Court File No. 00-CV-192059

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Plaintiffs

-and-

THE ATTORNEY GENERAL OF CANADA, THE PRESBYTERIAN CHURCH IN CANADA, THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH, THE BAPTIST CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN BAY, THE CANADA IMPACT NORTH MINISTRIES OF THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE DIOCESE OF SASKATCHEWAN, THE DIOCESE OF THE SYNOD OF CARIBOO, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (ALSO KNOWN AS THE METHODIST MISSIONARY SOCIETY OF CANADA), THE INCORPORATED SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE ANGLICAN CHURCH OF THE DIOCESE OF QUEBEC, THE SYNOD OF THE DIOCESE OF ATHBASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE ANGLICAN SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE SYNOD OF THE DIOCESE OF NEW WESTMINISTER, THE 2 SYNOD OF THE DIOCESE OF YUKON, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE BOARD OF HOME MISSIONS AND SOCIAL SERVICE OF THE PRESBYTERIAN CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, SISTERS OF CHARITY, A BODY CORPORATE ALSO KNOWN AS SISTERS OF CHARITY OF ST. VINCENT DE PAUL, HALIFAX, ALSO KNOWN AS SISTERS OF CHARITY HALIFAX, ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX, LES SOEURS DE NOTRE DAME-AUXILIATRICE, LES SOEURS DE ST. FRANCOIS D'ASSISE, INSITUT DES SOEURS DU BON CONSEIL, LES SOEURS DE SAINT-JOSEPH DE SAINT-HYANCITHE, LES SOEURS DE JESUSMARIE, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE, LES SOEURS DE L'ASSOMPTION DE LA SAINT VIERGE

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

Defendants

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

FACTUM OF APPLICANTS/IAP CLAIMANTS
REQUEST FOR DIRECTIONS RETURNABLE DECEMBER 17, 2013

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PART I - NATURE OF THE REQUESTS FOR DIRECTIONS

1. There was widespread sexual and physical abuse of residential school children at St. Anne's Indian Residential School ("St. Anne's"), which was operated in the remote northern community of Ft. Albany, Ontario. The flow of justice for the children who were abused at St. Anne's started with the 1992 Keykaywin Conference, which sought to bring the abuse to light and promote healing among St. Anne's survivors. The Conference fed into a five year investigation by the Ontario Provincial Police ("OPP"), which led to criminal charges, preliminary hearings, trials and/or convictions. The allegations of abuse also led to civil litigation out of Cochrane, Ontario, to an ADR pilot project, and continues today under class action settlement and the IAP process.

2. The IRS Settlement Agreement establishing the IAP process imposes broad and clear disclosure obligations on the Federal government. It is intended to be an expedited civil process, premised on full advance disclosure by the federal government. Adjudicators are to supposed to read all allegations of sexual and/or physical abuse by the perpetrator and conditions at the school before hearing evidence of the claimant in the private IAP hearings. Evidentiary and liability presumptions are all in favour of the claimants.

3. Sadly, it has become apparent that despite the Federal government having knowledge of the extensive OPP investigation and ensuing prosecutions, and having possession of related documents since at least 2003, it has failed to put these documents before adjudicators or claimants from St. Anne's. Until very recently, to adjudicators in the IAP process, the OPP investigation never happened and the evidence produced and accepted at criminal trials was invisible. Claimants have individually been forced to establish such abuse in each IAP hearing, without any benefit from the signed statements given by brave St. Anne's survivors to the OPP and/or testimony to the court. In failing to bring forward the documents concerning criminally proven abuse and the OPP investigations, the federal government has blocked the flow of justice in this last stage, the IAP process.

4. Sack Goldblatt Mitchell LLP ("SGM") represents approximately 60 former students from St. Anne's in the IAP Process. The Applicants' Request for Directions pertains to whether the

federal government had valid legal authority to not disclose documents relating to the OPP investigation and criminal convictions arising therefrom in the IAP process. In the context of individual IAP hearings, the applicants have already been proving that some documents have been withheld by the federal government, but the scope of the non-disclosure and the remedies that should flow need to be determined. The legal rights of individual IAP claimants are being violated.

5. The Indian Residential School Settlement Agreement ("IRSSA") is intended to be remedial. The federal government is a defendant, obligated under Court Order to comply with the terms thereof. At no time in the past 6 years has the federal government sought judicial determination/validation of its decision to not bring forward such documentation in the IAP process.

6. The federal government filed its own RFD dated September 5, 2013, seeking instructions from the Court whether to obtain copies of the OPP investigation documents. Undisclosed until November 4, 2013, ten years ago the federal government already obtained legal authority from the Ontario Superior Court of Justice to inspect all the OPP investigation documents of St. Anne's and to copy documents pertaining to approximately 154 plaintiffs who were former students of St. Anne's and/or 180 named perpetrators. The rights of "non-plaintiffs" to the OPP documents was adjourned *sine die* by this Court in 2003. The existence of OPP documents had never revealed by the federal government in the IAP process to adjudicators and/or claimants.

7. As a result of individual hearings and an interlocutory order of Mr. Justice Perell, it has been proven that since 2003, the federal government also had copies of some transcripts of criminal court proceedings against former employees of St. Anne's. It is not known what other documents containing findings and/or allegations of sexual or physical abuse of residential school children at St. Anne's are already in the possession of the federal government, which have not been disclosed in the IAP process.

8. As relief in this RFD, the claimants are requesting an Order:

   a. requiring an individual at AANDC or the Department of Justice to provide a sworn affidavit listing all documents currently in the possession of the Attorney

General of Canada and/or its legal counsel that are relevant to sexual or physical abuse at St. Anne's, excluding documents already produced in the narratives and POI reports to date, to produce the documents, and for that person to be available for cross-examination;

b. requiring the federal government to seek and produce the OPP documents;

c. requiring the narrative for St. Anne's to be amended;

d. ruling as to the evidentiary manner in which transcripts, expert medical evidence, signed witness statements, etc. may be used in evidence in the IAP process; and

e. costs on a substantial indemnity basis to SGM and costs paid to Mushkegowuk Council and to the affiants for pursing this RFD.

PART II - ISSUES

9. The issues in this RFD are:

a. The nature of the Federal government's production obligations to St. Anne's IAP claimants, particularly in relation to documents related to the OPP investigation and the criminal convictions that arose from it;

b. The admissibility and use of those documents in the IAP process; and

c. The relevance and rules of evidence applicable to these documents in IAP hearings.

PART III -THE IAP PROCESS

10. The nature of the IAP process and the scope of the Federal government's obligations in the process are important to distinguish from regular civil litigation.

A. Order of the Court

11. The IAP process is the result of a class action settlement. The IRS Settlement Agreement was embodied into a Judgment Order of the Ontario Superior Court of Justice issued by Mr. Justice Winkler R.S.J., dated December 15, 2006 ("Judgment Order"). The Judgment Order provides that the Settlement will be interpreted in accordance with the laws in force in the Province of Ontario.[1] There are no provisions in the Judgment Order that contemplate breach of the terms therein.

12. The Implementation Order dated March 8, 2007 confirms that the Court has inherent jurisdiction to implement and enforce the Judgment Order.[2] Moreover, the Judgment Order is subject to Rule 60.11 of the *Rules of Civil Procedure*, which governs the enforcement of Orders. The terms of the Judgment Order are already binding on the defendants. Nothing in the Settlement Agreement or the Judgment Order excludes the operation of general legal principles in its interpretation, except where it is stated explicitly.

B. Interpretation of provisions the IAP process

13. In *Fontaine v. Canada (Attorney General)*, where Goudge J.A. ordered that Canada provide documents archived at Library and Archives Canada to the Truth and Reconciliation Commission, he applied the following principles for determining contested provisions:

> *The principles of interpretation applicable to the Settlement Agreement are straightforward. The text of the agreement must be read as a whole. The plain meaning of the words used will be important as will the context provided by the circumstances existing at the time the Settlement Agreement was created. A consideration of both is necessary to reach a proper conclusion about the meaning of the contested provisions.*[3] [emphasis added]

14. As to the context, Goudge J.A. relied upon the shared objective on the conclusion of the Settlement Agreement was "a fair and lasting resolution of the painful negative experiences of

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[1] "Judgment Order", *Fontaine v. Canada*, 15 December 2006, On Sup Ct J, File No. 00-CV-192059CP, para. 6.9, online: <http://www.classactionservices.ca/irs/documents/OntarioSettlementApprovalOrder.pdf>.

[2] "Implementation Order", *Fontaine v. Canada*, 8 March 2007, On Sup Ct J, File No. 00-CV-192059CP, online: <http://www.classactionservices.ca/irs/documents/OntarioImplementationOrder.pdf>.

[3] *Fontaine v. Canada (Attorney General)*, 2013 ONSC 684, para. 68.

former students, the enduring impacts of these experiences, and the resolution of all individual and class actions."[4] Aboriginal groups sought "a response that would address both compensation and the need for continued healing".[5]

C. The expedient and remedial nature of the IAP process

15. The IAP process set out in the Judgment Order is a remedial process, designed to provide compensation to individuals disadvantaged by sexual and/or physical abuse as children. Its provisions should be interpreted to allow for the expeditious processing of claims, but in a manner that consistently flexes in favour of IAP claimants. Throughout the IAP process, the legal provisions, presumptions and rules of evidence that vary from regular civil proceedings bend in favour of claimants, but never in favour of the defendants.

16. The remedial nature of the IAP process is apparent in a number of its characteristics:

(i) Full advance disclosure by the Federal government of documents about sexual and/or physical abuse

17. As will be discussed in greater depth below, the Federal government is given responsibility to search for, gather and present the relevant evidence about the IRS in question, any perpetrators at issue in the IAP claim and documents that exists about the claimant.

(ii) Inquisitorial process

18. The IAP process is an inquisitorial process. The adjudicator has full advance disclosure of all the documents and the adjudicator determines the questions to be asked of the claimant. During the hearing there is no questioning by counsel for the federal government. Counsel for the claimant and federal government caucus with the adjudicator to propose questions or lines or inquiry and make brief oral submissions but do not control the questioning.[6]

19. The Federal government's exposure to pay costs of claimant counsel is limited to 15% surcharge on the award, recognizing the relatively limited role that the claimant counsel would

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[4] *Fontaine v. Canada (Attorney General)*, para. 12.

[5] *Fontaine v. Canada (Attorney General)*, para. 11.

[6] Schedule D, Assessment Process Outline, e. Procedure – General, pgs. 9-10, paras. i, ix, xiv.

play if there is full advance disclosure by the federal government to the adjudicator.[7] The adjudicator is expected to be provided with all relevant evidence in advance of the hearing, as is claimant counsel. Claimants have mandatory disclosure obligations and the option to file additional evidence, including corroborating evidence.[8]

(iii) Flexible rules of evidence and relaxed burden of proof

20. The IAP process has flexible evidentiary rules and relaxed burden of proof requirements on claimants. When compared to civil litigation, the IAP process is consistently structured in favour of claimants. For example:

a. For claims in the standard track, consequential harms and loss of opportunity must be proven on the balance of probabilities, but the claimant must merely establish that those are "plausibly linked" to at least one of the acts proven.[9]

b. Where a claimant has made prior inconsistent statements regarding the abuse he or she has suffered, "it is specifically recognized that progressive disclosure is a possible explanation for inconsistencies."[10]

c. A witness statement or interview notes pertaining to an alleged perpetrator who does not appear at the hearing are inadmissible, "except to the extent it contains an admission."[11]

d. Hearsay can be admitted, as the adjudicator may receive and base a decision on evidence adduced in the proceeding and considered credible and trustworthy in the circumstances.[12]

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[7] Schedule D, Assessment Process Outline, a. Core Assumptions as to Legal and Compensation Standards, pg. 7, para. vi.

[8] Schedule D, Appendix VII: Mandatory Document Production by Claimants, pgs. 28 – 29.

[9] Schedule D, Assessment Process Outline, b. Resolution Processes within this IAP, pg. 8, para. v.

[10] Schedule D, Assessment Process Outline, h. Burden of Proof and Evidentiary Standards, pgs. 12-13, at para. iv.

[11] Schedule D, Assessment Process Outline, h. Burden of Proof and Evidentiary Standards, pg. 13, para. ix.

[12] See below, Section IV(B) of this Factum.

e. Without further proof, adjudicators may accept relevant findings in previous criminal or civil trials.[13]

(iv) Private and confidential proceedings

21. Finally, the IAP process is private and confidential. Hearings are closed to the public and participants are required to agree to keep information confidential to the IAP process or as required by law. Decisions are redacted to remove identifying information about claimants and perpetrators.[14] While the documentation and information provided to claimants and adjudicators may include allegations of abuse by individuals other than those named in the complaint at issue, names of other students or persons are redacted.[15]

(v) The remedial and expedited nature of the IAP process

22. These four elements of the IAP process – full advance disclosure, the inquisitorial process, the flexible application of evidentiary rules and the burden of proof, and its private and confidential nature – create the necessary ingredients for an expedited and less expensive process for remediating the wrongs done to children at an IRS. They are necessary to achieve the objectives of the Settlement Agreement, as noted by the Goudge J.A. in *Fontaine*. By providing a means of dealing with these claims fairly, expeditiously and confidentially, the IAP process was intended to provide "a response that would address both compensation and the need for continued healing".[16] To that end, it is clear that to the extent that the IAP process deviates from the normal rules of procedure and evidence, it is always *intended to favour the interests of claimants.*

23. Sadly, the events leading up to this RFD have demonstrated that these same characteristics have been misused by the Federal government, as a means of obtaining an unfair advantage in individual IAP claims from St. Anne's. Having knowledge and possession since 2003 of documents related to the OPP investigation and the ensuing criminal proceedings against employees of the school who were still alive, the Federal government has held back that

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[13] See below, Section IV(A) of this Factum.

[14] Schedule D, Assessment Process Outline, o. Privacy, pg. 15, paras. i, ii.

[15] Schedule D, Appendix VIII, pg. 30.

[16] *Fontaine v. Canada (Attorney General)*, para. 11.

incriminating documentation from IAP adjudicators and claimants. This is a miscarriage of the IAP justice system.

PART IV - THE FACTS SURROUNDING ABUSE AT ST. ANNE'S

A. St. Anne's Indian Residential School and the OPP investigation

24. St. Anne's was located in Fort Albany, Ontario, on the western coast of James Bay. The federal government, under treaty, was responsible to provide education to aboriginal children. St. Anne's operated from 1902 to 1970 within a Roman Catholic mission, which included a Residential School Program from 1904. From 1970 to 1976, St. Anne's was operated by the Federal government.[17] This residential school closed in 1976.

25. The students who had to attend St. Anne's were drawn from the Fort Albany, Attawapiskat, Weenusk, Constance Lake, Moose Fort and Fort Severn reserves.[18] Children were required to attend residential schools for approximately 8 years, starting as early as age 5 or 6, living apart from their parents during the most of the year.

26. There was widespread physical and sexual abuse of students by employees of St. Anne's. The collective trauma for the children and their resulting dysfunction and/or ill health as adults eventually led to the organizing of the Keykaywin conference in 1992, where survivors returned to the St. Anne's Residential School building.[19] The funding agencies for the conference included Health Canada, and the Catholic Church was in attendance.[20] At the Keykaywin conference, participants shared stories of sexual and physical abuse confidentially with a panel, including allegations of sexual abuse and physical abuse such as having been forced to eat vomit and being subjected to punishment in an electric chair, leading to two written reports.[21] Fear of

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[17] Fort Albany (St. Anne's) IRS School Narrative, dated November 12, 2008 ["2008 Narrative"], Exhibit 3 to the Affidavit of Graham MacDonald sworn November 1, 2013 ["MacDonald Affidavit"], Applicant's Record ["A.R."], Tab 16, pgs. 3112-3123.

[18] 2008 Narrative, A.R. Tab 16, pg. 3119.

[19] Affidavit of Edmund Metatawabin sworn August 26, 2013 ["Metatawabin Affidavit"], para. 9, A.R. Tab 1, pg. 13.

