CITATION: Fontaine v. Canada (Attorney General), 2018 ONSC 24
COURT FILE NO.: 00-CV-192059
DATE: 20180104

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 SYNOD OF THE DIOCESE OF YUKON, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE BOARD OF HOME MISSIONS AND

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

BEFORE: **PERELL, J.**

COUNSEL: *E. Anthony Ross, Q.C.* and *Katrina Marciniak* for the Applicant, Ruth Anne Henry

Wayne Malcolm Schafer, Q.C., Alethea LeBlanc and *Aminollah Sabzevari* for the Attorney General of Canada

HEARD: In writing

REASONS FOR DECISION

A. Introduction

[1] On October 29, 2014, Edward Sadowski filed an amended Request for Direction seeking to add "Fort William Indian Hospital (Sanatorium) School" to the list of recognized Indian Residential Schools ("IRSs") pursuant to Article 12 of the Indian Residential School Settlement Agreement ("IRSSA").

[2] Around the same time, Ruth Anne Henry (the "Applicant"), who is the genuine Applicant for this RFD, requested that "Fort William" be added as an IRS. She described "Fort William" as "an institution for which Canada was jointly responsible within Fort William, whatever it was identified as over the course of the years."

[3] For the purposes of this RFD, I interpret "Fort William" to mean the institution that housed the Fort William Sanatorium (the "Sanatorium"), the Fort William Sanatorium School (the "Provincial School"), and the Fort William Indian Hospital Day School (the "Indian Day School").

[4] Ms. Henry's RFD raises the novel issue of whether an institution housing: (1) a sanatorium at which Aboriginal children resided; (2) a provincial school at which at least some of those Aboriginal children received some education; and (3) a day school operated jointly by Canada, which provided at least some education to at least some of the children resident in the sanatorium, constitutes an IRS within the IRSSA.

[5] For the reasons set out below, I conclude that Fort William is not an IRS. As such, the RFD application is dismissed.

B. Background and Facts

1. The IRSSA and Indian Residential Schools ("IRSs")

[6] The IRSSA settled claims arising from the operation of IRSs across Canada. On March 8, 2007, the IRSSA was incorporated into court orders issued in nine provinces and territories. The administration of the IRSSA is supervised by nine provincial and territorial superior courts, including the Ontario Superior Court of Justice.

[7] Pursuant to Article 1.01 of the IRSSA, "Indian Residential Schools" are:

> (a) Institutions listed on List "A" to the Office of Indian Residential Schools Resolution Canada's Dispute Resolution Process attached as Schedule "E"

(b) Institutions listed in Schedule "F" ("Additional Residential Schools") which may be expanded from time to time in accordance with Article 12.01 of this Agreement; and

(c) Any institution which is determined to meet the criteria set out in Section 12.01(2) and (3) of this Agreement.

[8] Two types of compensation are available to class members under the IRSSA: the "Common Experience Payment" ("CEP"), which is provided to all those who resided at an IRS, as that term is defined in the IRSSA; and compensation through the Independent Assessment Process ("IAP"), which permits eligible claimants to seek compensation for serious physical and sexual abuse, or "other wrongful acts".

2. Article 12 Applications

[9] Under Article 12 of the IRSSA, a person or organization can request that an institution be added to Schedule "F" of the IRSSA by submitting the name of the institution and any relevant information in their possession to Canada. Pursuant to Section 12.01(2), the following criteria must be satisfied in order to add an institution:

(a) The child was placed in a residence away from the family home by or under the authority of Canada for the purposes of education; and,

(b) Canada was jointly or solely responsible for the operation of the residence and care of the children resident there.

[10] Section 12.02(3) provides a non-exhaustive list of indicators to be considered in determining whether the second of these criteria has been met (*i.e.*, whether Canada was jointly or solely responsible for the operation of the residence and care of the children there):

(a) The institution was federally-owned;

(b) Canada stood as the parent to the child;

(c) Canada was at least partially responsible for the administration of the institution;

(d) Canada inspected or had a right to inspect the institution; or,

(e) Canada did or did not stipulate the institution as an Indian Residential School.

[11] When Canada receives a request to add an institution to Schedule "F", it researches the proposed institution and determines whether it is an IRS. It does this within 60 days or such other time as Canada may ask of the requestor. Canada then provides the requestor and the National Administration Committee ("NAC") with its decision, written reasons for the decision, and a list of materials upon which the decision was made: Section 12.01(4).

[12] If Canada refuses to add a proposed institution, the requestor may dispute the decision by applying to the appropriate court, or the NAC may apply to the court of the province or territory where the requestor resides for a determination of the matter: Section 12.01(5).

[13] Pursuant to this process, the courts responsible for supervising the implementation of the IRSSA have determined many Article 12 disputes.[1]

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[1] See, *e.g.*, *Fontaine v. Canada (AG)*, 2016 NUCJ 31 [Kivalliq Hall]; *Fontaine v. Canada (AG)*, 2011 ONSC 4938 [Stirland Lake]; *Fontaine v. Canada (AG)*, 2013 SKQB 323, aff'd 2017 SKCA 64 [Timber Bay]; *Fontaine v. Canada (AG)*, 2014 ABQB 7, aff'd 2015 ABCA 132 [Grouard/Moosehorn]; *Fontaine v. Canada (AG)*, 2014 MBQB 209, aff'd 2017 MBCA 2 [Teulon].

