

**CITATION:** Fontaine v. Canada (Attorney General), 2021 ONSC 2921

**COURT FILE NO.:** 00-CV-192059

**DATE:** 20210420

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

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

Plaintiff

**- and -**

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

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**COUNSEL:**

- *Catherine A. Coughlan*, for the Attorney General of Canada
- *Stuart Wuttke and Jeremy Kolodziej*, for the Assembly of First Nations
- *David Schulze*, for Independent Counsel

- *Michael Swinwood and Fay K. Brunning*, for Edmund Metatawabin, IAP Claimant T-00185, IAP Claimant S-20774, and IAP Claimant S-16753
- *Peter R. Grant and P. Jonathan Faulds, Q.C.*, for the Chair of the National Administration Committee

## HEARD IN WRITING

### PERELL, J.

#### REASONS FOR DECISION

- [1] This is a matter of some urgency because the administration of the Indian Residential School Settlement Agreement (“IRSSA”) is near completion and serious allegations have been made about the integrity of its Independent Assessment Process (“IAP”) and about whether the claims of certain Claimants who attended St. Anne’s Indian Residential School (“St. Anne’s”) were administered in accordance with the provisions of the IRSSA.
- [2] On March 31, 2021, with the completion of all IAP claims across the country, the IAP was terminated. The appointments of the Chief Adjudicator and of the IAP Adjudicators ended. The administrative apparatus that supported the Chief Adjudicator and the IAP adjudicators, which was known as the Indian Residential Schools Adjudication Secretariat, was wound up.
- [3] However, the matter of the serious allegations about the IAP at St. Anne’s remains outstanding.
- [4] The Attorney General of Canada (“Canada”) brings this Request for Directions (“RFD”) for the appointment of an Independent Special Advisor (“ISA”) to conduct a review of certain claims by former students of St. Anne’s.
- [5] For the reasons set out below, I agree that it is necessary for an independent person to review certain St. Anne’s IAP claims to determine if disclosure of additional documents and reports would have made a difference to the determination of those claims.
- [6] Canada’s review proposal is set out in Schedule “A” to these Reasons for Decision. However, the form of this review, as proposed by Canada, is inadequate. I have therefore modified the proposed ISA review process to address the shortcomings in Canada’s proposal and to address the concerns raised by: (a) the Assembly of First Nations (“AFN”), (b) Independent Counsel, (c) Peter Grant, the Chair of the National Administration Committee (“NAC”),<sup>1</sup> and (d) the requestors in the Metatawabin RFD #2.
- [7] The review process that I shall approve is set out in Schedule “B” to these Reasons for Decision.
- [8] The IRSSA was signed in 2006 as a comprehensive settlement of numerous class actions for the harms suffered at residential schools. Its purpose was to achieve a "fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools" (IRSSA, preamble).

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<sup>1</sup> Whether the NAC or its Chair are properly before me is doubtful. The Chair’s desire to participate in this RFD was supported by 5 of NAC’s 7 members. A sixth member abstained. The seventh, Canada, opposed. Canada opposed on the bases that the NAC’s participation in this RFD fell outside its mandate, and the NAC’s proposal would increase the cost of the settlement and therefore required Canada’s consent pursuant to Article 4.11(10) of the IRSSA.

- [9] One element of the IRSSA was the IAP, a *sui generis*, inquisitorial, adjudicative process where individual students could make claims for compensation for physical abuse, sexual abuse, or other wrongful acts committed against them while they were students at a residential school.
- [10] For reasons that will become apparent below, it shall be important to note that the IAP was very carefully and elaborately designed to be an inquisitorial process with numerous safeguards in place for privacy, confidentiality, and procedures to avoid retraumatizing and revictimizing the former students and to encourage them to make claims.
- [11] St. Anne's was an Indian residential school located in Fort Albany, Ontario. It operated from 1904 until 1976. In a previous decision, I explained that "St. Anne's was the site of some of the most egregious incidents of abuse within the Indian Residential School system" (*Fontaine v. Canada (Attorney General)*, 2014 ONSC 283, at para. 105 ("*St. Anne's #1*").
- [12] On a number of previous occasions, this Court addressed issues surrounding Canada's disclosure obligations under the IRSSA in relation to IAP claims involving St. Anne's.
- [13] In *St. Anne's #1* and *Fontaine v. Canada (Attorney General)*, 2015 ONSC 4061 ("*St. Anne's #2*"), I concluded that Canada was in breach of its disclosure obligations under the IRSSA. Accordingly, in 2014 and 2015, I ordered Canada to disclose additional documents in its possession and to revise various reports relating to abuse allegations at St. Anne's (the "Disclosure Orders").
- [14] Canada did not appeal the Disclosure Orders and subsequently produced thousands of documents and revised reports.
- [15] Using the IRSSA and *St. Anne's #1* and *St. Anne's #2* (the disclosure Orders) as a means of classification, all former students of St. Anne's can be divided into three groups:
- a. Those who did not bring IAP claims, either because they settled their claims outside of the IRSSA regime or for various other reasons;
  - b. Those who brought IAP claims that were resolved (whether by adjudication, settlement, negotiation, or withdrawal) before additional disclosure was made available pursuant to the Disclosure Orders; and
  - c. Those who brought IAP claims that were resolved after the additional disclosure was made available.
- [16] This RFD relates to the St. Anne's survivors who fall into the second category. It is alleged that these IAP Claimants have a grievance that undermines the integrity of the IAP.
- [17] Whether or not any blame can be attached to it and whether or not the disclosure process was in compliance or in contravention of what the parties bargained for and the court approved, the grievance is that there may be St. Anne's IAP claims that were not resolved on the best evidence.
- [18] The question is whether the additional information that was forthcoming after *St. Anne's #1* and *St. Anne's #2* (the Disclosure Orders) would have made a difference.
- [19] This festering grievance risks undermining public confidence in the integrity of the IAP with respect to St. Anne's IAP claims. No similar grievances exist with respect to the IAP as it was