[20] Metatawabin Affidavit, paras. 12-13, A.R. Tab 1, pg. 14.

[21] Report of the Testimonial/Panel, St. Anne's Residential School Reunion and Conference, Exhibit A to the Metatawabin Affidavit, A.R. Tab 1, pgs. 25-26. See also St. Anne's Residential School 1992 Reunion and Keykaywin Conference: Summary Report, Exhibit B to the Metatawabin Affidavit, A.R. Tab 1, pgs. 29-45.

authority was pervasive amongst former students. This conference was the beginning of the flow of justice sought for the children who had been so severely abused at St. Anne's.

27. Due to the criminal nature of the testimony heard by the panel at the Keykaywin Conference, then Chief Edmund Metatawabin of Ft. Albany First Nation was asked to take the testimony forward to the Ontario Provincial Police ("OPP").[22]

28. The OPP then conducted a five-year investigation into abuse of children at St. Anne's, between 1992 and 1997, led by Detective Constable Greg Delguidice, Cochrane Detachment. With the support of community leaders like Chief Metatawabin, survivors came forward. The OPP were given approximately 992 signed statements from about 700-750 people.[23] Those former St. Anne's students told their stories to the police of rape, fondling, forced masturbation, electrocution in an electric chair, being forced to eat vomit, whippings, and such horrors they experienced as children.[24] Many people, however, did not have the confidence or belief in their own presence to tell their stories to the police.[25]

29. The OPP seized several thousand documents about St. Anne's. Search warrants were issued in Ottawa, Montreal, Moosonee and Fort Albany for the seizure of evidence. In total, about 7,000 documents from the investigation were catalogued by the OPP.[26] In the course of its investigation, the OPP also utilized a computer database (used at Mount Cashell) to organize and correlate the statements, documents and data collected with respect to the abuse at St. Anne's.[27]

30. By 1997, the Attorney General of Ontario (AGO) laid charges. Many of the former supervisors, alleged to be perpetrators, were already deceased.[28] In 1997, charges were laid by

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[22] Metatawabin Affidavit, paras. 15-16, A.R. Tab 1, pg. 14; Anticipated Evidence of D/C Greg Delguidice dated April 26, 2013 ["Anticipated Evidence of D/C Greg Delguidice"], Exhibit D to the Metatawabin Affidavit, A.R. Tab 1, pg. 54.

[23] Anticipated Evidence of D/C Greg Delguidice, A.R. Tab 1, pgs. 55-56.

[24] Anticipated Evidence of D/C Greg Delguidice, A.R. Tab 1, pgs. 61-62.

[25] Metatawabin Affidavit, para. 17, A.R. Tab 1, pg. 14.

[26] Anticipated Evidence of D/C Greg Delguidice, A.R. Tab 1, pgs. 56-58.

[27] See Documents provided in response to Freedom of Information Act request by D.W., Exhibit E to the Affidavit of D.W. sworn August 25, 2013 ["D.W. Affidavit"], Tab 2, pg. 137; Anticipated Evidence of D/C Greg Delguidice, A.R. Tab 1, pgs. 54-55.

[28] Anticipated Evidence of D/C Greg Delguidice, A.R. Tab 1, pg. 61.

the AGO against seven former employees of St. Anne's, based on the OPP investigation: Anna Wesley, Jane Kakeychewan, J.C., John Rodrigue, Claude Lambert, Claude Chenier and Marcel Blais. There were preliminary inquiries and trials in Moosonee, Cochrane and elsewhere in Ontario. All such former employees except J.C. were reportedly convicted of at least some charge(s).[29] Some of these convictions were reported in the media[30] and were documented by the Law Commission of Canada in its report on Institutional Child Abuse in Canada.[31]

31. The Chiefs of the First Nations in the region (Mushkegowuk Council) gave authority to the Peetabek Keway Keykawyin Association ("PKKA"), and Chief Metatawabin as its President, to represent and assist St. Anne's survivors. The PKKA provided counseling to the many brave individuals who testified in the criminal proceedings.

B. Civil justice proceedings for St. Anne's Survivors

32. After the criminal trials had concluded, a pilot ADR project was organized by the Federal government, the Catholic Church and the Ontario Government, in which Chief Metatawabin and the PKKA represented approximately 100 victims from St. Anne's.[32]

33. Starting around 2000, some former students also filed civil claims for the sexual and physical abuse they suffered at St. Anne's. Approximately 154 plaintiffs, represented by one law firm, launched litigation in in Cochrane against the federal government and the Catholic Church.[33] None of those civil cases ever proceeded to trial.[34]

34. Unknown in the IAP process until November 2013, the federal government, Catholic Church and 154 plaintiffs in those civil claims obtained a Court Order dated August 1, 2003 from Mr. Justice Trainor that allowed the parties to review all of the OPP investigation

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[29] Anticipated Evidence of D/C Greg Delguidice, A.R. Tab 1, pgs. 63-75.

[30] Timothy Appleby, "Former school's workers charged in sex-abuse probe" (September 19, 1997), The Globe and Mail, Exhibit 3 to the Affidavit of Christina Ruest, sworn September 17, 2013 ["Ruest Affidavit"], A.R. Tab 7, pg. 200.

[31] Goldie Shea, *Institutional Child Abuse in Canada: Criminal Cases* (Law Commission of Canada, October 1999), Exhibit 4 to the Ruest Affidavit, A.R. Tab 7, pg. 203.

[32] Metatawabin Affidavit, paras. 20-22, A.R. Tab 1, pg. 15.

[33] Affidavit of Haniya Sheikh sworn June 24, 2003 ["Sheikh Affidavit"], Exhibit 4 to the Exhibit 4 to the Cross-Examination of G. MacDonald ["MacDonald Cross-Examination"], A.R. Tab 16, pg. 3226.

[34] MacDonald Affidavit, para. 9, A.R. Tab 16, pg. 3069.

documents and to copy documents those related to the 154 plaintiffs and 180 perpetrators identified in the actions.[35] The affidavit evidence filed in support of that motion,[36] sworn by a Department of Justice lawyer involved in defending those claims, advised the Court that the OPP documentation was "relevant", "critical" and "useful to the parties" in the civil proceedings brought to redress the sexual and physical abuse of children at St. Anne's.

35. Further, in the context of defending the civil cases and/or the ADR pilot project, in 2003 the federal government purchased transcripts of some (if not all) of the criminal proceedings against former employees of St. Anne's.[37]

36. Linda Denis, the AANDC employee responsible for St. Anne's in 2003, is indicated as being the "instructing client" on the 2003 motion to obtain the OPP documents. However, while officials at AANDC were aware of the criminal transcripts and the OPP investigation, no one at AANDC was ever permitted to review either the OPP investigation documents or the transcripts of criminal proceedings.[38] As discussed below, transcripts were never reviewed by persons compiling the narrative and/or POI reports. The transcripts were never produced in the IAP process until after the Interlocutory Order of Mr. Justice Perell dated September 27, 2013.[39]

37. At the same time as the 154 civil claims out of Cochrane were proceeding, the class action lawsuit was proceeding. The IRS Settlement Agreement was reached in 2006, and the Judgment Order was issued across Canada on December 15, 2006. The IAP process was thereafter implemented. SGM does not know the date of the first IAP hearing for a St. Anne's survivor.

38. IAP hearings are entirely private and confidential. As a result, Chief Metatawabin, the OPP and other leaders had no knowledge until May 2013 that none of the evidence and

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[35] Motion Record of the Attorney General of Canada dated June 25, 2003 ["2003 Motion Record"], Exhibit 4 to the MacDonald Cross-Examination, A.R. Tab 16, pgs. 3226-3230.

[36] Sheikh Affidavit, A.R. Tab 16, pgs. 3226-3231.

[37] Email from B. Bly to F. Brunning and T. Walsh dated June 25, 2013, Exhibit 29 to the Ruest Affidavit, A.R. Tab 7, pgs. 459-461.; Responses to undertakings by Graham MacDonald dated November 25, 2013 ["Responses to Undertakings"], paras. 7-8, in the Second Supplementary Affidavit of Christina Ruest, dated November 28, 2013 ["Second Supplementary Ruest Affidavit"], A.R. Tab 17, pg. 3269.

[38] Responses to Undertakings, paras. 3, 7 and 22, A.R. Tab 17, pgs. 3268, 3272 and 3274.

[39] Order of Justice Perell not yet finalized.

documentation starting with the Keykaywin conference had been brought into the IAP process by the federal government.[40]

PART V - THE FEDERAL GOVERNMENT'S DUTY TO SEARCH FOR, COLLECT AND PROVIDE DOCUMENTS

A. POI reports and Narratives required under Appendix VIII

39. Under Appendix VIII, the Federal government is required to:

> ... search for, collect and provide a report about the persons named in the Application Form as having abused the Claimant, *including* information about those persons' jobs at the residential school and the dates they worked or were there, as well as any allegations of physical or sexual abuse committed by such persons, where such allegations were made while the person was an employee or student.[41] [Emphasis added]
>
> ... The government will also gather documents about the residential school the Claimant attended, and will write a report summarizing those documents.
>
> ... The following documents will be given to the adjudicator who will assess a claim: ... any sexual or physical abuse claims concerning them [person(s) named as abusers] ... any documents mentioning sexual abuse at the residential school(s) in question.

40. Appendix VIII imposes two obligations on government that are relevant for the purposes of this RFD. First, the government is required to produce "POI reports" about any alleged perpetrators. POI reports must list *any* allegations of physical or sexual abuse concerning the person named as an abuser. Indeed, the use of the term "including" in Schedule VIII indicates that POI reports must include the information listed, but may include other relevant information.

41. The Court should reject a restrictive interpretation of the line "any allegations of physical or sexual abuse committed by such persons, where such allegations were made while the person was an employee or student". If, as the Federal government has suggested,[42] this is interpreted to limit its disclosure obligation to allegations made *while the victim was a student*, it would be

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[40] Metatawabin Affidavit, para. 27, A.R. Tab 1, pgs. 16-17.

[41] Schedule D, Appendix VIII, pg. 30.

[42] Ruest Affidavit, A.R. Tab 7, pg. 244.

absurd. That federal government interpretation would limit disclosure to allegations made by abused children while they were still at the school and being victimized.

42. The correct interpretation of the concerning the timing of reported abuse should require that the allegations *relate to events that occurred* while the perpetrator was an employee or student. Disclosure of documents should not be limited to allegations that were made *while the victim was attending* the school.

43. This correct interpretation is supported later in the same Appendix VIII, which further mandates that the documents to be given by the federal government to the adjudicator include "documents about the person(s) named as abusers, including ... *any* sexual or physical abuse allegations concerning them" and "*any* documents mentioning sexual abuse at the residential school(s) in question" (emphasis added).[43] This disclosure requirement is not limited to allegations made while the victim was a student.

44. Under Appendix VIII, in addition to preparing POI reports, the Federal government is required produce a narrative: it must "gather documents about the residential school the Claimant attended" and to "write a report summarizing those documents".[44]

45. The scope of the Federal government's obligation to search for, collect and provide documents in the POI report and narrative goes beyond Appendix VIII.

46. In Appendix X, which deals with the use of extra-curial knowledge, adjudicators are instructed:

> ... to carry forward information from hearing to hearing for example on alleged perpetrators and the modus operandi of proven perpetrators, conditions at the school and credibility findings ...
>
> ... the acts and knowledge of adult employees, and where an individual is found to have committed a number of assaults in a particular way, their *modus operandi*.[45]

[43] Schedule D, Appendix VIII, pg. 30.

[44] Schedule D, Appendix VIII, pg. 30.

47. *Modus operandi* implicitly means from more than one source. Accordingly, reliable evidence of what the perpetrator is alleged to have done repeatedly, must, *at the very least*, be part of the scope of relevant documents to be produced by the federal government, if in its possession. This will be discussed further below.

48. In *Fontaine*, Goudge J.A. noted that the scope of disclosure is not unlimited. He defined the standard for relevant documents "is akin to the modulating concept of proportionality that now applies to document production in civil actions in Ontario, which recognizes that exhaustive production is antithetical to just outcomes".[46]

49. When reading Schedule D as a whole, and being mindful of the explicit search, gather and disclosure obligations in Schedule VIII, the duty for advance disclosure by the federal government of relevant documents clearly applies to the transcripts of criminal proceedings that were already in its possession since 2003. The transcripts clearly contain, at the very least, allegations of sexual or physical abuse of children by former employees of St. Anne's.

50. Moreover, the federal government already testified to the Court in 2003 that the OPP documents were "relevant" to adjudication of the civil claims, which are almost identical to IAP claims, and it would be "unfair" to adjudicate claims without these documents. It would an abuse of process for the federal government to so obtain authority from the Court to access all the OPP investigation documents, including almost 1000 signed statements of former students, and to copy documents related to sexual and/or physical abuse of 154 plaintiffs by 180 perpetrators, to then allow the federal government to withhold the same documents allegedly on the basis of being irrelevant to IAP claimants.

B. Non-disclosure by the Federal government in narratives and POI reports

51. The applicants have already proven in the few months that the Federal government has had possession of many transcripts of criminal proceedings and of a substantial part of the OPP

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[45] Schedule D, Appendix X, 4. Previous findings, pg. 41.

[46] *Fontaine v. Canada (Attorney General)*, para. 80.

investigation since 2003. However, these documents have never been used in narratives or POI reports by AANDC and have never been made available to IAP claimants or adjudicators.[47]

52. The documentation obtained by the federal government during the course of the ADR pilot project and/or civil actions for 154 plaintiffs issued out of Cochrane is currently in the possession of the Department of Justice (DOJ).[48] The transcripts are in the possession of the DOJ. None of that documentation has been reviewed or made available to AANDC. However, under Appendix VIII, the obligation is on the "federal government", which includes the DOJ. Unless there is a valid legal claim such as solicitor and client privilege over not producing a document, DOJ is not excluded from production obligations.

53. The non-disclosure has continued over the past 6 years that the IAP process has been law, because AANDC has not received the documents from DOJ.

54. In the affidavit tendered on this RFD in November 2013, the federal government disclosed that a previous narrative for St. Anne's, prepared for the pilot ADR project in 2004, included information about the Keykaywin Conference and some criminal prosecutions of former employees. The documents available behind those references were media reports. The references were incomplete and totally inaccurate as compared to the information in the transcripts of criminal proceedings already in the possession of DOJ.[49]

55. The St. Anne's IAP claimants who are the subject of this RFD were provided with a subsequent narrative report compiled by AANDC, dated November 2008 (the "2008 Narrative").[50] As compared to the incomplete 2004 narrative, *all references to the OPP investigation and criminal charges in the 2004 narrative were removed from the 2008 narrative.* The explanation provided for the removal of the references to the Keykaywin Conference and the criminal convictions by the federal government's affiant from AANDC was simply that "Canada is unable to conclusively determine why criminal charges and convictions were not recorded in

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[47] Responses to Undertakings, para. 1, A.R. Tab 17, pg. 3273.

[48] Responses to Undertakings, para. 13, A.R. Tab 17, pg. 3270.

[49] MacDonald Affidavit, A.R. Tab 16, pg. 3069; Fort Albany (St. Anne's) IRS School Narrative dated June 3, 2004 ["2004 Narrative"], Exhibit 4 to the MacDonald Affidavit, A.R. Tab 16, pgs. 3102-3110.

[50] 2008 Narrative, A.R. Tab 16, pgs. 3112-23.

the 2008 Narrative".[51] The affiant did not discuss this removal with DOJ, only with other AANDC officials. The affiant had never read the transcripts or OPP documents, even at the time of swearing the affidavit or at the time of being cross examined.

56. Under the heading "Documents Referring to School Incidents", the 2008 Narrative reads as follows:

> The following suggestions of abuse, listed chronologically, comprise all known identifiable complaints and/or allegations received by government officials and all available information regarding the follow-up and outcome.[52]

57. Under that heading, four incidents of physical abuse are listed. None relate to the OPP investigation or the criminal prosecutions.[53] The 2008 Narrative also states that there were "[n]o known incidents found in documents regarding sexual abuse",[54] which is untrue.[55]

58. A new narrative report for St. Anne's was produced at a hearing on October 1, 2013. This narrative includes references to the OPP investigation and the criminal charges and convictions that stemmed from it, but does not rely upon the transcripts from the criminal trials and does not refer to any documents from the OPP investigation.[56] As a result, the information with respect to the convictions for Anna Wesley is still incorrect.[57] Not all criminal proceedings are listed.

