

CANADA / JUDGMENT

Fontaine v. Canada (Attorney General)

2020 BCSC 21

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 21 Fontaine v. Canada (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fontaine v. Canada (Attorney General),

2020 BCSC 21

Date: 20200109

Docket: L051875

Registry: Vancouver

Between:

Larry Philip Fontaine et al

Plaintiffs

And

The Attorney General of Canada et al

Defendants

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

Corrected Judgment: The text of the judgment was corrected at paragraphs 15, 40 and 56 on January 14, 2020.

Before: The Honourable Madam Justice B.J. Brown

Reasons for Judgment

Counsel for IAP Claimant G-K-11553:

B. Omoruyi

Counsel for the Attorney General of Canada:

C.A. Coughlan

Counsel for the Court:

B. Gover

Place and Date of Hearing:

New Westminster, B.C.

November 4, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 9, 2020

Introduction

- [1] The Indian Residential Schools Settlement Agreement ("IRSSA" or "Settlement Agreement") remains Canada's largest and most complex class action settlement. In 2005 and 2006, various stakeholders negotiated the IRSSA to achieve a "fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools" ("IRS", whether singular or plural). This court is one of nine provincial and territorial superior courts (the "Courts" or "Supervising Courts") that approved the IRSSA in December 2006 and January 2007 on substantially identical terms.
- [2] Despite its importance to the goals of promoting healing and achieving reconciliation with Indigenous Canadians, fundamentally the IRSSA remains a contract.[1] Together with the IRSSA, the Courts' Implementation Orders and the Court Administration Protocol ("CAP") appended to those orders govern the IRSSA's administration.
- [3] The CAP required the Courts to designate the nine judges who heard the motions for approval of the Agreement, or their successors as "Supervising Judges". It also stipulated that from among the Supervising Judges, two "Administrative Judges" should be designated, one "Eastern Administrative Judge" and one "Western Administrative Judge". The Supreme Court of Canada has recognized the importance of ongoing judicial supervision of the IRSSA's administration.[2] For more than a decade now, since 2009, I have been both the Supervising Judge for British Columbia and the Western Administrative Judge.
- [4] The CAP provided for "a streamlined process for addressing all matters that require court orders, directions or consideration during the course of the [IRSSA's] administration". This process involves bringing a "Request for Direction" ("RFD").

- [5] The IRSSA established two compensation streams: a common experience payment ("CEP"), payable to anyone who attended an IRS, and the Independent Assessment Process ("IAP"), which is the inquisitorial process provided by the IRSSA for adjudicating individual claims made by former IRS students in relation to physical and/or sexual abuse that they suffered.
- [6] Section 6.01 of the IRSSA provides for establishment of the IAP as set out in Schedule "D" to the Settlement Agreement. Also known as the "IAP Model", Schedule "D" defines the categories of compensable claims and sets out what are referred to as the "compensation rules" (the forms of physical or sexual abuse or "other wrongful acts" that once proven are compensable, the categories of consequential harms, the aggravating factors and allowances for future care and consequential loss of opportunity), the core assumptions as to legal and compensation standards, the resolution processes and procedures, burden of proof and evidentiary standards, adjudicators' decision-making and the means of reviewing and re-reviewing adjudicators' decisions.
- [7] The IAP Model provides a closed process for determining individual IAP claims, with one in-person hearing and two levels of review (referred to as "review" and "re-review", the latter being performed by the Chief Adjudicator or his delegate).[3] In these reasons, the adjudicator who conducted the first review in relation to the IAP claim in this case is referred to as the "Review Adjudicator" and the adjudicator who conducted the "second review" or "re-review" is referred to as the "Re-Review Adjudicator".
- [8] Schedule "D" also provides for the apparatus necessary for the IAP: the Chief Adjudicator, an "IAP Oversight Committee" to oversee the certain functions of the Chief Adjudicator and a Secretariat to provide administrative support.
- [9] Appendices to Schedule "D" provide guidance to IAP claimants, their counsel and IAP adjudicators on a broad range of issues, such as the form of applications for compensation, the involvement of alleged perpetrators in hearings, documents to be produced, adjudicators' use of extra-curial knowledge and the format for adjudicators' decisions.
- [10] As will be seen, of particular relevance to this RFD is Appendix IX to Schedule "D" ("Instructions for Adjudicators"), which provides direction to adjudicators on application of the compensable claims criteria, stipulating that they must not refer to case law on vicarious liability or negligence and that "[t]he compensability of proven continuing claims must be determined only by reference to the terms of this IAP, including instructions issued pursuant to it." [4] As is discussed below, the instructions under heading "A", "Physical or Sexual Abuse Committed by an Adult" prescribe different tests to be applied, depending on whether or not the victim was a "student or resident" of an Indian Residential School.
- [11] In summary, beyond its essential character as a negotiated contractual component of the IRSSA, the IAP is a complete code [5] that prescribes a post-litigation claims assessment process, one that involves a closed adjudicative process operating under the purview of independent adjudicators, without any rights of appeal or judicial review. [6]

- [12] The IAP has now very nearly run its course. According to the latest statistics available on the Indian Residential Schools Adjudication Secretariat's website,[7] as of November 30, 2019, 38,248 IAP claims - 99% of the total - have been resolved. Only 15 claims remain in progress, 11 of which are at the post-hearing stage. In all, 26,703 IAP hearings have been conducted.