administered in relation to the other Indian Residential Schools, of which there were approximately 140.

[20] Without admitting that it is blameworthy for the grievances, Canada has brought this RFD to confront the problem. Canada proposes that this Court direct the ISA, the Honourable Ian Pitfield, (who has already been appointed by the supervising courts for other purposes under the IRSSA) to conduct an independent review of St. Anne's IAP claims.

[21] The core elements of Canada's proposal are:

- a. The ISA's primary task will be to answer three questions: (i) whether the 2014/2015 disclosure was made available for the claim's adjudication, (ii) if not, was there a conscious decision by the claimant (or their legal counsel) to proceed in the absence of the disclosure, and (iii) in any event, would the 2014/2015 disclosure have been reasonably likely to have impacted the amount of compensation paid on the claim.
- b. The ISA may contract with one former adjudicator of the IAP for assistance, but all decisions and recommendations must reflect the opinion of the ISA alone.
- c. Canada will provide documents to the ISA to enable him to conduct his review, including all of the additional and revised documents that were made available pursuant to *St. Anne's #1* and *St. Anne's #2*.
- d. The ISA is permitted to contact Claimants or their counsel only in very limited circumstances, and the review will be based on the documentary record and not on submissions from Claimants or their counsel.
- e. Canada has included various provisions and restrictions regarding the claims that the ISA must prioritize or focus on.
- f. The ISA will produce a report outlining the claims for which the additional disclosure would have been reasonably likely to have resulted in additional compensation for the claimant.
- g. The report will be provided to the appointing Court and Canada.
- h. Canada may then act on the recommendations and/or seek further judicial determination.
- i. Canada will pay all costs associated with the ISA's review.

[22] As noted above, Canada's full proposal is set out in a draft order that is reproduced as Schedule "A" to these reasons.

[23] A number of parties objected to Canada's proposal and raised concerns about it.

- a. The Assembly of First Nations argues that Canada's proposal is duplicative of the issues in another RFD that is already before Justice Glustein of this Court (the "Metatawabin RFD #2").
- b. Independent Counsel objects on the basis that the process contains arbitrary distinctions and restrictions on the ISA's review.
- c. The Chair of NAC takes issue with the fact that St. Anne's IAP claimants themselves will not have the ability to participate or be represented as part of the review. The

Chair of the NAC makes an alternative proposal, whereby St. Anne's IAP claimants will be assigned counsel and given the opportunity to request a review, which will then be determined either through negotiations with Canada or review by an IAP adjudicator.

- d. The requestors in the Metatawabin RFD #2 oppose Canada's proposal on the basis that all claimants will not be informed of the additional disclosure that may have impacted their claims and they will be denied any ability to provide input or make submissions.

[24] I agree with some but not all of the objections made in relation to Canada's proposal.

[25] And I have my own concerns about some aspects of Canada's proposal that in my opinion may be incompatible with achieving a "fair, comprehensive and lasting resolution" in relation to the questioned St. Anne's IAP claims or could frustrate the aspirations for reconciliation that are the overarching purpose of the IRSSA.

[26] At the outset, I do not agree with the submissions that an ISA review of certain St. Anne's IAP claims is inappropriate because of overlap with Metatawabin RFD #2. The immediate RFD and the Metatawabin RFD #2 concern different issues.

