data in Canada and the methods to ensure very minimal risks of re-identification. Dr. El Emam's publications include a co-authored publication with (then) Information and Privacy Commissioner for Ontario, Dr. Anne Cavoukian: *Dispelling the Myths Surrounding De-Identification: Anonymization Remains a Strong Tool for Protecting Privacy* (Information and Privacy Commission, 2011). In this IPC publication, the IPC states:

> As long as proper de-identification and re-identification risk measurement techniques are employed, the re-identification of individuals is relatively difficult in actual practice. In fact, a recent review of the evidence indicates that there are few cases in which properly de-identified data have been successfully re-identified.[78]

101. Finally, it is noted that no other branch of government tasked with supporting or implementing the Agreement is exempt from federal law. The records of Health Canada, for example, which provided healing supports under the Agreement, are neither exempt nor are they court records, despite containing sensitive and confidential information. It may be that these records are never archived, but they are subject to federal law nonetheless.

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[77] Flaherty Affidavit, para.74, footnote 52, AR Vol. IX at pp.154-155.

[78] A. Cavoukian and K. El Emam, *Dispelling the Myths Surrounding De-Identification: Anonymization Remains a Strong Tool for Protecting Privacy* (Toronto: Information and Privacy Commission, 2011) at p. 6 (see also pp.1 and 15). Council of Canadian Academies, 2015. Accessing Health and Health-Related Data in Canada. Ottawa (ON): The Expert Panel on Timely Access to Health and Social Data for Health Research and Health System Innovation, Council of Canadian Academies (see Executive Summary at p.xix which identifies a de-identification process reflecting best practices), downloaded at:

http://www.scienceadvice.ca/uploads/eng/assessments%20and%20publications%20and%20news%20releases/Health-data/HealthDataExecSumEn.pdf.

102. In sum, government institutions and archives securely hold vast amounts of highly sensitive and confidential information. The IAP records may be safely and securely archived by LAC.

g. Enhanced Notice Plan

103. This Court should not interfere with the order of the lower court that the Chief Adjudicator develop a Notice Plan, in consultation with the parties, to inform survivors of their option to archive their IAP hearing transcripts in the NCTR.

104. Fulfillment of Scheduled D: O(ii) does not turn on the disposition of this appeal. Even if the IAP transcripts are ultimately archived at LAC, survivors are entitled to be informed that they may immediately deposit their transcript in the NCTR.

105. At a forum held by the Commission in 2011 to envision the NCTR, Charlene Belleau, then Assembly of First Nations Director for Indian Residential Schools said:

> Please don't relegate me to another number in an archive. My number was 165, and it was all over the place and it was all they knew me by. I need to be personalized. Don't freeze my time and experience.[79]

106. Survivors are entitled to choose to preserve and share their experience in a more personal and individualized form, distinct from the over 24,000 records of adjudicated decisions that form the collective story to be archived at LAC under the RDA.

107. Justice Perell ruled that he didn't have the evidence before him to order the terms of the Notice Plan:

> …the precise terms of the notice program should be an evidence-based decision. Care needs to be taken that the notice program not inflict physiological harm and re-victimize the survivors of the Indian Residential Schools. Therefore, I direct that the

[79] Available on the TRC's website, videos of the NRC Forum 2011 at https://vimeo.com/album/1750974/video/20696021

> TRC or the NCTR may give Claimants notice that with the Claimant's consent, his or her IAP Application, hearing transcript, hearing audio recording and adjudicator's decision may be archived at the NCTR. The archiving of the document would be conditional on any personal information about alleged perpetrators or affected parties being redacted from the IAP Document. The court will settle the terms of the notice program at another RFD hearing that may be brought by the TRC or the NCTR.[80]

108. There is no evidence before this Court that a "simple" notice plan (presumably meaning a mail out and some advertisements) would be effective, appropriate, or safe for survivors. There is no evidence that the addresses to which any such letters might be mailed are even valid or correct. There is no evidence as to what percentage of survivors filed their applications only through counsel, however there is good reason to believe that the number is high.

109. Neither Canada nor the Chief Adjudicator are in any position, on their own, to develop and carry out a respectful and meaningful Notice Plan, particularly without consultation, evidence and input from the Indigenous parties and the full participation of the NCTR to whom survivors will be directing their records.

110. Since the development and implementation of the Notice Plan will need to be a collaborative effort, the NCTR takes no issue with the Court of Appeal's order that the Chief Adjudicator, rather than the NCTR, develop the Plan. Regardless of who is tasked with the development of the Plan by the Court, the NCTR will necessarily play a central role, since survivors will need direct information on the archive "developed for the purpose."

