IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Fontaine v. Canada (Attorney General),* 2016 BCSC 2218

Date: 20161129
Docket: L051875
Registry: Vancouver

Between:

Larry Philip Fontaine et al

Plaintiffs

And

The Attorney General of Canada et al

Defendants

Brought under the Class Proceedings Act, R.S.B.C. 1996, c. 50

SEALED REASONS

There is a ban on the publication of names of the parties in this action, on any information that would identify the parties to the public, and on the details of any of the claims

Before: The Honourable Madam Justice B.J. Brown

Reasons for Judgment

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Place and Dates of Hearing:	Vancouver, B.C. November 7, 8, 9 and 10, 2016
Place and Date of Judgment:	Vancouver, B.C. November 29, 2016

Table of Contents

Introduction

[1] These reasons address five requests for directions ("RFDs") under the Indian Residential Schools Settlement Agreement ("IRSSA" or "Settlement Agreement"). All of these RFDs seek judicial recourse from decisions made within the Independent Assessment Process ("IAP") established under the IRSSA. These RFDs were heard together, and a number of intervenors participated, to address the issue of the court's jurisdiction on this type of RFD.

[2] For the reasons set out below, I decline to grant the relief sought in any of the present RFDs. At the end of these reasons, I give directions as to the process and timelines for future RFDs of this nature.

[3] The IRSSA is Canada's largest and most complex class action settlement. Various stakeholders negotiated the IRSSA to achieve a "fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools." This court is one of nine provincial and territorial superior courts (the "Courts" or "Supervising Courts") that approved the IRSSA on identical terms. It is important to understand that in addition to the IRSSA, the Courts' Implementation Orders and the Court Administration Protocol appended to those orders comprise what might be termed the "package" of documents that govern the IRSSA's administration The Court Administration Protocol required the Courts to designate the nine judges who heard the motions for approval of the Agreement, or their successors as "Supervising Judges" and stipulated that from among the "Supervising Judges", two "Administrative Judges" should be designated, one "Eastern Administrative Judge" and one "Western Administrative Judge".[1]

[4] The IRSSA established two compensation streams: a common experience payment ("CEP"), payable to all attendees of Indian Residential Schools ("IRSs"), and the Independent Assessment Process ("IAP"), which is the inquisitorial process provided by the IRSSA for adjudicating individual claims made by former IRS students in relation to physical and/or sexual abuse that they suffered.

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[1] Court Administration Protocol, paragraph 1.

[5] Since 2009, I have been the Supervising Judge for British Columbia and the Western Administrative Judge. In those roles, I have heard over 30 RFDs addressing a broad range of issues[2] and have determined over 740 of the CEP Court Appeals.[3] At this point, I am the longest serving Supervising Judge and Administrative Judge. I can say from personal observation that administering the IRSSA has been a significant undertaking not just for IAP adjudicators and other appointed administrators, but also for the courts. It is striking that a class action settlement that was the subject of an agreement in principle in 2005, finalized and approved in 2006 and ordered implemented in 2007 continues to generate litigation. Administration of the Settlement Agreement is an ongoing endeavour, and, it is fair to say, continues to draw a significant amount of court resources.

[6] On the present RFDs, the Requestors are IAP claimants. For varying reasons, each is dissatisfied with the decision on Re-Review of their case. Each of

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[2] The decisions in these cases, all cited as *Fontaine v. Canada (Attorney General)* address topics such as: alleged misconduct by lawyers representing IAP claimants and remedial action taken to protect those claimants (2012 BCSC 839, 2012 BCSC 1671 and 2016 BCSC 1998 (Blott)); 2013 BCSC 1888, 2013 BCSC 1955, 2014 BCSC 1940, 2014 BCSC 2531, 2015 BCSC 67, 2015 BCSC 68, 2015 BCSC 597, 2015 BCSC 717 and 2015 BCSC 1968 (Bronstein)); the court appointed monitor overcharging Canada for conducting investigations of one those lawyers (2016 BCSC 609); the monitor's authority to settle costs of investigations (2015 BCSC 1969); whether an IAP claimant's direction that a law firm apply IAP award funds to outstanding accounts constitutes an "assignment" prohibited by Article 18.01 of the Settlement Agreement or s. 67 of the *Financial Administration Act* (2016 BCSC 1306); admission to the IAP sought after the deadline established by the IRSSA (Directions dated November 20, 2014 and May 5, 2014); whether fees paid to claimants' counsel for work through to November 20, 2005 pursuant to Article 13.06 or 13.08 of the IRSSA should be accounted for in IAP fee assessments conducted by adjudicators under Articles 17 through 19 of the Courts' Implementation Orders (2010 BCSC 1208); whether Canada should be directed to pay IAP counsel fees to a law firm in circumstances of a dispute between that firm and two former associates (2016 BCSC 595 and 2016 BCSC 1046); whether the parties intended that three "successor institutions" be considered Indian Residential Schools for the purposes of the IRSSA (2013 BCSC 756); whether students billeted at private boarding homes qualified for CEP (2012 BCSC 313 and 2014 BCSC 941); management and ultimately, dismissal on procedural grounds of an application pursuant to Article 12 of the IRSSA to add an institution to the list of Indian Residential Schools (2014 BCSC 1939); whether assumed class members have standing to challenge the manner in which the IRSSA has been administered (2015 BCSC 1386); management of the excess from the $2.1B Designated Amount Fund, which funded the CEP (2016 BCSC 1996 and 2016 BCSC 1997); and reconsideration of a CEP appeal (2014 BCSC 2272).

[3] Article 5.09 of the IRSSA provides that a CEP applicant whose claim has been denied in whole or in part can appeal to the National Administration Committee ("NAC"), and that if the NAC denies the appeal in whole or in part, "the applicant may apply to the Appropriate Court for a determination of the issue". In order to promote consistency in the determination of the CEP Court Appeals, it was decided that I would be the sole Supervising Judge to hear them.

them seeks access to a Supervising Judge through what has been termed either "judicial recourse" or "curial review"[4] after exhausting the review processes prescribed by the IAP. Their claims and the issues raised in relation to their respective RFDs are summarized below.

[7] In retrospect, it was distinctly advantageous to hear these five RFDs together. While each initially appeared to be distinct and exceptional (and while each has been determined on its own merits), when heard together it became difficult to distinguish them from ordinary appeals. That is the challenge in applying the test articulated by the Ontario Court of Appeal in *Fontaine v. Duboff Edwards Haight and Schachter*[5] and determining whether the "very exceptional circumstances" warranting judicial recourse arise in these RFDs.[6]

[8] Because of the potential impact of judicial recourse RFDs on the IRSSA's administration, and through Court Counsel, the court invited the parties to make submissions as to whether it would appropriate to impose timelines within which any further judicial recourse RFDs should be brought if they are to be heard by the Courts. As noted above, in this Direction, in addition to determining the present RFDs, I provide guidance concerning the process that must be followed in the event that any further RFDs of this kind are brought, including the timelines within which such an RFD must be initiated.

Background

The IRSSA and the IAP

General Terms of the Settlement Agreement

[9] Fundamentally, the IRSSA is a contract. Consequently, it must be interpreted in the manner in which contracts are construed. It contains standard contractual terms, such as an "entire agreement" clause[7] and provides that it cannot

[4] For reasons set out below, I prefer the term "judicial recourse" to "curial review".

[5] 2012 ONCA 471 (*"Schachter"*)

[6] See *Schachter*, para. 53.

[7] IRSSA, Section 18.06

be amended or varied, except in some circumstances with the consent of the parties.[8] Both this court and the British Columbia Court of Appeal have held that the Courts' supervisory jurisdiction in the implementation and administration of the IRSSA does not empower the Courts to vary or amend the IRSSA's terms.[9]

The Independent Assessment Process

[10] Schedule D to the IRSSA provides for the IAP Model. Like all aspects of the Settlement Agreement, the IAP was carefully negotiated. An "IAP Working Group" was created. The IRSSA provided for the IAP Working Group's members to be compensated for their work in designing the IAP between the date of the Agreement in Principle and the Settlement Agreement's implementation.[10]

[11] The IAP is: (a) a post-litigation claims assessment process, (b) a contractual component of the IRSSA, arising from the parties' negotiations, and (c) a closed adjudicative process, operating under the purview of independent adjudicators without any rights of appeal or judicial review.

[12] As put by the Chief Adjudicator in his submissions:

> The IAP is a *sui generis* claims adjudication process, negotiated by the parties to the IRSSA as the appropriate means of providing compensation to individuals for the harms they suffered from experiencing sexual and physical abuse and other wrongful acts at Indian Residential Schools. It is a claimant-centred process, with special procedures developed to address the particular circumstances of IRS claimants, and to provide timely and effective resolution of claims involving deeply painful experiences suffered by claimants many years ago.

[13] To prove their claims, claimants alleging compensable abuse are entitled to a hearing before an adjudicator. The IAP is intended to be inquisitorial, presided over by adjudicators who are empowered to ask questions of claimants, drawing out the full story and testing the evidence where necessary. As I have previously observed:

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[8] IRSSA, Section 4.11(14)

[9] *Fontaine v Canada (AG)* (20 November 2013) BCSC L051875 at paras 53-57, upheld in *Myers v Canada (Attorney General),* 2015 BCCA 95, [2015] 2 CNLR 175.

[10] IRSSA, Section 13.13.

> [29] The purpose of the IAP is to provide a modified adjudicative proceeding for the resolution of claims of serious physical or sexual abuse suffered while at a residential school. The hearings are to be inquisitorial in nature and the process is designed to minimize further harm to claimants. The adjudicator presiding over the hearing is charged with asking questions to elicit the testimony of claimants. Counsel for the parties may suggest questions or areas to explore to the adjudicator but they do not question claimants directly.
>
> [30] The hearings are meant to be considerate of the claimant's comfort and well-being but they also serve an adjudicative purpose where evidence and credibility are tested to ensure that legitimate claims are compensated and false claims are weeded out. It is strongly recommended that claimants retain legal counsel to advance their claims within the IAP.[11]

[14] In addition to its compensatory aspect, the IAP also has other important purposes. As I have previously stated:

> [131] The IAP provides both compensatory and non-compensatory benefits. Pursuant to the settlement terms, claimants are entitled to compensation for proven claims of abuse. They are also entitled to the opportunity to have their claims adjudicated in a non-confrontational process that takes into account special considerations in determining credibility, which in essence, is the main issue in respect of any claim in the IAP.[12]

[15] The IAP also includes a legal fee review and assessment process which itself has resulted in decisions of the Supervising Courts.

The Role of IAP Adjudicators

[16] Individual IAP claims are managed and decided by independent adjudicators.[13] Under the IAP Model, for each IAP claim, independent adjudicators must:

> "[A]ssess the credibility of each allegation [… and] determine whether what has been proven constitutes a continuing claim under [the] IAP;"[14] and, Issue a compensation decision outlining key factual findings and any rationale relied upon,[15] and organized according to a set rubric.[16]

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[11] *Fontaine v Canada (Attorney General)*, 2012 BCSC 839, at para 29-30.

[12] *Fontaine v Canada (Attorney General)*, 2012 BCSC 839 at para 131.

[13] IRSSA Schedule D ["*IAP Model*"] at para III (e) (ii), page 9.

[14] *Ibid* at Appendix IX, page 31.

[15] *Ibid* at para III (k), pages 13 – 14.

[16] *Ibid* at Appendix XII, pages 45 – 46.

[17] The inquisitorial nature of an IAP hearing requires adjudicators to manage the hearing, draw out and test the evidence of witnesses, caucus with the parties on proposed lines of questioning, and then make factual and legal conclusions necessary to resolve the claim. These combined roles require a unique combination of skills. Recognizing this, the parties agreed that adjudicators should be highly-qualified individuals,[17] selected by all-party consensus,[18] who receive intensive training approved by the IAP Oversight Committee and ongoing mentoring by the Chief Adjudicator and other senior adjudicators.[19]

[18] The criteria for the selection of Adjudicators are set out in Appendix V of Schedule D on p. 24, and include, *inter alia*, knowledge of and sensitivity to Aboriginal culture and history, knowledge of and sensitivity to sexual and physical abuse issues, and the ability to work with staff and participants from diverse backgrounds, as well as knowledge of personal injury law, and damages assessment, the ability to elicit useful evidence in a concise manner, and a demonstrated ability to assess credibility and reliability. It is noteworthy that adjudicators need not be legally trained, so long as they have a combination of related training or significant experience.

[19] The Ontario Court of Appeal has recognized that "[a]djudicators are specially trained to conduct the hearing in a way that is respectful to the claimant and conducive to obtaining a full description of his or her experience."[20] The Court of Appeal for Ontario further recognized that the Chief Adjudicator possesses "broad discretion"[21] and "relative expertise."[22] In the exercise of his duties, the Chief Adjudicator is monitored and guided by the Oversight Committee.[23]

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[17] See Schedule D, Appendix V, on p. 24.

[18] See Schedule D, Appendix XIII, on p. 48.

[19] For the Chief Adjudicator's responsibility for training adjudicators, see Schedule D, III(s)(i) on p. 17; for the Chief Adjudicator's responsibility to promote consistency, see Schedule D, III(m)(ii) on p. 14; for the role of training materials in supporting the hearing process, see Schedule D, Appendix X, on p. 39-40.