59. POI reports relating to former St. Anne's employees are similarly incomplete. The POI reports fail to disclose the existence of OPP documents and those relating to criminal prosecutions which are in the possession of the federal government, despite the fact that these documents detail criminal allegations, criminal convictions and the *modus operandi* of perpetrators. Instead, the POI reports reference only their records of conviction, which include no

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[51] MacDonald Affidavit, A.R. Tab 16, pg. 3069.

[52] 2008 Narrative, A.R. Tab 16, pg. 3120.

[53] 2008 Narrative, A.R. Tab 16, pg. 3120.

[54] 2008 Narrative, A.R. Tab 16, pg. 3121.

[55] MacDonald Cross-Examination, A.R. Tab 16, pg. 3047.

[56] Fort Albany (St. Anne's) IRS School Narrative, dated July 24, 2013 ["2013 Narrative"], Exhibit 4 to the MacDonald Affidavit, A.R. Tab 16, pgs. 12-14.

[57] As her transcript makes clear, Anna Wesley was convicted of five counts of assault and three counts of administering a noxious substance, rather than two counts of assault and three counts of administering a noxious substance, as is reported in the narrative, based on newspaper articles: Transcript of *R. v. Wesley*, A.R. Tab 10, pgs. 2118-19.

details, no victims and not even an obvious link to St. Anne's. Because DOJ has not provided any of this documentation to AANDC and/or because AANDC officials will not review the transcripts or OPP documents, none of it is referenced nor made available in the POI reports.

60. For instance, claimants who make IAP claims against Anna Wesley have been given a POI report that contains one covering page and four convictions from 1999.[58] The records of conviction identify the date, locate and title of the offence, but contained no facts or details that would connect the crime committed to Anna Wesley's abuse of children at St. Anne's. By consulting the transcripts (which are not revealed nor referenced in the POI report), AANDC would have to reveal that Anna Wesley was convicted after the school was closed, but for offences committed against children while Anna Wesley was employed at St. Anne's. The conclusions of the jury were reached after a full trial, wherein Anna Wesley was represented by legal counsel and testified in her own defence. The transcripts disclose findings of physical abuse of children at St. Anne's. Details essential to the jury's convictions on five counts of assault are only in the transcripts. The transcripts alone disclose three convictions for "administering a noxious substance", based on Anna Wesley's repeated practice of assaulting St. Anne's children and forcing them to eat their own vomit in the dining room at the school, in front of their peers.[59]

61. The transcripts also include expert medical evidence led by the Crown that assaulting a child for becoming ill or forcing a child to eat vomit caused physical and psychological harm, essential evidence to the elements necessary to convict for "administering a noxious substance".[60]

62. IAP claimants who name John Rodrique as a perpetrator have been given a POI report with records of convictions for a number of sexual assaults, but no transcripts. None of the records of conviction indicated the victims of sexual abuse were students at St. Anne's.[61] The POI report for John Rodrique included a portion of a transcript of a sentencing proceeding, but

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[58] IAP POI Report: Sister Anna Wesley ["Wesley POI Report"], Exhibit 23 to the Ruest Affidavit, A.R. Tab 7, pgs. 429-31, and Exhibit 5 on MacDonald Cross-Examination, A.R. Tab 16, pgs. 3249-3252.

[59] Transcript of *R. v. Wesley*, A.R. Tab 10, pgs: 1340-2122.

[60] Transcript of *R. v. Wesley*, A.R. Tab 10, pgs. 1002-1027 (testimony of Dr. Brian Kain) and pgs. 984-1002 (testimony of Dr. Peter Jaffe).

[61] IAP POI Report: John Brian Rodrique ["Rodrique POI Report"], Exhibit B to the Affidavit of A.N., sworn October 24, 2013 ["A.N. Affidavit"], A.R. Tab 9, pgs. 628-652.

one that related to another sexual offence in 1997, with no mention of St. Anne's.[62] The POI report (and the narrative for St. Anne's) did not include or reference the transcripts related to John Rodrique's guilty pleas for sexually abusing 6 boys at St. Anne's, found in the agreed statements of facts contained in the transcripts, along with details of the manner in which the abuse was conducted.[63] The federal government has had possession of these transcripts since 2003.

63. Similarly, IAP Claimants who identify J.C. as a perpetrator were given a POI report that made no reference to any allegations of sexual abuse against him or ensuing prosecutions. Yet he was subject to a preliminary hearing and trial on allegations of sexual abuse to a student at St. Anne's.[64] The Federal government acquired these transcripts in 2003. J.C. was acquitted for the charge, but the transcripts clearly includes "allegations" of abuse.[65] As well, the judge in his ruling commented that "if the test were that I be satisfied beyond grave suspicion that the prosecution had established [J.C.'s] guilt, I would find him guilty".[66] That comment could properly inform an IAP adjudicator acting under a different onus of proof.

C. Non-production of criminal transcripts

64. As outlined above, POI reports must include any allegations of physical or sexual abuse relating to the alleged perpetrator. "Allegations" must include the testimony of the witnesses at trial and certainly include criminal findings of sexual or physical abuse. To argue otherwise would be untenable.

65. AANDC appears to agree with that position, as in his examination, Mr. MacDonald explained that in his time working as a researcher to assemble historical documentation on IAP claims, he would flag information about convictions and criminal records as relevant. He recalls

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[62] Rodrique POI Report, A.R. Tab 9, pgs. 648-652.

[63] Transcript of *R. v. Rodrique*, A.R. Tab 11, pgs. 2124-90.

[64] IAP POI Report: John Francis Cushing ["Cushing POI Report"], Exhibit F to the A.N. Affidavit, A.R. Tab 9, pgs. 677-79.

[65] Transcript of *R. v. J.C.*, A.R. Tab 12, pgs. 2191-2748.

[66] Transcript of *R. v. J.C.*, A.R. Tab 12, pgs. 2746.

doing this once with respect to convictions related to a school in Saskatchewan, which were then included in that school's narrative report.[67]

66. The Federal government draws the line on relevance at the transcripts behind these convictions. It states it "has never had a practice of systematically or routinely searching external sources for information on criminal convictions related to former employees at any IRS in the IAP, including St. Anne's IRS".[68] The Federal government in individual hearings has opposed production on the basis its obligation to search for and collect documents does not extend to those that are otherwise available in the public domain.

67. That position is a red herring. This RFD is no longer about what the federal government had to seek, because the federal government already sought this documentation in its due diligence to defend the ADR pilot project and civil claims from St. Anne's issued out of Cochrane. It has had the transcripts and OPP documents (and perhaps more) in its possession since 2003.[69] If its obligation to search for and collect documents in the hands of the federal government extends to anything, disclosure in the IAP must encompass these documents that would be subject to disclosure obligations in civil proceedings.

68. Any arguments to justify non-disclosure based on the fact that the transcripts are publicly accessible has no valid legal authority in the IAP provisions. There is nothing in the Judgment Order to validate this non-disclosure and during the past 6 years, and if the Federal government had any question, it could have asked the Court for directions, rather than DOJ unilaterally withholding these documents.

69. Mr. MacDonald admitted that when AANDC officials discover that a POI has been convicted, they know it is relevant, and arrange to obtain a record of conviction from the relevant courthouse.[70]

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[67] MacDonald Cross-Examination, A.R. Tab 16, pgs. 3033-34.

[68] MacDonald Affidavit, para. 5, A.R. Tab 16, pgs. 3068.

[69] Email from B. Bly to F. Brunning and T. Walsh, dated June 25, 2013, Exhibit 29 to the Ruest Affidavit, A.R. Tab 7, pg. 459.

[70] MacDonald Cross-Examination, A.R. Tab 16, pgs. 2999-3000; Responses to Undertakings, para. 14, A.R. Tab 17, pg. 3270.

70. Mr. MacDonald also affirmed that, while AANDC was compiling the narratives and POI reports, they might be told of convictions by officials from the Department of Justice, and arrangements would be made to obtain the records of conviction.[71] In other words, the records of conviction, which are "generally disclosed" with POI reports,[72] must be obtained by the Federal government from the relevant courthouses.

71. The Department of Justice is part of the "Federal government" and if there is no claim for solicitor and client privilege over a document, relevant documents should go to AANDC for disclosure in the IAP process.

72. With a certificate of conviction, but without the transcripts, it is impossible to determine who the victim was to an offence, where precisely the offence occurred, whether it had a connection to the perpetrator's employment at a residential school, and/or the nature of the conviction. The question of relevance will be discussed further below, but a certificate of conviction establishes, at the very least, that the obligation on defence counsel to search for, collect and provide documentation relevant to residential schools and alleged perpetrators would include ordering transcripts of criminal proceedings in public courts of law. As established below, in the context of individual hearings, that is how SGM established the federal government has had such transcripts in its possession, as of 2003. In the IAP process, in addition to getting advance disclosure, claimant counsel are supposed to be able to request copies of relevant documents at no expense from the federal government.

D. Non-production of documents from the OPP investigation

73. Similarly, SGM brought the OPP investigation to the attention of the federal government because it is a whole body of evidence that exists and could be obtained by court order. Only this month, November 2013, did the federal government finally reveal it obtained such an order in 2003 as part of its due diligence in defending 154 civil claims. That order leaves the Court seized of the rights of "non-plaintiffs".

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[71] MacDonald Cross-Examination, A.R. Tab 16, pg. 2999.

[72] MacDonald Affidavit, para. 5, A.R. Tab 16, pg. 3068.

74. Again, the Court is not required to assess the extent of the Federal government's obligation to search for documents relevant to the IAP process, because like the transcripts, it has had complete access to all of the OPP documents since 2003, as well as the right to copy any document that related to any one of 180 perpetrators and/or 154 plaintiffs, and any plaintiffs or perpetrators who might later be the subject of the civil litigation.

75. The Notice of Motion summarizes that:

> ... the records in the possession of the non-party the Ontario Provincial Police are relevant and necessary to these claims and cannot be obtained by other means. It would be unfair to require the defendants to proceed to trial without production of these documents. The non-party requires Court orders for the release of these records. [73]

76. The Affidavit of Ms. Sheikh supporting that motion confirms the civil claims were for physical and sexual abuse and consequential harms of former students of St. Anne's, which are identical to those being adjudicated in the Settlement Agreement and the IAP process.[74] Ms. Sheikh swore that the redacted information in the material obtained through Freedom of Information requests was "critical information required to defend these actions", and that the witness statements and complaints in the OPP file "would be useful to all parties" in the claim.[75] She swore that the Federal government "require[d] the contents of the police investigation file in order to defend the allegations" and that "[i]t would therefore be unfair to require the Federal government Defendant to proceed to trial without production of these documents".[76] Obtaining these documents is within the normal standard of practice of any defence counsel in civil actions.

77. The Court remains seized of determining access to the OPP documents, as the scope of the 2003 Order of Mr. Justice Trainor is not restricted to the plaintiffs and defendants who were before him. Justice Trainor was not dealing with a single action, but with a number of actions that were before him and many other possible claims that involved the same defendants and very similar allegations. As a result, his order is somewhat unorthodox. It provided:

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[73] Notice of Motion, dated June 25, 2003 ["2003 Notice of Motion"], para. 3, Exhibit 4 to the MacDonald Cross-Examination, A.R. Tab 16, pg. 3221.

[74] Sheikh Affidavit, paras. 4, 5, A.R. Tab 16, pgs. 3226-227.

[75] Sheikh Affidavit, paras. 9, 20, A.R. Tab 16, pgs. 3227-228.

[76] Sheikh Affidavit, paras. 28, A.R. Tab 16, pg. 3229.

> THIS COURT ORDERS that counsel for the parties may inspect and copy the contents of the Ontario Provincial file of the investigation of St. Anne's Residential School, relating to the Plaintiffs set out in Exhibit "A" of the motion record, *any perpetrators, and to any further plaintiffs added to the action or any further perpetrators which become known.*
>
> THIS COURT ORDERS the remainder of the Defendant's motion as it relates to information in the Ontario Provincial Police file, *of non-plaintiffs*, is hereby adjourned *sine die*". ... This order pertains to all of the actions listed in the Motion Record *and to any further actions which may be heretofore brought by Plaintiffs' counsel.*[77]
>
> [Emphasis added]

78. The terms of the order are disjunctive – that is, the Federal government is granted permission to inspect and copy documents relating to any plaintiff *OR* any perpetrator. If the Federal government was given the authority to copy *any* file relating to 180 alleged perpetrators, this may have captured a great part of the OPP investigation file.[78]

79. Justice Trainor specifically declined to dispose of the motion, and retained jurisdiction over the rights of *non-plaintiffs* to access the OPP investigation documents. This contemplates that the need to inspect and copy the OPP investigation file may be expanded in the future, if new plaintiffs filed an action against the defendants, or if new perpetrators were named.

80. Obviously, on a plain reading, "non-plaintiffs" in the context of claims of physical and sexual abuse at St. Anne's would include individuals who were instead members of the class action in 2003, and are now IAP claimants from St. Anne's. The styles of cause listed for the 154 plaintiffs covered by paragraph 1 of the 2003 Order of Justice Trainor does not include the class action herein, which was underway in 2003. The Federal government should therefore be responsible for returning the Motion to the Court to deal with the rights of "non-plaintiffs".

81. While standard of practice obligations on plaintiff counsel may also be to search for documents in the public domain, or to seek orders of the court to access documents such as the

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[77] Order of Mr. Justice R. G. Trainor, dated August 1, 2003 ["2003 Order"], paras. 1-2, Exhibit 4 to the MacDonald Cross-Examination, A.R. Tab 16, pgs. 3141-42.

[78] List of plaintiffs and perpetrators subject to the 2003 Motion are found in Sheikh Affidavit, Exhibits A, B, A.R. Tab 16, pgs. 3233-40.

body of evidence in the possession of the OPP, the IAP process puts the onus of all such disclosure on the federal government. Claimant counsel is supposed to receive full advance disclosure upon request of relevant documents about sexual and/or physical abuse and conditions at the school, and *modus operandi* of proven perpetrators, obtained by the federal government at the expense of the federal government.

82. There is no doubt that the federal government's responsibility to provide relevant documents in school narrative for St. Anne's and POI reports extends to the OPP documents that it has had complete access to and substantial possession of since 2003. Given that all civil claims were settled following disclosure of these documents, it should be presumed that they are adverse to the interests of the Federal government.

83. In regular litigation, such material non-disclosure at trial would lead a Judge to strike the Statement of Defence at trial. The IAP hearings are the trial for IAP claimants.

84. The Federal government has engaged in abuse of legal process by failing to bring forward this entire body of evidence to the IAP process, particularly after it obtained unfettered access to that documentation through a court order, on the basis of motion materials that pronounced that it would be "unfair" to proceed in the litigation without access to this evidence.

85. The Federal government has failed to reveal to SGM it had all this documentation (and likely more) since August 2012. It forced SGM to find reporters, order copies of transcripts and fulfill all standard practice obligations to plaintiffs, while opposing any obligations to pay costs for these additional steps to offset the non-disclosure and finally expose that the documentation has been in the possession of the defence counsel all along.[79] The fact that claimant counsel must fund this work while facing denial of liability for costs has likely been the reason for this non-disclosure never coming back to the Court.

86. The efforts to not disclose have been vigorous and ongoing. Only this month, the federal government filed the Order of Mr. Justice Trainor, but still did not file the Motion record behind it. When produced under protest, the federal government also protested the Notice of Motion and

[79] See Part VII, below.

affidavit being put into evidence during the examination of Mr. MacDonald. It refused to produce Ms. Sheikh for cross examination on that affidavit. It also failed to reveal its knowledge and possession of the OPP investigation documents to the Court, including in its RFD dated September 5, 2013, until its evidence was filed on November 4, 2013.