- a. The Metatawabin RFD #2 was brought by three St. Anne's IAP claimants, as well as Edmund Metatawabin, a former Chief of Fort Albany First Nation, who has never made an IAP claim himself.
- b. For reasons that will become apparent below, it is important to note that the lawyers representing Mr. Metatawabin and these three requestors do not represent any other St. Anne's IAP claimants, who may have their own counsel or who may never have retained counsel.
- c. The relief sought in the Metatawabin RFD #2 is a declaration that Canada has breached the Disclosure Orders. The issue of whether Canada breached the Disclosure Orders after 2015 – the central issue in the Metatawabin RFD #2 – is irrelevant to this RFD.
- d. The ISA review proposed by the immediate RFD, is about the group of IAP claimants whose claims were resolved before the Disclosure Orders were made. The three IAP Claimants grievances are different and would not be resolved by the review process proposed by Canada. Their particular grievances will not be resolved by the independent review process that I shall be approving.
- e. The RFD now before the court does not preclude or circumscribe the rights of St. Anne's IAP claimants under the IRSSA. It creates an additional process consistent with the IAP through which St. Anne's IAP claimants may receive the benefit of additional compensation resulting from an independent examination of their claims. Nothing in Canada's proposal would prevent the Metatawabin RFD #2 requestors from continuing to litigate Canada's alleged breach of the Disclosure Orders.
- f. In short, there is no basis for the concerns raised by the AFN and the Metatawabin RFD #2 requestors that this immediate RFD interferes with or is duplicitous with the Metatawabin RFD #2, which is being managed by Justice Glustein.

- [27] I turn now to the other objections and concerns, including my own, about Canada’s proposal. I have revised the proposal to address these deficiencies.
- [28] As noted above, the revised form of order which is acceptable and that I shall issue is contained in Schedule “B” to these reasons. I shall next describe and explain the nature of the review process set out in Schedule B. That process addresses the concerns raised by the AFN, Independent Counsel, and the Chair of the NAC.
- [29] As set out in Schedule “B,” this Court will direct the ISA to conduct an independent review of St. Anne’s IAP claims that were resolved without the additional disclosure under the Disclosure Orders. The ISA will provide a report detailing which claims could have been materially impacted by this disclosure.
- [30] The ISA will be assisted in this process by an experienced former IAP adjudicator serving in an amicus role to represent the interests of and be an advocate for the IAP claimants. This framework has four advantages over Canada’s proposal.
- [31] *First*, I agree with the objecting parties that Canada’s proposal suffers by not having any representation for the St. Anne’s claimants themselves as part of the review process.
- a. The interests and rights of the IAP claimants must be protected in the review process. In exercising its power to implement and supervise the IRSSA, this Court has an obligation to protect the interests of absent and vulnerable class members and can fashion such terms as are necessary to do so: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 at para. 12 (Ont. S.C.J.); *Fontaine v. Canada (Attorney General)*, 2017 ONSC 2487, at para. 167.
  - b. The Chair of NAC’s alternative proposal of contacting and assigning counsel to all St. Anne’s claimants who fall into the category of claims being reviewed is unacceptable. It is all of unnecessary, intrusive, and unmanageable.
  - c. The information contained in IAP claims is very private and sensitive. Confidentiality is a core component of the IRSSA: *Canada (Attorney General) v. Fontaine*, 2017 SCC 47, at paras. 45-47. The Court must be very wary of any process that risks disclosure and the retraumatizing and revictimizing of the former students.
  - d. I am concerned by the harm inherent in disturbing the peace of IAP claimants by informing them that their claim is being reviewed and they *may* be entitled to more compensation, when the review may not discover any impact to their claim. This is not a matter of just avoiding creating disappointed expectations. In this regard, it may be noted that St. Anne’s Claimants had a 96% success rate. It is no trivial matter to unnecessarily call to mind horrific experiences that many Claimants have struggled to live with their whole lives.
  - e. Stirring up these horrific memories is not consistent with the goals of healing and avoidance of further harm underlying much of the IRSSA.
  - f. The approach suggested by the Chair of the NAC also risks seriously undermining the finality of adjudicated IAP claims.
  - g. Moreover, by signing on to the IRSSA, the parties contracted for an inquisitorial process for the IAP: *J.W. v. Canada (Attorney General)*, 2019 SCC 20, at paras. 66,

132. An independent review process where the interests of the IAP claimants can be advanced by an amicus with knowledge and experience of the standards of the inquisitorial process is consistent with the IRSSA and requires no amendment to it.

- h. Finally, the alternative suggested by the Chair of NAC undermines existing solicitor-client relationships of claimants who were represented by counsel during their IAP claims by involuntarily assigning them new counsel.

[32] Thus, in my view, the best way to resolve these competing interests is for the ISA to retain a former adjudicator in the nature of an amicus to represent the interests and be an advocate for the St. Anne's IAP claimants during the review process.

[33] While Canada's proposal simply contemplated hiring a former adjudicator to informally assist the ISA, it would make more sense for this person to take on a more formal role to advocate for the interests of claimants. By being a former IAP Adjudicator, this amicus will have expertise in the resolution of IAP claims.

[34] However, to ensure that there is no actual or reasonable apprehension of bias, the amicus should be someone who has not previously adjudicated any claims relating to St. Anne's. This solution will ensure that St. Anne's claimants have an advocate "in the room" during the review process but will not disturb the peace of claimants unless necessary.