Background to this RFD

- [13] This RFD is in relation to an IAP claim and is what has come to be known as a "judicial recourse RFD". Like other RFDs of this kind, it is a request that the court overturn a decision made at the final stage of review within the IAP. As has been noted above, decisions at this final stage within the IAP are made by either the Chief Adjudicator or the Chief Adjudicator's delegate.

IAP Claimant K-11553 (the "Requestor")

- [14] The Requestor[8] was 15 years old when she was taken to St. Michael's IRS located in Duck Lake, Saskatchewan. She was a resident there from September 1970 to June 1971. In September 1971, she was enrolled at Lebret IRS, but after running away from that school and being returned to it by the police she was discharged on October 29, 1971.
- [15] In her IAP claim, the Requestor alleged that she was the victim of two distinct sexual assaults. One was a very serious form of sexual assault, which at the time would have constituted the former offence of rape. In the IAP Model's terms, what was alleged in that respect would have amounted to an SL-4 category sexual assault. It was the Requestor's evidence that she was raped while being taken from the Witchehan Lake Indian Reserve to St. Michael's IRS by a man who said it was his job to take people to the IRS (the "Alleged Perpetrator"). The Requestor testified that she knew nothing about residential schools before being taken to St. Michael's IRS, and that she did not know whose idea it was for her to attend one. The evidence disclosed that the Alleged Perpetrator (whom the Requestor named) was employed by the federal Department of Indian Affairs and Northern Development as a guidance counselor. The evidence also indicated that this very serious sexual assault took place en route to St. Michael's IRS, not on the premises of the IRS.[9]
- [16] The other sexual assault, which is not before me, was alleged to have occurred when she ran away from Lebret IRS. That assault amounted to an unwanted sexual touching at the SL-1.4 level and the Requestor ultimately received compensation for it through the IAP.[10]
- [17] At no stage - up to and including the hearing of the RFD - did Canada dispute either the Requestor's credibility or the reliability of her evidence.

- [18] Returning to the serious sexual assault that remains for the court's consideration, the Requestor's status at the time of the assault is a key consideration. Specifically, was the Requestor a student, or was she a non-student at the relevant time? On the evidence, the assault occurred when she was being driven to the IRS, but at a time when she and the Alleged Perpetrator were not yet on its premises and in fact, some distance away.
- [19] Where physical or sexual abuse is alleged to have been committed by an adult, Appendix IX to Schedule "D", the IAP Model (Instructions for Adjudicators) mandates application of different tests depending on whether the claimant was a student (or resident) or a non-student (or non-resident) at the time of the alleged abuse.
- [20] If the Requestor is found to be a student (or resident) at the time of the alleged abuse, the IAP Model establishes the following tests (to which I will refer collectively as the "Student/Resident Test"):
1. Where a sexual or physical assault was committed on a resident or student of an IRS by an adult, the following tests must be met:
 - a) Was the alleged perpetrator an adult employee of the government or a church entity which operated the IRS in question? If so, it does not matter whether their contract of employment was at that IRS.
 - b) If the alleged perpetrator was not an adult employee, were they an adult lawfully on the premises?
 - c) Did the assault arise from, or was its commission connected to, the operation of an IRS? This test will be met where it is shown that a relationship was created at the school which led to or facilitated the abuse. If the test is met, the assault need not have been committed on the premises.[11]
- [21] On the other hand, what I will refer to as the "Non-Student/Non-Resident Test" provides as follows:[12]
2. Where the victim was not a student or resident

Where a sexual or physical assault was committed by an adult on a non-student, the following tests must be met:

- a) Was the alleged perpetrator an adult employee of the government or a church entity which operated the IRS in question? If so, it does not matter whether their contract of employment was at that IRS.
- b) If the alleged perpetrator was not an adult employee, were they an adult lawfully on the premises?
- c) Was the Claimant under the age of 21 at the time of the assault?

- d) Did an adult employee give the Claimant permission i) to be on the premises ii) for the purpose of taking part in school activities?
- e) Did the assault arise from, or was it connected to, the operation of the school? This test will be met where it is shown that a relationship was created at the school which led to or facilitated the abuse. If the test is met, the assault need not have been committed on the premises. The permission to be on the premises for an organized activity creates the circumstances in which an assault may be compensable if the other tests are met, but it does not also circumscribe the location in which an assault must have been committed to qualify as one which arose from or was connected to an IRS.

[22] As can be seen, while parts (a) and (b) of the two tests are the same and part (c) of the Student/Resident Test is substantially identical to part (e) of the Non-Student/Non-Resident Test,[13] there are some key differences between the three-part Student/Resident Test and the five-part Non-Student/Non-Resident Test. Specifically, the Non-Student/Non-Resident Test contains the following additional elements:

§ The non-student/non-resident claimant must have been under the age of 21 at the time of the assault (part (c)); and

§ An adult employee must have given the non-student/non-resident claimant permission (i) to be on the premises (ii) for the purpose of taking part in school activities (part (d)).

Initial Adjudicator's Decision

[23] In a decision dated November 1, 2015, the adjudicator who heard the Requestor's IAP claim (the "Initial Adjudicator") found that the claim had not been proven.