87. The IAP claimants' rights to advance disclosure by the federal government of relevant documentation to the adjudicator and claimant is key in the IAP process. Disclosure of relevant documentation, even if adverse in interest, is a fundamental tenet of our civil justice system. These IAP claimants from St. Anne's, who have already suffered enough from inaction by federal government officials, do not deserve substandard legal process. The IAP process is supposed to bend in their favour.

(i) OPP information should not be considered subject to a deemed undertaking

88. The most recent excuse offered by the Federal government for failing to disclose the OPP documentation in the IAP process is the supposed existence of a deemed undertaking. Such excuse is disclosed in a letter to the Truth and Reconciliation Commission dated September 12, 2013, a letter which was not copied to SGM. SGM was directly notified of the Federal government's view that a deemed undertaking applied in the answers to the undertakings on Mr. MacDonald's affidavit, which were provided on November 25, 2013.[80]

89. The implied/deemed undertaking rule exists for two main reasons: to protect the privacy rights of parties that produce information, and to ensure the efficient conduct of civil litigation, which includes promoting full discovery and full and frank disclosure.[81] Given the scope of Justice Trainor's order, as discussed above, there is no basis for considering that a deemed undertaking applies to the OPP investigation documents.

90. The OPP documents were never generated by the federal government, nor does the government represent the former students who gave statements. Rather, the 2003 order provides for complete access to the OPP investigatory documents, to the extent they implicate *any* plaintiff, *any* perpetrator or *any future* plaintiff or perpetrator. Justice Trainor remained seized of

[80] Responses to Undertakings, para. 7, A.R. Tab 17, pg. 3274.

[81] *Juman v. Doucette*, 2008 SCC 8 (CanLII), [2008] 1 S.C.R. 157, [2008] S.C.J. No. 8, paras. 24, 30.

the issue, adjourning the motion *sine die* with respect to "non-plaintiffs" – the IAP claimants – and providing explicitly that the order applies to "*any further actions* which may be heretofore brought by Plaintiffs' counsel". Justice Trainor could not have contemplated IAP counsel specifically, as the IAP was not yet in place, but His Honour quite clearly expressed his order in a manner that would capture future claims concerning physical and sexual abuse at St. Anne's. The Court protected the rights of other former students from St. Anne's who may come forward with civil claims and might similarly need access to that OPP documentation and/or the federal government and Catholic Church wanting renewed access. The part of the motion of the federal government was adjourned *sine die*, so the federal government could return that motion to the Court.

91. There is no deemed undertaking over the OPP documents in the knowledge and possession of the Federal government. Moreover, to the extent that there is any doubt over this question, the Federal government should have been frank and forthright with the IRSAS and/or should have sought direction from the court on how to best respect its disclosure obligations when the IAP process was starting.

92. In the alternative, even if a deemed undertaking were to apply, this Court should exercise its discretion to waive it in the circumstances. The first basis for the deemed undertaking rule is "to protect the privacy interest of the party compelled by the rules of disclosure to provide that information to another party to the litigation".[82] These privacy rights are not owed to the Federal government, and cannot be claimed by the IAP defendants. The privacy rights are owed to the OPP or, more likely, to the individuals who gave signed statements to the OPP.

93. Note that the IAP is a highly confidential process: any statements used as evidence in individual proceedings are redacted, hearings are private and decisions are not released publicly. This documentation is not going into the public domain if released into the IAP process. The IAP process involves a much higher degree of privacy than the civil proceedings to which Justice Trainor's disclosure order pertained, and/or the criminal proceedings that stemmed from the OPP

[82] *Kitchenham v. Axa Insurance Canada*, 2008 ONCA 877, para. 10.

investigation, in which many trials were conducted without publication bans.[83] Indeed, the IAP process specifically contemplates the use of such private information. Schedule VII provides that narratives will "mention sexual abuse by individuals other than those named in an application as having abused the Claimant", but that names of other students or persons are the school are blacked out to protect privacy.[84]

94. Furthermore, the privacy rationale for the implied undertaking rule must be understood in light of the second basis for the rule: encouraging the efficient conduct of civil litigation. The rule encourages parties to make full disclosure by guaranteeing that the information disclosed will not be used improperly in subsequent proceedings.[85] Using the OPP documentation about abuse at St. Anne's in the IAP process for St. Anne's claims is not improper use of the OPP documentation – it is in line with a proper interpretation of the scope of disclosure under the IAP process. It is in line with the flow of justice for survivors that started with the Keykaywin Conference. It will expedite proceedings because the federal government should be admitting more facts in the narrative and admitting liability in more IAP cases, provided the adjudicator believes the IAP claimant.

95. Material non-disclosure at the time of trial is sanctioned by the court to preserve the fundamental need for parties to disclose relevant documentation in civil proceedings, even if adverse in interest. It is abuse of the deemed undertaking rule for a defendant whose employees were engaged in sexual and physical abuse of children, to cloak all the proven abuse in secrecy and not reveal the documentation that is likely to rightly influence the adjudicators to find liability.

96. Courts have warned against abuse of the implied undertaking rule. For example, in *Kitchenham v. Axa Insurance Canada*, the Ontario Court of Appeal held:

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[83] The trial of J.C. was subject to a publication ban. The remaining criminal transcripts are not. A.R. Tab 12, pg. 2191.

[84] Schedule D, Appendix VIII, pg. 30.

[85] See, for example, *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 SCR 743, para. 60 ("The aim is to avoid a situation where a party is reluctant to disclose information out of fear that it will be used for other purposes. The aim of this procedure is also to preserve the individual's right to privacy.").

> [...] wrapping all information produced in the discovery process in one action in a cloak of non-disclosure for any subsequent purpose and requiring a court order to remove that cloak of secrecy would inevitably interfere with the effective operation of the discovery process.[86]

Similarly, in *Tanner v. Clark*, the Court emphasized that it was unacceptable to use the rule as a cloak of privilege or a protective shield against the production of highly relevant evidence.[87] In *Juman v. Doucette*, the Supreme Court cautioned that the rule "should not permit a witness to play games with the administration of justice."[88]

97. The Supreme Court in *Juman* articulated a balancing test for courts to apply when determining whether to modify or relieve from an implied undertaking. It involves deciding whether there is a public interest of greater weight than the aforementioned values the implied undertaking rule is meant to protect, on a balance of probabilities.[89] The Supreme Court reviewed courts' exercise of such discretion, and highlighted one common denominator in particular:

> [...] where discovery material in one action is sought to be used in another action with the same or similar parties and the same or similar issues, the prejudice to the examinee is virtually non-existent and leave will generally be granted.[90]

98. In this case the OPP investigation materials will be going only into the confidential IAP process, for other former students claiming against the same defendants for essentially the same issues: sexual and physical abuse as children at St. Anne's IRS.

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[86] *Kitchenham v. Axa Insurance Canada*, 2008 ONCA 877 (CanLII), para. 32.

[87] *Tanner v. Clark* (2003), 63 OR (3d) 508, para. 6-7.

[88] *Juman v .Doucette,* para. 41.

[89] *Juman v. Doucette,* para. 32.

[90] *Juman v. Doucette,* para. 35. This holding reflected the view expressed much earlier by John B. Laskin, in the article "The Implied Undertaking in Ontario" (1990), 11 Adv. Q. 298 ("Where leave is sought to use the material in other proceedings, an important factor is the extent to which those proceedings are connected with the proceedings in which disclosure was made. Where the two sets of proceedings involve the same or similar parties and the same or similar issues, leave will most readily be granted."), cited in *B.E. Chandler Co. v. Mor-Flo Industries Inc.*, 1996 CanLII 8030 (ON SC).

PART VI - RULES OF EVIDENCE AND BURDEN OF PROOF

99. The previous sections established the Federal government's obligation to disclose. This section will deal with the use and relevance of those documents in individual IAP proceedings.

100. Seven individual IAP claimants have filed their evidence with the Court to demonstrate their legal rights to advance disclosure have been violated, or only remedied upon interlocutory Court order for disclosure. Now, 5 or 6 years into the IAP process, adjudicators are receiving thousands of pages of transcripts of criminal proceedings against perpetrators at St. Anne's, which include findings, but the documents are coming from claimant's counsel, not the federal government. Confusion as to what rules apply to this evidence is evident in the transcripts of various IAP hearings.

101. The conduct of the federal government in the RFD's and in individual IAP hearings justifies the Court to set clear guidelines to guide IAP adjudicators as to the future possible use of evidence found in the OPP investigation documents and the transcripts of criminal proceedings. Clear guidelines will prevent conflicting decisions and multiple appeals over many years. Clear guidelines will also prevent the federal government, in the context of these private hearings, from challenging the evidence of claimants when the documentary evidence already establishes the perpetrator's *modus operandi*, known conditions at the school (such as the existence of an electric chair, being forced to each vomit in the dining room of the school or existence of weapons) and/or credibility findings (employee testified at trial and was not believed).

102. The first clear example is seen in the transcripts and the interim decision on transcripts in *T-11878*. The perpetrator in this IAP claim is Anna Wesley, who was convicted for 5 counts of assault and 3 counts of administering a noxious substance. The 1200 pages of transcripts were provided by SGM to the adjudicator after the Interlocutory Order dated September 27, 2013. The IAP hearing began within days, on October 1, 2013. The issue, after hearing the claimant's evidence, is whether the blow to the head of the claimant by Anna Wesley was hard enough to warrant referral to a physician for possible physical abuse under the IAP. The claimant submitted that the evidence falls within the category "should have led to hospitalization or serious medical

treatment by a physician"[91]. The Federal government is arguing against any compensation for this assault. During caucus, the Federal government raised questions about the size, strength, and age of Anna Wesley on this point. The claimant then sought to tender as evidence under Article III h(vi) the relevant findings from the criminal trial against Anna Wesley, because the victims – whose testimony was accepted by the Jury over Anna Wesley's testimony – all testified as to how hard Anna Wesley could hit, her propensity to deliver a blow to the head of the child, often unexpected and from behind, and the level of injuries that resulted from the assaults she made on little children.

103. Following submissions by claimant counsel and counsel for Canada, the adjudicator rendered an interim decision that criminal transcripts are admissible, but that the transcripts are not relevant because the facts in the transcripts did not involve this particular IAP claimant. Further, despite having deciding that the transcripts were admissible, the adjudicator went on to find that the low probative value and high prejudicial effect made the evidence problematic.[92]

104. Using this as an example, the Court could establish the correct legal framework into which adjudicators in the IAP process may apply rules of evidence to this body of evidence that was otherwise withheld to date. There are no decided cases and no guidelines from the Chief Adjudicator, perhaps because to date the federal government has withheld such evidence all across Canada in the IAP process.

A. Article III h(vi): "Findings" that maybe be accepted without further proof

105. Preventing abuse of process is codified in the IAP process. Under the section of Schedule D dealing with evidentiary standards, Article III h(vi) provides that "*Relevant findings in previous criminal or civil trials, where not subject to appeal, may be accepted without further proof*".[93]

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[91] Under Schedule D, to establish physical abuse, there must be a physical assault, physical injury and one of six scenarios. A referral for medical evidence is required if the claimant submits that, notionally, if the child had been taken to emergency or a family physician when the assault happened, the child would have been hospitalized or would have received serious medical treatment by a physician.

[92] Transcript of Interim Decision in T-11878 ["T-11878 Transcript"], Exhibit 43 to the Supplementary Affidavit of Christina Ruest, dated October 25, 2013 ["Supplementary Ruest Affidavit"], A.R. Tab 8, pgs. 588-95.

[93] Schedule D, Assessment Process Outline, h. Burden of Proof and Evidentiary Standards, pg. 13, para. vi.

106. The doctrine of abuse of process bars the re-litigation of issues where it would otherwise violate principles such as judicial economy, consistency, finality, and the integrity of the administration of justice.[94] In *Toronto (City) v. C.U.P.E., Local 79,* the Supreme Court held that re-litigation "should be avoided unless the circumstances dictate that re-litigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole".[95]

107. Abuse of process stems from the doctrine of issue estoppel. For issue estoppel to apply, three preconditions must be satisfied: a) the same question was previously decided; b) the earlier decision was final; and c) the same parties or their privies were parties in the earlier proceeding ("mutuality").[96] Issue estoppel may not apply in the context of IAP proceedings, because the parties were not identical to those in the previous proceeding such as criminal proceedings or civil proceedings, whereas abuse of process does not require the same parties.

108. Preventing abuse of process was strengthened in 1995 with the addition of s. 22.1(1) of the Ontario *Evidence Act*, which provides : "Proof that a person has been convicted or discharged anywhere in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person".[97]

109. In the IAP process, Article III h(vi) codifies the abuse of process doctrine.

110. In IAP hearings, as soon as the federal government suggests lines of questions or makes submissions to adjudicators that are essentially collateral attacks on the findings in criminal courts of law on the criminal charges against the employees for whom the federal government is civilly liable, transcripts of criminal trials should be admitted. Appendix X of the IAP process clearly authorizes adjudicators to bring forward from hearing to hearing knowledge of the *modus operandi* of proven perpetrators, conditions at the school, and credibility findings. Essential findings of criminal courts of law should be binding against the federal government in the IAP

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[94] *Toronto (City) v. C.U.P.E., Local 79,* 2003 SCC 63, [2003] 3 SCR 77, paras. 42-43.

[95] *Toronto (City)*, para. 52.

[96] *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44.

[97] *Evidence Act*, R.S.O. 1990, c E.23, at s. 22.1(1). See *Andreadis v. Pinto*, 2009 CanLII 50220 (ON SC), paras. 28-31, 41.

process. Massive public resources were devoted to the OPP investigation and criminal proceedings that followed. It has been a miscarriage of justice for that evidence to have been withheld, and not known to be withheld because the IRSAS and adjudicators in the IAP process were kept in the dark. Leaders in the community had no knowledge of what was happening in private hearings for disadvantaged IAP claimants.

111. The Federal government has already admitted by practice that Certificates of Convictions of perpetrators are relevant in adjudicating IAP claims. Mr. MacDonald stated in his affidavit that records of conviction are "generally disclosed" in POI reports.[98] It is absurd to suggest that the "findings" contemplated in paragraph h(vi) of Schedule D can be gleaned from mere Certificates of Conviction. The certificates do not indicate the identity of the victim, the circumstances of the offence, *modus operandi*, etc.

112. According to the Ontario Court of Appeal, *the factual findings that are essential to the criminal verdict* will be the basis for an abuse of process claim, if challenged by another party in a subsequent proceeding.[99] In *Trang v. Alberta (Edmonton Remand Centre)*, the Alberta Court of Queen's Bench found "not only the finding going to conviction but evidence of the surrounding circumstances that, while not essential to establishing guilt, are substantial". While essential facts – those necessary for the conviction – were not reviewable, non-essential facts were regarded by the Court as *prima facie* proof of those facts, and entitled to deference.[100] *Trang* was cited with approval by the Ontario Court of Appeal.[101]

113. "Essential findings" underlying a criminal conviction is not an issue dealt with often by the courts. However, in *Smith v. Doucette*, the Supreme Court of Nova Scotia specifically refused to apply the doctrine of abuse of process when it was presented only with the certificate of conviction, commenting that "normally, in deciding whether 'evidence of a conviction' is sufficient to ground civil liability, the court will usually have something more than the bare

[98] MacDonald Affidavit, at para. 5, A.R. Tab 16, pg. 3068.
[99] *Caci v. Dorkin*, 2008 ONCA 750, leave to appeal to S.C.C. refused, [2009] S.C.C.A. No. 2.
[100] *Trang v. Alberta (Edmonton Remand Centre)*, 2002 ABQB 658 (CanLII), paras. 56, 59, 73.
[101] *Polgrain Estate v. The Toronto East General Hospital*, 2008 ONCA 427.

certificate to rely upon".[102] It elaborated, holding that "[w]ithout reviewing the trial judge's reasons for decision and the trial transcript, it is difficult, if not impossible, to determine these issues. The certificate of conviction merely records that a conviction was entered on a particular date for a particular offence".[103] That authority clearly supports the position of SGM in its efforts to bring forward the transcripts into the IAP process.