[35] Accordingly, the ISA will not be permitted to contact individual claimants or alleged perpetrators. The review process will use the existing record of each affected IAP Claimant along with the additional documents that may have material affected the outcome of the IAP claim.

[36] An additional term of the order that provides protection for the Claimants is that Canada will **not** have a role to play in the ISA's review process itself, apart from its obligations to produce various documents to the ISA.

[37] I appreciate that Canada's proposal did not appear to contemplate that it should have more of a role in the review itself, but the order set out in Schedule "B" makes this clear. Again, this is consistent with the inquisitorial nature of the IAP which was what the parties contracted for under the IRSSA.

[38] *Second*, I agree with the objecting parties that Canada's draft order contains unnecessary restrictions and conditions on the ISA's review. Some of these are arbitrary and may preclude the ISA for getting to the core of the question to be answered: whether the disclosure under the Disclosure Orders would have made a difference to St. Anne's IAP claims decided without it.

- a. For this reason, this Court's order will direct the ISA to look at IAP claims alleging abuse at St. Anne's before the Disclosure Orders of *St. Anne's #1* and *St. Anne's #2* and draft a report which answers the following three questions:
  - i. Were the 2014/2015 disclosure documents available for the claim's adjudication?
  - ii. If not, could the 2014/2015 disclosure and use of the documents for the IAP have materially affected the amount of compensation paid on the claim? and,



- iii If the disclosure and use of the documents could have materially affected the amount of the compensation, what additional compensation should have been paid in accordance with the IRSSA?
- b. These questions address the underlying issues that gave rise to the need for the ISA review.
- c. I would leave it to the expertise of the ISA to determine which claims to prioritize and how to conduct his inquisitorial review. (Under the Court's Order he will be empowered as a referee under the *Rules of Civil Procedure*.)
- d. These questions also remove the distinction Canada appears to draw for situations where claimants or their counsel decided to proceed without the disclosure. Such a distinction is unnecessary. The fundamental question is whether the claims were determined without the best evidence available, not how the situation arose and who is to blame for it.
- e. The review process that I shall approve, also removes the presumptions built into Canada's order that withdrawn, abandoned, or settled IAP claims would not have been impacted by the revised disclosure. Such a presumption is inappropriate given that withdrawal, abandonment, or settlement decisions may well have resulted from the fact that the claimant did not have access to the additional evidence at the time.

[39] *Third*, the order that I shall make provides the ISA with the appropriate powers to be able to complete his review. This includes the ability to seek direction from the appointing court by way of an RFD, request further documentation if required, and to seek further directions if, in the course of his review, he identifies any additional issues that require further consideration.

[40] *Fourth*, at the conclusion of his review, the ISA will deliver his report to Canada and the Court. The ISA may also move for confirmation of his report.

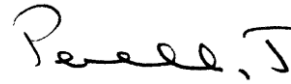
[41] The objecting parties raised the concern that Canada's initial proposal left it entirely up to its discretion to take any actions in relation to the ISA's recommendations. At this time, it is difficult to craft an order with specific provisions, in advance, regarding the ISA's eventual recommendations, without his review having taken place. However, the inclusion of an amicus role in the review, the ISA's ability to bring RFDs, and this Court's supervision of the ISA's report are aimed to alleviate some of these concerns.

[42] I am satisfied that the Court has the jurisdiction to make the Order set out in Schedule "B". In *JW v. Canada (Attorney General)*, 2019 SCC 20, the Supreme Court confirmed that the Supervisory Courts have a broad jurisdiction to oversee the administration and implementation of the IRSSA. The Implementation Order for the courts approval of the IRSSA states:

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

[43] There is no merit to the objection of requestors in the Metatawabin RFD #2.that there was no evidence to decide this RFD. Sadly, the underlying facts that precipitated this RFD are notorious and matters of both public and adjudicative record, and, moreover, Canada and the objectors including the parties to Metatawabin RFD #2 provided evidence in their submissions.

- [44] The revised order addresses the concerns of the objecting parties, while aiming to provide justice to St. Anne's IAP claimants and preserve their privacy.
- [45] The ISA's review may result in more compensation for the aging population of St. Anne's survivors who deserve it. In this way, it will further the core goals of the IRSSA to provide a "fair, comprehensive and lasting resolution".
- [46] I make no order as to costs.



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PERELL J.

