



CITATION: Fontaine v. Canada (Attorney General), 2018 ONSC 6381

COURT FILE NO.: 00-CV-192059

DATE: 2018/10/25

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

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

Plaintiffs

- and -

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

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

BEFORE: PERELL J.

COUNSEL: *Diane Soroka* for Independent Counsel

Joanna Birenbaum for the National Centre for Truth and Reconciliation

Stuart Wuttke and Jeremy Kolodziej for the Assembly of First Nations

Catherine Coughlan and Brent Thompson for the Attorney General of Canada

HEARD: September 20, 2018.

REASONS FOR DECISION

A. Introduction

[1] International human rights standards create a state's duty to remember and remind its citizens of its history, however shameful that history may be. This duty to remember was a feature of the Indian Residential Schools Settlement Agreement (“IRSSA”). Another feature of the IRSSA was a concern about the privacy, the dignity, and the health and welfare of the survivors of the schools, whose personal stories comprise the shameful history of the schools. There is an extreme tension between these two important features of the IRRSA.

[2] In this Request for Directions (“RFD”), “Independent Counsel” (one of the groups of plaintiffs’ counsel that signed the IRSSA¹) seeks the court’s direction about these two features of the IRRSA. Independent Counsel seeks direction about what privacy protections apply to the National Centre for Truth and Reconciliation (“NCTR” or the “Centre”) in its treatment of the documents and the records it received from the now defunct Truth and Reconciliation Commission (“TRC” or the “Commission”).

[3] Independent Counsel requests an Order imposing conditions on the use that can be made of materials and information transferred to the Centre by the Commission or by any party to the IRSSA. The conditions Independent Counsel seeks to impose are:

- (a) the materials and information are subject to privacy protection;
- (b) researchers may only have access to the materials and information subject to privacy protection;
- (c) no one shall make any reference whatsoever to the possible civil or criminal liability of any person or organization, unless such liability has been established through legal proceedings;
- (d) no one shall, except as required by law, use or permit access to statements made during Commission events or activities, except with the consent of the speaker and only for the purpose and to the extent of the consent granted;

¹ Under the IRRSA, “Independent Counsel” is defined as follows: “Independent Counsel” means Plaintiffs' Legal Counsel who have signed this Agreement, excluding Legal Counsel who have signed this Agreement in their capacity as counsel for the Assembly of First Nations or for the Inuit Representatives or Counsel who are members of the Merchant Law Group or members of any of the firms who are members of the National Consortium.

(e) no one shall identify persons in events, activities, public statements, reports or recommendations without the express consent of the person identified unless the identification has already been established through legal proceedings, by admission, or by public disclosure by the person identified.

(f) information that could be used to identify individuals shall be anonymized to the extent possible; and

(g) no one shall except as required by law, provide to any other proceeding, or make available for any use, any personal information of any person, without that person's prior written consent.

B. Position of the Parties

[4] In its RFD, Independent Counsel submits that the Centre is bound by the privacy provisions of the IRSSA that bound the Commission; i.e., Independent Counsel submits that the Centre is bound by the federal *Privacy Act*,² the federal *Access to Information Act*³ and other privacy restrictions found in the IRSSA that bound the Commission.

[5] Further, Independent Counsel submit that Canada and the Commission were prohibited from transferring documents containing personal information to the Centre, unless the Centre agreed to be bound by the privacy provisions of the IRSSA, which the Centre did not do. Rather, the Centre agreed to and operates under a different privacy regime. Thus, Independent Counsel submits that the transfer of documents from the Commission to the Centre, which has already occurred, contravened the IRSSA. In other words, Independent Counsel submits that the Centre breached the privacy provisions of the IRSSA when it received the documents from the Commission.

[6] Further, Independent Counsel submits that the “La Tuque Indian Residential School Episode,” discussed below, reveals that on an ongoing basis the Centre is mismanaging and breaching the privacy provisions of the IRSSA to the detriment of the survivors of the schools.

[7] In responding to the RFD, the Centre denies any breach of the IRSSA, and it submits that the order requested by Independent Counsel is contrary to the IRSSA and would constitute a material amendment to the IRSSA that the court has no jurisdiction to make.

[8] Further, the Centre submits that to the extent that Independent Counsel seeks an *in rem* order, it is beyond the jurisdiction of the court.

[9] The Centre says that the “La Tuque Indian Residential School Episode” is an acknowledged mistake that was rectified and should not bring about a change to how the Centre operates. The Centre submits that its operation correctly balances the truth telling and the privacy protections mandated by the IRSSA.

[10] In responding to the RFD, Canada agrees with the Centre and opposes the request of Independent Counsel. Canada submits that the matters raised by the Independent Counsel are outside the court’s supervisory jurisdiction. Canada also submits that an RFD decision is unwarranted.

² R.S.C. 1985, c. P-1.

³ R.S.C. 1985, c. A-1.

[11] The Assembly of First Nations (“AFN”) takes a neutral position in responding to the RFD. It submits that the court does have the jurisdiction to make an order with respect to the documents or information in the possession of the Centre. The AFN submits that were the court to exercise that discretion, the court must balance the state’s duty to remember with the parties’ agreement to protect the privacy and the health and welfare of the survivors.

[12] Thus, the AFN submits that the court should allow the Centre to fulfill its mandate, which includes ensuring that the public has access to historical records, while at the same time protecting the privacy and the health and welfare of the survivors of the Indian Residential Schools and their families. The AFN suggests that culturally appropriate protocols between the NCTR and First Nations might provide a process to govern the manner of how documents are disclosed to third parties and researchers. Those protocols remain to be developed should the court exercise its discretion to make an order.

C. Overview

[13] The issues raised by Independent Counsel are solemn and very important to the fundamental goal of reconciliation that underlies the IRSSA. The parties’ arguments are correspondingly sincere and passionate. My ultimate conclusion, however, is that while the court does have the jurisdiction to direct how the Centre deals with the documents it received from the Commission and from others, no substantive orders or directions need be made.

[14] I also conclude that there has been no material breach of the IRSSA. I reach my conclusions because properly understood, the existing provisions of the IRSSA and the existing legal instruments that govern the operation of the Centre are adequate and reach the appropriate balance between truth telling and privacy. There is no need for the court to exercise its supervisory jurisdiction.

[15] Although the operative ingredient of this RFD decision (that no action be taken) appears trivial, the legal and educative components of this RFD are actually very substantial. As the discussion below will reveal, the difficulties of resolving the sensitive subject matter of this RFD is intensified because the IRSSA is a very complex agreement and because other features of the IRSSA, including most prominently its Independent Assessment Process (“IAP”), also raise tensions between truth telling versus privacy.

[16] In other words, the issues raised in the immediate RFD influence and are influenced by other important features of the IRSSA. If this were all not complicated enough, there is the further complication that the issues in the immediate case are affected by decisions made in relation to several very significant prior RFDs that have addressed the thorny problems associated with gathering historical records that some survivors want memorialized while other survivors want the records suppressed, censored or destroyed.

D. Factual Background

1. Truth Telling and Privacy and the Negotiation of the IRSSA

[17] Between the 1860s and 1990s more than 150,000 First Nations, Inuit, and Métis children were required to attend Indian Residential Schools (“IRS”) operated by religious organizations with the funding of Canada. What happened at the schools was an abomination. For the purpose

of assimilation and missionary fervour, the operators of the schools, kidnapped, brainwashed, ethnically and culturally cleansed, tortured, physically assaulted, sexually assaulted, and otherwise mistreated children who were the school's students.

[18] What also happened in the toxic hellish conditions of the schools is that some children at the schools assaulted, molested, or raped other students. In a previous RFD, Larry Philip ("Phil") Fontaine, one of the Indigenous leaders who negotiated the IRSSA testified that if the names of alleged perpetrators of student-on-student abuse ever became public knowledge, the disclosure of the information would harm and revictimize the survivors and their communities. Mr. Fontaine stated:

If any of this information is placed into an archive, even if it is sealed for ten years, fifty years, a hundred years or longer, the identities of these perpetrators and their victims will someday become available to their descendants or researchers who may publish information. Within our communities, such knowledge even in future generations would continue the legacy of dysfunction and trauma that was created by the Residential Schools.

[19] By the early 2000s, the tragic history of the schools became public knowledge. Across the country, approximately 18,000 individual actions by former students of the IRSs and numerous class actions were commenced against Canada and the churches that operated the schools.

[20] With the matter now getting attention, there were extensive negotiations to settle the individual actions and the class actions. Before the negotiations, the AFN had called on Canada to respond to the aftermath of the Indian Residential School System with compensation and with the creation of a full public record of the history of the schools.

[21] In May 2005, a political agreement was signed between Canada and the AFN that a settlement would be negotiated that would include compensation, healing, and a truth and reconciliation process. A few months later, the AFN became a plaintiff by launching a class action against Canada, and Mr. Fontaine, who was then the AFN's National Chief, was named as proposed Representative Plaintiff.

[22] In late November, 2005, an agreement in principle was negotiated. Negotiations continued into 2006. There were many issues to negotiate. There were the matters of liability, reparations, compensation, apologies, procedures, releases, and truth and reconciliation. The AFN also promoted the need for a mechanism that would record fully and publicly the residential school experience, and its impacts on First Nation peoples, then called Aboriginals and now referred to as Indigenous.

[23] The call from the AFN for all of compensation, truth, and reconciliation evolved in into a truth-telling and public education process. In the AFN's "Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools," it sought a holistic, just and fair settlement for residential school survivors. The AFN's appeal for a truth process built upon previous calls for a public inquiry.

[24] In the negotiations for the IRSSA, determining the mandate of what was to become the Commission, including the establishment of a national research centre involved extensive consultations with survivors and their communities, as well as with church representatives, government officials and international experts.

[25] The AFN sought a comprehensive and accessible record based on human rights principles. The compilation of a true history responded to a right to justice, a personal and

collective right to know, and the state's duty to remember. The AFN sought an archive to ensure that historical records surrounding Indian Residential Schools could not be unilaterally destroyed, altered, or erased by Canada.

[26] At the time of the negotiations, the international human rights standards associated with a right to justice, a personal and collective right to know, the state's duty to remember, the best practices for truth commissions, and the standards for the preservation of records relating to systemic human rights abuses in archives were well established. The International Council on Archives' *Code of Ethics* (1996) and the United Nations Joinet-Orentlicher Principles (1997) are the foundational international standards that inform archival practice when managing records with importance for human rights. Preservation of records relating to systemic human rights abuses in archives, including the preservation of the records of truth commissions was known and understood to be a foundational measure to combat impunity and to respect the "right to know" of individuals and peoples.

[27] In the context of a state's duty to remember, the words "archive"⁴ and "research centre" have a meaning derived from the Joinet-Orentlicher Principles, approved by the United Nations in 1997 and updated in 2005,⁵ which state:

As used in these principles, the word "archives" refers to collections of documents pertaining to violations of human rights and humanitarian law from sources including: (a) national government agencies; (b) local agencies, such as police stations, that were involved in human rights violations; (c) State agencies, including the office of the prosecutor and the judiciary, that are involved in the protection of human rights; and (d) materials collected by truth commissions and other investigative bodies.