111. The NCTR is, of course, concerned about the possible ongoing delay in the fulfillment of informing survivors of their right to archive their records, posed by the court approval process of any such Notice Plan. Unfortunately, however, court approval of the notice plan, as required by the courts below, cannot be avoided. The Chief Adjudicator, hopefully with the support of the parties, will need to demonstrate to the Court that the proposed notice plan is effective, culturally appropriate and safe.

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[80] *Fontaine v. Canada (Attorney General)*, 2014 ONSC 4585 (CanLII) at para. 370.

112. This Court should not limit the scope, content or methods of notice that may be proposed to the lower court after careful consultations between the parties and discussions and outreach to survivors, all of which will form the evidentiary basis for the proposed notice plan that will be put before the lower court.

CONCLUSION

113. The Agreement was negotiated with the express intention of creating a new path forward. It was negotiated with attention to the profound individual and systemic intergenerational and communal trauma caused by the IRS, so as to create a foundation for healing, based on recognition, knowledge and trust. It is a roadmap for the future.

114. The Commission's framework principles for reconciliation include:

- Reconciliation is a process of healing of relationships that requires public truth sharing, apology and commemoration that acknowledge and redress past harms;
- Reconciliation requires political will, joint leadership, **trust building**, **accountability**, and **transparency**, as well as substantial investment of resources. (emphasis added)

115. The Settlement Agreement intended and required that IAP records designated by the National Archivist as having enduring historical value be preserved. The government departments charged with implementing the Agreement (the SAO and the Secretariat) are government departments subject to federal privacy, access and archiving law. For the reasons set out above, it is not possible to create a comprehensive, enduring and lasting Settlement that respects principles of the rule of law, the integrity of the administration of justice, and international human rights standards, without this framework being a fundamental component of the Agreement.

116. Lack of information and/or incomplete information provided to survivors about the meaning or limits of 'confidentiality' in the IAP process (and about the meaning of

Appendix B to the IAP Guide), does not alter the language or structure of the Agreement made.

117. Nor is it possible (or appropriate), ten or more years after the Agreement was signed, to go back in time and implement a meaningful information or consent program either for retention or destruction of the records. Destruction will erase thousands of voices from history without the consent of survivors.

118. As stated in the government of Canada's factum at paras.3, 5 and 118, the federal legislative regime balances preservation with the importance of protecting the confidential and personal information of IAP claimants.

119. Some of the parties in favour of destruction have, among other things, expressed a lack of trust in the legislated protections. The answer to this lack of trust is not irreversible and permanent destruction; it is not to deny future generations of the collective knowledge and history essential to healing. Building trust is a cornerstone for reconciliation. It will be incumbent on present and future generations of Indigenous and non-Indigenous Canadians to continue the work of reconciliation, including through ongoing and careful approaches to the respectful retention of the IAP records. The honour of the Crown may well be engaged, whether formally or in spirit. Whether this might mean statutory amendment or enactment of regulation to exempt the IAP records for a longer period of time from access, or other alternative approaches to appropriately balance the State's dual responsibilities of preservation and respect for survivors' privacy, this work must happen outside the courtroom.

PART IV- SUBMISSIONS CONCERNING COSTS

120. The NCTR seeks no costs and requests that no costs be awarded against it.

PART V- ORDER SOUGHT

121. The NCTR seeks an order:

(i) allowing the appeal and setting aside the order of the court below, except as set out in paragraph (ii) below;

(ii) upholding paragraph 5 of the Order of Justice Perell as modified by the Ontario Court of Appeal, requiring the Chief Adjudicator to develop a Notice Plan, to be approved by the Court, to give survivors notice of their right to archive their redacted IAP application form, transcript and decision(s) in the NCTR.

All of which is respectively submitted this 19th day of April, 2017

Joana Birenbaum
Counsel for the Respondent,
The National Centre for Truth and Reconciliation

PART VI- AUTHORITIES AND STATUTORY PROVISIONS

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Manulife Bank of Canada v. Conlin [1996] 3 SCR 415	65
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LEGISLATION

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Freedom of Information and Protection of Privacy Act, C.C.S.M., c. F175

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

Personal Health Information Act, C.C.S.M. c.P33.5

Privacy Act R.S.C. 1985, c.P-21 (“Privacy Act”), s.8(2)(j) and ss.7 and 8

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