Released: April 20, 2021

**Schedule “A”**

Court File No. 00-CV-192059CP

**ONTARIO**  
SUPERIOR COURT OF JUSTICE

THE HONOURABLE MR. )  
JUSTICE PAUL PERELL ) DAY OF \_\_\_\_\_, THE \_\_\_\_\_  
DAY OF \_\_\_\_\_, 2021

BETWEEN:

**LARRY PHILIP FONTAINE, et al.**

Plaintiffs

- and -

**THE ATTORNEY GENERAL OF CANADA, et al.**

Defendants

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

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**ORDER**  
**(Re: ISA Review of St. Anne’s Claims)**

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**UPON THE REQUEST FOR DIRECTION** of the Attorney General of Canada (Canada) requesting that the Independent Special Advisor (ISA) appointed under the Indian Residential Schools Settlement Agreement (IRSSA) be assigned to review concluded Independent Assessment Process (IAP) claims arising from former students of St. Anne’s Indian Residential School (St. Anne’s);

**AND ACKNOWLEDGING** that the supervising courts of the IRSSA, including this Honourable Court, have a duty to supervise its implementation, including a duty to protect the interests of absent and vulnerable class members, and possess sufficient powers to make such

further and ancillary orders, from time to time, as are necessary to implement and enforce the provisions of the IRSSA;

**AND FURTHER ACKNOWLEDGING** that the office of the Court Monitor was established by the supervising courts of the IRSSA by way of their March 9, 2007 Implementation Orders and that, ancillary to the office of the Court Monitor, the office of the ISA was established by the Administrative Judges of the IRSSA in 2014 to handle complaints related to the operation of the IAP;

**THIS COURT ORDERS** that:

The ISA's Appointment to Undertake the St. Anne's Review

1. The ISA is hereby appointed to conduct a review of all St. Anne's IAP claims (the "St. Anne's Review") in accordance with the parameters set out in this Order. That appointment will endure until further order of this court.
2. Mr. Ian Pitfield will retain and fulfill the role of ISA for the purposes of this Order.
3. The ISA may contract with one former adjudicator of the IAP in order to complete the St. Anne's Review:
  - a. To the extent possible, the selected adjudicator will have: (i) past experience on St. Anne's claims, and (ii) past experience as a Deputy Chief Adjudicator;
  - b. The selection of an adjudicator will require the approval of this Honourable Court, which the ISA may seek without further notice;
  - c. The selected adjudicator will provide assistance and guidance to the ISA on an informal basis and will complete work tasks assigned by the ISA; and,
  - d. Notwithstanding the involvement of an adjudicator in the St. Anne's Review, all final reports, decisions, and recommendations will reflect the opinion of the ISA alone.
4. The ISA will conduct the St. Anne's Review as an agent of the court. The ISA may communicate freely with the appointing court, as well as with Court Counsel and the Court Monitor (including its legal counsel). Notwithstanding the generality of the foregoing, the ISA may also seek formal direction from the appointing court by way of a Request for Direction under the Court Administration Protocol.
5. The objective of the St. Anne's Review is to undertake an independent analysis of the St. Anne's IAP claims within the four corners of the IRSSA. It is anticipated that the St. Anne's Review will be concluded within three months of this Order.

6. Canada will pay all costs associated with the St. Anne's Review as undertaken by the ISA, as supported by any adjudicator selected in accordance with Paragraph 3 above.

ISA's Access to Documents Held by Canada

7. Notwithstanding any previous orders of the Administrative or Supervisory Judges of the IRSSA, including the August 6, 2014 *In Rem* Order (as varied), Canada shall be permitted to retain all copies of IAP Documents relating to St. Anne's IAP Claims. In addition to any other proper purpose to which those documents may be put under the *In Rem* Order (including lawyer regulation purposes), the ongoing retention is intended to facilitate the tasks assigned to the ISA under the terms of this order.
8. Forthwith upon confirmation of the ISA's appointment, Canada shall provide the ISA with access to or with copies of:
  - a. All foundational documents to the IRSSA (including the IRSSA itself, the IAP Model, etc.);
  - b. A chart listing all IAP claims containing an allegation of abuse at St. Anne's IRS (the "St. Anne's Claims");
  - c. The documents for each St. Anne's Claim, including the application(s), hearing transcript, POI report(s), hearing decision, and review and re-review decisions if applicable; and,
  - d. A package including all additional documents made available (including the revised St. Anne's School Narratives and POI reports) as a result of *St. Anne's RFDs #1 and #2* ("Additional Documents").
9. If the ISA determines that further documentation is required to complete the St. Anne's Review, the ISA must make that request to the Court on notice to Canada. Canada will provide any additional documentation approved by the Court.