[28] The idea of establishing a research centre was derived, in part, from the Royal Commission on Aboriginal Peoples⁶ and from the Law Commission of Canada's report *Restoring Dignity, Responding to Child Abuse in Canadian Institutions*. The Royal Commission's report recommended a national repository that would act as a clearinghouse of information for researchers and educators. Volume three, chapter five of the Royal Commission's report discussed the need for an Aboriginal documentation centre, with a focus on the history of residential schools, as follows:

The history of residential schools and of the relocation of Aboriginal people is recorded in government, church, school and corporate archives throughout the country. While their experiences are etched in the memories of thousands of Aboriginal people today, these events are only partially documented. In our discussions of residential schools and relocations in Volume I, Chapters 10 and 11, we recommended that this unique and historically significant information should be collected, preserved and made accessible. We believe that a national Aboriginal documentation centre could provide appropriate leadership by establishing an active program of research and dissemination and by maintaining a suitable facility for such a collection.

[29] The factual nexus of the IRSSA negotiations reveals that the parties intended to establish

⁴ As noted by the Canadian Association of Archivists in its online materials, archives ensure that the records of today are preserved for future generations. People can then use the records to study and understand the life, ideas and thoughts of their original creators, linking the past, present and future. See <https://archivists.ca/content/what-me-archives>.

⁵ United Nations Human Rights Counsel, *Updated set of Principles for the Protection and Promotion of Human Rights to Combat Impunity* (the "Joinet-Orentlicher Principles"), E/CN.4/2005/102 Add.1:8 February 2005.

⁶ Canada, Georges Erasmus, and René Dussault. 1996. *Report of the Royal Commission on Aboriginal Peoples*. Ottawa: The Commission.

a comprehensive archive and collection of Indian Residential School materials, in accordance with the accepted international and domestic standards and practices for truth commissions and human rights archiving.

[30] In May 2006, the IRSSA was signed. The signatories were: (a) Canada, as represented by The Honourable Frank Iacobucci; (b) the class action Plaintiffs, as represented by the National Consortium, Merchant Law Group, and Independent Counsel; (c) the AFN and Inuit Representatives; and, (d) the General Synod of the Anglican Church of Canada, the Presbyterian Church of Canada, the United Church of Canada, and 51 Roman Catholic Entities.

[31] The IRSSA is a product of the settlement of thousands of individual actions and numerous class action including several under Ontario’s *Class Proceedings Act, 1992*.⁷ Between December 2006 and January 2007, each of nine courts across the country, issued judgments certifying the class actions and approving the terms of settlement as being fair, reasonable, and in the best interests of the Class Members.

[32] Justice Winkler as he then was, certified the action in Ontario in reasons reported as *Baxter v. Canada (Attorney General)*.⁸ The IRSSA is intended to bring about a “fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools”. The IRSSA aims to promote “healing, education, truth and reconciliation and commemoration”.

[33] In March 2007, on consent of the parties, the nine courts issued identical Approval Orders and Implementation Orders. Both the judgments of the courts and the Approval Orders provide that that the respective courts shall supervise the implementation of the IRSSA and the judgment and may issue such orders as are necessary to implement and enforce the provisions of the agreement and the judgment. In *Canada (Attorney General) v. Fontaine*,⁹ the document retention and destruction case that led to the *In Rem Order*, which is discussed below, the Supreme Court of Canada described the jurisdiction of those tasked with overseeing the IRSSA’s implementation and administration in the following way:

31. [...] Supervising judges, significantly, have *administrative and supervisory jurisdiction* over the implementation and administration of the IRSSA and can, among other things, hear requests for directions. If, therefore, the proper administration and implementation of the IRSSA necessitates direction on the handling of the IAP Documents, supervising judges are empowered to give that direction.

32. These broad powers are conferred upon supervising judges by the orders which approved and implemented the IRSSA [...] They are also supported by class action legislation, which provides that courts must have generous discretion to make orders and impose terms as necessary to ensure a fair and expeditious resolution of class actions (see, e.g., *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 12; *Endean v. British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 162, at para. 38). It follows, particularly given the nature of the IAP and the IAP Documents, that the supervisory role in implementing the terms of the IRSSA included making directions regarding disposition of the IAP Documents at the conclusion of the IAP.

33. [...] Further, in any instance where the scope of superior courts’ powers granted by class action legislation does not expressly contemplate certain supervisory functions, superior courts retain residual supervisory powers under their inherent jurisdiction. Removing the inherent jurisdiction of superior courts requires “clear and precise statutory language” [...]

⁷ S.O. 1990, c. 6.

⁸ (2006), 83 O.R. (3d) 481 (S.C.J.).

⁹ 2017 SCC 47 [*In rem Order*].

[34] There are four major components to the IRSSA: (1) Canada placed \$1.9 billion into a trust fund to fund payments of the “Common Experience Payment” (“CEP”) to Class Members who resided at an IRS during the class period; (2) Canada established the uncapped but time-limited IAP, under which Class Members who suffered physical or sexual abuse at an IRS could claim compensation in a process administered by Canada but adjudicated by independent adjudicators; (3) a Truth and Reconciliation Commission was established with a mandate to create an historical record of the IRS system to be preserved and made accessible to the public for future study; and (4) Class Members released their legal claims in exchange for the benefits of the IRSSA. The releases extended to Canada and the Catholic Church Entities who were the named Defendants.

[35] The National Administration Committee (“NAC”) supervises the implementation of the IRSSA. The NAC is comprised of seven representative members, including Canada, the AFN, Inuit Entities, Church Entities, and three representatives of plaintiffs’ counsel. The NAC prepares policy protocols and standard operating procedures. The NAC hears appeals with respect to CEP eligibility. It also determines references from the Commission. Subsection 4.11(14) of the IRSSA stipulates that the unanimous consent of the NAC is required for an amendment to the IRSSA to be considered by the court.

[36] Section 7.01 of the IRSSA provided for the establishment of the Truth and Reconciliation Commission and specified that its process and mandate was set out in Schedule “N”, which is set out in Schedule “A” to these Reasons for Decision.

[37] Schedule “N” establishes the mandate of the Commission of contributing “to truth, healing and reconciliation.” The Commission was directed to identify sources and create as complete a historical record as possible of the Indian Residential School system and legacy for the purposes of future study and use by the public. The Commission was also mandated to produce a report as well as recommendations to Canada concerning the Indian Residential School system and, in particular “the history, purpose, operation and supervision of the IRS system, the effect and consequences of IRS (including systemic harms, intergenerational consequences and the impact on human dignity) and the ongoing legacy of the residential schools.”

[38] Balanced against the truth-telling function of the Commission was a concern to protect the privacy interests of the parties to the IRSSA. Under Schedule “N” the Commission was, among other things, subject to the federal *Privacy Act*.

[39] Schedule “N” of the IRSSA, envisioned that the Commission would establish a research centre to preserve and archive historic material and to make it available to former students, their families and communities, the general public, researchers, and educators.

[40] Under the IRSSA to implement and facilitate the work of both the Commission and also the IAP, very substantial obligations were imposed on the Defendants, most particularly Canada, to produce documents, many of which contained extraordinarily sensitive personal information about the causes and effects of the abomination that was Canada’s IRS system. Canada’s document disclosure obligations with respect to Commission were set out in Schedule “N” of the IRSSA. Schedule N imposes obligations on Canada and the Church defendants to provide all relevant documents in their possession or control to the Commission.

[41] Pursuant to Schedule N of the IRSSA, Canada and the Church Entities transferred documents held in their respective archives to the Commission. The Commission collected

records from some 88 church archives and 33 different federal government institutions. The Commission also collected documents and records in carrying out its mandate at events and activities across Canada. The large majority of records collected by the Commission were copies of historical records produced by the Government of Canada.

[42] For present purposes, it is necessary to understand and to keep in mind that the government of Canada held and still holds millions of records relating to the operation and administration of the Indian Residential Schools that were not transferred to the Commission. Many, but not all, of the records are held by Library and Archives Canada (“LAC”) and some are held by other government departments and have yet to be transferred to LAC.

[43] It also should be noted that several previous and highly contentious RFDs have addressed Canada’s disclosure obligations to the Commission and to the IAP. In *Fontaine v Canada (Attorney General)*, [LAC Documents],¹⁰ Justice Goudge ordered Canada to make full disclosure of its holdings at LAC. Justice Goudge held that the Commission needed access to the information at LAC to prepare a historical record and to discharge its mandate. In *Fontaine v. Canada (Attorney General)*, [St. Anne’s #1],¹¹ I ordered some but not all documents associated with criminal investigations, criminal investigations, and civil proceedings arising from the despicable events at St. Anne’s Indian Residential School to be produced to the Commission and to the IAP.

2. **The Establishment of the National Centre for Truth and Reconciliation and the Transfer of the Commissions Documents to the Centre**

[44] As noted above, Schedule “N” is the source of the establishment of an archival and research centre for IRSSA documents and information. Schedule “N” promoted the goal of accessibility to research materials subject to privacy concerns. Schedule “N” stated: “[...] To the extent feasible and taking into account the relevant law and any recommendations by the [Commission] concerning the continued confidentiality of records, all materials collected through this process should be accessible to the public.

[45] The means of access to the history for posterity was to be an archive and research centre. Schedule “N” stated:

3. Responsibilities

In keeping with the powers and duties of the Commission, as enumerated in section 2 above, the Commission shall have the following responsibilities:

(a) to employ interdisciplinary, social sciences, historical, oral traditional and archival methodologies for statement-taking, historical fact-finding and analysis, report-writing, knowledge management and archiving;

[...]

(d) to establish a research centre and ensure the preservation of its archives;

[...]

¹⁰ 2013 ONSC 684 [LAC Documents].

¹¹ 2014 ONSC 283 [St. Anne’s #1].

12. *National Research Centre*

A research centre shall be established, in a manner and to the extent that the Commission's budget makes possible. It shall be accessible to former students, their families and communities, the general public, researchers and educators who wish to include this historic material in curricula.

For the duration of the term of its mandate, the Commission shall ensure that all materials created or received pursuant to this mandate shall be preserved and archived with a purpose and tradition in keeping with the objectives and spirit of the Commission's work.

The Commission shall use such methods and engage in such partnerships with experts, such as Library and Archives Canada, as are necessary to preserve and maintain the materials and documents. To the extent feasible and taking into account the relevant law and any recommendations by the Commission concerning the continued confidentiality of records, all materials collected through this process should be accessible to the public.

[46] Under the IRSSA, the roles of the Commission and the Centre were connected but different, and the Centre and the Commission were distinct entities; the Commission collected historical records and documents and prepared a report, and the Centre was to be an archive and research centre that would make the records and documents available.¹²

[47] In 2012, the Commission chose the University of Manitoba to be the host institution for the Centre. The University of Manitoba provides administrative structure and oversight. The Centre's governance includes a Governing Circle, the majority of whose members are Indigenous, and a Survivor's Circle, comprised of survivors of the Indian Residential Schools.

[48] In June 2013, the Centre was formally established. The Commission and the University of Manitoba as trustee signed a Trust Deed. The signatures of the signing parties were witnessed by Levinia Brown, Rod Bruinooge, M.P., Mr. Fontaine, John Morrisseau, Florence Paytner, and the Honourable Gregory Selinger. For present purposes the relevant provisions of the Trust Deed are set out in Schedule "B" to these Reasons for Decision.