[24] In coming to her decision, the Initial Adjudicator applied the Student/Resident Test, despite finding that:

[45] A further and somewhat unique fact in this case is that the rape that [the alleged perpetrator] carried out happened while he was driving the [Requestor] to the residential school and before she was admitted there. In effect she was not a residential school student when he raped her; though she soon would be ...[14]

[25] The Initial Adjudicator found that the Student/Resident Test had not been satisfied in two respects: first, although he was a federal government employee, the Alleged Perpetrator was not employed at St. Michael's IRS;[15] and second, the sexual assault had not taken place on the premises of the IRS.

[26] The Initial Adjudicator reasoned as follows:

- [48] I am persuaded by Canada's submission that Part (a) of the test is not met here because the [A]lleged [P]erpetrator was not an adult federal government employee who had a contract of employment with an IRS or an adult employee of the church entity which operated the IRS. He was employed by a different federal government department but that is not enough to bring his actions into the umbrella of the Settlement Agreement and thus entitle [the Requestor] to compensation for his actions.
- [49] In coming to this conclusion I adopt the reasoning of Chief Adjudicator Shapiro in B -205305 wherein he wrote at paragraph 21 that it was the intention of the parties to the Settlement Agreement that an alleged perpetrator must have an employment relationship with an IRS [emphasis added] for Part (a) of the test to be met.
- [50] I also accept and adopt his finding that to interpret Part (a) as including all federal government employees, irrespective of any employment relationship with an IRS, would render the last sentence of Part (a) meaningless. It is my finding that the Settlement Agreement does not impose liability in respect of the conduct of all federal government employees who injured or abused any IRS students. It is restricted to those perpetrators who had a contract of employment with an IRS or otherwise fall under the provision in Part (b) and Part (c) of the test, as set out above.
- [51] To bring the claim within the ambit of the IAP Model, the claimant must prove that the [Alleged Perpetrator] was either an adult employee or that he was lawfully on the premises. Implicit in this requirement is that that assault must have taken place on IRS premises or that Part (c) is applicable. That is not the case here. The assault took place on a back road distant from St. Michael's IRS. The fact that the perpetrator had lawful access to St. Michael's (he drove there to drop off the claimant) does not alter where the assault took place. It took place off IRS premises.
- [27] The Initial Adjudicator pointed out that in providing for the IAP, the IRSSA did not eliminate other means of legal redress and stated, "If counsel believes that his client is entitled to relief not provided for in the IAP, he has every right to pursue [the Requestor's] claim in the proper venue." [16] The Initial Adjudicator encouraged the Requestor to discuss this with her counsel. [17]

Review Adjudicator's Decision

- [28] The Requestor sought a review of the Initial Adjudicator's decision on the grounds that she had misapplied the IAP Model and also that her factual findings amounted to a palpable and overriding error. [18]

[29] In a decision dated July 18, 2017, the Review Adjudicator dismissed the application for review. In coming to that result, the Review Adjudicator held that because the Requestor was neither a student at nor a resident of St. Michael's IRS at the time of the sexual assault,[19] the test that the Initial Adjudicator should have applied was the Non-Student/Non-Resident Test. However, the Review Adjudicator concluded that four of the five components contained in the Non-Student/Non-Resident Test were not satisfied.

[30] The Review Adjudicator reasoned as follows:

[24] I agree with the [Initial] Adjudicator that the part (a) test has not been met. It has now been well established that for the part (a) test to have been met the Alleged Perpetrator must be an employee of an IRS. From B-20530 it says:

I agree with Canada's submission that part (a) of the test is not met because the alleged perpetrator was not an adult federal government employee who had a contract of employment with an IRS or an adult employee of the church entity which operated the IRS. I am of the view that it was in fact the intention of the parties to the Settlement Agreement that an alleged perpetrator must have an employment relationship with an IRS for part (a) to be met. To interpret part (a) to include all federal government employees, irrespective of any employment relationship with an IRS, would render that last sentence of part (a) meaningless. To recap, the settlement does not impose liability in respect of the conduct of all federal employees who injured IRS students, only those who had a contract of employment with an IRS.

...

[26] The part (b) test is not met because at the time of the assault, the Alleged Perpetrator was not on the premises. Part (d) is not met because the [Requestor] had not yet been on the premises. More importantly, the part (e) test is not satisfied. I agree with the decision of N-10174 that the transportation of residents to and from the IRS is an activity that is connected to the operation of the IRS but the facts in this case are too remote. Fundamental to the liability coverage set out in the IAP Model is that the IRS and its employees must have been placed in a position of care and responsibility for the victim. I do not think that liability can be extended to a circumstance such as this where the [Requestor] is sexually assaulted on her own Reserve in circumstances where she is being transported to the IRS by an employee of the Government. The [Non-Student/Non-Resident Test] in general terms requires a much more direct, obvious line of responsibility between the IRS and the [Requestor]. This does not occur here.