Operating Principles of the St. Anne's Review

10. The primary purpose of the St. Anne's Review is for the ISA to make an independent determination on each St. Anne's Claim as to (i) whether the 2014/2015 disclosure was made available for the claim's adjudication, (ii) if not, was there a conscious decision by the claimant (or their legal counsel) to proceed in the absence of the disclosure, and (iii) in any event, would the 2014/2015 disclosure have been reasonably likely to have impacted the amount of compensation paid on the claim. In fulfilling this primary purpose, the ISA shall have discretion and shall have access to the appointing court for

further direction. It is expected that the ISA shall exercise his discretion in accordance with the following operating principles:

- a. The St. Anne's Review shall follow the do-no-harm principle. Presumptively, the ISA shall not contact individual claimants or alleged perpetrators as part of the St. Anne's Review. The ISA shall exercise his discretion to rebut this presumption with reference to the do-no-harm principle. In such cases, which are expected to be confined to the Priority Claims (defined below), the ISA shall first make efforts to establish contact through the IAP counsel of record. The ISA will conduct the St. Anne's Review in accordance with the principles below and drawing from that office's significant experience dealing with sensitive matters under the IAP.
- b. The ISA shall undertake all activities connected to the St. Anne's Review independently and primarily on the strength of the existing documentary record. Although the ISA has the discretion to contact legal counsel, government officials, and others about questions of general practice, the St. Anne's Review will not be undertaken on the strength of claim-by-claim advocacy or submissions from counsel. All decisions rest exclusively with the ISA based on the existing expertise of that office, and the further expertise to be developed during the course of the St. Anne's Review itself.
- c. The confidentiality of St. Anne's class members shall be at the forefront of all activity and decision-making related to the St. Anne's Review. As creations of the IRSSA and agents of the court, the ISA and selected adjudicator shall have access to IAP Personal Information and IAP Documents related to St. Anne's IAP participants. However, St. Anne's claimants and alleged student perpetrators shall at all times have the benefits of the "absolute confidentiality" of the August 6, 2014 *In Rem* Order.
- d. Except with regard to the primary purpose of the St. Anne's Review set out at Paragraph 10 above, the ISA shall not seek to disturb, undermine, or question the adjudicative findings, negotiated results, or withdrawal decisions made in relation to St. Anne's claims. In particular:
  - i. The ISA will not stand in the place of a reviewing or re-reviewing adjudicator in undertaking the above-mentioned task. In other words, the role of the ISA is not to identify overriding and palpable errors of fact or misapplications of the IAP Model, which is a task reserved exclusively for IAP adjudicators on review and/or re-review.
  - ii. The ISA will not stand in the place of a court on judicial recourse. In other words, the role of the ISA is not to identify whether the decisions in question made reference to the correct terms of the IAP Model (or IRSSA) or in any way to evaluate adjudicative compliance with either.

- iii. In evaluating the effects of revised disclosure, the ISA will focus on tangible and readily discernible impacts. The inquiry will focus on whether the revised disclosure is reasonably likely to have led to a higher compensation award on each St. Anne's Claim, specifically by contributing to proof of a higher category of compensable act than ultimately proven by the Claimant.
- e. All IAP claims involving allegations of abuse relating to St. Anne's will be considered "Reviewable Claims." The ISA will have access to the information set out in Paragraph 8 above in respect of all Reviewable Claims. For greater certainty, this includes all revised POI Reports and School Narratives, along with their source documents. The ISA will have the discretion to consider and review any of the Reviewable Claims in light of any of the above-noted information and to make recommendations regarding any issues observed in relation thereto.
- f. In particular, of the Reviewable Claims, the ISA will identify "Priority Claims" featuring the following two characteristics:
  - i. Revised disclosure (under the January 14, 2014 order) was not made available during the adjudication or negotiation; and,
  - ii. The IAP Application contained allegations of abuse that were ultimately unsubstantiated and that implicated a higher category under the IAP Model than those for which the Claimant received compensation (if any).
- g. For greater certainty, Priority Claims do not include the following:
  - i. Those for which the revised disclosure (pursuant to the January 14, 2014 Order) was made available;
  - ii. Those that received compensation for acts of abuse at or above the highest category alleged in the St. Anne's Claimant's application form;
  - iii. Those that featured unsubstantiated allegations of abuse only at the same or equivalent category as the highest proven act for which the Claimant received compensation (for greater certainty, abuse at the SL2, PL, and OWA or OWA2 levels are consider to be "equivalent"); and,
  - iv. Those featuring unsubstantiated allegations of abuse only at a lower category than the highest proven categories for which the Claimant received compensation (referred to as "subsumed" in the IAP).
- h. Although the ISA will have discretion to make any recommendations he deems appropriate in respect of all St. Anne's Claims, whether individually or as a whole, recommendations of further compensation on individual claims must be

supported by reasoning. Recommendations of further compensation are expected to be made only for Priority Claims, although the ISA has the discretion to make such recommendations on any St. Anne's Claim with reasoning.