[49] For the purposes of the discussion and analysis below, I regard it as significant and informative that Mr. Fontaine, the main representative plaintiff in the class actions that yielded the IRSSA, was a signatory of the Trust Deed.

[50] The Commission and the University of Manitoba signed an Administration Agreement to govern the documents received pursuant to the Trust Deed. For present purposes the relevant provisions of the Administration Agreement are set out in Schedule "C" to these Reasons for Decision. The access and privacy provisions of the Administration Agreement are set out below:

Access and Privacy

31. Subject to the below, the University will make the Settled Property as accessible to the public as possible.

32. The Mandate requires that the archives be preserved and accessed "subject to and in compliance with applicable privacy and access to information legislation". To the extent possible under applicable legislation, records among the Settled Property will be made available to the public in an un-redacted form.

33. It is intended that the Settled Property, once under the control of the University, will be subject to *The Freedom of Information and Protection of Privacy Act* (Manitoba) ("FIPPA"), which is substantially equivalent to the federal *Access to Information Act* and *Privacy Act*. The University and the TRC will take all reasonable steps to work with the Government of Manitoba to ensure the records

¹² *Fontaine v. Canada (Attorney General)*, 2015 ONSC 5522 [NCTR Standing Decision]

among the Settled Property are subject to FIPPA, and to achieve any new statutes or amendments to legislation or regulations necessary to ensure that the Settled Property is not less accessible than it would be if it were held at Library and Archives Canada.

34. The Settled Property has not been reviewed by the TRC for the purposes as assessing which records or information can be made publicly accessible under applicable legislation. Upon receipt of the Settled Property, the University will begin the task of reviewing the Settled Property to determine what records and information can be made publicly accessible in both unredacted and redacted form under applicable legislation as soon as possible, with priority to be given to statements given to the TRC.

35. Those portions of the Settled Property which cannot be made generally accessible to the public may be made available to researchers in accordance with applicable legislation, appropriate ethics and other approvals, and in accordance with the requirements of the University.

36. Certain portions of the Settled Property, including records related to the IAP process under the Settlement Agreement, may be subject to particular confidentiality provisions, imposed by a court of competent jurisdiction, or otherwise. The University will use all reasonable efforts to protect such records in accordance with the confidentiality requirements.

[51] In 2015, the Government of Manitoba enacted the *National Centre for Truth and Reconciliation Act*¹³ to establish and to govern the Centre. The relevant provisions of this Act are set out in Schedule “D” to these Reasons for Decision. The Access and Privacy provisions of the Act are set out below:

FIPPA and PHIA apply to Centre records

4 (1) The *Freedom of Information and Protection of Privacy Act* and *The Personal Health Information Act* apply to all Centre records, except as otherwise provided in this Act.

Centre records not excluded from FIPPA

4 (2) For certainty, Centre records are not exempt from *The Freedom of Information and Protection of Privacy Act* under clause 4(j) (archival records) of that Act.

[...]

PROACTIVE DISCLOSURE OF CENTRE RECORDS

Proactive disclosure of records

7 (1) To fulfill the mandate of the Centre as it relates to ensuring availability of the Centre records, the director is authorized to make Centre records available and to disclose any personal information, including personal health information, contained in the records, to the extent that the director considers it necessary to fulfill the mandate.

Interaction with FIPPA and PHIA

7 (2) For certainty, subsection (1) authorizes the disclosure of personal information under clause 44(1)(e) of *The Freedom of Information and Protection of Privacy Act* and personal health information under clause 22(2)(o) of *The Personal Health Information Act*.

Disclosure only if consistent with restrictions

7 (3) The disclosure of a record or information under this section must be consistent with any commitment made in an agreement under subsection 6(2) and the restrictions referred to in section 8.

Restrictions on proactive disclosure

8 (1) The director must restrict the disclosure of records and information under subsection 7(1) if

¹³ S.M. 2015, c 2; C.C.S.M. c. N20.

- (a) the disclosure would be an unreasonable invasion of an individual's privacy; or
- (b) a court order prohibits disclosure.

Director to consider circumstances

8 (2) In determining whether a disclosure would be an unreasonable invasion of an individual's privacy under clause (1)(a), the director must consider all of the relevant circumstances, including whether the public interest in the disclosure clearly outweighs any invasion of privacy that could result from the disclosure.

Classification of documents

8 (3) The director may establish classes of Centre records and the information contained in them and, for the purposes of this section, specify restrictions that apply to each class.

Types of restrictions on proactive disclosure

8 (4) A restriction under this section may do all or any of the following:

- (a) restrict or prohibit disclosure for some or all purposes;
- (b) restrict or prohibit disclosure for a certain period of time;
- (c) restrict who may have access to a Centre record.

Severing information

9 When disclosure of information in a Centre record is restricted under subsection 6(2) or section 8, but the restricted information can reasonably be severed from the record, the director may sever the restricted information and disclose the remainder of the record.

Complaints re proactive disclosure

10 The Centre must establish a procedure for receiving and dealing with complaints about the disclosure of Centre records under sections 7 and 8.

RIGHT OF ACCESS BY INDIVIDUAL WHO PROVIDED INFORMATION

Purpose of this section — additional right of access

11 (1) The purpose of this section is to allow an individual who has provided a record to the Commission or the Centre access to the record without having to make a formal access request under Part 2 of *The Freedom of Information and Protection of Privacy Act* or Part 2 of *The Personal Health Information Act*.

Access right of individual who provided information

11 (2) An individual has the right, on request and without charge, to examine and receive a copy of a Centre record or information contained in a record if

- (a) he or she provided the record or information to the Commission or the Centre; or
- (b) the record or information is a transcript or recording of a statement or other information provided by the individual to the Commission or the Centre.

Person authorized to act for individual

11 (3) The individual may authorize any person to exercise the right under subsection (1) on his or her behalf.

Right of access of relative

11 (4) A family member of the individual has the right, on request and without charge, to examine and receive a copy of a record or information referred to in clause (2)(a) or (b) if

- (a) the individual consents; or

(b) the individual is deceased and the director believes that disclosing the record or information to the family member would not unreasonably invade the privacy of the deceased individual or another individual referred to in the record.

Duty to provide information

11 (5) The director must comply promptly with a request under this section.

Director must take precautions

11 (6) The director must not permit records to be examined or copied under this section without being satisfied as to the identity of the person making the request and, if applicable, the authorization or consent of the individual who provided the record or information.

Restrictions do not apply

11 (7) A restriction imposed under section 8 does not affect a request under this section.

ACCESS REQUEST UNDER FIPPA

Access request under FIPPA

12 (1) When a request for access to a Centre record is made under Part 2 of *The Freedom of Information and Protection of Privacy Act*,

- (a) the exceptions set out in sections 17, 18, 24, 25 and subsection 27(1) of that Act apply;
- (b) the exceptions set out in sections 19 to 23, subsection 27(2) and sections 28 to 31 do not apply; and
- (c) the director must not disclose the record or information contained in the record if
 - (i) a commitment has been made not to disclose it in an agreement under subsection 6 (2), or
 - (ii) a court order prohibits disclosure.

Extended privacy protection for deceased individuals

12 (2) In applying clause 17(4)(h) of *The Freedom of Information and Protection of Privacy Act* to a request for access to a Centre record, the clause must be read as referring to an individual who has been dead for more than 20 years rather than 10 years.

Restrictions on proactive disclosure do not apply

12 (3) For certainty, a restriction imposed under section 8 does not affect a right of access under Part 2 of *The Freedom of Information and Protection of Privacy Act* or Part 2 of *The Personal Health Information Act*.

DISCLOSURE FOR RESEARCH PURPOSES

FIPPA governs research requests

13 Section 47 (disclosure for research purposes) of *The Freedom of Information and Protection of Privacy Act* applies to all Centre records. Sections 24 and 24.1 (disclosure for health research) of *The Personal Health Information Act* do not apply.

[52] As may be observed the privacy provisions of the *National Centre for Truth and Reconciliation Act* incorporate Manitoba's *Freedom of Information and Protection of Privacy Act*, ("FIPPA").¹⁴

[53] In 2015, the Commission's mandate expired, and all of its documents were transferred to

¹⁴ C.C.S.M. c. F. 75.

the Centre. The records included the material submitted by the Churches and Canada. These records and documents were the “Settled Property” of the Trust Deed to be administered in accordance with the Administration Agreement. The Commission’s records were delivered unaltered to the Centre.

[54] The Centre is currently engaged in the task of ingesting and accessioning the records transferred to it by the Commission. The Centre is prioritizing access requests by former students and their family members.

[55] Currently, almost the entirety of the Centre’s collection is restricted and is held in a secure database accessed only by Centre staff. Only a small portion of the collection has been made available to the public on the Centre’s website. Of these, almost all were already publicly available records.

3. **Truth Telling and Privacy and the IAP**

[56] The IRSSA disclosure obligations were combined with numerous provisions to protect the confidentiality and privacy of the survivors of the IRSs and to respect that their stories were their stories to tell or to keep private. It is, however, important to keep in mind and to differentiate the disclosure obligations and the privacy obligations with respect to the IAP and the Commission.

[57] The IAP and the Commission had very different purposes and needs, and the information being gathered by Canada was being disclosed to the Commission and to the adjudicators of the IAP for very different purposes. The operation of any privacy provisions of the IRSSA responded to the exigencies of those very different purposes.

[58] Canada’s document disclosure obligations with respect to the IAP are set out in Schedule D, Appendix VIII “Government Document Disclosure,” the relevant provisions of which are set out in Schedule “E” to these Reasons for Decision.

[59] Under Appendix VIII of Schedule D of the IRSSA, Canada had detailed disclosure obligations with respect to providing information about: individual IAP Claimants, the residential school attended by the Claimant; documents mentioning sexual abuse at the school; and alleged perpetrators of assaults (“Persons of Interest” or “POIs”).

[60] Canada’s obligations with respect to the IAP also included the preparation of reports about POIs and also reports known as School Narratives (or “Narratives”). The Narratives are histories about the individual IRS. The Narratives and the POIs were prepared by what was then Aboriginal Affairs and Northern Development Canada, the department of the government of Canada with responsibility for policies relating to Indigenous peoples. The Narratives themselves are not themselves historical documents or artifacts; rather, the Narratives are the product of intensive research of historical documents.

[61] The IRSSA states that once a document has been identified, then the IAP Claimant or his or her lawyer can request the document and Canada is obliged to provide a copy. However, to ensure that the privacy rights of others would be protected, information would be redacted. Section D, Appendix VIII, of the IRSSA states:

Upon request, the Claimant or their lawyer will receive copies of the documents located by the government, but information about other students or other persons named in the documents (other than alleged perpetrators of abuse) will be blacked out to protect each person’s personal information, as

required by the *Privacy Act*.

[62] IAP applicants were also required to disclose personal and very private information to make an IAP claim and there were privacy provisions associated with the IAP claimants' application and the hearing of their applications.