Re-Review Adjudicator's Decision

[31] The Requestor sought a second or "re-review", pursuing three grounds, namely that: (1) a denial of procedural fairness resulted from the the Review Adjudicator's failure to raise whether the Non-Student/Non-Resident Test was the "proper test" at a time when the Requestor's counsel could address it; (2) the Review Adjudicator erred in failing to find that at the moment she was picked up to be transported to the IRS, the Requestor became a

"student" for the purposes of determining which test to apply (necessitating application of the Student/Resident Test); and (3) the Review Adjudicator erred in (a) concluding that for liability to arise, it must be shown that the Alleged Perpetrator had a contract of employment with an IRS and (b) failing to conclude that the sexual assault arose from or that its commission was connected to the operation of an IRS.[20]

- [32] In a decision dated May 7, 2019, the Re-Review Adjudicator dismissed the application for re-review as it related to the Requestor's claim that she was raped by the Alleged Perpetrator while en route to the IRS.[21]
- [33] The Re-Review Adjudicator essentially agreed with the Review Adjudicator's reasoning:
- [27] The [Review Adjudicator] essentially corrected the Initial Adjudicator's decision when he held that the Claimant was not a student or resident at the time of the abuse. As a result, he applied the five-part [Non-Student/Non-Resident Test]. The [Review Adjudicator] noted that at the time of the assault, the [Requestor] had no connection to the IRS whatsoever.
- [28] The [Review Adjudicator] was correct in his conclusion that the [Requestor] was not a student or resident at the time of the assault. There was no evidence that she had entered the IRS or been admitted as a student. In fact, the [Requestor] had no idea that she was even going to the IRS. She was just walking along the road when she was scooped up by a strange man. The [Requestor] testified that this was the first time she met this individual. After the [Requestor] was forced into the [A]lleged [P]erpetrator's car, he stopped on a sideroad on the way to Duck Lake and perpetrated the sexual assault. He then proceeded to drop the [Requestor] off at the IRS.
- [29] It would have been helpful if the Initial Adjudicator provided more thorough reasoning regarding her finding that the [Requestor] was a student or resident at the time of the abuse. There is simply no evidence to support her conclusion that the [Requestor] was a student or resident. Accordingly, the Initial Adjudicator's reasoning path was not non-existent on this pivotal point. The [Review Adjudicator] was obligated to correct the Initial Adjudicator's decision.
- [34] The Re-Review Adjudicator then set out the five-part Non-Student/Non-Resident Test and continued:
- [31] The [Review Adjudicator] agreed with the Initial Adjudicator's factual finding that the [A]lleged [P]erpetrator was not an employee of the government which operated the IRS. This is a requirement in both the three-part [Student/Resident Test] and the five-part [Non-Student/Non-Resident Test]. With both tests, the claim can still be proven even if the perpetrator is not an IRS employee. For the five-part [Non-Student/Non-Resident Test], the [Requestor] would need to prove that the perpetrator was an adult lawfully on the premises and that an adult gave the [Requestor] permission to be on the premises for the purpose of taking part in school activities.

- [32] The Initial and [Review] Adjudicators correctly determined that the [A]lleged [P]erpetrator was not an employee of the Government which operated the IRS in question. The school documents show the Alleged Perpetrator was employed by the Federal Government through the Department of Indian and Northern Affairs to help arrange schooling for students on the reserve. He had guidance counsellor-type duties, however, he did not work at the St. Michael's IRS in any capacity.
- [35] Like the Review Adjudicator, the Re-Review Adjudicator adopted the analysis of then-Deputy Chief Adjudicator Shapiro in B-20530, holding that the parties to the IRSSA intended that for part (a) of the Non-Student/Non-Resident Test to be met where the alleged perpetrator was a federal government employee, the alleged perpetrator must have been employed at an IRS. To similar effect, the Re-Review Adjudicator adopted the decision of Deputy Chief Adjudicator Linka (acting as a Review Adjudicator) in E-10170 and his own re-review decision in S-21552.
- [36] The Re-Review Adjudicator then set out his conclusion in relation to each component of the five-part Non-Student/Non-Resident Test. Like the Review Adjudicator, the Re-Review Adjudicator found that the Requestor had failed to satisfy four of the five parts comprising that test:
- [36] To summarize, the [Review Adjudicator] correctly held that the [A]lleged [P]erpetrator was not an employee of the Government which operated the IRS in question. Part b) of the test, which is an alternative to part a) is not met either because at the time of the assault, the [A]lleged [P]erpetrator was not on the premises. Part c) is met because the [Requestor] was under the age of 21 at the time of the assault. Part d) is not met because the [Requestor] had not been on the IRS for any purpose, let alone taking part in school activities. Finally, part e) is not satisfied because the [Requestor] was not yet placed in the care of the IRS. The [Review Adjudicator] correctly held that liability cannot be extended to a circumstance such as this one where the [Requestor] was sexually assaulted on her own reserve in circumstances where she is being transported to the IRS by an employee of the Government. The Government employee did not work for the IRS. I agree with the [Review Adjudicator's] finding that the non-resident test requires a much more direct and obvious line of responsibility between the IRS and the Claimant.

The Parties' Submissions

- [37] The court had the benefit of the Requestor's main and reply submissions and Canada's responding submissions, all in writing, as well as the parties' oral submissions at the hearing of the RFD.

Requestor's Submissions

- [38] It was the Requestor's position that the three-part Student/Resident Test governed, and that it was satisfied.