11. The central outcome of the St. Anne's Review is for the ISA to review every Priority Claim alongside the Additional Documents. To elucidate potential reasons for further compensation on Priority Claims, the ISA shall apply his discretion to the analysis of all Priority Claims in accordance with the following rubric:
  - a. The ISA will consider unsubstantiated abuse allegations only where they exceed the highest proven act of abuse, and not where they are of the same/equivalent category or subsumed by the proven act.
  - b. The ISA will triage those Priority Claims featuring dismissed allegations. It is to be presumed, subject to rebuttal with reasons, that withdrawn or abandoned allegations would not be impacted by the revised disclosure, given that the choice to withdraw or abandon rests with the Claimant and implicate strategic decision-making. It is further to be presumed, again subject to rebuttal with reasons, that claims settled by consent (short-form decisions and negotiated settlement process claims) would not be impacted by the revised disclosure.
  - c. The unsubstantiated allegations on the Priority Claims will be examined with regard to any available reasoning manifest in the available claim records. The reasons for which an allegation was not substantiated may include, *inter alia*: non-compliance with abuse categories (particularly, PL, OWA, and student-on-student), a "downgrading" of allegations to a lower category, lack of connection to St. Anne's IRS, credibility/reliability issues, claim inactivity, previous settlement, or lack of capacity. It will be relevant whether the Claimant or claimant counsel agreed that certain allegations were, in whole or in part, unable to be substantiated.
  - d. Upon consideration of the reasons identified for each Priority Claim at (c) above, the ISA will consider whether any Additional Documents are reasonably likely to have had an impact on the unsubstantiated allegations.
  
12. In applying the above rubric to the Priority Claims, the ISA shall summarize and record the resulting analysis in a chart:
  - a. If the St. Anne's Claimant received no compensation or failed to substantiate an abuse allegation set out in his or her application, the ISA will record that Claim and will record whether, in the ISA's opinion, access to the Additional Documents would have been reasonably likely to result in additional compensation for the Claimant;
  - b. If the ISA believes that compensation would have been affected by the Additional Documents, he must record reasoning to justify that conclusion relative to the information within the Additional Documents that would have made a difference.



The ISA will also record any recommendations for a fair resolution as he sees appropriate, given the materials before him, the Compensation Rules of the IAP, and the overarching goals of the IRSSA; and

- c. If the ISA believes that the Additional Documents would have affected a claim by resulting in more compensation, he will record the difference between the compensation sought in the application, and the compensation actually received.
13. The ISA will also record any other Reviewable Claims for which he recommends further compensation, along with reasoning consistent with paragraph 10(h) above. If the ISA, in his review of any of the Reviewable Claims, becomes aware of anything that is outside his mandate but which he believes requires further review, he will seek direction from the Court.
  14. For further clarity, should the ISA make any recommendations regarding IAP claims that have previously proceeded before the courts on requests for judicial recourse or direction (in particular, IAP claims T-00178, K-10106, E-10290, H-15019, and C-14114), those recommendations must account for the judicial reasoning on those claims and, if sought, the ISA will be given access to the relevant court record.

#### The ISA's Reporting on the St. Anne's Review

15. Upon completion of the St. Anne's Review, the ISA shall provide a report to the appointing court. It is anticipated that the report shall be delivered between three to six months from the date of this Order. The report will consider whether any St. Anne's IAP claimants whose claims were adjudicated in the absence of disclosure ordered by this Honourable Court on January 14, 2014 are reasonably likely to have received greater compensation had the disclosure been available for consideration on their claims. The report will include the chart referred to at paragraph 9 above, and it may also include any further supporting reasons or rationales for the conclusions drawn. The report will include any recommendations the ISA may see fit to make, and without limiting the generality of the ISA's recommendatory power, the ISA may make suggestions regarding further work to be undertaken or compensation to be paid.
16. If the Court approves of the ISA's conclusions, it will issue an Order approving the form and content of a public version of the report referred to at Paragraph 13, summarizing the total Reviewable Claims, the total Priority Claims, and how many St. Anne's Claims were identified by the ISA for further action to be taken by Canada. Subject to the terms of the Order, no publicly filed materials shall include IAP Personal Information or IAP Documents.
17. Canada shall be provided with a copy of the court's Order as contemplated in Paragraph 14. The ISA shall also provide to Canada a copy of the chart referred to at Paragraph 9 above, as well as any further details about the recommendations made in order for Canada to be able to act upon them. The ISA may disclose IAP Personal Information or IAP Documents to Canada. Canada may seek judicial direction regarding its response

to any of the recommendations. Canada shall also inform the court about its response to the recommendations.

18. At the conclusion of the ISA's mandate, the Court may make any further order required to discharge the ISA from its appointment and to ensure that the terms of the August 6, 2014 *In Rem* Order (as varied) and any other existing court orders resume in their application to IAP Documents related to St. Anne's IAP Claims.