[63] The documents collected or prepared for use in the IAP ("IAP Documents") fall into seven categories: (1) applications submitted by the IAP Claimants; (2) mandatory documents containing private personal information; (3) witness statements; (4) documentary evidence produced by the parties; (5) transcripts and audio recordings of the hearings; (6) expert and medical reports; and (7) decisions of the adjudicators and any appeals.¹⁵

[64] What use could be made of the IAP Documents after the IAP process was completed and whether those documents should be archived or destroyed became a matter of controversy that is still in the process of being resolved. In 2014, in an earlier RFD decision,¹⁶ I addressed the issue of whether IAP Documents should be preserved or destroyed. This decision has come to be known as the *In Rem* Order. It is important to emphasize that this RFD focussed on the exigencies of the IAP and did not directly address the exigencies of the Commission or the Centre, although the role of the Centre was an important aspect of the *In Rem* Order.

[65] In the RFD, I concluded that on balance, the court should exercise its jurisdiction to order destruction of the highly confidential, personal, and private IAP Documents. Three reasons animated my decision to order destruction of the IAP Documents. First, the IRSSA is a contract, and in my opinion, the parties contracted for destruction of the IAP Documents. Second, the IAP Documents are subject to an implied undertaking, which the court can enforce by ordering their destruction. Third, I concluded that the IAP Documents are subject to the law governing breach of confidence, and that Canada's agreement to transfer the IAP Documents to LAC amounted to a breach of confidence.

[66] However, I concluded that the destruction order should be made subject to a retention period. This would allow for the development and implementation of a notice program, conducted by the Commission or the Centre to advise IAP claimants of the rights they have under the IRSSA to share their stories with the Centre. I concluded that this retention period should be for 15 years. The order resulting from IAP Documents was expressly made to apply *in rem* and hence it is referred to as the "*In Rem* Order".

[67] Several of the Catholic organizations or entities that had been involved in operation of some of the Indian Residential Schools appealed to the Ontario Court of Appeal, arguing that for IAP Documents to be archived with the Centre, their consent was also required. Canada cross-appealed, arguing that it controlled the IAP Documents, which were therefore subject to federal privacy, access to information, and archiving legislation. The appeal and cross-appeal were dismissed in 2016.¹⁷ However, the majority (Strathy C.J.O. and MacFarland J.A., Sharpe, J.A. dissenting) held that the notice program should be conducted by the Chief Adjudicator of the IAP, and not by either the Commission or the Centre.

[68] A further appeal to the Supreme Court of Canada was dismissed in 2017.¹⁸ Writing for a

¹⁵ *Fontaine v. Canada (Attorney General)*, 2014 ONSC 4585 at para. 205 [*In Rem* Order].

¹⁶ *Fontaine v. Canada (Attorney General)*, 2014 ONSC 4585 [*In Rem* Order].

¹⁷ *Fontaine v. Canada (Attorney General)*, 2016 ONCA 241 [*In Rem* Order].

¹⁸ *Canada (Attorney General) v. Fontaine*, 2017 SCC 47 [*In Rem* Order].

unanimous seven-member panel, Justices Moldaver and Rowe stated at para. 62:

62. Having concluded, without palpable and overriding error, that the IRSSA allowed for the destruction of the IAP Documents, the supervising judge then had to craft an appropriate order. In doing so, he had to strike a balance between competing concerns: preserving confidentiality and the need to memorialize and commemorate, all the while respecting the choice of survivors to share (or not share) their stories. The supervising judge's order, as modified by the majority of the Court of Appeal, charts an appropriate course between the Scylla of potentially unwanted destruction and the Charybdis of potentially injurious preservation. [...] A perfect outcome here is, in these circumstances, simply not possible. In our view, however, the destruction of records that some claimants would have preferred to have preserved works a lesser injustice than the disclosure of records that most expected never to be shared. The supervising judge's order, as varied by the majority of the Court of Appeal, was an appropriate exercise of his discretion.¹⁹

[69] The Supreme Court of Canada stated that it “endorse[d] the entreaties of the courts below that the Chief Adjudicator conduct the notice program without delay and with full cooperation from the parties, in order to give effect to the express wishes of the greatest number of IAP claimants possible.”²⁰

[70] In the spring of 2018, there was another RFD to settle the terms of the notice program.²¹

4. The “La Tuque Indian Residential School Episode”

[71] On December 30, 2015, Peter Grant, as Chair of NAC, wrote to the Centre inviting its Director, Ry Moran, to address privacy issues at the next meeting of the NAC and indicating that NAC might file an RFD to obtain that privacy interests were being protected in accordance with the IRSSA.

[72] On January 18, 2016, Mr. Moran responded. Mr. Moran indicated unavailability for the next NAC meeting but requested advice about whether it might be possible to attend another meeting by teleconference. Mr. Moran also inquired about the nature of NAC's concerns.

[73] On February 4, 2016, Mr. Grant wrote Mr. Moran and noted that the privacy issues involved the publication of confidential information on the Centre's website contrary to the terms of the IRSSA.

[74] On February 10, 2016, Mr. Moran wrote to ask for specific details. He wrote that it was a matter of concern for the Centre that NAC perceived that the Centre was contravening the IRSSA.

[75] Mr. Grant wrote again on February 16, 2016 and pointed to the NCTR's publication of the La Tuque Indian Residential School Narrative posted on the Centre's website. The School Narrative included the information that: “An employee was suspended and later discharged after four former students to La Tuque told Police they had been sexually abused”. The Narrative referred to source documents, which if accessed through the Centre's website revealed the name of the individual who had been suspended and the names of the four survivors who had been

¹⁹ The variation was to have the Chief Adjudicator administer the notice program rather than the Commission or the Centre because it would be inconsistent with a confidential notice process to provide the Commission or the Centre with the information necessary for the notice program. *Canada (Attorney General) v. Fontaine*, 2017 SCC 47 at para. 63 [*In Rem Order*].

²⁰ *Canada (Attorney General) v. Fontaine*, 2017 SCC 47 at para. 64 [*In Rem Order*].

²¹ *Fontaine v. Canada (Attorney General)*, 2018 ONSC 4179 [Enhanced Notice Program].

assaulted when they were students. Those former students were still alive at the time of the posting of the La Tuque Indian Residential School Narrative.

[76] The exchange of correspondence continued with Mr. Moran's letter of February 24, 2016 to Mr. Grant, which stated:

Dear Mr Grant:

Thank you very much for your letter dated February 16th outlining a specific concern regarding the records hosted on the NCTR's website, as well as your position more generally on the interpretation of the Settlement Agreement,

As articulated in our past letters, the protection of personal information is extremely important to the NCTR, as is our ongoing discussion with survivors and intergenerational survivors on the NCTR's core mission of preserving and making public the IRS history and legacy, balanced with the protection of privacy.

To this end, the NCTR's practice is to review and possibly remove records that have been the subject of concern. After review of the materials, the La Tuque school narrative was removed and re-posted in edited form. A secondary review of the other school narratives on the site was also conducted.

Our goal is to respond quickly and effectively to any question or concern raised about the site. That the NCTR has responded to your letter by editing records, should not be taken as acceptance of the assertions in your letter, including your allegations that there has been a breach of the NCTR's legal obligations or the characterization of the records as IAP records pursuant to Schedule "D" of the Agreement. The records in question were provided to the TRC in accordance with the historical document production process established between the TRC and the Government of Canada.

We look forward to productive and co-operative approaches. With you and in all of the national community engagement initiatives with survivors and intergenerational survivors that we have held across the country, we encourage careful discussion of privacy and appreciate participation in this discussion.

[77] Communications between Mr. Grant and Mr. Moran continued through 2016 and into 2017 and there were meetings as NAC, its members, and the Centre attempted to work out a solution to the privacy concern issues raised by NAC and to resolve the debate about that nature of the privacy provisions applicable to the Centre.

[78] During these 2016-2017 communications, Mr. Moran said that the disclosure of documents connected to the La Tuque Narrative was an inadvertent mistake. However, no resolution was achieved about NAC's concerns, and the exchanges culminated with Independent Counsel, of which Mr. Grant is a member, and not the NAC, bringing the RFD now before the court.

E. Analysis and Discussion

[79] I reject the jurisdictional arguments of the Centre and of Canada. The court has supervisory jurisdiction to ensure that Class Members are gaining the full benefits of the IRSSA and to ensure the proper administration and implementation of the IRSSA. The court has an ongoing obligation to oversee the implementation of the IRSSA to ensure that the interests of the class members are protected, in particular any vulnerable Class Members.

[80] The court has administrative and supervisory jurisdiction to implement and administer the IRSSA pursuant to the IRSSA, class action legislation, and its inherent substantive

jurisdiction, which includes its jurisdiction to interpret contracts.²²

[81] If, as affirmed by the Supreme Court of Canada in the document retention and destruction case, it is true that the court has the jurisdiction to conclude that IAP documents should be destroyed after a fifteen year retention period, then, *a fortiori*, the court has the jurisdiction in the immediate case to address what at first blush is a similar problem and a similar gap in the implementation and administration of the IRSSA.

[82] The genuine issue in the immediate case is not whether the court has the jurisdiction to make the order requested by Independent Counsel; the court has the jurisdiction, the issue in the immediate case is whether the court should exercise that jurisdiction.

[83] If the court exercised its jurisdiction in the immediate case it would not be amending the IRSSA, it would be interpreting, implementing and administering it, but the genuine issue, once again, is whether the court should exercise its authority to interpret, implement, and administer.

[84] In my opinion, it is both unnecessary and it would also be wrong to grant the relief requested by Independent Counsel in the immediate case. It would be wrong for the court to exercise its discretion in the immediate case.

[85] Independent Counsel seeks an Order that the Centre be subject to the same privacy provisions that governed the Commission. However, federal privacy legislation does not bind the Centre because it is not a government institution within the meaning of the *Privacy Act*²³ or the federal *Access to Information Act*.²⁴ Further, the federal *Personal Information Protection and Electronic Documents Act* (“PIPEDA”),²⁵ which governs private sector data privacy, does not apply to the Centre, which is not engaged in commercial, for-profit activities.

[86] The application of federal privacy legislation is also unnecessary. The Centre is bound by the privacy provisions of the Administration Agreement, the *National Centre for Truth and Reconciliation Act*, and Manitoba’s *Freedom of Information and Protection of Privacy Act*, (“FIPPA”), which are ample and sufficient and not much different than the federal provisions that were applicable to the Commission.

[87] It is at least debatable that the privacy provision applicable to the Centre and the governance of the Centre may even be more rigorous for the Centre than was the case for the Commission. In any event, the privacy provisions of the Administration Agreement, the *National Centre for Truth and Reconciliation Act*, and FIPPA set an appropriate balance between truth-telling and the protection of privacy under the IRSSA.

[88] As noted above, the negotiators and drafters of the IRSSA were aware of internationally recognized standards for archivists dealing with historical materials and grappling with the problem of the state’s duty to remember and individual privacy concerns. In this regard, the *Principles of Access to Archives* adopted by the International Council on Archives state:²⁶

²² *Canada (Attorney General) v. Fontaine*, 2017 SCC 47 [In Rem Order]; *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283 [St. Anne’s #1]; *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.); *Fontaine v. Canada (Attorney General)*, 2013 BCSC 1995.

²³ R.S.C. 1985, c. P-1.

²⁴ R.S.C. 1985, c. A-1.

²⁵ S.C. 2000, c. 5.

²⁶ International Council on Archives, *Principles of Access to Archives*, adopted on August 24, 2012, Principle #4 and commentary (in part).