- [39] On behalf of the Requestor, Mr. Omoruyi submitted that the Requestor was in Canada's custody and was therefore a "student" from the moment when the Alleged Perpetrator, a federal government employee, took control of her.
- [40] It was also Mr. Omoruyi's submission that although the IRSSA does not define the term "student", the parties' intentions and the meaning of the term can be gleaned from Section 12.01(2)[22] of the IRSSA (which deals with requests to add institutions to the list of IRS for the purposes of the Settlement Agreement). Section 12.01(2) is concerned with placement of children "in a residence away from the family home by or under the authority of Canada for the purposes of education" where "Canada was jointly or solely responsible for the operation of the residence and care of the children resident there". Mr. Omoruyi also referred to Section 12.01(3) [23] and contended that the failure of the Review Adjudicator and the Re-Review Adjudicator to find that the Requestor was a student when she was picked up by the alleged perpetrator amounted to an unauthorized amendment of the IRSSA and a failure to uphold its terms.
- [41] In reply, Mr. Omoruyi candidly conceded that if the Requestor did not become a student when she was picked up by the alleged perpetrator, she could not succeed in this RFD. In making this concession, Mr. Omoruyi explained that the Requestor cannot meet the five-part Non-Student/Non-Resident Test.
- [42] In addressing the elements of the Student/Resident Test, Mr. Omoruyi submitted that the Initial Adjudicator, the Review Adjudicator and the Re-Review Adjudicator all erred in holding that for part (a) of that test to be met in the circumstances of this case, it was necessary to show that the Alleged Perpetrator was employed at an IRS. Mr. Omoruyi submitted that in reading in the requirement that the Alleged Perpetrator be shown to have been an employee of an IRS, the adjudicators engaged in unauthorized amendment of the IRSSA and a failure to implement its terms.
- [43] Mr. Omoruyi reminded the court that it is the responsibility of the Supervising Courts to "focus on the words of the Settlement Agreement, so that the benefits promised to the class members are delivered".[24]
- [44] Mr. Omoruyi submitted that the issues on this RFD transcended a mere interpretive dispute concerning the IRSSA and that the actions of the Review Adjudicator and the Re-Review Adjudicator amounted to an unauthorized amendment of the Settlement Agreement. He also disputed Canada's submission that judicial recourse is unavailable on interpretive grounds in light of the Supreme Court of Canada's decision in *J.W v. Canada (Attorney General)*, 2019 SCC 20.[25]

- [45] The relief sought by the Requestor included an order that the matter be remitted to the Chief Adjudicator for assignment of a new adjudicator, for determination in accordance with declarations that the Requestor was a student, the Student/Resident Test applied and part (a) of that test did not require that the Requestor show that the Alleged Perpetrator was an employee of an IRS.
- [46] Importantly, the Requestor did not contend that a gap in the IRSSA arises in this case, such that the court must intervene on that basis.

Canada's Submissions

- [47] In response, Ms. Coughlan submitted on behalf of Canada that the test for judicial recourse is not met in this case.
- [48] This submission had six distinct aspects.[26] First, the Requestor received what she was entitled to in accordance with the IAP's procedure (hearing, review and re-review). Second, the Requestor did ultimately receive an IAP award in relation to her SL1.4 claim; this is not a case in which the IAP claimant was not compensated at all. Third, the determination that the Requestor was not a student or resident at the time of the SL4 abuse was purely factual and within the adjudicators' exclusive domain. Fourth (and this flows from the finding that the Requestor was neither a student nor a resident), the Non-Student/Non-Resident Test was properly identified and applied. Fifth, interpretive questions provide no basis for judicial recourse. Sixth, there is no procedural gap in this case as there was in J.W., and so there is no basis for intervening on that basis.
- [49] Ms. Coughlan pointed out that this court has previously dismissed an RFD where the same interpretation of part (a) (albeit of the Student/Resident Test, which is identical in this respect) was at issue. In that case, the court found that there was "nothing exceptionally unreasonable" about the adjudicator's interpretation.[27]
- [50] In response to a question from the court, Ms. Coughlan conceded that the Requestor was within Canada's control once she was picked up by the Alleged Perpetrator (and therefore at the time of the sexual assault), but submitted that the fact of being within Canada's control did not make her a student.
- [51] Ms. Coughlan further submitted that the Initial Adjudicator erred in applying the Student/Resident Test (the test that the Requestor urged the court to apply) but that this error was corrected on review (where the Non-Student/Non-Resident Test was applied) and the correction was upheld on re-review.
- [52] It was Ms. Coughlan's submission that ultimately, the Requestor failed to meet four of the five parts of the Non-Student/Non-Resident Test. In making this submission, she described as "rooted in plain language" the three adjudicators' determinations that to meet part (a) of the test, it had to be shown that the Alleged Perpetrator had an employment relationship with an IRS. Ms. Coughlan also submitted that this interpretation gave meaning to part (a)'s concluding phrase "it does not matter whether their contract of employment was at that

IRS." (emphasis added)

[53] In addressing the appellate guidance on judicial recourse, Ms. Coughlan submitted that the British Columbia Court of Appeal's decision in *Brown v. Canada (Attorney General)*, 2019 BCCA 245 ("Brown") requires that the court undertake the analysis applying the principles set out in both the J.W. case and also Brown itself, as the court did in *Fontaine v. Canada (Attorney General)*, 2019 BCSC 1431 ("Fontaine 2019").

[54] Canada sought dismissal of the RFD.