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The Honourable Justice P. Perell

**Schedule “B”**

Court File No. 00-CV-192059CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE MR. )  
JUSTICE PAUL PERELL ) \_\_\_\_\_, THE \_\_\_\_\_  
DAY OF \_\_\_\_\_, 2021

BETWEEN:

**LARRY PHILIP FONTAINE, et al.**

Plaintiffs

- and -

**THE ATTORNEY GENERAL OF CANADA, et al.**

Defendants

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

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**ORDER  
(Re: ISA Review of St. Anne’s Claims)**

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**UPON THE REQUEST FOR DIRECTION** of the Attorney General of Canada (Canada) requesting that the Independent Special Advisor (“ISA”) appointed under the Indian Residential Schools Settlement Agreement (“IRSSA”) be assigned to review concluded Independent Assessment Process (“IAP”) claims arising from former students of St. Anne’s Indian Residential School (“St. Anne’s”);

**AND ACKNOWLEDGING** that the supervising courts of the IRSSA, including this Honourable Court, have a duty to supervise its implementation, including a duty to protect the interests of absent and vulnerable class members, and possess sufficient powers to make such further and ancillary orders, from time to time, as are necessary to implement and enforce the provisions of the IRSSA;

**AND FURTHER ACKNOWLEDGING** that the office of the Court Monitor was established by the supervising courts of the IRSSA by way of their March 9, 2007 Implementation Orders and that, ancillary to the office of the Court Monitor, the office of the ISA was established by the Administrative Judges of the IRSSA in 2014 to handle complaints related to the operation of the IAP;

**THIS COURT ORDERS** that:

1. The ISA is hereby appointed to conduct a review of all St. Anne's IAP claims in accordance with the directions set out in this Order (the "St. Anne's Review").
2. The Honourable Ian Pitfield will continue as ISA for the purposes of this Order.
3. For the purposes of this Order, the ISA shall be appointed a referee in accordance with Rule 54 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 *mutatis mutandis* and shall make a report that contains his or her findings, conclusions, and recommendations.
4. Upon completion of the reference, the IAP shall deliver a sealed copy of the report to the court and to Canada. The report will be filed with the court as a sealed court document.
5. The ISA may seek direction from the appointing court by way of a Request for Direction under the Court Administration Protocol.
6. Subject to the approval of this Honourable Court, the ISA shall retain an Amicus to represent and to be an advocate for all St. Anne's IAP claimants whose claims are subject to review.
7. The Amicus shall be a former IAP adjudicator who has not adjudicated any St. Anne's IAP claims.
8. Canada shall not participate in the St. Anne's Review save as provided in this Order.
9. Canada shall pay all costs associated with the St. Anne's Review.
10. In the report, the ISA shall make an independent determination for each IAP Claimant whose IAP claim was resolved (whether by adjudication, settlement, negotiation, or withdrawal) before additional disclosure was made available pursuant to the orders made in *St. Anne's #1 Fontaine v. Canada (Attorney General)*, 2014 ONSC 283 ("St. Anne's #1") and *Fontaine v. Canada (Attorney General)*, 2015 ONSC 4061 ("St. Anne's #2"), and the ISA shall report to the court answers to the following questions:
  - i. Were the 2014/2015 disclosure documents available for the claim's adjudication?

- ii. If not, could the 2014/2015 disclosure and use of the documents for the IAP have materially affected the amount of compensation paid on the claim? and,
  - iii. If the disclosure and use of the documents could have materially affected the amount of the compensation, what additional compensation should have been paid in accordance with the IRSSA?
- 11. Canada shall provide the ISA and Amicus with access to or with copies of:
  - a. All foundational documents to the IRSSA (including the IRSSA itself, the IAP Model, etc.);
  - b. A chart listing all IAP claims containing an allegation of abuse at St. Anne's IRS;
  - c. The documents for each St. Anne's Claim, including the application(s), hearing transcript, POI report(s), hearing decision, and review and re-review decisions if applicable; and,
  - d. A package including all additional documents made available (including the revised St. Anne's School Narratives and POI reports) as a result of the court's decisions in "*St. Anne's #1* and "*St. Anne's #2*."
- 12. If the ISA determines that further documentation is required to complete the St. Anne's Review, the ISA may request the documents from Canada and if Canada is unable or unwilling to produce the documents, the ISA may seek the directions of the Court.
- 13. In conducting the St. Anne's Review, the ISA shall not contact individual claimants or alleged perpetrators.
- 14. If, in the St. Anne's Review, the ISA becomes aware of anything that is outside his mandate but which he believes requires further review, he will seek direction from the Court.
- 15. Should the ISA make any findings regarding IAP claims that have previously proceeded before the courts on requests for judicial recourse or direction (in particular, IAP claims T-00178, K-10106, E-10290, H-15019, and C-14114), those recommendations must account for the judicial reasoning on those claims and, if sought, the ISA will be given access to the relevant court record.
- 16. On notice to Canada and the Amicus, the ISA may move for confirmation of his report.

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The Honourable Justice Perell

**CITATION:** Fontaine v. Canada (Attorney General), 2021 ONSC 2921  
**COURT FILE NO.:** 00-CV-192059  
**DATE:** 20210420

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

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

Plaintiffs

**- and -**

THE ATTORNEY GENERAL OF CANADA et  
al.

Defendants

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**REASONS FOR DECISION**

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Perell, J.

Released: April 20, 2021