[20] *Fontaine v. Canada (Attorney General)*, 2016 ONCA 241, 397 DLR (4th) 243 at para 48.

[21] *Schachter ONCA* at para 54.

[20] The IAP creates an exclusive jurisdiction[24] for independent adjudicators to manage IAP hearings, find facts, and assess IAP claims, which in turn fosters their considerable expertise.

[21] The exclusive jurisdiction of independent adjudicators has previously been recognized by Perell J., the Eastern Administrative Judge, in what was referred to in the submissions I heard as the *Kain and Jaffe RFD*:

> [15] Under the IRSSA, the adjudicators are – as their name suggests – exercising a judicial function in accordance with the terms of the IRSSA. It is for them, on a case by case basis and not the Court, to make evidentiary rulings. As already ordered in the January 14, 2014 Order:
>
> THIS COURT ORDERS THAT the adjudicators of the IAP have the exclusive jurisdiction with respect to the admission of and use to be made of evidence for the IAP.[25]

The Process for Review of an IAP Decision

[22] If an IAP claimant or Canada is dissatisfied with an adjudicator's decision, they have rights of review. These are set out in Appendix III of Schedule D, and provide as follows:

> 1. Review
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> i. For cases within the standard or complex track, any party may ask the Chief Adjudicator or designate to determine whether an adjudicator's, or reviewing adjudicator's, decision properly applied the IAP Model to the facts as found by the adjudicator, and if not, to correct the decision, and the Chief Adjudicator or designate may do so.
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> ii. In both the standard and the complex issues tracks, Claimants may require that a second adjudicator review a decision to determine whether it contains a palpable and overriding error.
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> iii. In the complex issues track, the defendants may require that a second adjudicator review a decision to determine whether it contains a palpable and overriding error.

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[22] *Ibid* at para 78.

[23] *IAP Model*, *supra*, para III (r), page 16.

[24] As a limited exception from the exclusive jurisdiction of independent adjudicators, a claimant may request "access to the courts to resolve a continuing claim" by satisfying the Chief Adjudicator that the claim is of such complexity or seriousness that it is not properly suited to the IAP: see *IAP Model*, *supra* at para III (b) (iii), pages 8 – 9. This exception does not apply to the instant claims.

[25] *Fontaine v. Canada (Attorney General)*, 2014 ONSC 4024, [2014] 4 CNLR 67 ["*Kain and Jaffe RFD*"] at para 15.

iv. If a palpable and overriding error is found, the reviewing adjudicator may substitute their own decision or order a new hearing.

v. All reviews are on the record (no new evidence permitted) and without oral submissions.

[23] In other words, the IAP provides a closed process for the determination of individual claims, with one in-person hearing and two levels of review.

[24] In considering whether an adjudicator properly applied the IAP Model to the facts, the standard of review is correctness. If an adjudicator is incorrect in his or her application of the IAP Model to the facts, then the review adjudicator is meant to correct the decision.

[25] In discussing the particular RFDs in these reasons, I will refer to the original adjudicator as the "Adjudicator" and to the two levels of reviewers as the "Review Adjudicator" and the "Re-Review Adjudicator" respectively.

Current Status of the IAP

[26] The IAP has now nearly completely run its course. According to statistics made available by the Indian Residential Schools Adjudication Secretariat, 99.7% of all anticipated IAP hearings have already been held, 26,452 in total.[26] Of the 38,094 total claims filed in the IAP, 35,730 (93.7%) have been resolved. Of the 2,364 unresolved claims, only 87 hearings were scheduled for a later date or awaiting scheduling; 1,111 cases were awaiting decisions, and 1,166 cases were expected to be resolved through non-hearing means.[27]

[27] Over three billion dollars has been paid to successful IAP claimants, and almost 90% of claims admitted to the IAP have resulted in an award in favour of claimants.

[28] I turn now to the facts of the individual RFDs before me.

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[26] All statistics are as of August 31, 2016. See http://www.iap-pei.ca/information/stats-eng.php.

[27] These include the Negotiated Settlement Process, the Incomplete File Resolution process, claims withdrawn by the claimant, and otherwise.

RFD F-10779

Claim

[29] Claimant F-10779 attended [redacted] IRS from 1969 to 1970, during which time she claimed to have suffered four sexual assaults that caused her lasting harm.[28]

[30] [redacted]

[31] [redacted]

[32] [redacted]

[33] [redacted]

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28 [redacted]

[redacted]

[34] [redacted]

[35] Claimant F-10779 claimed that the alleged incidents, and particularly the [redacted] caused her lost opportunity: she claimed that, as a result of the alleged incidents, she did not complete Grade 12 until later in her adult life. This delay occasioned a delay in her qualifying as a [redacted]. She outlined proposed future care comprising sessions [redacted].

Adjudicator's Decision

[36] The Adjudicator found that Claimant F-10779 had established the [redacted] is compensable under the IAP Model as an SL3 assault. The Adjudicator found that paragraph (a) of the test on page 31 of the IAP Model was satisfied because, at the time of the assault, the perpetrator was [redacted] employed by the Canadian government.

[37] The Adjudicator determined that paragraph (c) of the test on page 31 of the IAP Model was also satisfied. In coming to this conclusion, he relied extensively on the reasoning in N-10174. Specifically, the Adjudicator noted that N-10174 held that, although the test in paragraph (c) is satisfied if a relevant relationship created in the IRS is proved, this is not necessary: the test is satisfied in the absence of such a

relationship if the claimant can establish that the assault arose from, or its commission was connected with, the operation of the IRS. The Adjudicator went on to note that N-10174 held that 'operation of the school' should be interpreted broadly to include activities or business that relates to the IRS, whether or not specifically related to the activities of students at the IRS, but inclusive of the activities and actions of students at the IRS. Finally, the Adjudicator noted that N-10174 held that the flow of students into and out of the IRS fell within the operation of the school.

[38] Accordingly, the Adjudicator found that N-10174 is broad enough to cover this claim: [redacted]'s access to Claimant F-10779 was connected to the operation of the school, as per N-10174, since the perpetrator [redacted]. The Adjudicator noted also C-14693, which held that the IRS had no liability for an assault suffered by one of its students when that student was under the care and control of his family. The Adjudicator noted that Claimant F-10779 [redacted], but found that she was nevertheless under the care and control of the IRS at the relevant time.

[39] [redacted]. Finally, the Adjudicator found that the relevant compensability test is in any event not satisfied, since the IRS did not have actual knowledge of the assault [redacted] nor that it ought to have known of the assault.

[40] The Adjudicator found that Claimant F-10779 had established that [redacted]. However, the Adjudicator found

that the touch did exceed touching of a recognised parental nature, and that it thus is compensable under the IAP Model as an SL1 assault.

[41] [redacted].

[42] The Adjudicator accepted Claimant F-10779's account of the harms suffered and that those harms were plausibly linked to [redacted], such that the harms were compensable under the IAP Model. The Adjudicator found that the harms fell under H3 and awarded 15 compensation points. The Adjudicator found that the assault was aggravated to the extent that (i) [redacted] and (ii) [redacted]. The Adjudicator accepted her account of the lost opportunity and found that it was compensable in that it was plausibly linked [redacted]. The Adjudicator found that her need for future care [redacted]. The Adjudicator awarded total compensation of $82,233, inclusive of future care.

Review Decision

[43] Canada sought review of the initial Adjudicator's decision in respect to the SL3 assault by the [redacted] on three grounds. First, Canada did not bear an *in*

loco parentis relationship to the claimant at the time [redacted]. Second, the Adjudicator misapplied the test in paragraph (a) on page 31 of the IAP Model, since that test is not satisfied in respect of [redacted]. Third, the initial Adjudicator misapplied part (c) of the three-part test on page 31 of the IAP Model.

[44] The Review Adjudicator rejected Canada's first ground. He found that, since Claimant F-10779 [redacted], her father was not at that point *in loco parentis* to her. Rather, at the point when she was [redacted], the IRS was *in loco parentis* to her. The Review Adjudicator acknowledged that the claimant had her father's approval to [redacted], but found that mere approval, in the absence of a letter or other express permission [redacted], was not sufficient establish that the [redacted], rather than the IRS, was *in loco parentis* to the claimant at the relevant time. The Review Adjudicator then drew upon B-14284 as support for the proposition that, in any event, the IAP Model constitutes a complete code that does not include any obligation to consider *in loco parentis*. Accordingly, the Review Adjudicator found that the first instance Adjudicator did not err in not expressly considering *in loco parentis* in this case.

[45] The Review Adjudicator rejected Canada's second ground. The Review Adjudicator found that paragraph (a) of the test on page 31 of the IAP Model unambiguously provides that it is satisfied when the perpetrator is an employee of the government, even if the perpetrator's contract of employment is not with the IRS in question. The Review Adjudicator found that the test had been properly applied by the initial Adjudicator: since the [redacted] was an employee of the government, the test was satisfied notwithstanding that his contract of employment was not with the IRS in question.

[46] The Review Adjudicator rejected Canada's third ground. The Review Adjudicator found that the initial Adjudicator had correctly applied paragraph (c) of the test on page 31 of the IAP Model: he endorsed the Adjudicator's reliance upon

and application of the reasoning in N-10174, noting that N-10174 had been approved by the Chief Adjudicator in S-21665.

[47] The Review Adjudicator thus upheld the decision of the initial Adjudicator in its entirety.

Re-Review Decision

[48] Canada sought re-review of the decision of the initial Adjudicator with respect to the SL3 assault by the [redacted]. The Re-Review Adjudicator found that the initial Adjudicator and the Review Adjudicator misapplied the IAP Model and that, properly applied, the Model provided that the assault by the [redacted] was not compensable.

[49] Relying upon E-10179, the Re-Review Adjudicator found that satisfaction of part (a) of the test on page 31 of the IAP Model requires that, where the perpetrator is an employee of the government that operated the IRS, the perpetrator's contract of employment need not be with that particular IRS, but must be with an IRS. Following B-20530, the Re-Review Adjudicator then found that it would be 'illogical' were the test to provide that the contract of employment need not be with an IRS at all, since that would then extend potential liability to all government employees. The [redacted] did not have a contract of employment with an IRS. Accordingly, the Re-Review Adjudicator found that both the initial Adjudicator and the Review Adjudicator had misapplied the test.

[50] The Re-Review Adjudicator also rejected the manner in which the Review Adjudicator and the Adjudicator applied part (c) of the test. Relying upon M-16568, the Re-Review Adjudicator agreed with Canada's position that the primary basis for liability under the IAP Model is the IRS standing *in loco parentis* to the resident child. In M-16568, IRS staff transported a student to a dentist who then [redacted]. M-16568 held that the IRS in question was not liable because its liability ceased at the point at which the student was delivered out of its control and into the control of the dentist. Following, M-16568, the Re-Review Adjudicator found that the liability in relation to

St. Mary's IRS ceased when the claimant was collected by the [redacted], since, from that point on, she was under his care and control.

[51] Finally, the Re-Review Adjudicator found that, since the [redacted] was not an employee of the IRS, the initial Adjudicator and the Review Adjudicator failed properly to apply part (b) of the test on page 31 of the IAP Model. The Re-Review Adjudicator found that part (b) provides that where the perpetrator is not an employee of the IRS, it is necessary that the assault happen on school premises in order to be compensable. Accordingly, the Re-Review Adjudicator found that in relation to [redacted], part (b) was not satisfied. The Re-Review Adjudicator thus found that the assault was not compensable; therefore the harms and opportunity loss allegedly owing to the assault were also not compensable. The Re-Review Adjudicator therefore altered the compensation owing to Claimant F-10779 to $13,000 and an additional $2,000 in respect of future care costs.

Parties' Positions on the RFD

Claimant

[52] On the RFD, Claimant F-10779 seeks the following relief: first, that the re-review decision be quashed, and the original decision be upheld, because the Re-Review Adjudicator lacked jurisdiction to conduct the re-review; and in the alternative for any relief deemed appropriate by the court.

[53] Claimant F-10779's position is as follows. The original Adjudicator found that [redacted] was an adult employee of the government. This finding, Claimant F-10779 submits, was a factual finding or a mixed finding of fact and law. As such, Canada did not have the right, under the IRSSA, to request a review of this decision and the Re-Review Adjudicator did not have the right to overturn it. Claimant F-10779 submits that the IRSSA is clear that Canada is not able to make requests for review on issues of fact, but only on issues of the proper application of the IAP Model, that is, Claimant F-10779 submits, issues of law.

[54] Claimant F-10779 notes that, first, part (a) of the test at page 31 of the IAP Model is satisfied when the perpetrator is an employee of the government and not an employee of an IRS. It is thus satisfied in the case of [redacted]. Second, the initial Adjudicator's application of part (c) of the test was correct: the [redacted] arose from, or its commission was connected to, the operation of the school. Since the test is met, the assault is compensable even though it did not take place on IRS premises, the implication being that the Re-Review Adjudicator's application of part (b) of the test is a misapplication of the IAP Model.

Canada

[55] First, Canada submits that Claimant F-10779 has failed to establish that the *Schachter* criteria are met. Canada submits that the Requestor has not articulated the jurisdiction under which a Supervising Court can hear her claim; the grounds upon which she can access that jurisdiction; any factual issues arising from the IAP decision; any IAP case law supportive of the relief sought.