Analysis

[55] In *Fontaine 2019* this court analyzed the scope of judicial recourse in light of the Supreme Court of Canada's decision in J.W. and the subsequent decisions of the British Columbia Court of Appeal in *Fontaine v. Canada (Attorney General)*, 2019 BCCA 178 ("Scout"); *Brown v. Canada (Attorney General)*, 2019 BCCA 245 ("Brown"); *Fontaine v. Canada (Attorney General)*, 2019 BCCA 246 ("Prince Albert IRS"); *Independent Counsel v. Fontaine*, 2019 BCCA 269; and *National Administration Committee v. Canada (Attorney General)*, 2019 BCCA 270 ("National Administration Committee").[28]

[56] The principles derived from that analysis can be summarized as follows:

§ Applying the Schachter line of cases,[29] and upholding its high threshold for judicial intervention in IAP cases, the Supreme Court of Canada held in J.W. that a Supervising Judge should only intervene (i.e., judicial recourse is only available) where there is a failure to apply or implement the terms of the IRSSA and the IAP Model or (as held by a minority of the court) where there is a gap in the IRSSA's provisions;[30]

§ The Court in J.W. unanimously held that disagreement with the result does not constitute a failure to apply or enforce the IRSSA, and that the Courts must not usurp the role of IAP adjudicators;[31]

§ Four of the seven judges who heard the appeal in J.W. held that judicial recourse does not extend to questions of interpretation of the IRSSA and the IAP Model, and that adjudicators have exclusive jurisdiction to interpret the IAP;[32]

§ Four of the seven judges who heard the appeal in J.W. also affirmed the approach taken by the Manitoba Court of Appeal in that case, holding that "as long as it can be said that an adjudicator has turned his or her mind to the compensation category raised by the claimant, then the adjudicator has applied the terms of the IRSSA" and that "it must be accepted that an adjudicator who has interpreted these terms, even if a court considers the interpretation unreasonable, has not failed to apply the terms;"[33]

§ In *Scout*, the British Columbia Court of Appeal accepted that Justice Côté's reasons "appear to express the view of the majority concerning the basis of the Court's supervisory jurisdiction under the Agreement and the nature of RFDs";[34]

§ However, in *Brown*[35] and *Prince Albert IRS*,[36] the Court of Appeal rejected the proposition that in *J.W.*, the Supreme Court of Canada established a scope for judicial recourse that is narrower or substantially different from the test established in *Shachter* and further articulated in *Spanish IRS* and *N.N.*; and

§ Likewise, in *National Administration Committee*, the Court of Appeal held that while judicial recourse is available in limited circumstances, "[t]he exact bounds of those circumstances remain somewhat uncertain." [37]

[57] As was the case in *Fontaine 2019*, the Requestor does not contend that there is a gap in the IRSSA that requires a remedy, and I find that there is none. In coming to this conclusion, I am again mindful of *Brown J.*'s dictum in *J.W.* that "[s]training to find a 'gap' in the IRSSA so as to pry open a little space for judicial recourse where the parties clearly intended to preclude it defeats the intentions of the parties and undermines the integrity of the process that they settled upon." [38]

[58] This RFD therefore falls to be determined in accordance with the principles relating to judicial recourse absent a gap, and that requires me to apply the guidance provided by *J.W.*, *Brown* and other cases in the *Schachter* line of authority.

[59] Based on an application of *J.W.*, the RFD cannot succeed. Applying the guidance provided by the majority in *J.W.* on the scope of judicial recourse absent a gap, the question to be determined is whether the Re-Review Adjudicator turned his mind to the provisions of the IAP Model applicable to the Requestor's claim. Provided that he did so, I must refuse to grant the relief sought by the Requestor. To scrutinize the Re-Review Adjudicator's interpretation of those provisions of the IAP Model and substitute my own interpretation would amount to error.

[60] I am satisfied that the Re-Review Adjudicator turned his mind to the appropriate provisions of the IAP Model, addressed the key question of whether the Student/Resident Test or the Non-Student/Non-Resident Test should be applied in light of the facts as found by the Initial Adjudicator and then appropriately applied the five-part Non-Student/Non-Resident Test. On the evidence, the sexual assault occurred while the Requestor was being taken to St. Michael's IRS, but before she was admitted as a student. While the Initial Adjudicator applied the Student/Resident Test, she gave no reasons for doing so and application of that test was inconsistent with her findings that the "[t]he assault took place on a back road distant from St. Michael's IRS off IRS premises" and that Requestor was "not a residential school student when he raped her, though she soon would be". The Initial Adjudicator's error in failing to apply the Non-Student/Non-Resident Test had been corrected by the Review Adjudicator, and there is no basis for interfering with the Re-Review Adjudicator's decision to uphold the Review Adjudicator's determination in that respect.