Archivists provide the widest possible access to archives, but they recognize and accept the need for some restrictions. Restrictions are imposed by legislation, by institutional policy, either of the archival institution or its parent body, or by a donor. Archivists ensure that the access policies and rules for their institution are published so that the restrictions and the reasons for them are clear to members of the public.

Archivists seek to limit the scope of restrictions to those imposed by law or to identified instances where a specific harm to a legitimate private or public interest temporarily outweighs the benefit of disclosure at the time. Restrictions are imposed for a limited period, either for a specified period of time or until a specified condition, such as the death of a person, has occurred.

[89] The Centre was not the successor institution to the Commission, and there is nothing in the IRSSA that expressly or implicitly or impliedly requires that the Centre operate under the federal privacy legislation that governed the Commission.

[90] In establishing the Centre, what was required of the Commission was that it ensure that the Centre would operate in a way that struck a balance between the countervailing pulls within the IRSSA between history and truth telling for posterity and protecting the privacy of the parties to the IRSSA who were a part of that ugly history.

[91] The obligation on the Commission was to comply with the federal *Privacy Act* and the privacy provisions of the IRSSA, but the Commission did not violate those provisions by transferring documents to the Centre, the envisioned research centre, provided that the Commission had ensured that appropriate privacy provisions applied to the Centre.

[92] Schedule N of the IRSSA does not mandate compliance with any particular legislative privacy regime on the research centre. The Agreement does not require the research centre to be bound by the federal access and privacy regime. Rather, the IRSSA provides that the historical records must be archived in accordance with access and privacy legislation and any other applicable legislation taking into account the relevant law and any recommendations by the Commission concerning the continued confidentiality of records. The Commission did in fact ensure that the Centre would be subject to appropriate privacy provisions.

[93] The Commission did not breach the IRSSA and the Centre was not a party to any breach of the IRSSA when it accepted unredacted documents and records of commission hearings from the Commission. The Commission had finished its own use of the documents and records and the Commission was fulfilling its mandate to establish a research centre, which it did in a very responsible and careful way.

[94] The Commission did not breach the IRSSA by transferring to the Centre the school Narratives that Canada had also prepared for the IAP. The school histories had a hybrid purpose, and it is to misread and misapply the *In rem Order* to suggest that these documents must be destroyed without the consent of a survivor. The *In rem Order* is directed at documents in the possession of the IAP and was not directed at determining whether documents in the possession of the Commission or the Centre should be destroyed.

[95] Although the School Narratives may be in the possession of the IAP Secretariat, the Narratives are not subject to the *In Rem Order*. The Narratives contain the background history of each residential school, as compiled from existing historical records. The Narratives were not generated for use in any specific IAP Claim. The School Narratives are critically important baseline documents to enable future research and understanding of the major events at each school. The School Narratives provide information on the location of the school, the dates of operation, and a chronology and overview of the school. The destruction of these research

documents would require a costly and time-consuming research effort and would waste the arduous work that was imposed on Canada by the IRSSA to create the Narratives. The Centre would be compelled to re-do this essential research. This outcome would be contrary to the IRSSA's commitment to public education and research, makes no sense, and is not in the public interest of truth and reconciliation.

[96] With respect to the School Narratives I adopt and quote paragraph 68 from the AFN's factum:

68. The school narratives, historical collections and school records particular to this RFD have important information concerning the abuse and negligence that occurred under the Indian Residential School system. The importance of preserving Canada's history continues with the mandate of Schedule N of the IRSSA and the establishment of the [Centre]. Canada has an obligation to preserve and remind the public of its history. The school narratives, historical collections and school records at issue in this RFD hold valuable information necessary for the preservation of the history of the Indian Residential School system. These records testify to the abuses committed under the Indian Residential School system and provide a unique insight to one of the major causes of many of the disadvantages faced by First Nations peoples today.

[97] I disagree with Independent Counsel's categorical interpretation of the IRSSA as requiring certain types of information to be protected from disclosure - in perpetuity.

[98] In support of this in perpetuity submission, Independent Counsel points to the privacy provisions that prescribed and imposed limits on the Commission in identifying a person, (survivors or perpetrators) unless that person consented or unless the identifying information had already been established through legal proceedings, by admission or by public disclosure by that person.

[99] There is, however, no term of the IRSSA that provides that all personal information in the historical records should be permanently withheld and there is no need to imply such a term.

[100] Apart from the legal fact that very strong, ample, and quite similar privacy provisions to those found in the federal legislation apply to the Centre, the truth-telling activity of the Commission was time-limited, while, in contrast, the duty to remember and archivist activity of the Centre is on-going. Thus, the limits on the disclosure of information and the privacy provisions applicable to the Centre must account for the circumstance that the memorialization work of the Centre benefits from the buffering effect that time brings to healing and reconciliation, while the truth-telling work of the Commission was brutally true, immediate, and up close and personal.

[101] The restrictions on the Commission were carefully crafted for its time-limited activities and should not be read to apply to the long-term archiving of records at the Centre. The accepted international standards for archivists does not provide for privacy protection in perpetuity.

[102] Similarly, it is inappropriate to extrapolate from the privacy provisions applicable to the time-limited activities of the IAP to the time in memoriam activities of the Centre.

[103] The La Tuque Indian Residential School Episode was a mistake. Perhaps the Centre was overly defensive in its response to the NAC just after the mistake became apparent. But, the Centre rectified the mistake. The mistake could have happened under the federal *Privacy Act*. It would be wrong for the court to over-react to the Centre's mistake.

[104] Apart from the absence of any need to make the requested Order, it would be wrong to make the requested Order. Making the Order would effectively shut down the Centre's public

website and make its public education and research activities extremely difficult, if not impossible. The Order would be contrary to internationally accepted archiving standards and practices that the AFN and the negotiators of the IRSSA had in mind.

F. Conclusion

[105] For the above reasons, I make no order for this RFD other than to dismiss the RFD.

[106] As for costs, I invite submissions from Independent Counsel, the Centre, and the AFN as to why their reasonable costs should be paid by Canada. Those submissions should be made within twenty days of the date of the release of these reasons, followed by Canada's submissions within a further twenty days.

[107] I thank all the parties for their helpful submissions, most particularly the AFN, which provided a thoughtful, eloquent, and balanced argument.

Perell, J.

Released: October 25, 2018

Schedule “A”**Schedule “N”****Mandate for the Truth and Reconciliation Commission**

[108] For present purposes the following provisions from Schedule “N” are pertinent:

There is an emerging and compelling desire to put the events of the past behind us so that we can work towards a stronger and healthier future. The truth telling and reconciliation process as part of an overall holistic and comprehensive response to the Indian Residential School legacy is a sincere indication and acknowledgement of the injustices and harms experienced by Aboriginal people and the need for continued healing. This is a profound commitment to establishing new relationships embedded in mutual recognition and respect that will forge a brighter future. The truth of our common experiences will help set our spirits free and pave the way to reconciliation.

Principles

Through the Agreement, the Parties have agreed that an historic Truth and Reconciliation Commission will be established to contribute to truth, healing and reconciliation. The Truth and Reconciliation Commission will build upon the "Statement of Reconciliation" dated January 7, 1998 and the principles developed by the Working Group on Truth and Reconciliation and of the Exploratory Dialogues (1998-1999). These principles are as follows: accessible; victim-centered; confidentiality (if required by the former student); do no harm; health and safety of participants; representative; public/transparent; accountable; open and honourable process; comprehensive; inclusive, educational, holistic, just and fair; respectful; voluntary; flexible; and forward looking in terms of rebuilding and renewing Aboriginal relationships and the relationship between Aboriginal and non-Aboriginal Canadians.

[...]

*Terms of Reference**1. Goals*

The goals of the Commission shall be to:

- (a) Acknowledge Residential School experiences, impacts and consequences;

[...]

- (d) Promote awareness and public education of Canadians about the IRS system and its impacts;

- (e) Identify sources and create as complete an historical record as possible of the IRS system and legacy. The record shall be preserved and made accessible to the public for future study and use;

- (f) Produce and submit to the Parties of the Agreement a report including recommendations to the Government of Canada concerning the IRS system and experience including: the history, purpose, operation and supervision of the IRS system, the effect and consequences of IRS (including systemic harms, intergenerational consequences and the impact on human dignity) and the ongoing legacy of the residential schools;

[...]

2. Establishment, Powers, Duties and Procedures of the Commission

The Truth and Reconciliation Commission shall be established by the appointment of "the Commissioners" by the Federal Government through an Order in Council, pursuant to special appointment regulations.

Pursuant to the Court-approved final settlement agreement and the class action judgments, the Commissioners:

(a) in fulfilling their Truth and Reconciliation Mandate, are authorized to receive statements and documents from former students, their families, community and all other interested participants, and, subject to (f), (g) and (h) below, make use of all documents and materials produced by the parties. Further, the Commissioners are authorized and required in the public interest to archive all such documents, materials, and transcripts or recordings of statements received, in a manner that will ensure their preservation and accessibility to the public and in accordance with access and privacy legislation, and any other applicable legislation;

[...]

(f) shall perform their duties in holding events, in activities, in public meetings, in consultations, in making public statements, and in making their report and recommendations without making any findings or expressing any conclusion or recommendation, regarding the misconduct of any person, unless such findings or information has already been established through legal proceedings, by admission, or by public disclosure by the individual. Further, the Commission shall not make any reference in any of its activities or in its report or recommendations to the possible civil or criminal liability of any person or organization, unless such findings or information about the individual or institution has already been established through legal proceedings;

(g) shall not, except as required by law, use or permit access to statements made by individuals during any of the Commissions events, activities or processes, except with the express consent of the individual and only for the sole purpose and extent for which the consent is granted;

(h) shall not name names in their events, activities, public statements, report or recommendations, or make use of personal information or of statements made which identify a person, without the express consent of that individual, unless that information and/or the identity of the person so identified has already been established through legal proceedings, by admission, or by public disclosure by that individual. Other information that could be used to identify individuals shall be anonymized to the extent possible;

(i) notwithstanding (e), shall require in camera proceedings for the taking of any statement that contains names or other identifying information of persons alleged by the person making the statement of some wrong doing, unless the person named or identified has been convicted for the alleged wrong doing. The Commissioners shall not record the names of persons so identified, unless the person named or identified has been convicted for the alleged wrong doing. Other information that could be used to identify said individuals shall be anonymized to the extent possible;

(j) shall not, except as required by law, provide to any other proceeding, or for any other use, any personal information, statement made by the individual or any information identifying any person, without that individual's express consent;

(k) shall ensure that the conduct of the Commission and its activities do not jeopardize any legal proceeding;

(l) may refer to the NAC for determination of disputes involving document production, document disposal and archiving, contents of the Commission's Report and Recommendations and Commission decisions regarding the scope of its research and issues to be examined. The Commission shall make best efforts to resolve the matter itself before referring it to the NAC.

3. Responsibilities

In keeping with the powers and duties of the Commission, as enumerated in section 2 above, the

Commission shall have the following responsibilities:

(a) to employ interdisciplinary, social sciences, historical, oral traditional and archival methodologies for statement-taking, historical fact-finding and analysis, report-writing, knowledge management and archiving;

[...]