3. The Nature and History of this Article 12 Application

[14] The procedural history leading to this matter being before the Court is set out in detail in my decision granting the Applicant an advance costs award in connection with the application.[2] Though I do not propose to repeat all of the details here, several salient points are important.

[15] Ms. Henry is a member of the Ochiichagwe'Babingo'Ining Ojibway Nation. In an affidavit filed in this proceeding, she swears that she was hospitalized at the Sanatorium for one year around 1941, and again between roughly 1945 and 1948, and that she was a student of the "Fort William Indian Hospital (Sanatorium) School".

[16] Though the RFD to add Fort William to Schedule "F" by way of an Article 12 application was initially filed by Mr. Sadowski, I accept that Ms. Henry is the individual who now brings this application before the Court on the basis that Canada has refused to add Fort William to Schedule "F".

[17] The Sanatorium was a community medical treatment facility for persons with tuberculosis. Some students who contracted tuberculosis while residing at an IRS were transferred to this facility, though medical treatment was not restricted to Aboriginal children.

[18] In the material filed by the parties before this court, there is some dispute about precisely which institution is sought to be added to Schedule "F". Canada submits that there are three separate entities between which the Court must distinguish; namely: (1) the Sanatorium, which was a non-federal community healthcare facility operating between 1935 and 1974; (2) the Provincial School, which was a school operated by the Fort William Sanatorium School Board, under the Province of Ontario, from at least January 1948 through at least 1968; and (3) the Indian Day School, which was jointly operated by Canada and the Province of Ontario within the Sanatorium concurrently with the Provincial School, from at least September 1951 through July 1953.[3]

[19] Ms. Henry, however, seems to urge the Court not to distinguish between these entities, as at different times the physical building at Fort William housed more than one entity. In this sense, Canada submits that Ms. Henry's position appears to have evolved from the amended application filed in 2014 that sought a declaration adding "Fort William Indian Hospital (Sanatorium) School" to Schedule "F".

[20] Courts have consistently held that Article 12 is concerned with determining whether "an institution in which Indian children resided while attending school" is an IRS under the IRSSA.[4] Put otherwise, "the criteria set out in Article 12 of the IRSSA can be understood to measure the degree to which Canada was responsible for the operation of an institution in which Indian children resided while attending school."[5]

[21] It is unfortunate that Ms. Henry has not been able to be more precise in articulating the parameters of the institution that she seeks to have added to Schedule "F". This may be a function of the relatively unique nature of the institution. However, I accept that the application must be understood to encompass more than simply the Sanatorium. I consider this to be an

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[2] *Fontaine v. Canada (Attorney General)*, 2015 ONSC 7007 at paras. 19-28, 37.
[3] Respondent's Factum at para. 20.
[4] Timber Bay SKQB at para. 34 (emphasis added); see also Timber Bay SKCA at para. 144.
[5] Timber Bay SKQB at para. 34.

application to add Fort William, defined as the physical institution that at various times housed the Sanatorium, the Provincial School, and the Indian Day School.

4. Fort William

[22] The Sanatorium was established in 1935 by the Tuberculosis Society of Northwestern Ontario as a community medical treatment facility for persons with tuberculosis. Some students who contracted tuberculosis while residing at an IRS were transferred to this facility, though medical treatment was not restricted to Aboriginal children. Both parties agree that the Sanatorium was not federally-owned.

[23] In making this Article 12 application, Ms. Henry emphasizes the particular context in which IRS students were placed in the Sanatorium. Tuberculosis was a serious health concern in the early twentieth century. It had devastating effects on the Aboriginal population and among those who attended IRSs. As students became afflicted, they were often transferred to sanatoria for treatment, as other tubercular individuals also were at the time. Sanatoria were different than hospitals, in that they were meant to isolate and treat tuberculosis primarily with rest, fresh air, and good nutrition.

[24] From the time the Sanatorium opened on April 27, 1935, Canada began to transfer tubercular IRS students to that institution, which was a provincial sanatorium. Canada agrees that it was responsible for removing some children from recognized IRSs and placing them in the Sanatorium. Canada paid the Sanatorium for medical services provided to Indian children there. Children could not be admitted without approval from the Department of Indian Affairs. During various times over the course of the Sanatorium's operation, a certain number of beds were reserved for Aboriginal patients.

[25] From at least 1948 through 1968, the building that housed the Sanatorium also housed the Provincial School, though there is some evidence that its operations extended from 1944 through 1971.

[26] There is evidence that at least one teacher provided education to Aboriginal children at the Sanatorium between 1942 and 1945. However, the only evidence about the authority under which she worked is that she was paid by the Province of Ontario and was "provided" by the Fort William Board of Education to instruct patients at the Sanatorium. To the extent that education was provided to Aboriginal children at the Sanatorium prior to the formal establishment of the Provincial School, the evidence suggests that this education was not provided under Canada's authority. Rather, teachers were engaged by a local school board and/or were paid by the Province of Ontario.