- [61] A review of his decision demonstrates that the Re-Review Adjudicator was alive to the fact that the Initial Adjudicator found that the Student/Resident Test was not satisfied in any event because the Alleged Perpetrator was not employed at the IRS and the sexual assault did not take place on its premises[39] - two elements that are common to both the Student/Resident Test and the Non-Student/Non-Resident Test.[40]
- [62] I find that there is no basis for interfering with the interpretive choices made by the Re-Review Adjudicator in relation to the Non-Student/Non-Resident Test. Even if judicial recourse were permitted in relation to adjudicators' interpretations of the IRSSA and the IAP Model - and, as has been discussed, four of the seven Supreme Court of Canada judges who heard the J.W. appeal have declared that it is not - all three adjudicators' (i.e., the Initial Adjudicator's, the Review Adjudicator's and the Re-Review Adjudicator's) interpretations of part (a) of the Student/Resident Test and the Non-Student/Non-Resident Test (as the case may be) are reasonable. Those interpretations follow decisions of other IAP adjudicators, including the Chief Adjudicator, and give meaning to the entirety of part (a), including the concluding sentence "If so (i.e., if the alleged perpetrator was an employee of the government or a church entity that operated the IRS in question), it does not matter whether their contract of employment was at that IRS (emphasis added).
- [63] There is similarly no basis for interfering with the Review Adjudicator's and Re-Review Adjudicator's interpretations of the balance of the Non-Student/Non-Resident Test (i.e., parts (b), (c) (d) and (e) and their determinations that parts (b), (d) and (e) were not met. Those interpretations accord with the plain meaning of those terms, and the Non-Student/Non-Resident Test's requirement that part (a) or (b) and each of parts (c), (d) and (e) be satisfied.
- [64] This is not a case in which findings concerning parts of the relevant test were made in the absence of evidence. There was ample evidence, for example, that neither the Requestor nor the Alleged Perpetrator was on the premises of the IRS at the time of the sexual assault (parts (b) and (d)).
- [65] I further conclude that this RFD cannot succeed applying the principles articulated in *Brown*. That case holds that where the adjudicators have failed to take into account some term of the IRSSA that is relevant to the interpretation of the IAP Model's provision in question, deference should not extend to the same extent to adjudicators' interpretive choices as it otherwise would. Contrary to the guidance provided by J.W. and earlier cases, this requires the court to scrutinize the manner in which adjudicators interpret the IAP Model. In practical terms for the purposes of the present RFD, that means that if there is some provision in the IRSSA that could shed light on how the interpretive choice should be made, it would be inappropriate to defer to the Re-Review Adjudicator on the interpretation of parts (a), (b), (d) and (e) of the Non-Student/Non-Resident Test.
- [66] I have considered Mr. Omoruyi's submission that in determining whether the Requestor was a student at the relevant time (and therefore, which test to apply), the Review Adjudicator and Re-Review Adjudicator should have taken Sections 12.01(2) and (3) of the IRSSA into

account. Article 12 is concerned with requests (to Canada) and applications (to the Supervising Judges) for adding institutions to Schedule "F", which lists additional IRS for the purposes of the IRSSA. While it is tempting to import considerations such as Canada's control over the Requestor when she was picked up by the Alleged Perpetrator and its responsibility for St. Michael's IRS into the determination of whether the Requestor was a student at the relevant time, I do not regard those considerations as relevant to that analysis. The question was whether the Requestor was a student at the time. The language of the IAP Model should not be contorted to extend beyond its plain meaning, particularly in view of Appendix IX's proscription that "[t]he compensability of proven continuing claims must be determined only by reference to the terms of this IAP, including instructions issued pursuant to it."^[41]

- [67] Taking into account the guidance provided in Brown, I conclude that the Review and Re-Review Adjudicators applied all relevant provisions of the IAP Model and IRSSA in the present case.
- [68] In summary, I conclude that regardless of whether the analysis as to the scope of judicial recourse absent a gap is guided by the majority in J.W. or by the Court of Appeal's decision in Brown, this RFD cannot succeed.
- [69] This is indeed a troubling case, and a troubling outcome. But as the Initial Adjudicator noted, the finding that no compensation could be granted under the IAP for this very serious sexual assault in no way precluded pursuing the claim through other means.

Disposition

- [70] I decline to grant the relief sought in this RFD.

"B.J. Brown, J."

- [1] J.W. v. Canada (Attorney General), 2019 SCC 20 ("J.W.") at paras. 6, 51 (per Abella J.); paras. 102, 105 (per Côté J.); paras. 175 and 178-179 (per Brown J.).
- [2] J.W. at paras. 21-22, 31-32 (per Abella J.); para. 120 (per Côté J.); para. 175 (per Brown J.).
- [3] The rights of review are set out in art. III(l) of the IAP Model (p. 14). In J.W., Abella J. concisely summarized these rights as follows: "If the alleged error in an adjudicative decision is a palpable and overriding factual one, the scheme allows for one level of internal review. If the error alleged is a failure to apply the IAP Model to the facts, there are two levels of internal review available." (at para. 11)
- [4] IRSSA, Schedule "D" (IAP Model), Appendix IX (Instructions for Adjudicators), p. 31.
- [5] See J.W. at 28 per Abella J.; paras. 130-131 per Côté J.; and para. 176 per Brown J.
- [6] As to the unavailability of judicial review, see J.W. at para. 24 per Abella J.; paras. 105 and 107 per Côté J.; and para. 181 per Brown J.