(d) to establish a research centre and ensure the preservation of its archives;

(e) to have available the use of such facilities and equipment as is required,

4. *Exercise of Duties*

As the Commission is not to act as a public inquiry or to conduct a formal legal process, it will, therefore, not duplicate in whole or in part the function of criminal investigations, the Independent Assessment Process, court actions, or make recommendations on matters already covered in the Agreement. In the exercise of its powers the Commission shall recognize:

[...]

(b) that the truth and reconciliation process is committed to the principle of voluntariness with respect to individuals' participation;

(c) that it will build upon the work of past and existing processes, archival records, resources and documentation, including the work and records of the *Royal Commission on Aboriginal Peoples* of 1996;

(d) the significance of Aboriginal oral and legal traditions in its activities;

(e) that as part of the overall holistic approach to reconciliation and healing, the Commission should reasonably coordinate with other initiatives under the Agreement and shall acknowledge links to other aspects of the Agreement such that the overall goals of reconciliation will be promoted;

(f) that all individual statements are of equal importance, even if these statements are delivered after the completion of the report;

(g) that there shall be an emphasis on both information collection/storage and information analysis.

[...]

6. *Secretariat*

The Commission shall operate through a central Secretariat.

[...]

(c) The Secretariat shall be responsible for the activities of the Commission such as:

(i) research;

[...]

(iii) statement taking/truth-sharing;

(iv) obtaining documents;

[...]

(vi) ensuring the preservation of records;

[...]

9. Research

The Commission shall conduct such research, receive and take such statements and consider such documents as it deems necessary for the purpose of achieving its goals.

[...]

11. Access to Relevant Information

In order to ensure the efficacy of the truth and reconciliation process, Canada and the churches will provide all relevant documents in their possession or control to and for the use of the Truth and Reconciliation Commission, subject to the privacy interests of an individual as provided by applicable privacy legislation, and subject to and in compliance with applicable privacy and access to information legislation, and except for those documents for which solicitor-client privilege applies and is asserted.

In cases where privacy interests of an individual exist, and subject to and in compliance with applicable privacy legislation and access to information legislation, researchers for the Commission shall have access to the documents, provided privacy is protected. In cases where solicitor-client privilege is asserted, the asserting party will provide a list of all documents for which the privilege is claimed.

Canada and the churches are not required to give up possession of their original documents to the Commission. They are required to compile all relevant documents in an organized manner for review by the Commission and to provide access to their archives for the Commission to carry out its mandate. Provision of documents does not require provision of original documents. Originals or true copies may be provided or originals may be provided temporarily for copying purposes if the original documents are not to be housed with the Commission.

Insofar as agreed to by the individuals affected and as permitted by process requirements, information from the Independent Assessment Process (IAP), existing litigation and Dispute Resolution processes may be transferred to the Commission for research and archiving purposes.

12. National Research Centre

A research centre shall be established, in a manner and to the extent that the Commission's budget makes possible. It shall be accessible to former students, their families and communities, the general public, researchers and educators who wish to include this historic material in curricula.

For the duration of the term of its mandate, the Commission shall ensure that all materials created or received pursuant to this mandate shall be preserved and archived with a purpose and tradition in keeping with the objectives and spirit of the Commission's work.

The Commission shall use such methods and engage in such partnerships with experts, such as Library and Archives Canada, as are necessary to preserve and maintain the materials and documents. To the extent feasible and taking into account the relevant law and any recommendations by the Commission concerning the continued confidentiality of records, all materials collected through this process should be accessible to the public.

13. Privacy

The Commission shall respect privacy laws, and the confidentiality concerns of participants. For greater certainty:

- (a) any involvement in public events shall be voluntary;
- (b) notwithstanding 2(i), the national events shall be public or in special circumstances, at the discretion of the Commissioners, information may be taken in camera;
- (c) the community events shall be private or public, depending upon the design provided by the community;

- (d) if an individual requests that a statement be taken privately, the Commission shall accommodate;
- (e) documents shall be archived in accordance with legislation.

[...]

Schedule “B”

Centre for Truth and Reconciliation Trust Deed

[109] For present purposes, the relevant provisions of the Trust Deed are set out below:

BETWEEN:

Truth and Reconciliation Commission of Canada as settlor (the “TRC”)

and

The University of Manitoba as trustee (the “University”)

WHEREAS:

A. The TRC is created pursuant to the Indian Residential Schools Settlement Agreement dated May 8, 2006 (the “Settlement Agreement”) and subsequent federal Orders-in-Council;

B. The University is a post-secondary educational institution created by the Legislature of the Province of Manitoba, pursuant to The University of Manitoba Act (Manitoba);

C. The Settlement Agreement, through its Schedule “N”, establishes a “Mandate for the Truth and Reconciliation Commission” (the “Mandate”), a copy of which is attached as Schedule “A”;

D. The Mandate states that “the Commissioners are authorized and required in the public interest to archive all such documents, materials, and transcripts or recordings of statements received, in a manner that will ensure their preservation and accessibility to the public and in accordance with access and privacy legislation, and any other applicable legislation”; that “all materials collected through this process should be accessible to the public” after “taking into account the relevant law and any recommendations by the Commission concerning continued confidentiality”; and directs the TRC to establish a National Research Centre, which this Deed refers to as the Centre for Truth and Reconciliation (the “Centre”), which will “ensure the preservation of its archives” and “be accessible to former students, their families and communities, the general public, researchers and educators”;

E. The Mandate further directs that “all individual statements are of equal importance, even if these statements are delivered after the completion of the report” and “anyone affected by the IRS legacy will be permitted to file a personal statement in the research centre with no time limitation”;

F. The Mandate further directs that, “insofar as agreed to by the individuals affected and as permitted by process requirements, information from the Independent Assessment Process (“IAP”), existing litigation and dispute resolution processes may be transferred to the Commission for research and archiving purposes”; and Schedule “D” of the Settlement Agreement, paragraph “o” states that in the IAP “Claimants will also be given the option of having the transcript deposited in an archive developed for the purpose”; and it is the intention of the settlor and the trustee that the Centre be recognized as an “archive developed for the purpose”;

G. The TRC and the University intend for the Centre to respect any conditions of confidentiality relating to IAP records that may be established by a court of competent jurisdiction, or otherwise be agreed by the TRC and University;

H. The TRC and the University intend for the Centre to ensure that all materials created or received by the Centre shall, in accordance with the Settlement Agreement, “be archived with a purpose and tradition in keeping with the objectives and spirit of the Commission’s work”;

I. The TRC intends to provide to the University all of the records it has collected or created through its work, including survivor statements and artifacts, as well as any of its physical assets which may be

of use to the University (the “Settled Property”);

J. The University intends to continue to add to the Settled Property even after the TRC mandate has expired through the continued collection of individual statements and the collection of records from the parties to the Settlement Agreement and others;

K. The TRC, as settlor, wishes to establish the Centre with the University through the creation of a trust for the benefit of the people of Canada, and intends to transfer to the University, as trustee, the Settled Property;

L. The University, as trustee, has agreed to hold and deal with the Settled Property pursuant to the conditions of trust set out herein.

NOW THEREFORE this Deed witnesses that the TRC, as settlor, hereby declares that the Settled Property will be transferred to the University, as trustee, to be held on the following conditions of trust:

Definitions

1. “Aboriginal” means the indigenous peoples and individuals of Canada, including First Nations, Inuit, and Métis peoples.
2. “Administration Agreement” means the separate administrative agreement between the TRC and the University setting out details concerning the administration and operation of the Centre.
3. “Centre” means the Centre for Truth and Reconciliation, or national research centre on Indian Residential Schools, or such other name as may be chosen, which is to be established by the TRC pursuant to its Mandate.
4. “Governing Circle” means the Governing Circle established pursuant to the Administration Agreement, which will provide guidance in the operation of the Centre.
5. “Mandate” means the mandate of the TRC, as set out in Schedule “N” of the Settlement Agreement, and attached hereto as Schedule “A”.
6. “Purposes” means the purposes of the trust established through this Deed, as set out herein.
7. “Settled Property” has the meaning assigned in the recitals, and includes any other property which the TRC, the University, or any other person may subsequently donate or otherwise transfer to the Centre.
8. “Settlement Agreement” means the Indian Residential Schools Settlement Agreement dated May 8, 2006.

Purpose of the Trust

9. The University shall use and preserve the Settled Property exclusively for the following purposes (the “Purposes”):
 - a. to ensure the preservation of the TRC’s archives and other materials relating to residential schools;
 - b. to make the materials accessible to former students, their families and communities, the general public, researchers and educators, in accordance with access and privacy legislation, and any other applicable legislation; and
 - c. to promote engagement of the public regarding residential schools and other Aboriginal issues, including through the fostering of understanding and reconciliation.

Transfer of Settled Property

10. The Settled Property shall be transferred to the University at such times as agreed between the TRC and the University.
11. Any additional assets, including survivor statements, historical records, documents and artifacts, subsequently collected by the University for inclusion in the Centre, from any source, will be added to

and form a part of the Settled Property for the purposes of interpreting this Deed.

Powers of Trustee

12. In addition to any other powers and discretions conferred upon the University, as trustee, under The Trustee Act (Manitoba) or other applicable law, and provided that at all times the University remains the trustee and the Settled Property is protected by access to information and privacy legislation, the University shall have full authority to enter into any transactions or do any acts that the University, in its unfettered discretion, deems advisable to help achieve the Purposes, including:

- a. acquire additional property to be added to the Settled Property;
- b. engage with other persons and organizations as partners in managing the Settled Property, for the furtherance of the Purposes;
- c. lend portions of the Settled Property to other persons and organizations, for the furtherance of the Purposes;
- d. earn income or collect fees related to the use of the Settled Property, so long as the income is reinvested exclusively for the support of the Centre;
- e. register the University's ownership rights, as trustee, in any of the Settled Property; and
- f. dispose of portions of the Settled Property which are duplicate, redundant, or of little or no archival value.

13. The University, as trustee, shall develop policies to guide the exercise of its powers and discretions, and shall seek advice from the Governing Circle in the development of such policies and in the exercise of the University's powers and discretions.

14. The University, as trustee, when exercising its powers and discretions, shall demonstrate respect for Aboriginal protocols and ceremonies in relation to Aboriginal sacred objects and ethics relating to Aboriginal research.

Restrictions on Trustee

15. The University, as trustee, may not:

- a. sell or otherwise dispose of for consideration any portion of the Settled Property; or
- b. pay to itself any fees for the management of the Settled Property through the depletion of the Settled Property.

Trust Irrevocable

16. This Deed and the settlement of property hereunder are irrevocable.

17. It is the intention of this Deed to establish the Centre as a resource for the benefit of the people of Canada, in perpetuity.

Termination of Trust

18. Should, no earlier than 10 years from the date of this Deed, and after consulting the Governing Circle, the University become unwilling or unable to continue to host the Centre, the University may transfer the Settled Property to another entity on conditions of trust substantially similar to those contained in this Deed. Pursuant to s.9 of The Trustee Act (Manitoba), as amended from time to time, the University shall apply to the Manitoba Court of Queen's Bench for approval of a substitute trustee, and advice and direction on the appropriate transfer of the Settled Property. The University shall give reasonable notice of any application to all partners of the Centre, the Assembly of First Nations, the Inuit Tapiriit Kanatami, the Government of Canada and to the senior offices of the United Church of Canada, Anglican Church of Canada, Presbyterian Church in Canada and the Roman Catholic Church. This Deed shall terminate upon the complete transfer of all Settled Property.