114. The legal question is to determine what constitutes a "finding" in a given criminal or civil case, such that the findings may be accepted without further proof. What constitutes a "finding" in the transcripts, following a criminal proceeding will depend on the nature of the verdict.

(i) Scenario #1: Conviction by judge alone

115. Where there is a criminal conviction by judge alone, the "findings" that would create an abuse of process if collaterally attacked and/or contradicted in subsequent proceedings, are most easily ascertained from reasons for Judgment, which are generally found in the transcripts. The reasons for Judgment and/or final ruling of the Judge will stipulate the essential elements that were found to convict.

(ii) Scenario #2: Guilty plea with agreed statement of facts

116. A guilty plea with an agreed statement of facts read by the Crown, presents a similar situation in determining the "findings" that can be accepted without further proof. The accepted facts underlying the conviction are agreed to by the parties and accepted by the trial judge to be sufficient to register a conviction. Therefore, those facts of essential elements underlying the conviction must be accepted by a subsequent judge or administrative decision-maker.[104]

117. If the same victim in the criminal proceedings is now an IAP claimant claiming compensation for sexual abuse by the convicted former employee of the IRS, it would be a complete abuse of process in the IAP process to not accept the transcripts as having established the essential elements of the crime.

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[102] *Smith v. Doucette*, 2005 NSSC 327, para. 8.
[103] *Smith v. Doucette*, para. 10.
[104] See e.g. *Andreadis v. Pinto.*

118. Indeed, the Federal government has recently accepted in *N-13600* that the 1997 guilty plea entered in *R. v. Rodrique* related to sexual assault against the claimant in *N-13600* when he was a child at St. Anne's IRS. The Federal government admitted at the IAP hearing on October 9 and 10, 2013 that "for the purpose of this proceeding only", the transcripts in *R. v. Rodrique* were admissible and relevant in the IAP proceedings.[105] This led to a short form decision – so the obviously relevant transcripts facilitated expediency in the adjudication of that IAP claim.

119. This IAP claim of *N-13600* alone establishes that *the Federal government is wrong to take a blanket position for the past 6 years that transcripts of criminal proceedings in the IAP process are never admissible or relevant.* It also demonstrates the falsity of the 2008 Narrative for St. Anne's, which reported "No known incidents ... regarding sexual abuse at Fort Albany IRS".[106] The IAP claimant in *N-13600* was brave enough to go to the police, and it is unjust for the findings in those transcripts of criminal convictions of John Rodrique to not be part of the narrative and/or POI report about that proven perpetrator.

120. The transcripts in *R. v. Rodrique* produced by the federal government under the Interlocutory Order of Mr. Justice Perell dated September 27, 2013, contain findings by the Court of *sexual abuse of many other boys at St. Anne's IRS by John Rodrique*. The Federal government has had those transcripts since 2003 but never disclosed them, and operated under a narrative that falsely claims there are no documents pertaining to sexual abuse at St. Anne's. SGM does not represent all those victims, only one. However, SGM represents numerous other former students who filed claims they were sexually abused by Rodrique, but the claimant had no knowledge Rodrique was convicted. But for SGM meeting over 200 former students of St. Anne's, SGM would not have known on an individual IAP claim basis that such evidence was missing.

(iii) Scenario #3: Conviction in a jury trial

121. In a jury trial, the factual findings are not as readily apparent, and it is necessary to examine the transcript itself to determine the "essential findings" that cannot be re-litigated. As a

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[105] Transcript of *R. v. Rodrigue*, A.R. Tab 11, pg. 2134; Transcript of proceedings in N-13600, A.R. Tab 16, pg. 2866.

[106] Transcript of *R. v. Rodrigue*, A.R. Tab 11.

result, the adjudicator (or Court on review) must analyze the essential elements of the criminal charges, read the evidence of the witnesses, read the charge to the jury and discern by inference what was necessarily found by the jury to find in order to convict.

122. In the jury trial of Anna Wesley in 1999, she was convicted on five counts of assault and three counts of "administering a noxious substance" for hitting three boys (between the ages of 6 and 9) to force them to eat their vomit in the dining room of the school, in front of their peers. Anna Wesley was a former nun of the Catholic Church and she was the supervisor of the boys from about 1951 to 1961.

123. In the transcripts at trial, the Attorney General of Ontario led expert medical evidence from a physician (Dr. Brian Kain) and also from a psychologist (Dr. Peter Jaffe) to establish an essential element of "administering a noxious substance", namely that the child would be *harmed* if forced to eat vomit in such circumstances. The scenario put to the doctors for the purpose of their opinions was:

> The supervisor forced small children under her care, at a residential school away from their parents, to eat their vomit while in the dining room and in front of their peers, and this was having thrown up for whatever reason. The supervisor had assaulted the child to force them to do so.[107]

124. Both doctors testified to these facts being "severe child abuse". Dr. Kain gave medical expert testimony as to the physical harms that a small child could suffer from being forced to eat vomit. The doctors also gave evidence that even watching other children being subjected to such severe abuse was also a form of child abuse. They testified to the likelihood of "severe life long psychological damage ... comparable to gross physical abuse or gross sexual abuse because it leaves a life long scar."[108] Anna Wesley's lawyer admitted that forcing children to eat vomit would cause physical harm, but objected to the admission of the medical evidence about psychological harm. The Judge ruled all this medical evidence was relevant to the charges before the jury, so it was admitted (Anna Wesley testified on her own behalf and denied the allegations against her.).

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[107] Transcript of *R. v. Wesley*, A.R. Tab 10, pgs. 988 and 1011.

[108] Transcript of *R. v. Wesley*, A.R. Tab 10, pg. 1018.

125. Several important findings stem from the three convictions for "administering a noxious substance": a) the jury found that Anna Wesley required children to eat their vomit in such circumstances; b) the jury accepted Anna Wesley's admission and the medical evidence confirmed that a child eating vomit caused physical harm; and c) the medical evidence met the threshold of relevance for admission at trial by the trial judge. These are all "findings" that should be binding on the federal government in the IAP process, pursuant to Article III h(vi), perhaps beyond St. Anne's. These findings, and the allegations and documents surrounding them, should be available to adjudicators and claimants when the claim is based upon a child being forced to eat their vomit.

126. In *W-10876*, where the IAP claimant claimed he was forced to eat his vomit in that same dining room at St. Anne's by another supervisor, and where the IAP claimant claimed he was physically abused by Anna Wesley as well, the transcripts in *R. v. Wesley* were never produced in advance of the March 2013 hearing to the adjudicator. Since then, the Federal government is arguing strenuously that eating vomit should not be considered physical abuse for the purpose of compensation under the IAP model, and arguing the physical abuse by Anna Wesley does not constitute physical abuse under the IAP model. The adjudicator did not have the transcripts in *R. v. Wesley* when the claimant gave his evidence in his IAP hearing, nor did the adjudicator or SGM know the medical findings of harm that were essential to the guilty verdict.[109] These transcripts have now been put before the adjudicator, who has stayed the IAP process pending the outcome of this RFD.[110]

(iv) Scenario #4: Acquittal in Criminal Trial

127. Where a perpetrator is acquitted in a criminal trial, the acquittal is to have no impact on determining liability in a subsequent civil trial. This is rooted in the different standards of proof between the two proceedings. As the Ontario Court of Appeal put it in *Polgrain Estate*:

> Barring unusual circumstances where a finding may have to be made on a balance of probabilities, the judicial finding to be made by the criminal court is whether

[109] Transcript of proceedings in W-10876, Exhibits 17 and 18 to the Ruest Affidavit, A.R. Tab 7, pgs. 375-76 and 378-81.

[110] Email from D.C.A. Landry dated November 13, 2013, Exhibit 50 to the Second Supplementary Ruest Affidavit, A.R. Tab 17, pgs. 3281-3282.

> the case has been proved beyond a reasonable doubt. That burden of proof is the touchstone of the criminal trial and is the lens through which the facts are viewed and findings made.[111]

128. As a result of the different burdens of proof, the court affirmed that "an acquittal of a wrongfully convicted individual re-establishes the accused's legal innocence but does not address factual innocence".[112] That is, the acquittal demonstrates that the alleged perpetrator's guilt could not be established beyond a reasonable doubt, but not that the alleged perpetrator did not commit the acts on a balance of probabilities.

129. Nevertheless, on the logic of *Trang*, discussed above, 'substantial' findings of fact made by a judge sitting alone in delivering a guilty verdict may still hold *prima facie* weight in a subsequent proceeding, and be owed deference.

130. J.C., one of the former employees of St. Anne's, was acquitted of a charge of sexual abuse, though the trial judge commented that "if the test were that I be satisfied beyond grave suspicion that the prosecution had established [J.C.'s] guilt, I would find him guilty".[113] These transcripts were produced at the outset of the hearing in IAP claim *N-13600* on October 9, 2013, where J.C. was a second main POI on allegations of sexual abuse. The transcripts had not been read by legal counsel attending for the Federal government and the adjudicator would not take receipt of the transcripts because the Federal government had not filed the transcripts in the IAP process and was requesting a signed undertaking from the adjudicator. The POI report for J.C. had given him a clear record, mentioning no *allegations* of abuse. Claimant counsel requested an adjournment to deal with these transcripts, which was opposed by the Federal government and the hearing proceeded. The IAP claimant told the adjudicator that he felt his rights were being violated by the Federal government.[114]

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[111] *Polgrain Estate*, para. 33.

[112] *Polgrain Estate*, para. 34.

[113] Transcript of *R. v. J.C.*, A.R. Tab 12, pg. 2746.

[114] Transcripts of Preliminary Caucus in N-13600, A.R. Tab 15, pgs. 2846-81.

B. Article III h(ii): Evidence that is credible or trustworthy in the circumstances

131. Schedule D of the Judgment Order specifically provides that adjudicators "may receive, and base a decision on, evidence adduced in the proceedings and considered credible or trustworthy in the circumstances".[115] On a plain reading, this expands the general rules for admissibility of evidence, to allow the adjudicator to receive and rely on *any* evidence that he or she deems to be credible and trustworthy. This aligns with the general thrust of the IAP process. The IAP model allows for broad admissibility of hearsay evidence. This includes evidence about the conditions at St. Anne's and the alleged perpetrator, as well as evidence of abuse pertaining to perpetrators and students who are not the subject of the particular claim at issue.[116]

132. As a result, when the signed statements given to the OPP are given to adjudicators and claimants in IAP hearings, and they contain relevant information, adjudicators can accept it as evidence that is credible and trustworthy in the circumstances. Databases compiled by the OPP that correlate incidents, perpetrators, victims and witnesses could be accepted as credible and trustworthy in the circumstances. Charts compiled by the OPP to show the *modus operandi* of perpetrators at St. Anne's could be accepted as well.

133. The signed statements of former students given to the OPP are documents taken by public officials in the context of a police investigation, and therefore carry many of the markers of reliable hearsay evidence. Indeed, courts have recognized that records from an investigation by police can be admissible under the principled exception to hearsay.[117] The work done by the OPP and Attorney General of Ontario with those signed statement is equally reliable.

134. Allowing the admission of credible and reliable hearsay evidence conforms with the general evidentiary thrust of the IAP process, which relaxes the standard rules of evidence in a manner that is intended to favour the interests of claimants. It could help expedite admissions of liability from the federal government for survivors from St. Anne's whose testimony is believed.

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[115] Schedule D, Assessment Process Outline, h. Burden of Proof and Evidentiary Standards, p. 12, para. ii.

[116] See Schedule D, Appendix VIII.

[117] *Éthier v. Canada (RCMP Commissioner)*, [1993] 2 FC 659 (C.A.).

135. The Court's legal directions are necessary and proper under the Judgment Order and Implementation Order and Rule 60.11. The disclosure requested is coming into the IAP process, giving rise to legal issues. Rather than getting a wide range of outcomes from various adjudicators that would otherwise take years to determine on review, the Court could provide guidelines and/or be immediately available for evidentiary rulings. In a civil context, the federal government's statement of defence would be struck, liability found, and references on damages would instead be heard. Every IAP hearing is the trial for the IAP claimant.

C. "Relevance" of previous findings and documentary evidence in an IAP hearing

136. As discussed, the Federal government takes the position that all the impugned evidence is always irrelevant in every IAP claim. It has repeatedly argued in four individual IAP claims in the past two months that transcripts of criminal proceedings that led to convictions of the same perpetrators at issue had no relevance to the IAP claim. On cross examination, the federal government has refused to reveal its own definition of relevance.[118]

137. The definition of "relevant" under Articles III h(ii) and h(vi) must be clarified by the Court for subsequent adjudicators. In the Claimants' submission, transcripts of criminal proceedings and documents from the OPP investigation (which have not yet been produced) may be relevant in IAP claims on the following bases.

(i) Direct finding of abuse against a particular claimant by a perpetrator

138. The clearest application of relevance arises where the criminal conviction relates to abuse by a perpetrator against a victim, who now claims the same abuse in the IAP process. As discussed above, pursuant to the doctrine of abuse of process, the previous finding of guilt is binding on the IAP adjudication and liability should be admitted.[119]

139. We see this type of claim in several of the cases on the record in this RFD. The Federal government accepted that the transcript in *R. v. Rodrique* was admissible and relevant with respect to the hearing in *N-13600*, which involved a claim of abuse by a victim who gave his

[118] MacDonald Cross-Examination, A.R. Tab 16, pgs. 2982-2983.
[119] *Caci v. Dorkin*, 2008 ONCA 750, para. 15.

evidence to the police and a guilty plea was entered on agreed facts.[120] In file *W-11736*, the claimant testified in the trial of Anna Wesley, about having been forced to eat vomit, and the jury convicted Anna Wesley for administering a noxious substance.[121] Medical evidence was accepted by the jury to find forcing a child to eat vomit is physically harmful to the child. In each of these cases, the evidence found in the criminal transcripts is clearly "relevant" to the IAP adjudications and should be accepted as evidence.

(ii) Evidence corroborating abuse or certain forms of abuse

140. Evidence from criminal transcripts or sworn statements made to the OPP investigation may corroborate the claims made by certain IAP claimants. The Federal government suggests in some correspondence that there is no place for corroborating evidence in the IAP process. It is true that the claimants' evidence *can* be accepted without corroboration. However, in practice, whether a claimant's evidence will be accepted is unknown until the hearing is well underway. The fact that a claimant's evidence may be accepted without corroboration does not mean claimant counsel can abandon the possible need to call corroborating evidence. In advance of the IAP hearing, claimant counsel must give advance notice of corroborating evidence that may be called.

141. Moreover, Schedule D itself contemplates that adjudicators may consider corroborative documentary evidence in assessing testimony. In Appendix X, "*modus operandi* of proven perpetrators" can be used by adjudicators, subject to certain limitations. Appendix X also notes that adjudicators may use any of the "orientation materials" provided to them "to question witnesses, but also to make findings of fact and to support inferences from evidence they find credible, for example to conclude that trauma of a certain kind can be expected to flow from a sexual assault on a child".[122] Similarly, the document collections on various residential schools "may be used as a basis for findings of fact or credibility".[123]

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[120] Transcript of *R. v. Rodrique*, A.R. Tab 11, pg. 2134; Transcript of proceedings in N-13600, A.R. Tab 15, pg. 2866.

[121] D.W. Affidavit, paras. 6, 8, 9, A.R. Tab 2, pgs. 89-90.

[122] Schedule D, Appendix X, 1. Orientation Material Provided to Adjudicators, pg. 40.

[123] Schedule D, Appendix X, 1. Document Collections, pg. 39.