- [7] <http://www.iap-pe.ca/stats-eng.php>. It should be noted that as a result of the inclusion of Kivalliq Hall (Rankin Inlet, Nunavut) in Schedule "F" to the IRSSA, some additional IAP claims are anticipated. The deadline for IAP claims in relation to Kivalliq Hall is January 25, 2020.
- [8] IAP Claimant 11553 died on November 14, 2015, following which her claim proceeded as an estate claim. For ease of reference, I have referred to IAP Claimant 11553 and her estate collectively as the "Requestor".
- [9] The Requestor testified that the Alleged Perpetrator stopped the car and raped her at or near the town of Kilwinning, Saskatchewan. The Initial Adjudicator found that the rape occurred "on a back road distant from St. Michael's IRS" (Initial Adjudicator's Decision, para. 51). However, while accepting that the Alleged Perpetrator was not on the premises of the IRS at the time of the rape, the Review Adjudicator erroneously stated that the rape took place on the Requestor's "own Reserve" (Review Adjudicator's Decision, para. 26). The Re-Review Adjudicator similarly accepted that the Alleged Perpetrator was not on the IRS premises at the time of the rape, but stated that the Requestor was "sexually assaulted on her own reserve" (Re-Review Adjudicator's Decision, para. 36). I am satisfied that nothing turns on the Review Adjudicator's and Re-Review Adjudicator's erroneous statements that the rape occurred on the Witchekan Lake Indian Reserve. The salient point remains that it did not take place on the premises of St. Michael's IRS.
- [10] The Requestor was compensated for the SL1.4 abuse pursuant to the decision of the Re-Review Adjudicator, dated May 7, 2019.
- [11] IRSSA, Schedule "D" (IAP Model), p. 31 ("Student/ Resident Test").
- [12] IRSSA, Schedule "D" (IAP Model), pp. 31-32 ("Non-Student/Non-Resident Test"). It should be noted that although the heading that precedes the excerpted portion is "Where the victim was not a student or resident", the text pertains only to "non-students" (i.e., it contains no provisions expressly relating to non-residents).
- [13] The difference between part (c) of the Student/Resident Test and part (e) of the Non-Student/Non-Resident Test is that the latter includes the following elaboration: "The permission to be on the premises for an organized activity creates the circumstances in which an assault may be compensable if the other tests are met, but it does not also circumscribe the location in which an assault must have been committed to qualify as one which arose from or was connected to an IRS."
- [14] Initial Adjudicator's Decision, para. 45.
- [15] In fact, at paragraph 20 of her decision, the Initial Adjudicator commented that there was documentary evidence showing that "the Guidance Counsellor role was not a role that was under the control or direction of the Administrator of the IRS."
- [16] Initial Adjudicator's Decision, para. 47.

[17] Initial Adjudicator's Decision, para. 67.

[18] This was a standard track case under the IAP Model. Item III I (p. 14) of the IAP Model provides as follows:

i For cases within the standard or complex track, any party may ask the Chief Adjudicator or designate to determine whether an adjudicator's, or reviewing adjudicator's, decision properly applied the IAP Model to the facts as found by the adjudicator, and if not, to correct the decision, and the Chief Adjudicator or designate may do so.

ii. In both the standard and the complex issues tracks, Claimants may require that a second adjudicator review a decision to determine whether it contains a palpable and overriding error.

[19] In fact, the Review Adjudicator went further, stating that "[The Requestor] had no connection to the IRS whatsoever." (Review Adjudicator's Decision, para. 23)

[20] The third ground related to parts (a) and (c) of the three-part Student/Resident Test.

[21] The fourth and final ground related to the SL1.4 claim (which is not before me). Ultimately, the Re-Review Adjudicator accepted that in light of the guidance provided in J.W., the Hearing Adjudicator had failed to apply the IAP Model to the SL1.4 claim - an error not corrected by the Review Adjudicator - and substituted a decision in which the Requestor was granted an award.

[22] In citing provisions of the IRSSA, I have used the conventions used in the IRSSA itself, which refers (for example, in Section 12.01(1) to "Section 12.01(2) of this Agreement".

[23] This submission included reference to three of the (non-exhaustive) indicators for determining whether Canada was jointly or severally responsible for the operation of the residence and care of the children, as set out in section 12.01(3). The three indicators referenced by the Requestor were whether: (1) the institution was federally owned; (2) Canada stood as a parent to the child; and (3) Canada was at least partially responsible for the administration of the institution.

[24] J.W. at para. 35, per Abella J.

[25] In this respect, Mr. Omoruyi cited *Brown v. Canada (Attorney General)*, 2019 BCCA 245 at para. 84.

[26] Canada's response factum enumerated seven bases for the submission that judicial recourse is unavailable, treating the proper identification and application of the Non-Student/Non-Resident Test as distinct items.

[27] *Fontaine v. Canada (Attorney General)*, 2016 BCSC 2218 at para. 200.

[28] *Fontaine* 2019, at paras. 50-76.

- [29] Fontaine v. Duboff Edwards Haight & Schachter, 2012 ONCA 471 ("Schachter"); Fontaine v. Canada (Attorney General), 2017 ONCA 26 ("Spanish IRS"); N.N. v. Canada (Attorney General), 2018 BCCA 105 ("N.N.").
- [30] J.W. at paras. 28, 32 (per Abella J.); para. 123 (per Côté J.); para. 175 (per Brown J.). Abella J. accepted that "there are compelling reasons for setting a high bar for judicial intervention in the IAP context". (at para. 28)
- [31] J.W., at paras. 25, 52, per Abella J.; paras. 95, 128-129, per Côté J.; and para. 175, per Brown J.
- [32] J.W. at paras. 123-124, 159, per Côté J.; paras. 175-176, per Brown J.
- [33] Ibid.
- [34] Fontaine v. Canada (Attorney General), 2019 BCCA 178 ("Scout") at paras. 62-66.
- [35] Brown, at para. 84, per Fisher J.A.
- [36] Prince Albert IRS, at paras. 37-38, per Fisher J.A.
- [37] National Administration Committee, at para. 9, per Groberman J.A., citing J.W. and Brown.
- [38] J.W. at para. 177, per Brown J.
- [39] Re-Review Adjudicator's Decision, para. 26.
- [40] Put differently, parts (a) and (b) of the two tests are identical.
- [41] IRSSA, Schedule "D" (IAP Model), Appendix IX (Instructions for Adjudicators), p. 31.

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