[56] Second, Canada submits that procedural fairness dictates that Claimant F-10779's request must fail: it contends that no submissions have been filed on the RFD, such that it would be procedurally unfair to find against Canada on the basis of arguments not yet advanced.

[57] Third, Canada submits that Claimant F-10779 has failed to articulate: (i) what standard of review was applied at the re-review hearing; (ii) why that standard was erroneous; and (iii) how application of that standard amounted to a misapplication of the IAP Model. Nor, Canada contends, has Claimant F-10779 detailed why the review decision should replace the re-review decision. Canada submits that Claimant F-10779 is improperly asking the court to adjudicate between its conception of the standard of review and the conception provided in the IAP Model. Canada contends that Claimant F-10779 is simply complaining about the results of the IAP process. The court does not have jurisdiction to re-determine issues "properly within the ambit of the adjudicator's decision making powers".

[58] Fourth, Canada's position is that Claimant F-10779 is asking the court to act beyond its jurisdiction in that: (i) she is asking the court to overturn decisions made under the exclusive jurisdiction of adjudicators under the IAP; (ii) the court does not have jurisdiction to quash a re-review decision, since to do so would be in effect to exercise a jurisdiction of judicial review or appeal not available under the IAP; (iii) reinstating a review decision or making a monetary award to Claimant F-10779 would constitute and ultra vires interference with the exclusive responsibilities of the adjudicators under the IAP Model.

AFN

[59] AFN contends that Re-Review Adjudicator misapplied Schedule D of the IAP Model: he erroneously took it to require that perpetrators who are employees of the government must have a contract of employment with a specific IRS. AFN contends that Schedule D requires that the perpetrator be an employee of the government or a church entity that operated the IRS in question, or another adult lawfully on the premises of the IRS. AFN contends that here "or" does not mean "and".

RFD H-13055

Claim

[60] Claimant H-13055 died on January 12, 2010, three days before she was due to give evidence at the initial adjudication of her claim. Her claim was pursued by her estate. She attended [redacted] IRS from the age of 6, until she left after completing Grade 8. [redacted]

Adjudicator's Decision

[61] Claimant H-13055's estate sought to prove the alleged assault by reference to the evidence of an eyewitness ("[redacted]"). The Adjudicator relied upon D-15417 and E-12325 for the proposition that the IAP Model disallows claims by deceased claimants in all but three circumstances: (i) where the deceased has previously provided its testimony at an IAP hearing; (ii) where the deceased has previously given reliable sworn testimony; or (iii) where there is some eyewitness testimony of the alleged assaults. The Adjudicator held that he had jurisdiction to hear Claimant H-13055's claim on the basis that her estate had an eyewitness to the alleged assault.

[62] [redacted]. The Adjudicator accepted [redacted]'s evidence.

[redacted]Relying upon B-11431 for the proposition that [redacted], the Adjudicator found that [redacted].

[64] [redacted] The estate sought to prove that [redacted] arose from [redacted] by way of hearsay evidence from Claimant H-13055's husband. [redacted]

[65] The Adjudicator relied upon D-15417 and E-12325 for the proposition that harm, aggravating factors and loss of opportunity cannot be proved by hearsay evidence. He found that harm, aggravating factors and loss of opportunity require proof on a highly subjective basis: a plausible link between the harm, aggravating factors and loss of opportunity and the proven assault must be established, and establishing such a link necessarily requires hearing the subjective evidence of the claimant. Accordingly, the Adjudicator found that Claimant H-13055's estate was unable to establish any harm, aggravating factors or loss of opportunity. The Adjudicator awarded compensation of $10,000 in relation to [redacted].

Review

[66] The claimant's estate requested a review hearing. It alleged that the initial Adjudicator had misapplied the IAP Model by refusing to award compensation for harm, aggravating factors and loss of opportunity on the basis of the hearsay evidence submitted. In doing so, the claimant's estate submitted that the initial Adjudicator's sole reliance upon D-15417 and E-12325 constituted a too narrow interpretation of the IAP Model; under the IAP Model, it was submitted, the subjective evidence of the claimant is important but not essential evidence of harm, aggravating factors and loss of opportunity.

[67] The Review Adjudicator upheld the decision of the initial Adjudicator in its entirety. The Review Adjudicator agreed that D-15417 and E-12325 support the proposition that the initial Adjudicator has the jurisdiction to hear and compensate claims of assault brought by deceased claimants if there is eyewitness evidence. He agreed also that D-15417 and E-12325 support the proposition that harm, aggravating factors and loss of opportunity cannot be proved by way of hearsay evidence. He thus found that the initial Adjudicator had correctly applied the IAP Model.

Re-Review

[68] The estate requested a re-review hearing on the same grounds as those upon which it requested the review hearing. The Re-Review Adjudicator upheld the

decision of the initial Adjudicator in its entirety. The Re-Review Adjudicator relied upon J-14246 for the proposition that the claimant need not testify in person to claims of assault; he thus found that the initial Adjudicator does have jurisdiction to hear and compensate claims of assault brought by deceased claimants. In addressing harm, aggravating factors and loss of opportunity, the Re-Review Adjudicator held that page 7 of the IAP Model provides that the initial Adjudicator must assess the subjective impact of the alleged harm. The Re-Review Adjudicator held that it is not possible for the initial Adjudicator to perform this assessment without interviewing the claimant; he relied upon D-15417 and E-12325 for the proposition that harm, aggravating factors and loss of opportunity cannot be established in the absence of direct evidence from the claimant.

Parties' Positions on the RFD

Claimant

[69] The estate asks that the claim be sent back to the initial Adjudicator for reassessment, and that that reassessment take into account Claimant H-13055's medical records and the testimony of her husband in assessing the claim for harm, aggravating factors and loss of opportunity.

[70] Claimant H-13055's estate submits that the IAP Model was misapplied by the initial Adjudicator, the Review Adjudicator and the Re-Review Adjudicator. The estate contends that the Adjudicators improperly considered themselves bound by D-15417, E-12325 and J-14246. Specifically, it submits that the Adjudicators cannot be bound by D-15417 because that would leave them unable to establish harm, aggravating factors and loss of opportunity on the basis of evidence other than subjective evidence from the claimant; this restrictive approach, the estate submits, is not provided by the IAP Model and therefore constitutes a misapplication of Schedule D.

[71] Further, the estate submits that the Adjudicators' decisions regarding H-10355 demonstrate that their application of D-15417, E-12325 and J-14246 is unjust. The estate highlights that it provided evidence of harm, aggravating factors and loss

of opportunity that is admissible under the IAP Model, that the initial Adjudicator found both credible and reliable, but which was ignored.

[72] Finally, the estate argues that the Adjudicators' application of D-15417, E-12325 and J-14246 would lead to claimants in effect becoming their own expert witness as regards the subjective link between proven assaults and harm, aggravating factors and loss of opportunity. This, the estate contends, invites the claimant to give evidence that ought properly to be given by an expert, and risks the evidence that is given being unreliable, the implication being that claimants are not best placed to testify about the relevant link.

Canada

[73] First, Canada contends that, under the IAP Model, adjudicators have no jurisdiction to hear claims from and grant compensation to claimants who are deceased before giving evidence. Rather, the IAP Model requires adjudicators to hear evidence from claimants in order to assess their credibility and reliability. As such, Canada submits that granting compensation to Claimant H-13055's estate in respect of the proven assault runs counter to the IAP Model.

[74] Second, Canada contends that allowing adjudicators to compensate harm, aggravating factors and loss of opportunity would constitute an impermissible amendment to the IRSSA. As such, it contends that all three Adjudicators in the case of H-10355 properly followed and applied D-15417, E-12325 and J-14246.

[75] Canada's position is thus that the Adjudicators did not misapply the IAP Model, and that the *Schachter* test is therefore not met. Accordingly, Canada's position is that the RFD should be dismissed.

AFN

[76] AFN's position is that that all three Adjudicators simply relied upon D-15417, and that that reliance resulted in a palpable and overriding error, since the decision of one adjudicator cannot bind other adjudicators. The IRSSA expressly provides in Schedule "D" as follows:

> 5. Stare decisis
>
> Although reasons will be issued in each case, the IAP will not operate on the basis of binding precedent. All adjudicators are of equal authority, and should not consider themselves bound by each other's previous decisions. Through conferencing, adjudicators may come to a common interpretation of certain procedural issues, but each case must be determined on its own merits.

National Consortium

[77] The National Consortium argues that the *Schachter* threshold is met by the failure of any level of adjudicator to take into account the relevant and admissible evidence of the husband to establish a plausible link between the wrongful acts and the harm suffered.

RFD C-18694

Claim

[78] C-18694 attended [redacted] IRS between 1955 and 1964. [redacted] Further, C-18694 contends that this treatment caused him to leave the IRS after finishing Grade 9, and take a hiatus from education altogether, before completing his studies in later life. This, C-18694 claims, caused him to have a delayed entry into the workforce, which, in turn, caused him actual income loss.

[79] Specifically, C-18694's claim has five parts:

a) [redacted];

b) [redacted];

c) [redacted];

d) [redacted];

e) [redacted].

[80] [redacted]

The claimant alleges also that his delayed entry into his profession translates into actual income loss [redacted].

Adjudicator's Decision

[81] The Adjudicator accepted the first part of C-18694's claim, save that [redacted]. The Adjudicator accepted the second part of C-18694's claim, but deemed it to be non-compensable because C-18694 had not had a medical assessment of the injury caused. The Adjudicator accepted the third part of C-18694's claim. The Adjudicator accepted the fourth part of C-18694's claim, and deemed the assault suffered to be compensable at level SL4. The Adjudicator accepted the fifth part of C-18694's claim, but deemed it to be non-compensable because C-18694 was not a student of the IRS [redacted].

[82] On the question of actual income loss, the Adjudicator found that C-18694 did not prove on the balance of probabilities that [redacted] caused him to have a delayed entry into the workforce. That delay, the Adjudicator found, was caused in any event by the following four factors:

(i) the cultural shock of moving from the IRS [redacted];

(ii) the cultural shock of experiencing racial discrimination in [redacted];

(iii) his treatment at the IRS; and

(iv) the fact that "Aboriginal Students were generally streamed toward less academic endeavours".

[83] Accordingly, the Adjudicator concluded that Claimant C-18694 had not proven on the balance of probabilities that, but for the sexual abuse, he would not have had a delayed entry into the workforce.

Review

[84] C-18694 sought a review of the Adjudicator's decision on four grounds. First, that the Adjudicator had misapplied the IAP Model in finding that the [redacted] is non-compensable. Second, that the Adjudicator made a palpable and overriding error in finding that [redacted]; C-18694 contended that the Adjudicator did not accept C-18694's initial responses to questions on this point, and asked leading questions of C-18694 until C-18694 gave responses that the Adjudicator deemed acceptable. Third, that by concluding that [redacted], the Adjudicator removed an important factor from the analysis of what caused C-18694's delayed entry into the workforce. Fourth, that in any event, the Adjudicator made a palpable and overriding error by misapplying the "but for" test on causation when assessing whether the sexual abuse suffered caused C-18694's actual income loss.

[85] Canada contended that the Adjudicator's finding that C-18694 was not a student at an IRS when [redacted] was a reasonable finding on the evidence. In the alternative, Canada claimed that, if that assault were compensable, compensation for it would be subsumed within the SL4 compensation already awarded. Finally, Canada claimed that Adjudicator understood and correctly applied the "but for" test.

[86] The Review Adjudicator upheld the Adjudicator's decision. First, the Review Adjudicator affirmed that the [redacted] is not compensable. The Review Adjudicator noted that proof of attendance at an IRS is established by Canada's production of the relevant documents, unless such documents are missing or incomplete. The Review Adjudicator found that, in the present case, Canada had produced complete documents demonstrating that C-18694 ceased to be a student of the IRS when he completed Grade 9, and was for that reason not a student of an IRS [redacted].

[87] Second, the Review Adjudicator found that the Adjudicator had not asked leading questions of C-18694 in order to elicit more acceptable responses to questions. The Review Adjudicator found that the Adjudicator had given C-18694 ample opportunity to give his version of events. The Review Adjudicator found that the transcript of the initial hearing showed that the Adjudicator had asked open questions and had resorted to leading questions only in order to clarify C-18694's responses.

[88] Third, the Review Adjudicator found that the Adjudicator had understood the "but for" test and properly applied it to the evidence. The Review Adjudicator found that the Adjudicator's decision that [redacted] had not caused C-18694's delayed entry into the workforce was within the range of reasonable outcomes.

Re-Review

[89] C-18694 sought a re-review, but only of the decision that the sexual abuse suffered did not cause his delayed entry into the workforce.

[90] The Re-Review Adjudicator found that the Adjudicator had correctly understood the "but for" test and had properly applied it to the facts. The Re-Review Adjudicator noted that C-18694 appeared to be asking him to reapply the "but for"

test to the evidence and find different facts. The Re-Review Adjudicator stated that the Re-Review Adjudicator's role is to determine whether the Adjudicator properly applied the IAP Model, and not to reassess evidence already assessed by the Adjudicator. Accordingly, the Re-Review Adjudicator affirmed the Adjudicator's decision.