142. The use of evidence other than testimony was recognized in the *L-14245* review decision. There, the adjudicator had preferred the evidence of the alleged perpetrator from a prior criminal proceeding over the testimony of the claimant. The reviewing adjudicator confirmed this approach, commenting that the adjudicator "is in the best position to weigh the evidence" and that "[t]here is no principle or presumption ... that the adjudicator must prefer *viva voce* over documentary evidence or Claimant's testimony over others, simply by virtue of the relative roles deponents play within, or even outside, this process".[124]

143. SGM anticipates that upon receipt of the body of missing evidence there will be many instances where documentary evidence may corroborate an IAP claimant's testimony. A statement to the OPP may not only mention allegations of abuse against the student making the statement, but also what abuse was witnessed against other students. This was the case in the statement that the claimant in *W-11736* made to the OPP, where he reported the use of a homemade whip by Brother Lauzon against another student.[125] Similarly, the claimant in *S-11462* reported Sister Jane hitting another student and being electrocuted.[126] The IAP claimant might not know which other students witnessed the IAP claimant being abused, but the OPP documentation may contain signed witness statements corroborating that abuse. If so, the federal government will have to admit the incident occurred and as such, the process may be expedited.

144. OPP statements made by students other than the claimant at issue may also corroborate the existence of certain facts as to conditions at the school, like specific whips/weapons or the electric chair. The claimant in *W-11736* identified the existence of a homemade whip. He also discussed the existence of a homemade electric chair,[127] a fact that was confirmed in other statements.[128] The affidavit of Haniya Sheikh, accompanying the 2003 motion, identified the various names and Cree nicknames of perpetrators, something that has been at issue in various claims.[129] Finally, as with the medical evidence about the harm of eating vomit in the Anna

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[124] Decision of the Reviewing Adjudicator, file number E5442-10-L-14245, dated September 6, 2010.

[125] Signed statement to OPP, Exhibit 5 to the D.W. Affidavit, A.R. Tab 2, pg. 122.

[126] Affidavit of L.S., sworn August 25, 2013 ["L.S. Affidavit"], para. 11, A.R. Tab 3, pg. 141.

[127] Signed statement to OPP, Exhibit 5 to the D.W. Affidavit, A.R. Tab 2, pg. 121 [pg. 6 on OPP docs, but 124 was pg. 7 on OPP docs].

[128] L.S. Affidavit, para. 12, A.R. Tab 3, pg. 141; Metatawabin Affidavit, para. 6, A.R. Tab 1, pg. 12.

[129] List of perpetrators, Appendix B to the Sheikh Affidavit, A.R. Tab 16, pgs. 3238-40.

Wesley trial, discussed above, criminal transcripts may corroborate the nature of the harm suffered.

145. Some former students who gave statements to the police may have died after May 2005 and before they filed an IAP claim, such that their estates may have an IAP claim.

(iii) Similar fact evidence and *modus operandi*

146. Finally, findings from criminal transcripts and reliable evidence from the OPP investigation may be admissible and relevant in an IAP claim as similar fact evidence, relevant to a perpetrator's *modus operandi*. Adjudicators are explicitly supposed to be provided with documents relating to "any sexual or physical abuse allegations concerning" the perpetrator.[130]

147. It is critical to remember that many IAP claimants are highly challenged individuals and many are terrified to testify about the events that happened to them as children. They may not be able to testify in a hearing and/or to provide reliable testimony on their own about what happened to them as children. Maybe memories of some details are erased or covered by prolonged addictions, mental suffering, etc. However, if their testimony is heard and similar fact evidence from findings in previous criminal or civil trials establishes similar fact evidence to meet the onus of proof, such evidence should be accepted to award compensation to the IAP claimant.

148. In Appendix X, which deals with the use of extra-curial knowledge, adjudicators are instructed to carry forward findings from previous hearings concerning, among other things, "the acts and knowledge of adult employees, and where an individual is found to have committed a number of assaults in a particular way, their *modus operandi*", in order to inquire about admissions or question witnesses.[131] *Modus operandi* implicitly means from more than one source. Accordingly, reliable evidence of what the perpetrator is alleged to have done repeatedly, must, *at the very least*, be admissible and relevant for the purposes of inquiring about admissions or questioning the IAP claimant before the adjudicator.

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[130] Schedule D, Appendix VIII, pg. 30.

[131] Schedule D, Appendix X, 4. Previous findings, pg. 41.

149. To be clear, however, this limitation on the use of *modus operandi* evidence – for inquiring about admissions or questioning the IAP claimant – stems from the fact that the evidence that an adjudicator carries through from a prior hearing is not disclosed and cannot be tested by the parties, and should therefore not be the basis of a finding of fact. Evidence found in criminal transcripts or the OPP investigation is far more akin to the evidence of "any sexual or physical abuse allegations", which are included in a POI report and can be the basis of findings of fact.

150. As a general rule, similar fact evidence of *modus operandi* is presumptively inadmissible in *criminal* proceedings as bad character evidence. However, even in criminal proceedings, the Supreme Court in *Handy* established an exception where the similarity between the facts alleged by the claimant and those alleged or proven previously will justify the admissibility and use of this evidence.[132] It is also not necessary for the previous allegation to have been proven.[133]

151. *Handy* identified the factors that would support a connection between the previous act(s) and the allegation in play: (a) proximity in time of the similar acts; (b) the extent to which the other acts are similar in detail to the charged conduct; (c) the number of occurrences of the similar acts; (d) circumstances surrounding or relating to the similar acts; (e) distinctive feature(s) unifying the incidents; (f) intervening events; and (g) Other factors which would tend to support or rebut the underlying unity of the similar acts.[134]

152. Weighing against the probative value of similar fact evidence is the potential prejudice that might result from the admission of the evidence. The prejudice that is weighed against the probative value of the evidence is its 'moral' and 'reasoning' prejudice. Reasoning prejudice prefers to "potential confusion and distraction" of the decision-maker,[135] though its impact has been found to be "considerably reduced" in a trial involving a judge sitting alone.[136] Moral

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[132] *R. v. Handy*, [2002] 2 S.C.R. 908, para. 48.
[133] Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3rd ed. (LexisNexis, 2009), pg. 682, para. 11.17.
[134] *Handy*, para. 82.
[135] *Handy*, para. 100.
[136] *R. v. J.W.*, 2013 ONCA 89, para. 57.

prejudice is "the potential stigma of 'bad personhood'".[137] It is elevated in the criminal context, where the accused's liberty is at stake.[138]

153. To be clear, in the IAP Process, the prejudice at play from admitting similar fact evidence is *not* a greater risk that the adjudicator finds that the perpetrator had committed physical or sexual abuse – that would in fact support the *probative value* of the evidence. It is not prejudice against the federal government that liability is established. This point would seem self-evident, yet it appears to be a point of confusion with the first IAP adjudicator to consider this line of argument from the federal government.[139] She agreed with the federal government argument that admitting the transcripts in the criminal proceedings against Anna Wesley would be prejudicial in the IAP hearing in which Anna Wesley was the POI. It also cannot be said to be prejudicial to the reasoning process of the adjudicator, as each adjudicator is already supposed to have all documents containing merely allegations of sexual or physical abuse in advance of the IAP hearing. It equally cannot be said to be unfair to the Federal government, because it is civilly liable for the actions of Anna Wesley, because she had a full jury trial, was defended by legal counsel and she testified on her own behalf.

154. The risks of prejudice are also greatly reduced in the civil context, where loss of liberty is not a risk. In the IAP process, the perpetrator (POI) is not even a party, and Schedule D already contemplates the admission and use of a wide range of 'bad character' evidence. Moreover, it would be abuse of legal process if the perpetrator elects to have a POI hearing in the IAP process,[140] if the transcripts of findings or documents containing other allegations against the perpetrator are not known/available to the adjudicator and claimant in advance of the POI hearing.

155. An instructive decision is the Nova Scotia Court of Appeal's decision in *J.M.D. v. NSUARB*.[141] There, the Court was considering whether to admit similar fact evidence in a proceeding that concerned the compensation available to a claimant under the *Victims' Rights*

[137] *Handy*, para. 100.
[138] Sopinka et al., *The Law of Evidence in Canada*, paras. 11.140-142.
[139] Interim decision in T-11878 dated October 14, 2013.
[140] Schedule D, Appendix III, pg. 21-22.
[141] *J.M.D. v. NSUARB*, 2004 NSCA 131.

and Services Act. The Court acknowledged the limits on the admissibility of similar fact evidence in the criminal context, but found that the considerations were different where "one is dealing with a civil matter, where the standard of proof is much different".[142] It cited the decision of Lord Denning in *Mood Music Publishing Co. v. De Wolfe Ltd.*, where he found that, in civil cases, "the courts will admit evidence of similar facts if it is logically probative, that is, if it is logically relevant in determining the matter which is in issue; provided that it is not oppressive or unfair to the other side; and also that the other side has fair notice of it and is able to deal with it".[143] To the Nova Scotia Court of Appeal, the potential prejudice of similar fact evidence "bears much less significance in a civil case".[144] But this was particularly true in the context of the proceedings before the Court, which related only to the compensation available to the victim under the legislation, to which the perpetrator was not a party. The Court commented that:

> ... there is good reason to question whether the law relating to similar fact evidence is even applicable to the proposed evidence. The similar fact rule permits evidence to be admitted that would otherwise be excluded under the rule barring evidence of the bad character of a party. As pointed out earlier, *neither Dr N. (nor his estate) is a party to this application for criminal injuries compensation.* Both Wigmore and Cross maintain that *generally no special exclusionary rules apply to character evidence of a non-party*: see R. Cross Evidence (5th, 1979) at 410; I Wigmore, s. 68 at 488 (3d), 1940 as cited in S. Schiff, Evidence in the Litigation Process, vol 2, 4th Edition/Master Edition (Scarborough: Carswell, 1993) at, 1162, n. 87. If that is so, *there is no need to rely on the similar fact doctrine to admit the proposed evidence because it is not excluded by the exclusionary rule relating to character evidence in the first place; the focus of analysis should be on relevance.*[145] [Emphasis added]

156. Seeing as the risk of prejudice is low in the IAP process, the question in admitting similar fact evidence in a given IAP hearing should be simply *whether it is logically probative of any of the facts in issue*. In fact, the potential relevance of such evidence was accepted by Mr. MacDonald in his cross examination. He said that "proven perpetrators" in the IAP process were those "who have been criminally proven to be perpetrators, and some alleged perpetrators out

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[142] *J.M.D. v. NSUARB*, para. 15.

[143] *Mood Music Publishing Co. v. De Wolfe Ltd.*, [1976] 1 All E.R. 763 (C.A.), cited in *J.M.D. v. NSUARB*, para. 15.

[144] *J.M.D. v. NSUARB*, para. 17.

[145] *J.M.D. v. NSUARB*, para. 17.

there who have not been criminally convicted, but we are aware they did these things, from a variety of sources".[146]

157. Mr. MacDonald also disclosed that the AANDC maintains a spreadsheet that contains past information about POIs, which lists whether a given perpetrator has been named in other files, the nature of the abuse that they are alleged to have committed and whether past claims were successful.[147] Mr. MacDonald said that, when going into an IAP hearing, he would sometimes look at the nature of the allegations that had been made against a POI in the past, and this would inform his approach to the case at issue, involving a different claimant and different facts.[148]

158. Mr. MacDonald admitted to the relevance of past evidence of the *modus operandi* from a perpetrator in a fresh claim. Yet, when asked whether he could draw this *modus operandi* from the certificate of conviction that is given to adjudicators and claimants with the POI reports, he stated: "Not from what I'm reading".[149] This is self-evident – in order to determine the *modus operandi* of a perpetrator, as found by a judge or jury, or as alleged to the police or the court in prior investigations, it is not sufficient to have a record of conviction. The adjudicator and the claimant must be given the opportunity to review the full transcript of conviction or the full statements made to the OPP.

159. The potential relevance of evidence of *modus operandi* is clear in individual cases. For instance, if allegations are made in a given case that Anna Wesley forced a claimant to eat vomit the dining room, there should be no question that Anna Wesley forces children to eat vomit. The only question should be whether she forced that particular claimant to do so. The same could be true where a perpetrator is known or alleged to have committed sexual assaults in a certain manner.

160. In IAP hearing *T-11878*, heard October 1 and 2, 2013, the IAP claimant was struck in the head by POI, Anna Wesley. In her trial transcripts, Anna Wesley was convicted on five counts of

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[146] MacDonald Cross-Examination, A.R. Tab 16, pg. 2966.
[147] MacDonald Cross-Examination, A.R. Tab 16, pgs. 1969-70.
[148] MacDonald Cross-Examination, A.R. Tab 16, pg.2970.
[149] MacDonald Cross-Examination, A.R. Tab 16, pg. 2975.

having assaulted children at St. Anne's. Her *modus operandi*, according to the testimony of the victims and witnesses to the events whose evidence was accepted, was usually a blow to the head for having broken one of "Anna's rules". Many men testified how terrified they were of Anna Wesley when they were small children, because of her brutality. Various men testified how hard Anna Wesley would hit and the physical injuries they suffered.

161. In *T-11878*, the Federal government was taking the position that the blow to the head was not of sufficient force to constitute physical abuse under the IAP model, based on the size, age and strength of Anna Wesley. Argument was made by both counsel as to admissibility and relevance of the transcripts after the evidence of the IAP claimant was heard. In this context, the evidence of Anna Wesley's *modus operandi* and of the nature of the harm she inflicted on the witnesses in her trial was relevant to the nature of the harm she was capable of inflicting on the claimant in *T-11878*.

162. Counsel for the Federal government had not "had an opportunity to read through the transcripts" in *R. v. Wesley*, but then argued they were not evidence, not relevant and not admissible.[150] The Federal government offered a flurry of arguments: that transcripts are not evidence, that evidence can only be tendered viva voce through a witness in the IAP, and that neither corroborating evidence or similar fact evidence is permitted in the IAP. The adjudicator concluded that the transcripts were admissible, but not relevant to the issues before her. On the question of similar fact evidence, she found that the "low probative value and highly prejudicial aspect of such evidence" made it problematic.[151]

[150] T-11878 Transcript, Tab 14, pgs. 2768-2845.

[151] Interim decision in T-11878 dated October 14, 2013.

PART VII - DELIBERATE NON-DISCLOSURE BY THE FEDERAL GOVERNMENT OF KNOWN ABUSE AT ST. ANNE'S.

163. This section is necessary for the Court, responsible to implement the Judgment Order, to understand the protracted process by which this non-disclosure has been revealed, the oppressive manner in which the federal government has misused its superior resources, and the barrier of possible non-recovery of costs by any claimant counsel to otherwise enforce the legal rights and entitlements of former students of St. Anne's, to otherwise enforce each former student's legal right to the benefit of this whole body of evidence come forward into confidential IAP hearings before properly informed adjudicators.

A. Confusion amongst former students in James Bay region about IAP process.

164. September 19, 2012 was the final deadline for a filing an IAP claim. Starting in January 2012, SGM and Suzanne Desrosiers of Timmins traveled to communities along the James Bay coast to provide independent legal advice to former IRS students in the region[152]. Many of the First Nations were trying to have experienced lawyers come in to provide legal advice in these remote communities because many former students do not have resources to access experienced legal counsel in civil matters and/or the former students are challenged.[153] The fiasco of other law firms whose IAP files were taken away, had touched on people in the region.

165. By May 2012, some former students who became clients of SGM advised they had testified in court against Anna Wesley and John Rodrigue.[154] SGM was also asked to meet a number of St. Anne's survivors who might be eligible to claim damages in the IAP process but who reported they would not pursue a claim because they knew their stories would not be accepted. They explained that they had given their stories to the police in the 1990's, and had been told that their stories would not be used in court. SGM tried to explain the difference in the burden of proof between criminal prosecutions and the IAP process to these former students.[155] SGM did not have the responsibility or resources to conduct widespread public information

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[152] Ruest Affidavit, para 5, A.R. Tab 7, pg. 169.

[153] Metatawabin Affidavit, para. 25-26, A.R. Tab 1, pg. 16.

[154] D.W. Affidavit, para. 6, A.R. Tab 2, pg. 89; A.N. Affidavit, para. 5, A.R. Tab 9, pg. 610.