General Terms

19. The recitals form an integral part of this Deed. Headings are for convenience only, and do not form part of the terms of this Deed.

20. Should any part of this Deed be found to be illegal or unenforceable, such part shall be severed from the Deed, and the rest remain in full force and effect, providing that the substantive intent of the Deed is preserved.

21. Should, at some time in the future, it become impossible or impractical for the University to follow or comply with the terms of this Deed, the University may apply to the courts of Manitoba to vary the trust, in accordance with the relevant provisions of The Trustee Act (Manitoba), provided notice of any application is given as set out in article 18.

22. This Deed shall be governed by the applicable laws of the Province of Manitoba and Canada. This Deed is subject to The Trustee Act (Manitoba), which provides that “any person creating” the trust or “any person beneficially interested” in the trust may apply for an appropriate order to be determined by a court of Manitoba.

IN WITNESS WHEREOF the settlor and trustee have executed this Deed by their authorized signing officers as of the day and year first written above, and in the presence of the undersigned witnesses.

[...]

Schedule “C”

Administration Agreement

[110] For present purposes the relevant provisions of the Administration Agreement are set out below:

WHEREAS:

A. The TRC, as settlor, and the University, as trustee, entered into a Centre for Truth and Reconciliation Trust Deed dated the 21st day of June 2013 (the “Trust Deed”);

B. The parties wish to enter into this Agreement to document their understanding regarding the ways that they will, individually, together and with others, work to realize the Purposes of the trust established through the Trust Deed and set more detailed goals and objectives.

NOW THEREFORE the parties, in exchange for the mutual covenants and agreements contained herein, agree as follows:

Definitions

1. All terms defined in the Trust Deed have the same meaning in this Agreement.

[...]

3. “Objectives” means the objectives the parties seek to accomplish through this Agreement, and in support of the Purposes, as set out herein.

4. “Partner” means an educational institution, research centre, archive, Aboriginal organization, or other interested group or entity engaged as a Partner, pursuant to an agreement with the University and the terms of this Agreement. The definition of “Partner” will include all Original Proposal Partners, so long as they continue to meet the conditions of eligibility set out in this Agreement.

5. “Proposal” means the proposal submitted to the TRC by the University, in association with the Original Proposal Partners, whereby the University and the Original Proposal Partners sought to be the host of the Centre.

Commitment

6. The University affirms its commitment to, on its own and through its Partners, fulfil the expectations established by the Proposal, and diligently pursue the Purposes of the trust set out in the

Trust Deed.

Objectives

7. In pursuing the Purposes, the University will use the Settled Property to help fulfil the following objectives (the “Objectives”):

- a. to establish an archival repository that is as complete as possible, and which attempts as much as possible to:
 - (i) allow the voices and personalities and cultures of the children who attended residential schools to be heard, celebrated, remembered and personalized;
 - (ii) create a record of the life and family experiences of the children who attended the schools, the families and communities whose children attended the schools, and the staff who operated the schools, not only during the hours they were on school property, but also to show how their lives were lived before, during and after their residential school years;
 - (iii) continue to offer and provide a safe environment so that anyone affected by the residential school legacy will be permitted to file a personal statement with the Centre, without time restriction;
 - (iv) preserve the historical records and evidence related to the creation, funding and administration of residential schools, any abuses that occurred at the schools, and the history of how the residential school system came to a close, including apologies, litigation and claims resolution, the Settlement Agreement, evolutions in Canada’s education policies towards Aboriginal peoples, and subsequent attempts at reconciliation;
 - (v) preserve the historical and current records and evidence, and promote analysis, research and publications, on Canada’s past and current laws and policies as they affect Aboriginal peoples, rights and cultures;
- b. to establish a Centre for public education and engagement, commemorative ceremonies, statement gathering, dialogues of reconciliation and celebrations of Aboriginal cultures, languages and ceremonies;
- c. to encourage and facilitate new research into residential schools, including but not limited to the experiences of former students, families and staff, the impacts and legacy of the system, pathways to reconciliation, oral history and Aboriginal concepts and ethics relating to archives and research;
- d. to assist Aboriginal peoples in Canada in the exercise of their rights under the *United Nations Declaration on the Rights of Indigenous Peoples*;
- e. to assist in fulfilling some of the recommendations of the *Royal Commission on Aboriginal Peoples*, including in particular recommendation 1.10.3, “a national repository of records and video collections related to residential schools, co-ordinated with planning of the recommended Aboriginal Peoples’ International University ... and its electronic clearinghouse, to facilitate access to documentation and electronic exchange of research on residential schools; provide financial assistance for the collection of testimony and continuing research; work with educators in the design of Aboriginal curriculum that explains the history and effects of residential schools; and conduct public education programs on the history and effects of residential schools and remedies applied to relieve their negative effects”;
- f. as resources permit, to assist in fulfilling some of the other recommendations of the *Royal Commission on Aboriginal Peoples*, including:
 - (i) 1.11.13 (relocations of Aboriginal communities);

- (ii) 1.12.4 (Aboriginal history research);
 - (iii) 2.3.30 (Aboriginal government transition centre);
 - (iv) 2.4.61(b) (Aboriginal heritage resource inventories);
 - (v) 4.2.1 (Aboriginal women’s research);
 - (vi) 4.5.6 (Métis research centre), and
 - (vii) 4.6.21 (traditional knowledge research).
- g. to attempt to provide educational and employment opportunities to Aboriginal people;
- h. to engage in public educational efforts regarding residential schools which promote understanding and reconciliation;
- i. to do all of the above with a national focus, by involving Partners across the country, facilitating national access to the archive, facilitating widespread educational efforts, and providing as much information and service as possible in both official languages and Aboriginal languages.

Governing Circle

8. The Centre will be guided by a Governing Circle. The Governing Circle shall constitute and operate as the advisory committee for the Centre contemplated by the University’s policy on *Research Centres, Institutes and Groups* (as amended from time to time).

[...]

11. The Governing Circle shall make decisions and provide advice to the University and the Partners on matters related to the Centre. In regard to the following topics, the University and the Partners shall show deference to the decisions and advice of the Governing Circle, as long as such advice is not inconsistent with applicable laws, the terms of the Trust Deed, the terms of this Agreement, and the University’s policies:

[...]

12. The Governing Circle shall provide advice and guidance to the University and the Partners on other topics, including the following:

[...]

- c. policies for the exercise of such discretionary decisions as permitted by freedom of information, privacy and copyright law;
- d. the application of appropriate research ethics related to Aboriginal matters, including (where appropriate) reference to Aboriginal principles of Ownership, Control, Access and Possession (“OCAP”), Protocols for Native American Archive Materials, and the Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans, specifically the chapter on Research involving the First Nations, Inuit and Métis peoples of Canada, or any similar or related protocols which have been or may in the future be developed;
- e. exercise of discretion to waive fees under the Manitoba *Freedom of Information and Protection of Privacy Act*;

Survivor’s Circle

13. So long as it is practical, the Governing Circle will establish and recruit members for an advisory committee known as the “Survivor’s Circle”. Members will be survivors of the residential school system, their families or their ancestors. The Survivor’s Circle will provide advice to the Governing Circle, the University and the Partners regarding any matters relevant to the Centre.

[...]

Centre within the University

15. The Centre will operate within the academic and administrative structure of the University, and as such, be subject to the policies and rules of the University.

16. Subject to a recommendation by its Senate, and approval by its Board of Governors, the University will cause the Centre to be established as an academic centre or institute of the University, pursuant to its policy on *Research Centres, Institutes and Groups* (as amended from time to time).

17. The Centre will be overseen by a Director, who shall report administratively to a member of the University's Executive. The Director will manage the affairs of the Centre, and in so doing, be guided by the advice of the Governing Circle and the policies and rules of the University.

18. The University will make available to the Centre and its staff all the usual supports available to academic and administrative units, including with regard to communications, external relations, fund-raising, human resources, finance, information technology, access to information and privacy, and legal matters.

Continuing Development of the Centre

19. The University will (and will seek commitments from its Partners to) continually work to improve the Centre by expanding its holdings, resources, partnerships and public education and outreach activities, including by:

- a. encouraging and collecting additional statements from former students, families and staff about residential school experiences and their impacts, ensuring that appropriate consents are obtained and respected and that appropriate health supports are available;
- b. seeking and collecting additional relevant records;
- c. seeking and collecting additional relevant artifacts;
- d. encouraging the development of community narratives;
- e. proactively reviewing records in the archive, and making them available as quickly as possible to the public, as permitted by applicable privacy and other legislation;
- f. seeking out researchers and research funding which will use the Centre as a resource;
- [...]
- k. public education and engagement;
- [...]

20. The University will (and will seek commitments from its Partners to) use all reasonable efforts to ensure that the Centre's holdings are maintained to the highest current technical, archival, public access and privacy standards, and will seek upgrades to the supporting technologies, facilities and methods as necessary over time.

[...]

Access and Privacy

31. Subject to the below, the University will make the Settled Property as accessible to the public as possible.

32. The Mandate requires that the archives be preserved and accessed "subject to and in compliance with applicable privacy and access to information legislation". To the extent possible under applicable legislation, records among the Settled Property will be made available to the public in an un-redacted form.

33. It is intended that the Settled Property, once under the control of the University, will be subject to

The Freedom of Information and Protection of Privacy Act (Manitoba) (“FIPPA”), which is substantially equivalent to the federal *Access to Information Act* and *Privacy Act*. The University and the TRC will take all reasonable steps to work with the Government of Manitoba to ensure the records among the Settled Property are subject to FIPPA, and to achieve any new statutes or amendments to legislation or regulations necessary to ensure that the Settled Property is not less accessible than it would be if it were held at Library and Archives Canada.

34. The Settled Property has not been reviewed by the TRC for the purposes as assessing which records or information can be made publicly accessible under applicable legislation. Upon receipt of the Settled Property, the University will begin the task of reviewing the Settled Property to determine what records and information can be made publicly accessible in both unredacted and redacted form under applicable legislation as soon as possible, with priority to be given to statements given to the TRC.

35. Those portions of the Settled Property which cannot be made generally accessible to the public may be made available to researchers in accordance with applicable legislation, appropriate ethics and other approvals, and in accordance with the requirements of the University.

36. Certain portions of the Settled Property, including records related to the IAP process under the Settlement Agreement, may be subject to particular confidentiality provisions, imposed by a court of competent jurisdiction, or otherwise. The University will use all reasonable efforts to protect such records in accordance with the confidentiality requirements.

Intellectual Property

37. Upon transfer of the Settled Property to the University, the TRC transfers all intellectual property rights, including consents, licences, permissions and Crown copyright, that it has with respect to the Settled Property, including the right to make the information publicly available pursuant to the Settlement Agreement, subject to freedom of information and privacy legislation.

Term and Termination

44. This Agreement will continue in force and be terminated only upon the termination of the Deed, in accordance with its terms.

General Terms

45. The recitals form an integral part of this Agreement. Headings are for convenience only, and do not form part of the terms of this Agreement.