Parties' Positions on the RFD

Claimant

[91] Claimant C-18694 seeks a declaration that, subject to the maximum $250,000 award, he is entitled to compensation for actual income loss that was proved on the balance of probabilities to have been caused [redacted].

[92] Claimant C-18694's principal submission that the Adjudicator failed properly to apply the test for causation as used by the civil courts. Claimant C-18694 notes that under Schedule D at Appendix IX (Instructions for Adjudicators), II. (Application of the Compensation Rules), Rule 5, actual income loss is to be determined using the same standards that a civil court would apply.

[93] Claimant C-18694 contends that the relevant test in this case is: 'but for the sexual assault the claimant would not have suffered the psychological injury that caused him delayed entry into the workforce'. Claimant C-18694's position is that this test has been satisfied on the balance of probabilities, the other causes of the delay notwithstanding. The Requestor relies upon the discussion of causation in *Athey v Leonati*,[29] highlighting the following principles:

> 1. the defendant is liable for any injuries caused by his or her negligence;
>
> 2. it is not necessary for the claimant to show that the defendant's negligence was the sole cause of injury;
>
> 3. the defendant will not be excused from liability because factors not caused by his negligence helped cause the harm.

[29] [1996] 3 SCR 458, 1996 CanLII 183

[94] Further, the Requestor relies upon *Blackwater v Plint* CanLII (at pages 329-333) for the proposition that factors that caused the claimant's harm in addition to the sexual abuse suffered are irrelevant to the liability of the perpetrator of that abuse.

[95] Third, and in the alternative, Claimant C-18694 submits that the Adjudicator's decision was unreasonable on three grounds. First, denying compensation for actual loss of earnings on the basis of factors (i) – (iv) would result in compensation for actual loss of earnings never being paid, the implication being that any case involving a former IRS students claiming actual income loss [redacted] will be such that the cause of the delay can in part be attributed to factors (i) – (iv). Second, the Adjudicator's finding that the claimant would have suffered psychological harm and a delayed entry into the workforce in any event is supported by neither the facts nor the relevant test for causation [redacted]. Third, the Adjudicator misapplied the IAP Model in using his personal knowledge to support his conclusions.

Canada

[96] Canada submits that Claimant C-18694 has failed to demonstrate that the Adjudicator failed properly to apply the IRSSA by supporting his conclusions on the question of causation with extra-curial knowledge. The Adjudicator's reliance on factors (i) – (iv) was based upon the facts as he found them, including the claimant's own testimony. Canada also highlights that the claimant agrees that factors (i) – (iv) did delay his entry into the workforce.

[97] Further, Canada's position is that the fact that a psychological report was not obtained by the Adjudicator is not an error under the IAP Model. Canada highlights that the claimant's counsel was aware that a psychological report would not be obtained [redacted].

[98] Canada contends also that Claimant C-18694 has failed to demonstrate that the Adjudicator improperly applied the applicable law on causation. Canada submits that the relevant "but for" test was applied and that the claimant failed to demonstrate to the satisfaction of that test that the actual income loss suffered was caused by the sexual abuse suffered at the IRS.

[99] Accordingly, Canada's position is that the claimant has failed to demonstrate that the *Schachter* threshold has been met. Canada contends that, in any event, the relief sought is not available, since the Supervising Courts have no jurisdiction to grant compensation under the IAP; the jurisdiction to grant compensation awards under the IAP is exclusive to adjudicators under the IAP.

AFN

[100] The AFN'S position is that the Adjudicator failed properly to apply the IRSSA by using his personal understanding to support his conclusions. The AFN submits also that the Adjudicator failed properly to apply the applicable law on causation, insofar as he judged the question whether the sexual abuse suffered by the claimant caused his delayed entry into the workforce against factors (i) – (iv), above, and not against the applicable "but for" test.

National Consortium

[101] The National Consortium argues that this RFD meets the *Schachter* test because it raises the possibility that the Adjudicators failed to apply the proper test for causation and relied on extra-curial knowledge to make findings of fact.

RFD N-10762

Claim

[102] Claimant N-10762 claimed that while resident at [redacted] IRS between 1952 and 1955, [redacted]

[103] The history of the proceeding was summarized as follows in the re-review decision in this matter:

> The Claimant's hearing in November 2012 was expedited [redacted]. As school records did not confirm the Claimant's attendance at the school nor the employment there of the [redacted], the Adjudicator allowed an adjournment of the Claimant's hearing to permit him to produce other evidence to help him prove his residency and identify the alleged perpetrator. Subsequently, arrangements were made to receive testimony [redacted] in September 2013, by which time, sadly, the Claimant had passed away. When the Claimant's brother failed to attend to testify at the witness hearing the Adjudicator and the parties' travelled to the brother's reserve to take his testimony. However, ultimately the brother did not testify, as it appeared that he had no evidence to give that would advance the Claimant's claim. At that stage the matter was again adjourned to allow Claimant Counsel to search for yearbooks or other evidence to establish the Claimant's residency at the school. A teleconference was subsequently scheduled for final submissions on May 6, 2014. On May 2, 2014, Claimant Counsel gave notice that he would ask the Adjudicator to recuse himself because of bias. By agreement, submissions on the recusal application were heard at the time set for final submissions. In the course of his submissions Claimant Counsel contended that the Adjudicator had improperly resorted to leading questions and inappropriate language during his questioning of the Claimant, which raised at the very least a reasonable apprehension of bias on his part. Following those submissions the Adjudicator declined to recuse himself. Final submissions were heard in September 2014. In November 2014 the Adjudicator issued his decision setting out his reasons for rejecting the recusal application and also for denying the claim for compensation due to his concerns about the Claimant's credibility and the reliability of his evidence.

Adjudicator's Decision

[104] The Adjudicator dismissed the claimant's claim and awarded no compensation. The Adjudicator found that the claimant had failed to prove, on a balance of probabilities, that he was sexually abused by an adult employee or a fellow resident at the residential school [redacted]. In particular, the Adjudicator found that the claimant's evidence was not credible or reliable.

[105] In his reasons, the Adjudicator also addressed the request made by counsel for the claimant that the Adjudicator recuse himself, on the ground that he had unfairly subjected the claimant to excessive and improper cross-examination, leading questions, and offensive language during the course of the hearing, which was indicative of pre-judgment on the part of the Adjudicator. The Adjudicator

declined to recuse himself. He considered the test for reasonable apprehension of bias and found that it had not been met. In particular, he underlined the inquisitorial nature of the IAP process gave the Adjudicator a responsibility to probe the evidence of the claimant, and did not accept that his questions were badgering. He also found that counsel had misconstrued one of his questions as offensive, because the transcript of the relevant exchange was inaccurate. Specifically, counsel suggested that when the Adjudicator said to the claimant, "Did you say you found God?", he was mocking the claimant. However, upon listening to the recording of the audio of the hearing, the Adjudicator confirmed that in asking the question, he was simply seeking to clarify the claimant's answer to the previous question. Finally, the Adjudicator found that the allegation of bias had been waived because it was raised late in the proceedings.

Review

[106] The claimant[30] requested a review on the basis that the Adjudicator committed a palpable and overriding error, and that the Adjudicator misapplied the IAP Model. The claimant also asked that the decision be set aside in light of the "bias conduct" of the Adjudicator. The claimant's position was that the questioning of the claimant by the Adjudicator was improper, and that the Adjudicator failed to adequately question the claimant in the area of opportunity loss.

[107] The Review Adjudicator affirmed the Adjudicator's decision. The Review Adjudicator concluded that there was no bias, "actual or reasonably perceived"; the conduct of the hearing and the questioning of the claimant did not amount to a misapplication of the IAP model; and no palpable and overriding error was made.

[108] The Review Adjudicator noted that the claimant did not in his submissions suggest what the palpable and overriding error of the Adjudicator was. The Review Adjudicator discerned that the claimant was challenging the Adjudicator's findings on

[30] As noted above, the claimant died before the IAP hearing was completed. For the sake of simplicity, I refer to the claimant in describing the subsequent history of the matter, although it is the claimant's estate that has pursued the relief.

credibility. The Review Adjudicator found no palpable and overriding error in this regard.

[109] On the question of bias, the Review Adjudicator held that the objective test for impartiality on the part of decision-makers, as set out in *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369, should apply to adjudicators in the context of the IAP. The Review Adjudicator concluded that an informed person looking realistically and practically at the transcript of the proceeding and the history of the Adjudicator's conduct of the case, would conclude that the Adjudicator acted impartially and without bias. She noted that the Adjudicator had made every effort to give an ailing claimant the best possible opportunity to prove his claim. The Review Adjudicator also noted that no suspicion of bias arose at the hearing itself, and it was only many months later, when counsel read the transcript of the hearing, that the issue of bias occurred to him. The Review Adjudicator concluded that the claimant's counsel, having been satisfied with the conduct of the hearing at the time, formed an impression of the Adjudicator's conduct from the transcript many months later, that was not based in reality.

[110] Regarding the Adjudicator's questioning of the claimant, the Review Adjudicator concluded that the questions impugned by the claimant as indicative of an inclination to disbelieve the claimant were no more that the testing of a claimant's evidence that is required of an adjudicator. Although the Adjudicator asked many leading questions, this is not only permitted, but is often necessary when a claimant is having difficulty testifying, or, as in this case, where the claimant's health requires a shortened hearing. The Review Adjudicator found that there was no evidence the Adjudicator was trying to manipulate the claimant's testimony to his detriment; to the contrary, the Adjudicator often used his questions to assist the claimant, giving him the benefit of the doubt and an opportunity to clarify his answers. The Review Adjudicator agreed that claimant counsel's concern about the Adjudicator's "God" question (which was not raised until a year and a half after the exchange) was a misunderstanding rooted in an error in transcription.

[111] While the Review Adjudicator felt that some of the "common street language" the Adjudicator used was not appropriate unless it were being used to match the language used by the claimant, the Review Adjudicator concluded that since the question was not raised until a year and a half later, neither the claimant nor his counsel took offence at the time.

[112] Regarding the Adjudicator's alleged failure to fully canvass the issue of opportunity loss with the claimant, the Review Adjudicator concluded that the Adjudicator asked questions that were appropriate to the claim being advanced, having regard to the conditions of the hearing, and in particular the claimant's fragile health. The Review Adjudicator also noted that if there was particular evidence that the claimant could have offered with respect to opportunity loss, claimant's counsel was in a position to raise it at the time. In any event, as there was no finding of compensable loss, any dearth of evidence as to opportunity loss made no difference to the result.

Re-Review

[113] The claimant requested a re-review, on the grounds that the Review Adjudicator failed to fully address the issues raised on review. The claimant argued that: (1) the Review Adjudicator improper relied on a "waiver" defence to dismiss the allegations of bias; (2) where it is alleged that a claimant did not receive a fair hearing, it is incumbent on the reviewing adjudicator to obtain and listen to the audio recording of the hearing, rather than rely on a transcript, whereas here the Review Adjudicator accepted the Adjudicator's own account of his actions and accepted that there must have been a transcription error; and (3) the Review Adjudicator improperly accepted Canada's position about the claimant's non-verbal responses to questions and pauses in testimony, and Canada's position that the Adjudicator was respectful to the claimant.

[114] In dismissing the application for re-review, the Re-Review Adjudicator noted that a second review is only available on a misapplication of the IAP Model by the Review Adjudicator, and that the Re-Review Adjudicator's responsibility was

restricted to determining whether that had occurred, and if so, to correct the Review Adjudicator's decision.

[115] Regarding waiver, the Re-Review Adjudicator concluded that the analysis of the Review Adjudicator was in accordance with settled law. The Re-Review Adjudicator rejected the claimant's submission that this was a case where the issue of bias was comingled with more generalized problems of procedural fairness. He found that the Review Adjudicator had correctly determined that the Adjudicator had provided the claimant with a hearing that was procedurally fair and afforded him the best possible opportunity to prove his claim. He found that the Review Adjudicator did not misapply the IAP Model to the facts found by the Adjudicator.

[116] The Re-Review Adjudicator addressed the argument that the Review Adjudicator ought to have obtained and listened to the audio recording, in assessing the Adjudicator's reasoning on the "God" question. While the Re-Review Adjudicator was of the view that it would have been preferable for the Review Adjudicator to have also listened to the audio, he held that nothing significant turned on the fact that she had not. The Re-Review Adjudicator listened to the audio, and found it supported the Adjudicator's rather than claimant counsel's account of what occurred. Specifically, the Review Adjudicator had been correct to conclude that the Adjudicator, believing he may have heard the claimant say he "found God", had simply checked with the claimant to establish whether he had properly understood, at which point the claimant corrected him.

[117] Regarding the allegation that the Review Adjudicator improperly accepted Canada's submissions, the Re-Review Adjudicator noted that the claimant's concern went to the manner in which the Review Adjudicator assessed the evidence, and failed to identify how the Review Adjudicator may have misapplied the IAP Model. In any event, the Re-Review Adjudicator held that the record did not support the suggestion that the Review Adjudicator simply accepted Canada's submission that the Adjudicator was respectful to the claimant, without considering the issue independently.