[155] Letter from F. Brunning to D.C. Delguidice, dated June 8, 2012, Exhibit 5 to the Ruest Affidavit, A.R. Tab 7, pgs. 224-26.

sessions; and while in the context of individual client meetings, legal advice could be given, the IRSAS had the duty to educate generally about the IAP process so that people knew whether they might talk to a lawyer.

166. Given this confusion in the region, SGM conducted internet searches, and eventually contacted Detective Constable Delguidice of the Cochrane OPP. SGM inquired whether the OPP could help explain the legal effect of the decision not to prosecute, and whether statements given to the OPP could be provided to the IRS Secretariat ("IRSAS").[156] SGM also contacted Chief Adjudicator Dan Ish on June 13, 2012, informing him of the OPP investigation into St. Anne's, and asking for help in educating former students who had given statements to the OPP and for IRSAS to obtain disclosure of the materials given to criminal defence counsel, funded by the Catholic Church, in the criminal proceedings.[157] Chief Adjudicator Ish replied on June 28, 2012, noting the serious issues raised, and offering to have IRSAS outreach staff attend to correct misunderstandings. He took the position that the IRSAS had no role in obtaining disclosure.[158] On questions regarding disclosure or obtaining transcripts, he did not confirm transcripts of criminal proceedings were already within the scope of disclosure in the IAP process. Rather, he referred SGM to the Director of Research in AANDC, David Russell.

167. On June 3, 2012, Norm Feaver, counsel for the OPP, responded to SGM's letter to D.C. Delguidice. Mr. Feaver wrote that the OPP could not legally disclose investigation records without the consent of the people whose information may be found in the records. He suggested a motion or a Freedom of Information (FOI) request was possible for individuals who spoke to the police for disclosure of their own statements.[159] There was no mention of Mr. Justice Trainor's Order dated August 1, 2003 (SGM resumes that the OPP in Cochrane were never made aware of that Order.)

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[156] Letter from F. Brunning to D.C. Delguidice dated June 8, 2012, Exhibit 5 to the Ruest Affidavit, A.R. Tab 7, pgs. 224-26.

[157] Letter from F. Brunning to D. Ish dated June 13, 2012, Exhibit 6 to the Ruest Affidavit, A.R. Tab 7, pgs. 228-30.

[158] Letter from D. Ish to F. Brunning dated June 28, 2012, Exhibit 7 to the Ruest Affidavit, A.R. Tab 7, pgs. 234-35.

[159] Letter from N. Feaver to F. Brunning dated July 3, 2012, Exhibit 8 to the Ruest Affidavit, A.R. Tab 7, pgs. 237-40.

168. Therefore, on July 30, 2012, SGM wrote an email, with these four letters attached, to the Department of Justice. SGM advised that there had been an OPP investigation into abuse at St. Anne's, stemming from the 1992 school reunion, which had involved around 1,000 interviews. SGM noted what was implied in Chief Adjudicator's letter, that this evidence "*has not been gathered yet for the purpose of adjudicating individual claims under the IAP claim process*", and SGM asked the Federal government to "*gather and view all this evidence now known to exist, for the purpose of relevance to IAP claimants*".[160]

169. On August 7, 2012, the Department of Justice replied and merely referred to Appendices VII and VIII as setting out the mandatory productions by claimants and the federal government. A further email was sent from SGM on August 7, 2012, asking the federal government to seek the OPP documentation at its own expense. SGM asked that the evidence go into the IAP process "*to ensure that further injustice is not done to the brave people who came forward in good faith to the law in the 1990's and a further injustice does not happen in the IAP claim process because known evidence is not being sought/reviewed/revealed.*"[161] SGM argued that the Federal government was obliged, under Appendix VIII, to disclose "any allegations of physical or sexual abuse committed by such persons" named as a perpetrator. Because SGM had so notified the federal government of the OPP investigation, SGM argued the federal government had a duty to seek to have the OPP disclose that evidence.[162]

170. The federal government's reply, dated August 7, 2012, wrote that "Canada adheres to Appendix VIII of Schedule 'D' to the IRSSA". On receipt of an IAP complaint, the federal government stated it

> ... searches its document collection and provides a report about the alleged perpetrator. That report includes information about an alleged perpetrator's employment at the residential school, the dates he/she worked or were present, and any allegations of physical or sexual abuse committed by such persons *where such allegations were made while the person was an employee or student.* Insofar

[160] Email from F. Brunning to F. Fisher, with attachments, dated July 30, 2012, Exhibit 9 to the Ruest Affidavit, A.R. Tab 7, pg. 242.

[161] Email from F. Brunning to G. Soonarane dated August 7, 2012, Exhibit 10 to the Ruest Affidavit, A.R. Tab 7, pgs. 244-46.

[162] Email from F. Brunning to G. Soonarane dated August 7, 2012, Exhibit 10 to the Ruest Affidavit, A.R. Tab 7, pgs. 244-46.

> as you advise that some of your clients made allegations to the OPP in the 1990s (well after St. Anne's closure in 1976), then these allegations are not captured by the IAP's government disclosure requirements.[163] [Emphasis in original]

171. "*Insofar as you advise that some of your clients made allegations to the OPP...*" was taken in good faith to mean that Department of Justice had not already been aware of the OPP investigation. The email gave no other reasons for non-disclosure, nor reveal that the OPP investigation documents and the transcripts were already in the Federal government's possession. There was no suggestion of returning the balance of the motion to Mr. Justice Trainor for the OPP documents.

B. Individual IAP claimants' rights are violated and hearings are prejudiced

172. Despite the Federal government's refusal to take steps to obtain information related to the OPP investigation and the criminal prosecutions, SGM tried progressive steps to seek the evidence related arising from the OPP investigation and the criminal prosecutions to have that evidence considered in the context of IAP claims. There is no funding for such steps. To prove there was an OPP investigation, Freedom of Information Requests were filed on behalf of SGM clients known to have testified in Court,[164] and contact was made again with D.C. Delguidice in order to have his evidence tendered in individual IAP claims.

173. In February 2013, SGM sought to admit in *W-10876* some documents found, that confirmed criminal convictions of Anna Wesley pertaining to St. Anne's students being forced to eat vomit and/or being assaulted by Anna Wesley.[165] The federal government, in February and March 2013 objected to the admissibility of any statements given to the OPP and/or any evidence about the OPP investigation, on the basis that this evidence could only be admitted through live testimony and arguing all this evidence was "*not relevant to credibility, liability or compensation (including aggravating factors)*".[166] In *W-10876*, SGM asked that the Federal

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[163] Email from G. Soonarane to F. Brunning dated August 28, 2012, Exhibit 10 to the Ruest Affidavit, A.R. Tab 7, pgs. 244-46.

[164] See e.g. D.W. Affidavit, para. 15, Exhibit E, A.R. Tab 2, pg. 91.

[165] Additional Evidence for Hearing of the Claimant, T. W., Exhibit 11 to the Ruest Affidavit, A.R. Tab 7, pgs. 248-345.

[166] Email from F. Fisher to F. Brunning dated February 22, 2013, Exhibit 12 to the Ruest Affidavit, A.R. Tab 7, pg. 347.

government be required to obtain and produce transcripts of the criminal trials of Anna Wesley to see the details of those convictions and her *modus operandi*.[167] That was refused and at no time did the federal government admit it already had the transcripts. The hearing of the claimant's evidence in *W-10876* went ahead, despite the absence of those transcripts.[168] The claimant's evidence was heard March 19 and 20 at Timmins, but the request of the claimant to call additional evidence was left to be determined. The federal government was seeking to dismiss, prima facie, the incidents in relation to being forced to eat vomit, being whipped by certain whip and being hit on the head by Anna Wesley.

174. SGM obtained, with the cooperation of Norm Feaver[169] a will-say statement by D.C. Delguidice, and sought to avoid having him testify in each proceeding.[170] The Federal government required that any evidence of the OPP be provided through live testimony.

175. SGM also attempted to locate court reporters to find transcripts of these previous criminal proceedings, with the assistance of the Crown Attorney in Timmins. SGM simultaneously sought to have the federal government obtain at its expense the Anna Wesley transcripts in claim *T-11878* (in which Anna Wesley was the main POI).[171] The hearing in that matter was adjourned in June 2013, because the federal government took the position that the adjudicator lacked any legal authority to order production. The IAP claimant elected not to proceed in the absence of the transcripts.[172] In *N-13600*, SGM located the court reporter, purchased and produced the transcripts o *R. v. Rodrique*, in which the claimant had been a child victim of convicted former employee, John Rodrique. SGM asked that the Federal government obtain the transcripts of other

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[167] Emails from F. Brunning to M. Landry dated May 28 and June 4, 2013, Exhibits 21 and 22 to the Ruest Affidavit, A.R. Tab 7, pg. 413.

[168] Transcripts from hearing in W-10876 to be provided.

[169] Email exchanges between F. Brunning, G. Soonarane and M. Landry, with respect to W-10876 dated May 3, 6, 8 and 13, 2013, Exhibits 17-20 to the Ruest Affidavit, A.R. Tab 7, pgs. 375-411. Email from F. Brunning to T. Walsh and B. Bly, with respect to T-11878 dated May 22, 2013, Exhibit 27 to the Ruest Affidavit, A.R. Tab 7, pgs. 453-54. Email from F. Brunning to P. Large-Morin with respect to W-10911, dated May 29, 2013, Exhibit 31 to the Ruest Affidavit, A.R. Tab 7, pgs. 465-67.

[170] Email from F. Brunning to F. Fisher dated March 13, 2013, Exhibit 13 to the Ruest Affidavit, A.R. Tab 7, pgs. 349-50.

[171] Email from Fay Brunning to T. Walsh and B. Bly dated May 22, 2013, Exhibit 27 to the Ruest Affidavit, A.R. Tab 7, pgs. 453-54.

[172] Affidavit of J.T. sworn August 25, 2013 ["J.T. Affidavit"], para. 8, A.R. Tab 6, pg. 163.

criminal convictions of John Rodrique, which was refused.[173] And in *W-10911*, SGM also sought the transcripts about John Rodrique, the POI named in that claim.[174]

176. In the process of these four claims, on June 25, 2013, nearly one year after SGM had first notified the Federal government of the OPP investigation and the ensuing criminal proceedings, Department of Justice counsel representing the federal government in the IAP hearing in *T-11878* wrote to "*clarify that [she had] not state[d] that Canada has 'not previously sought' the transcripts of criminal proceedings*". Rather, she wrote:

> In the course of the litigation in about 2003, transcripts were purchased of some of the criminal proceedings relating to St. Anne's former employees, including [Anna Wesley]. In the IAP, these transcripts are not referred to by Canada as they are not probative of issues in this process. It should be noted that [Anna Wesley] is deceased.[175]

The Federal government also stated it was "considering" whether to amend the narrative for St. Anne's to reference the OPP investigation and the criminal convictions.

177. The fact that the federal government already had such transcripts was a shock to SGM. Despite possession, the transcripts would not be produced by the federal government, and it repeatedly took the position adjudicators had no power to order production. In *W-10876*, SGM advised Deputy Chief Adjudicator Landry that the Federal government already had possession of the transcripts in *R. v. Anna Wesley*, whereas the federal government in that case was arguing that even the OPP evidence could not be called. Simultaneously, in *W-10911*, the Federal government was objecting to producing the transcripts of more criminal proceedings against Rodrique for sexual abuse, on the excuse that a reporter fee must be paid for each copy, an objection raised by Federal government counsel in several claims.

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[173] Email from F. Brunning to K. Serbu dated July 10, 2013, Exhibit D to the Affidavit of A.N., A.R. Tab 9, pg. 668.

[174] Email from F. Brunning to P. Large-Morin dated May 29, 2013, Exhibit 31 to the Ruest Affidavit, A.R. Tab 7, pgs. 465-67.

[175] Email from B. Bly to F. Brunning and T. Walsh dated June 25, 2013, Exhibit 29 to the Ruest Affidavit, A.R. Tab 7, pgs. 459-61.

178. In *W-10876*, Deputy Chief Adjudicator Landry ordered that the transcripts were a reasonable and necessary expense for claimant counsel to order, so that order was made.[176]

179. In the meantime, SGM advised Edmund Metatawabin that none of the documentation of police and criminal proceedings from 1992 forwards had been brought into the IAP Process. The leaders in the region, including Edmund Metatawabin, Grand Chief Louttit of Mushkegowuk Council and Charlie Angus, Member of Parliament, were so advised. These leaders found it unbelievable that the federal government had hidden all proven abuse and documentation. Edmund Metatawabin states:

> Each person was being isolated in their [IAP] hearings, in front of authority figures, being asked to tell their story yet again and again, from the beginning. There is no context in which the story is being heard by an adjudicator if none of the proven abuse is known to the adjudicator. The two authority figures, the federal government and Catholic Church, appear to be working together again to suppress the same people who were abused as children at St. Anne's.[177]

180. On July 3, 2013, MP Charlie Angus wrote to the Honourable Bernard Valcourt, Minister of Aboriginal Affairs and Northern Development ("AANDC"), expressing his surprise and profound concern that documents related to the OPP investigation had not been included in the IAP process. "In the spirit of [the Prime Minister's] apology" in the House of Commons, Mr. Angus asked that the documents related to the OPP investigation "*be immediately sought and thereafter supplied by the Federal government to the Adjudicators and to the claimants*".[178]

181. Minister Valcourt responded on July 17. He wrote that the information provided to claimants in the POI reports is "in accordance with Canada's disclosure obligations" under the Settlement Agreement. He accepted that Canada was "aware" of the OPP investigation, but suggested that its "*disclosure obligations do not, however, include the requirement to seek out the investigative files of police forces*". He noted that the OPP file contains the confidential statements of individuals and was subject to privacy legislation, though individual claimants

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[176] Emails between F. Brunning, M. Landry and G. Soonarane dated June 26 and 28, 2013, Exhibits 25 and 26 to the Ruest Affidavit, A.R. Tab 7, pgs. 448-51.

[177] Metatawabin Affidavit, para. 28, Tab 1, pg. 17.

[178] Letter from C. Angus to the Honorable B. Valcourt dated July 3, 2013, Exhibit 34 to the Ruest Affidavit, A.R. Tab 7, pgs. 474-76.

could obtain their own statements through Freedom of Information requests. In any event, in Minister Valcourt's view, the statements could not be used as evidence in the IAP process, where only oral testimony is considered evidence, for which no corroboration is necessary. Nevertheless, "in order to bring clarity to these issues", Minister Valcourt instructed department officials to make a Request for Direction with respect to the OPP documents.[179] There was no mention that Department of Justice already had an order of the Court in relation to the OPP documents nor that the motion could be returned by the federal government.

182. On July 25, 2013, a letter was sent by SGM to the DOJ legal team leader handling the St. Anne's claims out of Toronto, suggesting a cooperative manner in which to proceed with the RFD's and facilitate disclosure of relevant documentation already in the possession of the federal government and obtaining other relevant documentation such as the OPP investigation documents.[180]

183. On August 13, 2013, SGM received the first two volumes of transcripts in *R. v. Anna Wesley* from the court reporter at a cost of $1,600. However, the second half of the trial was no longer available from the court reporter as the recording could no longer be accessed. This prejudice of not being able to access half the transcripts was communicated to DOJ counsel.[181] The first two volumes contained medical expert evidence that being forced to eat vomit was harmful to children in such circumstances. The outcome of the trial was not known because the second half of the transcripts could no longer be produced and the federal government would not produce them.

184. In late August, SGM travelled to the region to meet leaders and individual IAP clients to explain the situation. Instructions were received to pursue the non-disclosure and affidavits were provided. Former Chief Edmund Metatawabin provided his evidence, including personal evidence about his own IAP claim and he waived his right to privacy over his own situation.

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[179] Letter from the Honourable B. Valcourt to C. Angus dated July 17, 2013, Exhibit 35 to the Ruest Affidavit, A.R. Tab 7, pgs. 478-80.

[180] Letter from F. Brunning dated July 25, 2013, A.R. Tab 17, pgs. 3261-65.

[181] Email from F. Brunning to M. Landry and T. Walsh dated August 13, 2013, Exhibit 37 to the Ruest Affidavit, A.R. Tab 7, pgs. 485-86.