46. Should any part of this Agreement be found to be illegal or unenforceable, such part shall be severed from the Agreement, and the rest remain in full force and effect, providing that the substantive intent of the Agreement is preserved.

47. This Agreement shall be governed by the applicable laws of the Province of Manitoba and Canada.

48. This Agreement and the Trust Deed shall be public documents.

Schedule “D”

National Centre for Truth and Reconciliation Act²⁷

[111] The relevant provisions of the *National Centre for Truth and Reconciliation Act* are set out below:

WHEREAS all Manitobans are beneficiaries of the treaties with Aboriginal nations and share responsibility for promoting respect for those treaties and for Aboriginal nations, culture, languages, communities and families;

AND WHEREAS Aboriginal people within Canada have been subject to a wide variety of human

²⁷ S.M. 2015, c 2; C.C.S.M. c. N20.

rights abuses since European contact, including the abuses of the Indian Residential Schools system;

AND WHEREAS one of the primary objectives of the residential school's system was to remove and isolate Aboriginal children from the influence of their homes, families, traditions and culture and to assimilate them into the dominant culture, based on the assumption that Aboriginal culture and spiritual beliefs were inferior and unequal;

AND WHEREAS this policy of assimilation was wrong and caused great harm;

AND WHEREAS the Truth and Reconciliation Commission (the "Commission") was established as part of a response to the residential school's legacy to contribute to truth, healing and reconciliation;

AND WHEREAS the Commission's mandate includes the collection of statements and documents from former students, their families and communities, and other interested participants;

AND WHEREAS the Commission is required to archive all such documents and transcripts or recordings of the statements received in a manner that will ensure their preservation and accessibility to the public, in accordance with access and privacy legislation and any other applicable legislation;

AND WHEREAS the Commission has entered into a Trust Deed with The University of Manitoba to establish a national centre through which the University will receive, hold and archive the Commission's records, including survivor statements and artifacts;

AND WHEREAS the Trust Deed requires the University to use and preserve the Commission's records exclusively for the following purposes:

- (a) to ensure preservation of the Commission's archives and other materials relating to residential schools;
- (b) to make the records accessible to former students, their families and communities, the general public, researchers and educators, in accordance with access and privacy legislation, and any other applicable legislation;
- (c) to promote engagement of the public regarding residential schools and other Aboriginal issues, including through the fostering of understanding and reconciliation;

AND WHEREAS, through the Centre, The University of Manitoba will continue to collect statements and other materials relating to residential schools and other Aboriginal issues;

THEREFORE, HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

DEFINITIONS

Definitions

1 The following definitions apply in this Act.

"Centre" means the national centre established as part of The University of Manitoba in accordance with the terms of a Trust Deed and an Administrative Agreement entered into by the Commission and The University of Manitoba. (« Centre »)

"Centre records" means the records in the custody or under the control of the Centre, but does not include records relating solely to the administration and operation of the Centre.

"Commission" means the Truth and Reconciliation Commission of Canada established in accordance with the Indian Residential Schools Settlement Agreement dated May 8, 2006.

"director" means the director of the Centre.

"information" includes personal information and personal health information.

"personal health information" means personal health information as defined in *The Personal Health Information Act*.

"personal information" means personal information as defined in *The Freedom of Information and*

Protection of Privacy Act.

"record" means a record as defined in The Freedom of Information and Protection of Privacy Act.

PURPOSE AND MANDATE

Purpose of this Act

2 The purpose of this Act is to set out the access and privacy laws that apply to Centre records.

Mandate of the Centre

3 For the purpose of this Act, the mandate of the Centre is

- (a) to preserve the Commission's archives and other materials relating to residential schools;
- (b) to acquire and preserve additional records that document the relationship between indigenous and non-indigenous peoples in Canada and the barriers to, and efforts made to achieve, meaningful reconciliation;
- (c) to make the Centre records accessible to former students, their families and communities, the general public, researchers and educators, in accordance with access and privacy legislation and any other applicable legislation; and
- (d) to promote the engagement of the public regarding residential schools and other Aboriginal issues, including through fostering understanding and reconciliation.

ACCESS AND PRIVACY LAWS APPLY TO CENTRE RECORDS

FIPPA and PHIA apply to Centre records

4 (1) The *Freedom of Information and Protection of Privacy Act* and *The Personal Health Information Act* apply to all Centre records, except as otherwise provided in this Act.

Centre records not excluded from FIPPA

4 (2) For certainty, Centre records are not exempt from *The Freedom of Information and Protection of Privacy Act* under clause 4(j) (archival records) of that Act.

AUTHORITY TO COLLECT AND USE RECORDS AND INFORMATION

General authority to collect and use records and information

5 For the purposes of fulfilling its mandate, the Centre is authorized

- (a) to collect records and information from any source and in any manner; and
- (b) to use Centre records.

Agreements re further collection of records

6 (1) In addition to the archives of the Commission received by the Centre, the director may enter into written agreements with other persons, governments and entities, including the Government of Canada and its departments and agencies, respecting the collection of records and information from them.

Commitment not to disclose

6 (2) An agreement may include a commitment to restrict the disclosure of records or information contained in the records.

Limit re records from parties to the Settlement Agreement

6 (3) However, an agreement may not include a commitment to restrict the disclosure of records or information that the Centre receives from the Commission or from a party to the Indian Residential Schools Settlement Agreement that is relevant to the experience of residential schools, or the impacts or consequences of residential schools.

Records from Government of Canada

6 (4) In the absence of an agreement under subsection (1), the Centre may receive records from the Government of Canada and its departments and agencies that are relevant to the mandate of the Centre.

PROACTIVE DISCLOSURE OF CENTRE RECORDS*Proactive disclosure of records*

7 (1) To fulfill the mandate of the Centre as it relates to ensuring availability of the Centre records, the director is authorized to make Centre records available and to disclose any personal information, including personal health information, contained in the records, to the extent that the director considers it necessary to fulfill the mandate.

Interaction with FIPPA and PHIA

7 (2) For certainty, subsection (1) authorizes the disclosure of personal information under clause 44(1)(e) of *The Freedom of Information and Protection of Privacy Act* and personal health information under clause 22(2)(o) of *The Personal Health Information Act*.

Disclosure only if consistent with restrictions

7 (3) The disclosure of a record or information under this section must be consistent with any commitment made in an agreement under subsection 6(2) and the restrictions referred to in section 8.

Restrictions on proactive disclosure

8 (1) The director must restrict the disclosure of records and information under subsection 7(1) if

- (a) the disclosure would be an unreasonable invasion of an individual's privacy; or
- (b) a court order prohibits disclosure.

Director to consider circumstances

8 (2) In determining whether a disclosure would be an unreasonable invasion of an individual's privacy under clause (1)(a), the director must consider all of the relevant circumstances, including whether the public interest in the disclosure clearly outweighs any invasion of privacy that could result from the disclosure.

Classification of documents

8 (3) The director may establish classes of Centre records and the information contained in them and, for the purposes of this section, specify restrictions that apply to each class.

Types of restrictions on proactive disclosure

8 (4) A restriction under this section may do all or any of the following:

- (a) restrict or prohibit disclosure for some or all purposes;
- (b) restrict or prohibit disclosure for a certain period of time;
- (c) restrict who may have access to a Centre record.

Severing information

9 When disclosure of information in a Centre record is restricted under subsection 6(2) or section 8, but the restricted information can reasonably be severed from the record, the director may sever the restricted information and disclose the remainder of the record.

Complaints re proactive disclosure

10 The Centre must establish a procedure for receiving and dealing with complaints about the disclosure of Centre records under sections 7 and 8.

RIGHT OF ACCESS BY INDIVIDUAL WHO PROVIDED INFORMATION

Purpose of this section — additional right of access

11 (1) The purpose of this section is to allow an individual who has provided a record to the Commission or the Centre access to the record without having to make a formal access request under Part 2 of *The Freedom of Information and Protection of Privacy Act* or Part 2 of *The Personal Health Information Act*.

Access right of individual who provided information

11 (2) An individual has the right, on request and without charge, to examine and receive a copy of a Centre record or information contained in a record if

- (a) he or she provided the record or information to the Commission or the Centre; or
- (b) the record or information is a transcript or recording of a statement or other information provided by the individual to the Commission or the Centre.

Person authorized to act for individual

11 (3) The individual may authorize any person to exercise the right under subsection (1) on his or her behalf.

Right of access of relative

11 (4) A family member of the individual has the right, on request and without charge, to examine and receive a copy of a record or information referred to in clause (2)(a) or (b) if

- (a) the individual consents; or
- (b) the individual is deceased and the director believes that disclosing the record or information to the family member would not unreasonably invade the privacy of the deceased individual or another individual referred to in the record.

Duty to provide information

11 (5) The director must comply promptly with a request under this section.

Director must take precautions

11 (6) The director must not permit records to be examined or copied under this section without being satisfied as to the identity of the person making the request and, if applicable, the authorization or consent of the individual who provided the record or information.

Restrictions do not apply

11 (7) A restriction imposed under section 8 does not affect a request under this section.

ACCESS REQUEST UNDER FIPPA

Access request under FIPPA

12 (1) When a request for access to a Centre record is made under Part 2 of *The Freedom of Information and Protection of Privacy Act*,

- (a) the exceptions set out in sections 17, 18, 24, 25 and subsection 27(1) of that Act apply;
- (b) the exceptions set out in sections 19 to 23, subsection 27(2) and sections 28 to 31 do not apply; and
- (c) the director must not disclose the record or information contained in the record if
 - (i) a commitment has been made not to disclose it in an agreement under subsection 6 (2), or
 - (ii) a court order prohibits disclosure.

Extended privacy protection for deceased individuals

12 (2) In applying clause 17(4)(h) of *The Freedom of Information and Protection of Privacy Act* to a request for access to a Centre record, the clause must be read as referring to an individual who has been dead for more than 20 years rather than 10 years.

Restrictions on proactive disclosure do not apply

12 (3) For certainty, a restriction imposed under section 8 does not affect a right of access under Part 2 of *The Freedom of Information and Protection of Privacy Act* or Part 2 of *The Personal Health Information Act*.

DISCLOSURE FOR RESEARCH PURPOSES

FIPPA governs research requests

13 Section 47 (disclosure for research purposes) of *The Freedom of Information and Protection of Privacy Act* applies to all Centre records. Sections 24 and 24.1 (disclosure for health research) of *The Personal Health Information Act* do not apply.

[...]

Schedule “E”**Appendix VIII of Schedule “D” (Government Document Disclosure)**

[112] For present purposes, the relevant provisions of Schedule D, Appendix VIII “Government Document Disclosure” are set out below:

The government will search for, collect and provide a report setting out the dates a Claimant attended a residential school.

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

Upon request, the Claimant or their lawyer will receive copies of the documents located by the government, but information about other students or other persons named in the documents (other than alleged perpetrators of abuse) will be blacked out to protect each person’s personal information, as required by the *Privacy Act*.

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

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

[...]

CITATION: Fontaine v. Canada (Attorney General), 2018 ONSC 6381
COURT FILE NO.: 00-CV-192059
DATE: 2018/10/25

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

REASONS FOR DECISION

Perell, J.

Released: October 25, 2018