Parties' Positions on the RFD

Claimant

[118] In his RFD, the claimant seeks the following relief:

a) A declaration that the claimant is entitled to compensation [redacted] at the SL5 level, for consequential harm at the H3 level, and for loss of opportunity at level OL2;

b) In the alternative, an order directing a different adjudicator to assess the claimant's claim based on the transcripts and record in according with the above-mentioned declaration in order to assess the remaining issues, including loss of opportunity and aggravating factors;

c) Costs on a full indemnity basis.

[119] The Claimant's position is as follows:

[120] Jurisdiction: The court can exercise supervisory jurisdiction on an RFD to ensure that claimants obtain the intended benefits of the IRSSA and to ensure that the integrity of the implementation and administration of the agreement and related processes are maintained, and to remedy any deficiencies in the administration of the IAP. The court may also exercise jurisdiction to examine the Chief Adjudicator's decision for compliance with the rules of natural justice, and under this rubric can address questions regarding reasonable apprehension of bias on the part of the Adjudicator.

[121] Here, the court should exercise its jurisdiction because: the claimant was vulnerable due to his age and health, and the fact that his application was filled and submitted by a form-filler working for Blott; and given the number of IAP claims still pending, there is a strong likelihood that the issues raised in this RFD will reoccur, and it is in the public interest for the RFD to be determined on its merits.

[122] Standard of review: The appropriate standard of review for the issue of whether there is a reasonable apprehension of bias on the part of the adjudicator

and matters of procedural fairness is that of correctness. For all other issues, it is reasonableness.

[123] Reasonable apprehension of bias: Impartial adjudication is crucial to the IAP. The appropriate test for finding a reasonable apprehension of bias is that set out by de Grandpré J. in *Committee for Justice and Liberty*. It is an objective test.

[124] In this case, the Adjudicator's conduct raised a reasonable apprehension of bias. He engaged in a prosecution-style cross-examination of the claimant in a manner that suggested he believed the claimant's claim was fabricated, and was intent on confirming his pre-determined perception of the case. This cross-examination started very early in the hearing and amounts to "badgering" of the claimant. In effect, the Adjudicator's questions suggest that he was simply never satisfied no matter how much or how well the claimant tried to respond to questions on his recollection of the sexual assaults. Other questions indicate the Adjudicator was attempting to get the claimant to change his story to match with the Adjudicator's pre-determined view. Others were filled with inappropriate innuendo, insensitive, disrespectful, sarcastic and without basis.

[125] The Adjudicator's approach was inconsistent with the IAP Model, which makes it clear that leading questions are only permitted to "draw out the full story from the witness", and the "test the evidence that is given". Here, the claimant was given little or no chance to explain what happened to him. The unwarranted prosecution-style question of the claimant was not justified by the IAP provisions on leading questions and cross-examination.

[126] In his ruling on the recusal motion, the Adjudicator improperly invoked the principle of waiver, and the Review Adjudicator and Re-Review Adjudicator also erred in this regard. The application for recusal was made before final submission and decision, and there was therefore no issue of delay in bringing the application in order to obtain a "tactical" advantage. The objective test for reasonable apprehension of bias, which requires that the observer have though the matter through, contemplates that some time will be necessary to "think the matter

through." Finally, a plea of waiver can have no application in cases, like this one, where the bias allegation is tied to what is said or done during the decision-making process.

[127] The Review Adjudicator failed to enforce the IAP Model: The Review Adjudicator abdicated her role under the IAP in failing to consider the cumulative effect of all the questions and comments that gave rise to the reasonable apprehension of bias, and instead, only focussed on the "God" question.

[128] The Re-Review Adjudicator failed to decide whether the Adjudicator misapplied the IAP Model: The Re-Review Adjudicator held that his responsibility was restricted to deciding whether the Review Adjudicator misapplied the IAP Model to the facts found by the Adjudicator. This was an error, and contrary to the direction of Justice Perell in *Fontaine v Canada*, 2016 ONSC 4326 at paras. 63-66, which held that the re-review adjudicator must ask whether ***either or both*** of the adjudicator and reviewer failed to apply the IAP Model.

[129] Like the Review Adjudicator, the Re-Review Adjudicator abdicated his role under the IAP in failing to consider the cumulative effect of all the questions and comments that gave rise to the reasonable apprehension of bias, and instead, only focussed on the "God" question.

Canada

[130] Jurisdiction: *Schachter* applies, and the claimant must show extraordinary circumstances before one of the Supervising Courts can intervene.

[131] Reasonable apprehension of bias not extraordinary circumstance: The allegations of bias as framed by the claimant do not meet the *Schachter* threshold. In any event, other supervisory judges have confirmed that judicial recourse is not available for allegations of bias in the IAP: see Winkler CJO in *Fontaine v Canada (AG)* (September 26, 2011) (ONSC) 00-CV-192059CP (Direction), in which he held that once the Chief Adjudicator has rendered his or her review decision, the provisions for review within the Settlement Agreement are exhausted.

[132] There are no other extraordinary circumstances: The review and re-review decisions thoroughly address the same allegations that the claimant now makes in the RFD. The claimant has failed to discharge the onus of proving a patent failure by the Chief Adjudicator to apply the terms of the RFD.

AFN

[133] Reasonable apprehension of bias: A claim of reasonable apprehension of bias must be assessed under an objective lens.

Independent Counsel

[134] Jurisdiction: Independent Counsel echoes the submission of the claimant as to the Courts' supervisory jurisdiction.

[135] Reasonable apprehension of bias: Reasonable apprehension of bias must be assessed on an objective standard. A claim of apprehension of bias must be addressed on its merits when it is raised prior to final submission based on the Adjudicator's conduct prior to final submissions. In considering such a claim, it is incumbent on adjudicators and reviewers to consider the long-term objectives of the IRSSA as set out in the Preamble, and in particular, whether the adjudicator's rejection of such a submission contributes to a "listing resolution of the legacy of the Indian Residential Schools" or "promot[es] healing… truth and reconciliation". In the Independent Counsel's submission, rejection of the submission does not do so.

[136] Independent Counsel supports the claimant's position that he has established a reasonable apprehension of bias on an objective standard in this case.

RFD R-11791

Claim

[137] Claimant R-11791 [redacted] was resident at [redacted] IRS between 1978 and 1988. [redacted]

[redacted] She claimed compensation for abuse at the SL2 level, harm at Level 3, and loss of opportunity at Level 3.

[138] [redacted] was the subject of what is termed a "POI Report". POI Reports were prepared by Canada and updated as further information became available.[31] An updated POI Report was prepared in this instance.

Adjudicator's Decision

[139] The original Adjudicator dismissed the claim and awarded no compensation. The Adjudicator found that the claimant had failed to prove, on a balance of probabilities, that [redacted]. In particular, the Adjudicator found that the claimant's evidence was not credible or reliable. The Adjudicator noted that there were inconsistencies between the application and the oral evidence, the claimant did not correctly identify her alleged perpetrator, and if the claimant's version of events were true, it would have meant that she put herself in harm's way a number of times.

[140] The identity of [redacted] and the overlap of [redacted] employment with the claimant's attendance at the school was one of the issues at the hearing. The Adjudicator concluded that the [redacted] described by the claimant, while a known person, was not working at the school during the period by the claimant. The Adjudicator first noted that despite the claimant's recollection that she was six years old when she went to residential school (which was in 1978), available records showed she was admitted there on August 31, 1980. The Adjudicator's evaluation of the evidence regarding the perpetrator was as follows:

> Although [the claimant] did not name [redacted] during her initial testimony, it was known that there was a [redacted] whose name was "X" who used to work at the Residence, [redacted] who has been named as a sexual predator by others. At one point in the hearing [the claimant] was provided with the name of two employees who worked as [redacted]. She said she recognized the name of "X" and also testified that she can recall hearing some of the teachers using his first name when they spoke about him. She said he was the man [redacted].

[31] See Schedule D, Appendix VIII, Government Document Disclosure.

> The employment report for "X" shows that he worked there on dates from 1975 to 1977 so he had ceased working there at least three years before the claimant arrived in August, 1980.
>
> [...]
>
> Counsel also addressed the outcome of the research carried out by Canada with respect to the [redacted]. He cautioned that although [the claimant] confirmed that she recognized the name of "X" and confirmed that he was her abuser, that she did not say that she was absolutely certain that it was this man [redacted]. I do note, however, that after hearing the name, "X" from me, she testified that she has a specific memory of teachers referring to [redacted] using the first name of the employee named "X." This was spontaneous information that came without any prompting from me and without any hesitation on her part.
>
> Unfortunately, despite her testimony and as already documented, the staffing records make it clear that "X" was not [redacted] when [the claimant] was a student there. I have given careful consideration to Mr. Racine's submission that there is not enough evidence before me to find that she was positive that the name of her abuser was "X" as [redacted]
>
> In considering and weighing this submission, I have listened to the audiotape of her testimony several times and reviewed the transcript. I do not accept his characterization of her testimony on identity, especially since she is certain that there was [redacted] and her estimate of the age of the man who abused her accords with the age range of "X.'
>
> [...]
>
> When she eventually acknowledged a memory of the name of the [redacted] "X," [redacted] it was established that he only worked at [redacted] from April 1975 to March 1976 and from September 1976 to March 31, 1977. Since the claimant was not admitted there as a student and resident until August 31, 1980 there was no overlap between their tenure so it is virtually certain that she was not abused by "X."
>
> One could theorize, as submitted by Mr. Racine, that the name she confirmed for the POI was not correct and so the POI research should not be considered a factor in assessing the credibility and reliability of her allegations. It would be more than passing strange that a man who is known to be of the age range and description given by the claimant [redacted], would replace "X" and work as [redacted] after her arrival in the August 1980 and to at least her departure date in the fall of 1988.

Review

[141] The claimant requested a review on the basis that in assessing the claimant's credibility and reliability, the Adjudicator committed a palpable and overriding error by overstating the inconsistencies, in relying excessively on Canada's research (which was not established at complete and accurate), and in her treatment of the

claimant's evidence as to what the Initial Adjudicator characterized as the claimant putting herself in harm's way.

[142] The Review Adjudicator noted that her task was not to review the Adjudicator's decision on a standard of correctness and recognized that deference was owed to the Adjudicator's findings, unless the Review Adjudicator found that Adjudicator misapplied the Model or that her decision contained a palpable and overriding error. The Review Adjudicator did not consider that the Adjudicator's decision contained an error that was clear and plain, or an error that was sufficient to vitiate the challenged findings of fact. In particular, the Review Adjudicator noted that:

- the Adjudicator's decision identified at least two examples of inconsistent evidence;
- the Adjudicator was faced with conflicting evidence as to the overlap between the claimant's attendance and the perpetrator's employment [redacted]. Moreover, the Adjudicator's decision to place greater weight on Canada's research than on the claimant's testimony was entitled to deference;
- although the Adjudicator's reasoning path as to why there was no overlap between the person of interest's employment at the school and the claimant's residence was less than clear, her finding fell within a reasonable range of outcomes.

[143] The Review Adjudicator observed that the Adjudicator's comments about the claimant putting herself in harm's way did not form part of the Adjudicator's conclusion on credibility and reliability. The Review Adjudicator agreed that it was not clear what the Adjudicator's concern was with the claimant's evidence as to why she continued to go the washroom alone. If the Adjudicator had intended to suggest that the claimant was a willing participant, the Review Adjudicator disagreed with that conclusion. However, the Review Adjudicator held that while the Adjudicator's comments were not entirely clear, they did not establish a basis to interfere with the Adjudicator's decision.

Re-Review

[144] Claimant R-11791 requested a re-review, asserting misapplication of the IAP Model. In particular, the claimant argued that the Review Adjudicator was wrong to hold that the Adjudicator's conclusion on credibility and reliability was reasonable, given that the Review Adjudicator found the reasoning path to be less than clear on two occasions; was wrong in concluding that the comments about the claimant putting herself in "harm's way" did not form part of the Adjudicator's conclusion to dismiss; and did not properly address the Adjudicator's conclusions on the inconsistencies in the evidence.

[145] After filing the request, the claimant asked that updated POI research on [redacted], obtained in another file, be considered by the Re-Review Adjudicator. The claimant submitted that the updated research contained information that the janitor was employed [redacted] until 1985, and not 1977 as stated in the original research.

[146] The Re-Review Adjudicator dismissed the request for re-review. He noted that complete deference was owed to the Adjudicator's findings of fact, and that his role was to determine whether the rules and principles found in the IAP Model had been correctly applied to those findings of fact. The Re-Review Adjudicator noted that as long as there was some evidence on which the Adjudicator reasonably based her findings as to credibility and reliability, a deferential approach must be taken. The Re-Review Adjudicator found that the Review Adjudicator provided a clear and reasoned analysis to explain why she deferred to the Initial Adjudicator's findings. On the question of inconsistencies in the claimant's testimony, the Re-Review Adjudicator found that the Review Adjudicator had correctly deferred to the Adjudicator's findings, and noted that there is no place on a second review for a re-examination of the facts or a further analysis of palpable and overriding error.

[147] On the handling of the claimant's explanation of why she put herself in "harm's way", the Re-Review Adjudicator disagreed with the Review Adjudicator's view that this evidence was not relevant to the claimant's credibility. The Re-Review

Adjudicator found that it "did not make logical sense for the claimant to allege unwanted touching yet return to the bathroom only to be assaulted again". For this reason, the Re-Review Adjudicator agreed with the Review Adjudicator, for different reasons, that the application of the "harm's way" evidence did not form the basis of a review.