185. In an email to DOJ counsel dated September 3, 2013, SGM proves to DOJ that there was no fee they owed to court reporters for copying transcripts, beyond the initial payment(a fact that one would have thought obvious to litigators). SGM also notified each of the individual lawyers who would be appearing on behalf of the federal government in the four IAP hearings in October, for "*immediate delivery of a copy of all transcripts or documents arising from court proceedings from St. Anne's IRS in the possession of DOJ and/or its client.*"[182]

186. On September 5, 2013, both the federal government and SGM filed Requests for Directions. Nowhere in the RFD did the federal government reveal the Court remained seized of accessing the OPP investigation documents. All requests for funding for the RFD have been denied, including funding for the affiants to travel to participate in steps such as cross examinations and the hearing in Toronto. The IAP claimants have no resources.

187. By September 27, 2013, SGM sought an interlocutory order to obtain disclosure in the four hearings set for October in which this evidence should have been given to the adjudicators in advance. The POI's in these four IAP claims have already been criminally convicted. The federal government offered, 30 minutes in advance of the motion, to provide the balance of the *R. v. Anna Wesley* transcripts and the transcripts of the convictions in *R. v. John Rodrique* for sexual abuse of children at St. Anne's. The Federal government agreed to produce these transcripts without prejudice to it arguing in the RFD's that it had no obligation to provide such transcripts in the IAP process, and/or that the transcripts are admissible or relevant in each hearing. SGM agreed to take receipt of the transcripts and be responsible to provide copies to the adjudicators.[183]

188. Four IAP claims proceeded in October 2013 in which there were varying outcomes. Some adjudicators would not read the transcripts in advance because there is confusion over not receiving such evidence from the federal government, plus the outstanding RFD's. One claim settled. Three are ongoing. In three cases, the DOJ lawyers said they had not read the impugned transcripts in advance of the IAP hearing, yet all argued the transcripts were not relevant. In one

[182] Email from F. Brunning to DOJ counsel dated September 3, 2013, Exhibit 40 to the Supplementary Ruest Affidavit, A.R. Tab 8, pgs. 513-19. Rule 4.01(2) Rules of Professional Conduct LSUC prohibit officers of the court to appear before a judicial proceeding without having disclosed something that ought to be disclosed.

[183] Order not yet finalized.

case, SGM was accused of trying to ambush the federal government on the transcript arguments. The adjudicators were not informed in advance by the Chief Adjudicator about the RFDs or how to proceed.

189. On November 4, 2013, the Federal government finally provided some evidence, the Affidavit of Graham MacDonald, a Senior Resolution Manager at AANDC.[184] In this affidavit, *well over one year after the date that SGM first raised the OPP investigation with the Federal government*, Mr. MacDonald revealed for the first time that the Federal government had sought and obtained an Order of Mr. Justice Trainor dated August 1, 2003.[185] As discussed above, the 2003 Order of Justice Trainor allowed the federal government and Catholic Church unfettered access to inspect all of the OPP files and to copy documents pertaining to 154 plaintiffs, 180 alleged perpetrators and/or any future plaintiffs or perpetrators.[186] Mr. MacDonald noted in his affidavit that none of these civil actions ever proceeded to trial.[187]

190. SGM requested the motion record underlying this 2003 Order of Justice Trainor.[188] As detailed above, the Notice of Motion states that the OPP investigation was "relevant and necessary" to defend the against the civil claims, and that it "would be unfair" to proceed without the OPP documents. In the accompanying affidavit, Haniya Sheikh, legal counsel with the Department of Justice, noted the similarity between the civil actions – which are identical to the scope of claims in the IAP process – she discussed her inquiries with the OPP, and she again affirmed the importance of the investigation files to the defence of the civil claims.[189] Attached to her affidavit was a list of 154 plaintiffs and 180 alleged perpetrators.[190] The federal government has never brought a return of that motion. They also refused to produce Ms. Sheikh for cross examination despite records showing she is still a lawyer with DOJ.

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[184] MacDonald Affidavit, A.R. Tab 16, pgs. 3067-69.
[185] MacDonald Affidavit, para. 9 and Exhibit 5, A.R. Tab 16, pgs. 3069, 3141-43.
[186] 2003 Order, A.R. Tab 16, pgs. 3141-43.
[187] MacDonald Affidavit, para. 9, A.R. Tab 16, pg. 3069.
[188] 2003 Motion Record, A.R. Tab 16, pg. 3188.
[189] Sheikh Affidavit, A.R. Tab 16, pgs. 3188-3247.
[190] Sheikh Affidavit, Schedule B, A.R. Tab 16, pgs. 3238-3240.

191. Mr. MacDonald, the AANDC affiant produced by the federal government, had no first-hand knowledge or involvement in the narratives or POI's for St. Anne's. He had never been shown the transcripts or OPP documents in the possession of the Department of Justice. He had never read the RFD evidence filed by the Applicants herein. He was never been the official primarily responsible for St. Anne's. Despite having attended some IAP hearings about St. Anne's, as the representative for the federal government Mr. MacDonald had no prior knowledge of the transcripts, convictions or OPP documents. The AANDC official, Linda Denis, who had been handling the earlier civil claims in 2003 and who still oversees the IAP process for St. Anne's, did not swear the evidence. As a result of Mr. MacDonald's lack of relevant knowledge, and because most of the knowledge lies with DOJ who refused to answer any questions, there were *189 refusals* on the cross examination.

192. Even in the answers to the few undertakings and advisements given, Linda Denis confirms she never read the transcripts of the criminal proceedings and she did not have access to the OPP documents despite being the "instructing" client on the 2003 motion. All the impugned documents have been located at the offices of DOJ in Toronto. The AANDC persons responsible for the narrative and POI reports have never seen the impugned documents.

193. The events leading up to this RFD have been surprising. SGM contacted the Federal government on July 30, 2012. In good faith, SGM made that contact with the goal of informing the Federal government of a police investigation and ensuing prosecutions related to St. Anne's, which appeared have escaped its notice and been omitted from narrative and POI reports. Rather than being a cooperative approach in assembling the standard body of relevant evidence in a civil context, as the scheme of the IAP process provides, SGM has been met with fierce resistance. Only by putting individual lawyers on notice in individual IAP hearings of their duties as officers of the court, to ensure disclosure of something that ought to be disclosed, has the DOJ suppression of this body of evidence from the IAP process been cracked.

194. The answers to undertakings and cross examination of Mr. MacDonald confirm that AANDC has been kept in the dark as well. No one from AANDC has read the impugned transcripts or OPP documents. The officials at AANDC who compile the narrative and POI

reports never had knowledge of this body of evidence until this RFD process was underway, and still have not been given the documentation.

195. The Federal government has offered a number of excuses why they filed to produce the transcripts and evidence in its possession into the IAP process – an interpretation of Schedule D that only requires production of allegations made *while the victim was a student*; the intellectual property rights of court reporters; an insistence that D/C Delguidice give *viva voce* evidence in every IAP hearing, never acknowledging that the Federal government had possession of the OPP investigation evidence, and now a claim of a deemed undertaking. At the same time, it has taken an aggressive approach in individual IAP hearings to prevent these documents from being admitted or found relevant.

196. This unfortunate, but clearly deliberate, non-disclosure without reasonable legal authority to do so, has coloured the underlying trust that compliance with the IAP process is being honoured. The Federal government holds a position of utmost responsibility and trust to comply with the requirements of the Judgment Order, embodying the IAP process. For the past 5 or 6 years, whether to disclose has not been brought to the Court for determination. The federal government clearly has superior resources and specialized lawyers to do so.

C. The impact of non-disclosure

197. The affidavits of IAP claimants, including Edmund Metatawabin, testify to the impact that non-disclosure by the Federal government, of material related to the OPP investigation and related criminal convictions, has had. Fundamentally, St. Anne's survivors had believed the IAP process is the final legal stage in the flow of justice for the widespread sexual and physical abuse of children at St. Anne's. This began with the Keykaywin Conference in 1992, and continued through the OPP investigation, to the criminal prosecutions, to the ADR project and civil proceedings, and now to the class action settlement and the IAP process. Those involved in this flow of justice did not know until recently that the documents from prior steps had not continued forward into the IAP process.[191] As former Chief Metatawabin puts it, non-disclosure is "against

[191] Metatawabin Affidavit, para. 31, A.R. Tab 1, pg. 17.

the spirit of reconciliation" and "has given rise to fresh feelings of rejection" by the legal system.[192]

198. Many courageous people gave statements to the police. Some of them testified in criminal courts, in preliminary hearings and criminal trials, and were subjected to cross examination by lawyers defending the former employees. In some cases, juries of 12 citizens have already heard the same or similar evidence and made findings, on a criminal standard of proof, to convict employees such as Anna Wesley of abusing the residential school children at St. Anne's.

199. As one former student, who testified against Anna Wesley on charges that lead to conviction, states in his affidavit, he "thought the evidence that was already given in court in the criminal trials would be available in this class action compensation program".[193]

200. Non-disclosure of a substantial body of evidence already unearthed, and proven in court, concerning abuse at St. Anne's risks re-victimizing the survivors of that institution. As another student expressed it, when she discovered that documents about the trials had not been disclosed, "I felt like I was treated like a low person, when I was trying to get help for myself over these terrible things in my childhood".[194]

PART VIII - ORDER REQUESTED

The Applicants seek:

1. Return of the remainder of the motion adjourned sine die by Mr. Justice Trainor in His Order dated August 1, 2003, to Mr. Justice Perell to find that IAP claimants are "non-plaintiffs" and to authorize IRSAS or some other designated party to access and copy the OPP investigation documents for appropriate confidential use within the IAP process; and

2. An Order that the person in authority at AANDC who is responsible for the narrative and the person in authority for St. Anne's IAP claims within the Department of Justice shall co-sign a

[192] Metatawabin Affidavit, paras. 33, 37, A.R. Tab 1, pgs. 18-19.
[193] D.W. Affidavit, para. 17, A.R. Tab 2, pg. 91.
[194] J.T. Affidavit, para. 15, A.R. Tab 6, pg. 164.

sworn affidavit of documents and be subject to cross examination before the Administrative Judge, if necessary, which affidavit is akin to an affidavit of documents listing all documents in the possession of the defendant, the Attorney General of Canada, that are relevant to sexual and/or physical abuse at St. Anne's IRS but excluding documents already available in the narrative; and for production of such documentation to AANDC for compliance with all disclosure obligations under the IAP process, including narrative, POI reports and appropriate advance disclosure to adjudicators and claimants; and

3. An Order that the federal government shall amend the narrative for St. Anne's and POI reports for perpetrators who were former employees of St. Anne's to include all relevant documents in the possession of the federal government to adjudicators in advance of IAP hearings and to claimants/claimant counsel upon request at no expense; and

4. An Order directing under Article III h(vi) adjudicators as to the evidentiary manner in which the findings of previous criminal trials and/or civil trials are be ascertained and used in the IAP process and prohibiting the federal government from engaging in any abuse of process such as collateral attacks on findings made in criminal or civil trials; and

5. An Order finding under Article III h(ii) that the signed statements given to the OPP are reliable and trustworthy in the circumstances and can be received into evidence by adjudicators in IAP hearings, along with data accumulated by the OPP and Attorney General of Ontario that correlates the information contained in those signed statements; and

6. An Order defining "relevance" for adjudicators the purpose of application of rules of evidence such as similar fact evidence, character evidence and prevention of abuse of process; and

7. An Order that any evidentiary issues that arise in this context may be returned to the Administrative Judge directly in a form to be defined by the Chief Adjudicator; and

8. An Order that the federal government shall pay the substantial indemnity costs of Sack Goldblatt Mitchell LLP for all work to uncover this non-disclosure since June 2012, agreed or assessed by the Administrative Judge; and

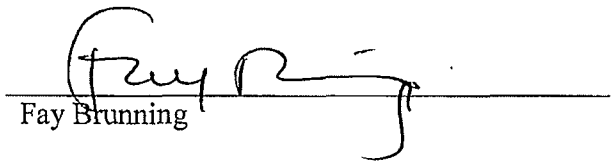
9. An Order that the federal government shall pay the disbursements and travel costs of the affiants, Mushkegowuk Council and PKKA since May 2013 to assist in pursuing the rights of former students of St. Anne's, as agreed or as assessed by the Administrative Judge; and

10. An Order that the Attorney General of Ontario is directed to issue an apology to the former students of St. Anne's IRS for this violation of the Judgment Order due to non-disclosure and the Attorney General is directed to undertake to ensure that hereafter all representatives who attend IAP hearings shall be informed of this Order and inform themselves of the documentation prior to attendance at any IAP hearing; any official of AANDC or Department of Justice who has concerns about possible additional non-disclosure in the IAP process shall have the right to access to the Administrative Judge and protections under the provisions of the *Public Servant Disclosure Protection Act S.C. 2005, c. 46, as amended.*; and

11. All other requests arising out of the non-disclosure are being handled by the TRC and AFN.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 28, 2013



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SCHEDULE "A"
LIST OF AUTHORITIES

1. Independent Assessment Process (IAP) For Continuing Indian Residential School Abuse Claims, Schedule D to the Indian Residential School Settlement Agreement dated December 15, 2006.
2. *Fontaine v. Canada (Attorney General)*, 2013 ONSC 684
3. *Juman v. Doucette*, 2008 SCC 8 (CanLII), [2008] 1 S.C.R. 157, [2008] S.C.J. No. 8
4. *Kitchenham v. Axa Insurance Canada*, 2008 ONCA 877
5. *Tanner v. Clark* (2003), 63 OR (3d) 508
6. *Toronto (City) v. C.U.P.E., Local 79,* 2003 SCC 63, [2003] 3 SCR 77
7. *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44
8. *Andreadis v. Pinto*, 2009 CanLII 50220 (ON SC)
9. *Caci v. Dorkin*, 2008 ONCA 750, leave to appeal to S.C.C. refused, [2009] S.C.C.A. No. 2
10. *Trang v. Alberta (Edmonton Remand Centre)*, 2002 ABQB 658 (CanLII)
11. *Polgrain Estate v. The Toronto East General Hospital*, 2008 ONCA 427
12. *Smith v. Doucette*, 2005 NSSC 327
13. *Éthier v. Canada (RCMP Commissioner)*, [1993] 2 FC 659 (C.A.)
14. Decision of the Reviewing Adjudicator, File Number E5442-10-L-14245 dated September 6, 2010
15. *R. v. Handy*, [2002] 2 S.C.R. 908
16. Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3rd ed. (LexisNexis, 2009), pg. 682
17. *R. v. J.W.*, 2013 ONCA 89
18. Interim Decision of Adjudicator Walsh dated October 14, 2013 in File Number: E5442-10-T-11878
19. *J.M.D. v. NSUARB*, 2004 NSCA 131

SCHEDULE "B"
RELEVANT STATUTES

Evidence Act, R.S.O. 1990, c E.23, at s. 22.1(1)

22.1 (1) Proof that a person has been convicted or discharged anywhere in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person, if,

(a) no appeal of the conviction or discharge was taken and the time for an appeal has expired; or

(b) an appeal of the conviction or discharge was taken but was dismissed or abandoned and no further appeal is available. 1995, c. 6, s. 6 (3).

Same

(2) Subsection (1) applies whether or not the convicted or discharged person is a party to the proceeding. 1995, c. 6, s. 6 (3).

Same

(3) For the purposes of subsection (1), a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction or discharge, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted or discharged, or by the deputy of the officer, is, on proof of the identity of the person named as convicted or discharged person in the certificate, sufficient evidence of the conviction or discharge of that person, without proof of the signature or of the official character of the person appearing to have signed the certificate. 1995, c. 6, s. 6 (3).

LARRY PHILIP FONTAINE et al.	and	**THE ATTORNEY GENERAL OF CANADA et al.**	Court File No: 00-CV-192059

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

FACTUM OF APPLICANTS/IAP CLAIMANTS REQUEST FOR DIRECTIONS RETURNABLE DECEMBER 17, 2013

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