[148] Finally, the Re-Review Adjudicator addressed the updated evidence as to when the POI worked at the school. This evidence was not before the Re-Review Adjudicator, but he held that, in any event, the IAP Model did not permit him to consider it. Although he acknowledged that the evidence "would have had a very significant impact on the Adjudicator's reasoning if it was available to her at the time when the hearing was heard in October of 2011", there was no procedural misstep or denial of natural justice during the hearing process. The Re-Review Adjudicator was troubled by the possibility that historical records now revealed the opposite of what the Adjudicator was provided, but held that the correct avenue for the claimant was to make an application for direction to the Supervising Courts.

Parties' Positions on the RFD

Claimant

[149] In her RFD, the claimant seeks the following relief:

a) A declaration that the claimant is entitled to compensation [redacted] at the SL2 level, for consequential harm at the H3 level, for aggravating factors at 8% and for loss of opportunity at level OL4;

b) In the alternative, an order directing a different adjudicator to assess the claimant's claim in accordance with the court's directions;

c) Costs on a full indemnity basis.

[150] The claimant's position is as follows:

[151] Jurisdiction: The court has four sources of jurisdiction over the performance of the IRSSA including the IAP, as see out in *Fontaine v Canada (AG)*, 2016 ONSC

4326 at para 34. The Courts can exercise supervisory jurisdiction on an RFD to ensure that claimants obtain the intended benefits of the IRSSA and to ensure that the integrity of the implementation and administration of the agreement and related processes are maintained, and to remedy any deficiencies in the administration of the IAP.

[152] Here, the court should exercise its jurisdiction because: the case involves Canada's failure to fulfill its obligations to provide accurate POI reports, leading to a gross miscarriage of justice; the claimant was vulnerable because she had no control over how and when Canada fulfills its obligation to release documents; and given the number of IAP claims still pending, there is a strong likelihood that the issues raised in this RFD will reoccur, and it is in the public interest for the RFD to be determined on its merits.

[153] Standard of review: The appropriate standard of review is reasonableness. The Re-Review Adjudicator's conclusion that the updated POI report may very well have resulted in a decision in favour of the claimant, and that he had no jurisdiction to make use of the updated information, are findings of mixed law and fact.

[154] The Adjudicator's findings on an inaccurate POI report constitute a palpable and overriding error: Although the Adjudicator made reference to some other inconsistencies, it was her reliance on Canada's research as to the time of the POI's employment that was the main reason for her decision to disbelieve the claimant. As the Re-Review Adjudicator observed, the updated information would have had a significant impact on the Adjudicator's decision. The decision therefore contains a palpable and overriding error.

[155] The Review Adjudicator erred by applying judicial review criteria instead of the IAP test: The Review Adjudicator applied a *Dunsmuir* standard of review by speaking in terms of a "reasonable range of outcomes", which is not the appropriate approach under the IAP.

[156] The Re-Review Adjudicator failed to decide whether the Adjudicator misapplied the IAP Model: The Re-Review Adjudicator's decision focused only on the Review Adjudicator's decision, and not on whether the Adjudicator properly applied the IAP Model. This was an error, and contrary to the direction of Justice Perell in *Fontaine v Canada (AG)*, 2016 ONSC 4326 at paras. 63-66, which held that the re-review adjudicator must ask whether ***either or both*** of the adjudicator and reviewer failed to apply the IAP Model.

[157] The Re-Review Adjudicator failed to apply the IAP Model by declining to act on the updated POI report: The Re-Review Adjudicator's failure to correct what he rightly viewed as a flawed decision brings the administration of justice into disrepute and occasioned a grave miscarriage of justice.

Canada

[158] Jurisdiction: *Schachter* applies, and the claimant must show a patent failure by the Chief Adjudicator to apply the terms of the IRSSA before one of the Supervising Courts can intervene.

[159] The updated POI report does not constitute extraordinary circumstances: The claimant was afforded the full benefits of the IAP process: the right to have a fair and impartial hearing on the merits of her claim, with the benefit of all of the evidence available at the time to Canada, and any evidence gathered by her own counsel. The IAP claim proceeded according to the IAP Model, and that this court has no jurisdiction to consider the claim.

[160] In this matter, Canada provided the most current POI Report available prior to hearing. A newer POI Report was not created until after the Hearing Decision and Review Decision were rendered. The IRSSA and IAP, by agreement of the parties, necessarily require that as new evidence is received (via claims assessment and through other means), certain disclosure materials may evolve over time. This feature of the IAP was negotiated to ensure that IAP claimants would be afforded the best support for their claims on a continual basis, not as a reason to call into question the finality or fairness of earlier IAP claims.

[161] In any event, the POI Report was merely one part of the interconnected factual matrix analysed by the Hearing Adjudicator. Any after-the-fact change to the evidence may affect the entire factual matrix, including the Hearing Adjudicator's assessment of the compensability of an IAP claim. To request such relief from this Honourable Court undermines the expertise, independence, and exclusive roles of IAP adjudicators.

[162] As noted by Perell J in his decision concerning the *St. Anne's* RFD, even if Canada had breached a disclosure obligation (which is not the case here), there remains a very high threshold for judicial recourse. The prejudice from non-disclosure has to be more than a theoretical miscarriage of justice.

Independent Counsel

[163] Independent Counsel supports the claimant's position. Independent Counsel submits that while it is true that the IRSSA provides that all reviews are on the record with no new evidence allowed, in this case the new evidence was not disclosed by the defendant until before the Re-Review took place and it showed clearly that the alleged perpetrator had indeed been employed at the school at the relevant time.

Analysis

The Courts' Jurisdiction to Entertain a "Judicial Recourse" RFD

General Principles

[164] All parties are generally agreed that the Courts, through the Supervising Judges, have the power to issue directions if satisfied that the Chief Adjudicator or his delegate has failed to properly implement the IRSSA.[32] The source of the Courts' ongoing supervisory jurisdiction is four-fold: the inherent jurisdiction of a superior court; the *Class Proceedings Act*; this court's Approval Order of March 2007 and Implementation Order of March 2007; and the express terms of the IRSSA regarding the ongoing role of the courts.

[32] This is the test articulated by the Court of Appeal for Ontario in *Schachter*. Although *Schachter* is not binding in British Columbia, its reasoning is generally considered persuasive and it has been accepted by courts across Canada.

[165] In my view, the relevant principles when it comes to the exercise of the Courts' supervisory jurisdiction are as follows:

- Decisions of the Chief Adjudicator (or his delegates) are not reviewable by appeal. The underlying litigation is at an end, and the relationship between the parties is governed by the terms of the IRSSA and the court orders approving the IRSSA. There is clearly no right to appeal each determination made within the context of the IAP.

- Decisions of the Chief Adjudicator (or his delegates) are not reviewable by judicial review, as the IAP adjudicators are creatures of contract, not statute. To the extent that the Courts permit judicial recourse in light of "very exceptional circumstances", they should avoid granting remedies normally associated with judicial review, such as quashing re-review decisions (as was sought, for example, by F-10779).

- Looking at the contract the parties made, it is apparent that some supervisory role of the Courts is anticipated. The Implementation Order contains an express provision that, "the Courts shall supervise the implementation of the Agreement and this order and, without, limiting the generality of the foregoing, may issue such further and ancillary orders, from time to time, as are necessary to implement the Agreement..."

- Accordingly, pursuant to the terms of the IRSSA and the Implementation Orders, IAP decisions of the Chief Adjudicator (or his delegates) are reviewable on a limited basis in cases where the final decision of the Chief Adjudicator (or his delegate) reflects a failure to comply with the terms of the IRSSA. This will be an exceptional circumstance.

- In exercising this power, Supervising Judges should be mindful to not interfere with the exclusive role of IAP adjudicators to control their own processes and make findings of fact. They must also be mindful to not provide the parties with a right of appeal or judicial review not contemplated by the IRSSA itself.

- The Courts' supervisory jurisdiction does not extend to varying the terms of the IRSSA as agreed upon by the parties. A Supervising Judge can only order that the terms of the IRSSA be enforced.

Parties' Positions

[166] The court heard submissions on the threshold issue of jurisdiction to entertain judicial recourse RFDs, not only from the claimants in the various RFDs and Canada, but also from the intervenors. The fundamental question that divides the

parties and the intervenors on this threshold issue is whether and to what extent the Courts can review the substantive decisions of IAP adjudicators.

[167] The claimants and some of the intervenors, to varying degrees, argue for a broader right of intervention. They say that error correction in the name of justice is justified and even required by the IRSSA's objectives of achieving fair compensation and reconciliation. While they agree that the IRSSA aims for closure, they say meaningful closure cannot take place if claimants are unfairly denied compensation. The AFN in particular argues that in exchange for the extinguishment of their individual claims, IAP claimants are entitled to the "complete and accurate assessment of their claims by adjudicators" and "a reasonable interpretation of compensation rules."

[168] Canada and the Chief Adjudicator both argue that the Courts' jurisdiction to remedy "failures to comply with the terms of the IRSSA" must be interpreted very narrowly. Otherwise, the bargained-for benefits of the IRSSA will be lost. These include the benefit of having claims determined quickly, fairly, and with an element of finality and predictability by carefully-chosen adjudicators who were selected for their expertise and unique qualifications. To give claimants a broad right of review that is akin to a right of appeal or judicial review undoes the bargain struck by the IRSSA, and jeopardizes the foundations of an agreement that has seen the successful, prompt and final resolution of thousands of claims.

[169] Canada notes that whereas the IRSSA expressly provides for access to the Courts in certain limited circumstances,[33] the parties did not provide for judicial recourse in relation to the substantive decisions of IAP adjudicators.

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[33] These include: the determination of applications pursuant to Article 12, to add insititutions to the list of Indian Residential Schools; permitting complex IAP matters to be referred to the Courts under Schedule D, para. III b. iii where the amount of actual income loss exceeds the $250K limit available within the IAP (as in *Fontaine v. Canada (Attorney General)*, 2013 MBQB 272, aff'd in *Fontaine v. Canada (Attorney General)*, 2014 MBCA 93); and the process for CEP Court Appeals (Article 5.09).

Jurisprudence on Judicial Recourse

[170] In 2011, in his capacity as Eastern Administrative Judge of the IRSSA, Winkler CJO released the seminal decision on judicial recourse from the IAP, in *Schachter* at first instance.[34] The decision analyses a Request for Direction following a review of the fairness and reasonableness of the legal fees that the Requestor had contracted to charge its client in the IAP.[35] Winkler CJO determined that there is no right to appeal or judicially review decisions of the Chief Adjudicator.[36]

[171] Again in 2011, Winkler CJO released a further decision involving judicial recourse from the IAP in the *SSJSSM RFD*. The decision addresses a Request for Direction regarding "the proper procedure for dealing with allegations of bias on the part of an adjudicator during an [IAP] hearing."[37] Winkler CJO found that allegations of bias "fall squarely within the ambit of the Chief Adjudicator's review mandate."[38] Winkler CJO went on to hold that:

> Once the Chief Adjudicator has rendered his or her review decision, the provisions for review within the [IRSSA] are exhausted. There is no further right of appeal. While the supervising courts maintain jurisdiction over the settlement and its implementation, a supervisory jurisdiction does not give a party of the settlement a general right of appeal, in the absence of specific language in the [IRSSA]. The [IRSSA] contains no such right.[39]

[172] In 2013, the Supervising Judge for Quebec addressed an application for an annulment of a decision by the Hearing adjudicator in an IAP hearing in the *J.C. RFD*.[40] The hearing adjudicator had granted compensation for sexual abuse at an IRS. The applicant, who was the alleged perpetrator, sought to challenge the finding

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[34] *Fontaine v Canada (AG)* (7 March 2011), Ont SC 00-CV-192059CP (Direction) ["*Schachter ONSC*"]

[35] *Schachter ONSC*, *supra* at para 24.

[36] *Ibid* at paras 19 & 22.

[37] *Fontaine v Canada (AG)* (September 26, 2011) (ONSC) 00-CV-192059CP (Direction) ["*SSJSSM RFD*"] at para 1.

[38] *Ibid* at para 19.

[39] *Ibid* at para 22.

[40] *Fontaine c. Canada (Procureur général)*, 2013 QCCS 553 [2013] 3 CNLR 266 (Unofficial Translation) ["*J.C. RFD*"] at para 1.

that abuse had taken place, claiming a breach of his rights under IAP procedure.[41] Chief Justice Rolland cited the *SSJSSM RFD*,[42] and declined to interfere with the adjudicative decision because "the Adjudicator made his decision in accordance with the provisions of the IRSSA."[43]

[173] Meanwhile, in 2012, the Court of Appeal for Ontario upheld Winkler CJO in *Schachter*, confirming that no appeal or judicial review lies from an IAP decision.[44] On the availability of some other "process, other than an appeal or judicial review, [...] to review a decision by the Chief Adjudicator,"[45] the Court of Appeal for Ontario has imposed a high jurisdictional threshold, permitting judicial recourse from the IAP only in "very exceptional circumstances."[46] Such a threshold recognizes that the IAP is a negotiated contract and a complete code. It reflects the parties' intention that "implementation of the [IRSSA] be expeditious and not mired in delay and procedural disputes."[47] It also respects "both the importance of the finality of decisions under the [IRSSA] and the relative expertise of the Chief Adjudicator [...]."[48]

[174] The Court of Appeal's decision in *Schachter* is cited frequently for its general principles about the source of, and limits on, the Court's review powers. It has been consistently followed. As noted above, *Schachter* arose in the context of a legal fee dispute, a matter governed not by Schedule "D" to the IRSSA and the IAP Model. There are, however, four post-*Schachter* cases that have specifically considered the role of the Courts in RFDs arising out of the decisions of IAP adjudicators.

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[41] *Ibid* at paras 50 - 65.

[42] *Ibid* at para 94.

[43] *Ibid* at para 95.

[44] *Schachter*, *supra* at paras 50 and 51.

[45] *Ibid* at para 53.

[46] *Ibid*.

[47] *Ibid*. at para 54.

[48] *Ibid* at para 78.

- In *Fontaine et al v. Canada (Attorney General) et al*, 2014 MBQB 200 (the "Claimant as Employee case"), Justice Schulman considered the proper interpretation of the IRSSA where the former student of a residential school was subsequently employed at the school while still a minor, and sexually assaulted by another employee. The Review Adjudicator determined that the claimant was entitled to be compensated. The Re-Review Adjudicator determined she was not. Justice Schulman noted that there were conflicting decisions on the issue, and the matter was of the utmost importance. He therefore found it fell within the exceptional circumstances outlined in *Schachter*.

- In *Fontaine et al v. Canada (Attorney General) et al,* 2015 ABQB 225, [2015] A.J. No. 376 (QL) (the "*Grouard* case"), Justice Nation was asked for directions on whether IAP adjudicators had the jurisdiction to determine whether a particular school was an IRS. The claimant in that case specifically took the position that IAP adjudicators were not meant to have the power to determine that a particular school had ceased operating as an IRS. Canada took the position that IAP adjudicators did have this jurisdiction. Interestingly, it does not appear that Canada took the position at this RFD that Justice Nation should not even determine whether the IAP adjudicators had this jurisdiction or not. Canada seems to have accepted that on an RFD, a Supervising Court can give directions about the extent and limits of an IAP adjudicator's jurisdiction.

  Justice Nation applied principles of contractual interpretation to determine the question before her: whether IAP adjudicators did or did not have the jurisdiction to determine which institutions were operating as an IRS. Having determined that they did have that jurisdiction, Nation, J. indicated it was not necessary for her to determine further whether the adjudicator's factual determination in the case before her – that the Grouard School was not an IRS at the relevant time – was or was not erroneously made. However, notwithstanding this finding, Justice Nation did express her views on that issue, in order to give guidance for similar cases that might arise in the future.

- In *Fontaine et al v. Canada (Attorney General) et al* 2016 MBQB 159 ("J.W."), Justice Edmond held that the Court's power to ensure the implementation and enforcement of the provisions of the IRSSA included a power to ensure that IAP adjudicators do not overstep their jurisdiction. He further concluded that IAP adjudicators do not have jurisdiction to apply a highly unreasonable legal interpretation to the terms of the IRSSA in determining whether a compensable claim has been made out. He found that his power of review was confined to cases where an unreasonable interpretation of the IAP Model in fact was so significant as to amount to a failure to comply with the terms of the IRSSA, in that the unreasonable interpretation resulted directly in claimants being denied the compensation that the IRSSA – reasonably interpreted – intended them to receive. Accordingly, Justice Edmond found that his jurisdiction in reviewing the substantive decisions of IAP adjudicators was confined to ensuring that the re-review adjudicator did not endorse a legal interpretation that is so unreasonable

that it amounts to a failure to properly apply the IAP to the facts of a particular case.

- In *Fontaine et al v. Canada (Attorney General) et al* 2016 ONSC 4326 (the "Spanish IRS Case"), Justice Perell considered a case where an adjudicator had accepted that a claimant had been sexually abused by an IRS employee. However, she used her own extra-curial knowledge to deduce that the abuse must have occurred once the claimant reached a certain age, at which point the IRS in question had closed and ceased to operate as an IRS. She denied compensation on this basis. Subsequently, it was discovered that the adjudicator's conclusion was incorrect: the employee had in fact departed the IRS prior to its closure, and so the abuse must have happened while the institution operated as an IRS. Justice Perell considered that the adjudicator's use of extra-curial knowledge (expressly prohibited by the IAP Model) resulted in a palpable and overriding error and in a failure to apply the IAP Model to the facts. The failure of these errors to be corrected on review and re-review were significant enough to amount to a failure to apply the IAP Model.

Discussion

[175] I have concluded that recourse to the Supervising Courts in respect of decisions of IAP adjudicators is governed by the principles set out in *Schachter*, and must be limited to exceptional circumstances.

[176] Firstly, I cannot accept the submission that *Schachter* is "just a fees review case". Clearly the Court of Appeal for Ontario turned its mind to the broader issue of judicial recourse following exhaustion of all levels of review made available within the IAP. As in the cases before me, the Court of Appeal was concerned with judicial recourse following a final decision of the Chief Adjudicator or his delegate.

[177] Similarly, I cannot accept that *Schachter* grounds a general "curial review" jurisdiction. In my view, the Court of Appeal for Ontario accepted that the parties to the IRSSA intended that access to the supervising judges be extraordinarily limited insofar as the IAP is concerned. I note that the phrase "curial review" does not even appear in *Schachter*. Moreover, the phrase "curial review" suggests a right to seek review before the Courts and a standard of review, both of which are untenable given the guidance provided by the Court of Appeal for Ontario in *Shachter*. The preferable phrase – and concept – is judicial recourse. The Court of Appeal has

explained that "the right to seek judicial recourse is limited to very exceptional circumstances".[49]

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

[179] In my view, Wagner J. explained the "why of it" well, particularly in respect of adjudicators' factual findings, in *Benhaim v. St.-Germain*, 2016 SCC 48. As Wagner J. put it at para. 37:

> [37] It may be useful to recall the many reasons why appellate courts defer to trial courts' findings of fact, which were described at length in *Housen*, at paras. 15-18. Deference to factual findings limits the number, length and cost of appeals, which in turn promotes the autonomy and integrity of trial proceedings. Moreover, the law presumes that trial judges and appellate judges are equally capable of justly resolving disputes. Allowing appellate courts free rein to overturn trial courts' factual findings would duplicate judicial proceedings at great expense, without any concomitant guarantee of more just results. Finally, according deference to a trial judge's findings of fact reinforces the notion that they are in the best position to make those findings. Trial judges are immersed in the evidence, they hear *viva voce* testimony, and they are familiar with the case as a whole. Their expertise in weighing large quantities of evidence and making factual findings ought to be respected.

[180] This principle of deference is even more imperative in this case. Despite my years of administering the IRSSA, it would be impossible for me to know better than those who have been immersed in the IAP since the IRSSA and with it, the IAP Model were implemented. This is plainly a setting where a deferential approach is both warranted and essential. The Courts are simply not well-placed to make findings of fact.

[181] Similarly, deference is warranted when it comes to legal interpretations of the IAP Model by adjudicators. There is a parallel to be drawn to the deference that courts accord to tribunals interpreting their home statute. While I do not view the

[49] *Schachter*, *supra* at para 53

Supervising Courts' role on an RFD as analogous to conducting a judicial review of a tribunal decision, the principle is the same: subject matter expertise and familiarity with the relevant governing instruments – and with how they are applied in context – attracts deference.

[182] I reject the contention that finding a limited right of judicial recourse amounts to importing a "privative clause" into the IAP. Determining the jurisdiction of the Supervising Courts requires an interpretation of the entire package of documents that governs the IRSSA's administration. Similarly, I reject the concept of "curial review" which connotes an approach to judicial recourse and a standard of review that cannot readily be ascribed to the parties' intentions when negotiating the IRSSA. In my view, the better term and governing approach is that adopted by the Ontario Court of Appeal, namely that "judicial recourse" should be available only where only there arise "very exceptional circumstances". In my view, that is the only approach that is consonant with the intentions of the parties to the IRSSA.

[183] We are left to consider when judicial recourse would be possible if *Schachter* is interpreted as I have, and as I believe the Court of Appeal for Ontario intends. As Canada pointed out in its written submissions, judicial recourse would be available where a re-review decision of the Chief Adjudicator reflects a patent disregard for the IAP Model's compensation rules, such as a failure to award compensation on the basis of the rubric it provides.

Application to These RFDs

[184] For the following reasons, I conclude that the circumstances of none of the RFDs under consideration involves exceptional circumstances permitting judicial recourse to the Supervising Courts.

F-11079

[185] The Re-Review Adjudicator found that the Adjudicator did not properly apply the IAP Model when the Adjudicator concluded that harms caused by [redacted]

[redacted] were compensable under the IAP Model. In the Re-Review decision, those harms were considered non-compensable because [redacted] did not have a contract of employment with an IRS, and because the claimant had been delivered out of the care and control of the IRS staff and into the care and control of [redacted].

[186] In my view, this case raises two issues:

a) Did the Re-Review Adjudicator err in effectively granting Canada a level of review it was not entitled to?

b) Was there an exceptionally unreasonable error of law (i.e. an error so unreasonable that it amounts to a failure to apply the IAP Model)?

Did the Re-Review Adjudicator erred in effectively granting Canada a level of review it was not entitled to?

[187] Under the IAP Model, Adjudicators are meant to be the finders of fact. They are then meant to apply the IAP Model to the facts as found by them. Canada can only seek review and re-review on the basis that the IAP Model was improperly applied to the facts as found by Adjudicator.

[188] Theoretically, then, if a Re-Review Adjudicator made a decision in Canada's favour and in so doing failed to defer to the facts as found by the Adjudicator, then it could be argued that the Re-Review Adjudicator had given Canada a level of review it was not entitled to under the clear terms of the IRSSA. This might, theoretically, justify Court intervention in clear and exceptional cases.

[189] However, this theoretical basis for intervention is not made out on the facts of this case.

[190] Pursuant to Schedule D of the IRSSA, compensation under the IAP is available in following circumstances:

> Where a sexual or physical assault was committed on a resident or student of an IRS by an adult, the following tests must be met:

> a) Was the alleged perpetrator an adult employee of the government or a church entity which operated the IRS in question? If so, it does not matter whether their contract of employment was at that IRS.
>
> b) If the alleged perpetrator was not an adult employee, were they an adult lawfully on the premises?
>
> c) Did the assault arise from, or was its commission connected to, the operation of an IRS? This test will be met where it is shown that a relationship was created at the school which led to or facilitated the abuse. If the test is met, the assault need not have been committed on the premises.

[191] The Adjudicator found [redacted] satisfied the definition two ways: pursuant to Part (a) he was "an adult employee of the government" in that he was employed by the Department of Indian Affairs; and pursuant to Part (c) there was sufficient evidence that the relationship was created at the school which led to or facilitated the abuse.

[192] The Review Adjudicator agreed with the Adjudicator. The Re-Review Adjudicator noted at paragraph 19 that he was required to give complete deference to the initial Adjudicator's finding of facts. He was to determine whether the initial Adjudicator applied the IAP Model properly to the facts as found by the initial Adjudicator. "Properly" indicates a correctness standard.

[193] Applying this standard of review, the Re-Review Adjudicator found that the Adjudicator had misapplied the IAP Model.

[194] [redacted] did not fall within Part (a) of the test, because the words "an adult employee of the government" were qualified by the words "which operated the IRS in question." As [redacted] was not an employee operating the IRS in question (a fact that was accepted by the Adjudicator), the abuse he perpetrated was not compensable under the IAP.

[195] Further, [redacted] did not fall within Part (c) of the test, because the Adjudicator found as a fact that the Requestor was delivered out of the care and control of the IRS staff and into the care and control of Mr. D.

[196] The claimant has not pointed to any facts found by the Adjudicator that were overturned or not deferred to by the Re-Review Adjudicator. The claimant has not

pointed to any facts relied upon by the Re-Review Adjudicator that were not facts found by the Adjudicator.

[197] Rather, the Re-Review Adjudicator applied a different interpretation of the IAP Model to the facts as found by the Adjudicator, which he was entitled to do following Canada's request for a re-review.

Was there an Exceptionally Unreasonable Error of Law?

[198] In the J.W. case, Justice Edmond, the Supervising Judge for Manitoba dealt with a case where the Adjudicator had expressly found that she could not make a finding that a claimant's sexual integrity had been violated unless the claimant could prove that the perpetrator had a sexual purpose in grabbing the claimant's penis. The Adjudicator's decision was upheld on review and re-review. In considering his jurisdiction to hear the RFD, Justice Edmond wrote,

> I find that my jurisdiction in reviewing the substantive decisions of IAP adjudicators is confined to ensuring that the Re-Review Adjudicator did not endorse a legal interpretation that is so unreasonable that it amounts to a failure to properly apply the IAP to the facts of a particular case. In my view, this is consistent with Sattva and how Sattva has been applied by other courts in the IRSSA context: see Fontaine v. Canada (Attorney General), 2014 MBQB 200 at paras. 54-56 and Fontaine v. Canada (Attorney General), 2014 MBCA 93 at paras. 37-40.

[199] The question here is whether, as a matter of law, the legal conclusions of the Re-Review Adjudicator were so unreasonable as to amount to a failure to properly apply the IAP model. I do not find that this high threshold is reached.

[200] There were essentially two legal interpretation issues in this case. First, the IAP Adjudicators were required to consider: "Was the alleged perpetrator an adult employee of the government or a church entity which operated the IRS in question?" The Adjudicator found the words "which operated the IRS in question" did not qualify the words "adult employee of the government." The Re-Review Adjudicator found otherwise. There is nothing exceptionally unreasonable about this conclusion.

[201] Second, the IAP Adjudicators were also required to consider whether [redacted] fell within Part (c) of the test: Did the assault arise from, or was its

commission connected to, the operation of an IRS? This test will be met where it is shown that a relationship was created at the school which led to or facilitated the abuse. If the test is met, the assault need not have been committed on the premises. The Re-Review Adjudicator found that these criteria were not satisfied when a claimant was delivered out of the care and control of the IRS staff and into the care and control of the alleged perpetrator. There is nothing exceptionally unreasonable about this conclusion, either. It follows that RFD F-10779 must be dismissed.

H-13055

[202] In my view, this case does not meet the exceptionality requirement to justify judicial recourse. I will address what I see as essentially the two issues raised by this case: whether there was improper reliance on *stare decisis*, and whether the adjudicators committed an exceptionally unreasonable error of law.

Improper Reliance on Stare Decisis

[203] Under the terms of the IRSSA, claimants are entitled to a hearing. An adjudicator who fails to even consider a claim on its merits because the adjudicator considers themselves bound by a decision in a separate IAP case could be said to have failed to give the claimant the hearing she was entitled to.

[204] However, in this case, it seems quite clear that the Adjudicator did not consider himself bound by other IAP decisions. He wrote expressly as follows.

> Although there is no *stare decisis* under the IAP, there is though an expressed need in the Model to find some consistency in decisions. I am not bound but find guidance and instruction from some of the previous re-reviews that have dealt with similar cases. …
>
> There are two re-review decisions that are notable. They are E5442-10-D-15417 and E-12325. Both are decisions rendered by Chief Adjudicator Shapiro. The decisions were issued on October 22, 2014 and November 17, 2014, respectively. They follow the same reasoning path and provide the same overall conclusions.

[205] The Adjudicator's decision is quite clear that the Adjudicator recognized he was not bound by any prior decisions, but that he had read, considered and analyzed the reasoning applied in those decisions, and agreed with that reasoning.

His reasoning pathway is explained, and he does not apply *stare decisis*. The exceptionality requirement is therefore not met on this ground.

Exceptionally Unreasonable Error of Law

[206] In the present case, the Adjudicator gave an award of compensation to the claimant's estate, having found there to be "proven acts" of sexual abuse. The estate seeks additional compensation for "consequential harms". This compensation was denied at all three levels of adjudication, with the Adjudicators considering the proper interpretation of the provision in Schedule D to the IRSSA setting out when adjudicators can grant compensation for compensable harms. That provision (Schedule D, III b. v, at page 8) reads as follows.

> In the standard track, consequential harms and consequential loss of opportunity must be proven on a balance of probabilities and then proven to be plausibly linked to one or more acts proven.

[207] The Adjudicator found that Claimant H-13055 had been abused, and found that she suffered harm, including alcoholism. However, there was no direct evidence to "plausibly link" the abuse to the consequential harms. The Adjudicator wrote, "to meet the requirements of a 'plausible link' between the acts and 'remaining components' requires subjective evidence that only a claimant could provide from their own direct evidence." Since Claimant H-13055 was not alive to testify, it was not possible for consequential harms to be proven. The Review Adjudicator and Re-Review Adjudicator agreed.

[208] The Adjudicators' conclusion is not exceptionally unreasonable. I do not find that the legal conclusion of the IAP Adjudicators – that proof of a "plausible link" between a proven act of abuse and proven suffering requires direct subjective evidence from a claimant – is so unreasonable as to amount to a failure to properly apply the IAP model. I accept that the requirement for testimony from the claimant to establish the existence of that plausible link arises from reading Schedule D in its entirety, including, for example, the requirement that claimants give evidence "in

their own words".[50] I do not find exceptionally unreasonable the alleged error in refusing to admit the evidence of H-13055's husband as to what she was supposed to have told him as an exception to the hearsay rule. In fact, even assuming this was a *res gestae* utterance (which it was not), this is a classic situation where deference is appropriate. The Courts should decline invitations to micromanage the IAP made in the guise of RFDs seeking judicial recourse.

C-18694

[209] In this case, the claimant and the supporting intervenors argue that the adjudicators applied the wrong test for causation, amounting to an error of law warranting the Supervising Court's intervention.

[210] Reading the decision as a whole, the Adjudicator first determined what injuries had been suffered by the claimant. This was not a case of indivisible injuries, as was *Athey*. After determining the compensable injuries, the Adjudicator assessed the damages that flowed from those injuries. He decided that the claimant was not entitled to compensation for actual loss of income because he would have suffered the income loss regardless of the compensable injuries he suffered. This is a common principle in assessing damages for personal injury: the plaintiff is not to be put in a better position than he would have been without the injury.

[211] I am not persuaded that the conclusion is wrong in law. It would not be so exceptionally wrong in law as to amount to a failure to apply the IAP Model.

[212] The claimant argues that the reasoning of the Adjudicator in this regard was flawed, nevertheless, because the additional causes of delayed entry into the workforce that the Adjudicator relied upon would be applicable to any one who left his or her reserve, with the result that no claimant could ever be eligible for actual income loss. In my view, these are the factual findings of the Adjudicator, which are entitled to deference.

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[50] Schedule D, subpara III e. v (page 10). See more generally pp. 9, 12 and 13.

[213] For these reasons, I conclude that there is nothing exceptional about the circumstances of this case warranting judicial recourse.

N-10762

[214] In my view, this case does not meet the exceptionality requirement. An allegation of reasonable apprehension of bias against the original adjudicator is not, *per se*, an exceptional circumstance requiring adjudication by the Supervising Court on an RFD.

[215] That issue has, in my view, previously been disposed of by Chief Justice Winkler in the *SSJSSM* RFD.[51] In that case, Chief Justice Winkler, who was one of the judges who approved the Settlement Agreement and one of the original Supervising Judges and Administrative Judges, was called upon to determine the proper procedure for dealing with an allegation of bias leveled against an IAP adjudicator. The church entity involved had sought recusal of the IAP adjudicator, and when she refused to recuse herself, moved before a judge of the Ontario Superior Court for an injunction. That motion was adjourned pending the determination of the RFD before Chief Justice Winkler.

[216] Chief Justice Winkler first acknowledged that bias or a reasonable apprehension of bias on the part of an adjudicator is incompatible with the proper administration of the IAP. However, he observed that an allegation of bias on the part of an adjudicator "falls squarely within the ambit of the Chief Adjudicator's review mandate."[52] He further observed that a review by the Chief Adjudicator based on an allegation of bias is available to all parties,[53] and once the Chief Adjudicator has rendered his or her review decision, there is no general right of appeal.[54]

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[51] *Fontaine v Canada (AG)* (September 26, 2011) (ONSC) 00-CV-192059CP (Direction)

[52] *Ibid.*, para 19

[53] *Ibid.*, para 21

[54] Ibid., para. 22

[217] It follows, in my view, that the dismissal by the Adjudicator and the Review Adjudicator and Re-Review Adjudicator of an allegation of reasonable apprehension of bias against the Adjudicator does not by itself constitute exceptional circumstances warranting review by the Supervising Court. Rather, the Requestor must show some error in the way that the Chief Adjudicator handled the allegation on review, amounting to a fundamental breach of the rules of natural justice.

[218] In my view, there was no such error in this case. On the one hand, the claimant is correct that the Re-Review Adjudicator misstated his role. That role was not limited to determining whether there was a misapplication of the IAP by the Review Adjudicator, but extended to whether the Adjudicator applied the IAP Model. However, it is clear from the reasons of the Re-Review Adjudicator that in any event he agreed with the legal analysis of the Review Adjudicator as to whether the hearing gave rise to a reasonable apprehension of bias, and whether the doctrine of waiver applied. It is also clear that he listened to the audio recording of the hearing himself, and drew his own conclusion that the Adjudicator's account of the "God" question was supported. Moreover, he found that the Review Adjudicator had correctly determined that the Adjudicator did not misapply the IAP model to the facts he found. In applying a correctness standard to that determination, the Re-Review Adjudicator in effect conducted a *de novo* analysis, as required.

R-11791

[219] This RFD involves disclosure that occurred after the initial hearing. When viewed in the context of the bargain struck by the parties in the IRSSA, and the requirement that there be "very exceptional circumstances" in order to give rise to judicial recourse, should such recourse be permitted in this instance?

[220] As noted above, the Re-Review Adjudicator in this case opined that the updated information "would have had a very significant impact on the Adjudicator's reasoning if it was available to her at the time when the hearing was heard in October of 2011".

[221] Importantly, however, he drew that conclusion without the benefit of having the updated POI Report before him. I have had the advantage of reviewing the various versions of the POI Report in question in this case, which were appended to the affidavit of Susan Sieg, filed by Canada on the RFD. The latest version of the POI Report that was available to the Adjudicator in this matter indicated that the dates of employment of the POI were "Apr. 1975 - Mar. 1976; Sep. 1, 1976 – Mar. 31, 1977". The version created after the hearing included the same dates, but also contained the following additional information in the "UNCONFIRMED INFORMATION" section, under the heading "Possible Presence at the IRS": "It is believed that [POI] was at Prince Albert IRS from the early 1960s to 1985."

[222] At first impression, the updated POI Report contained new information that should have been considered in any thorough review of the case. However, on further analysis it is my view that this additional disclosure does not rise to the level required to engage judicial recourse, having regard to the full circumstances of the case. This evidence is at best inconclusive as to whether the POI was present at the school at the relevant time. Certainly, the evidence as to whether the POI was present at the school on the dates alleged was weighed by the Adjudicator and was one factor she considered. However, the Adjudicator clearly had many concerns about the reliability of the claimant's evidence, independent of the dates when the POI was present at the school.

[223] In these circumstances, I do not view it as reasonably probable that, if available to the original Adjudicator, the version of the POI Report indicating the "unconfirmed," "possible" presence of the POI at the school on the relevant dates would have led to a different result. I therefore do not see exceptional circumstances permitting recourse to the Supervising Court in this case.

Conclusion on the RFDs

[224] None of the five Requestors has made out any exceptional circumstances that would warrant intervention by a Supervising Judge. In fact, these cases illustrate the need for the "bright line" threshold established in *Schachter*. Further,

as noted at the outset of these reasons, hearing these RFDs together has provided an important and useful perspective in that it demonstrated that they amounted to ordinary appeals rather than possessing the "very exceptional circumstances" warranting recourse to the Courts.

Process and Timelines for Future Judicial Recourse RFDs

[225] As noted above, the court invited submissions as to whether it would be appropriate to impose timelines within which any further judicial recourse RFDs should be brought if they are to be heard by the Courts.

[226] The idea of timelines for court applications is not foreign to the IRSSA. The court has applied timelines in respect of CEP applications, applications under Article 12 of the IRSSA (regarding recognition of institutions as Indian Residential Schools for the purpose of the IRSSA), and applications regarding Personal Credits (disbursements contemplated from the surplus in the fund for CEP recipients).

[227] IAP applications call out for some finality. It is inconceivable that the administration of the IRSSA could wind down without some time limits for seeking recourse from IAP decisions. The RFD by Claimant R-11791, for example, was brought 18 months after the re-review decision. If future RFDs seeking re-hearings could be brought at any time, the administration of the IRSSA could go on indefinitely.

[228] In my view, time limits are fair, and benefit all parties. Accordingly, I make the following directions:

a) For matters in which a Re-Review decision has not yet been released, the deadline for filing any RFD seeking judicial recourse will be 30 days from the release of the Re-Review decision.

b) For those matters in which a Re-Review has already been determined, but no judicial recourse RFD has been filed, the deadline for filing any such RFD shall be 90 days from the release of these reasons.

[229] I also direct that notice of this decision (after redaction for claimant's privacy) should be posted on the Indian Residential Schools Adjudication Secretariat ("IRSAS")'s website. Although I have concluded that the relief sought in these RFDs should not be granted, there may be further RFDs that merit judicial recourse.

Disposition

[230] I decline to grant the relief sought in the RFDs.

[231] The following directions are made in the event that judicial recourse is sought in further RFDs:

a) notice of this decision should be posted on the IRSAS's website;

b) for matters in which a Re-Review decision has not yet been released, the deadline for filing any RFD seeking judicial recourse will be 30 days from the release of the Re-Review decision;

c) for those matters in which a Re-Review has already been determined, but no judicial recourse RFD has been filed, the deadline for filing any such RFD shall be 90 days from the release of these reasons.

[232] These reasons will be redacted before being distributed to counsel so that each claimant's privacy interests are respected.

The Honourable Madam Justice B.J. Brown