[27] I find that the Provincial School was operated by the Fort William Sanatorium School Board and there is no evidence that Canada had any role on this Board.

[28] By Order in Council dated February 23, 1950, Canada established the "Fort William Indian Hospital Day School" at Fort William, pursuant to subsection 9(a) of the *Indian Act, 1927*. Ms. Henry suggests that this Order in Council purportedly formalized what had already been at place at Fort William since at least 1942, by officially establishing a school. She submits that subsection 9(a) of the *Indian Act*, as it read at that time, did not actually authorize the Governor in Council to establish "day schools" other than on reserves.

[29] It is not clear to me what turns on this submission. However, I find that despite the distinction in wording between the *Indian Act* and the Order in Council, in 1950 the Governor in Council established an Indian Day School that operated within Fort William. In my view, the substantive import of this Order in Council, which is supported by evidence that demonstrates Canada employed teachers at the Indian Day School who were supervised by a Principal engaged by the Province, is that Canada established and was jointly responsible with the Province for the operation of an entity that provided education within Fort William.

[30] It appears that the Indian Day School ceased operations in July 1953 and that Canada thereafter paid tuition for Aboriginal children who received education from the Provincial School.

C. Issues

[31] Ms. Henry submits that Fort William should be recognized as an IRS commencing in 1942. The issue to be determined on this application is whether Fort William meets the criteria as set out in Section 12.01(2) to be added to Schedule "F" of the IRSSA. The criteria for adding an institution are that: (a) the child was placed in a residence away from the family home by or under the authority of Canada for the purposes of education; and, (b) Canada was jointly or solely responsible for the operation of the residence and care of the children resident there.[6]

[32] It is well-established that each Article 12 application turns on the specific facts of the case.[7] Further, Article 12 must be interpreted in a manner consistent with the intentions of the parties at the time the Settlement was concluded.[8] In *Fontaine v. Canada (AG)*, [Timber Bay], the Court recognized that the purpose of the Article 12 test was to measure the degree to which Canada was responsible for the operation of an institution in which Indian children resided while attending school.[9] In that case, the Court further noted at the same paragraph that "[t]he overarching purpose of the IRSSA is not to compensate all former residents of residential institutions in Canada."

[33] Though each case turns on its own facts, I also agree with the Court's determination in *Fontaine v. Canada (AG)*, [Kivalliq Hall] that "consistency among the cases decided pursuant to Article 12 remains important."[10]

D. The Destruction of Records

[34] Before conducting my analysis of the issues at hand, I note that Ms. Henry has asked this Court to accept that documents related to the various entities operating at Fort William have been destroyed by Canada. As a result, she asks that I draw inferences in her favour wherever gaps in the evidence exist.

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[6] I note that the Manitoba Court of Appeal in [Teulon] at para. 30 characterized this second part of the Article 12 test as consisting of two parts: "that Canada was jointly or solely responsible for the operation of the residence...and that Canada was jointly responsible for the care of the children while at the residence." In my view, nothing turns on this distinction. I will proceed with determining this application in accordance with the two-part test, which appears to be adopted in the vast majority of Article 12 court decisions.

[7] Stirland Lake at para. 6.

[8] Teulon MBQB at para. 40.

[9] Timber Bay SKQB at para. 34.

[10] Kivalliq Hall at para. 65.

[35] Contemporaneous records show that consideration was given to destroying records pertaining to sanatoria such as the Sanatorium. It appears that an appendix to a June 1956 Treasury Board minute authorized the destruction of correspondence related to sanitaria after ten years. Further, a Treasury Board minute from March 4, 1957 appeared to authorize the destruction "of records of Indian and Northern Health Services and Field Offices and Hospitals" with respect to, among other things, "applications and enquiries re employment" and "welfare, education and training".

[36] Though Canada admits it is "possible" that some documents falling within these categories pertaining to the Sanatorium were destroyed, numerous documents certainly survived and were filed as evidence in this Court through Mr. Sadowski's roughly 8,000-page affidavit. To give but one example, correspondence with respect to one woman's employment as a teacher at the Fort William Sanatorium survived and was appended to the affidavit of Mr. Sadowski. Further, the evidence of Canada's affiant, Ms. Sellers, was that to her knowledge, no Fort William-related documents had been destroyed by Indian Affairs, nor had she come across any documents related to the destruction of Fort William Sanatorium records in her research.

[37] In the circumstances, I am not prepared to find that relevant documents pertinent to Canada's involvement with the Sanatorium – or any other entity at Fort William – were destroyed, much less that Canada intentionally destroyed relevant evidence such that the doctrine of spoliation might apply to permit me to draw inferences in the Applicant's favour in this proceeding, which is effectively what the Applicant asks me to do.[11] As such, I will proceed to consider whether the Applicant has established on a balance of probabilities that Fort William meets the Article 12 test based on the evidence before me, without drawing adverse inferences against Canada where there are alleged "gaps" in the evidence.

E. Analysis

1. Does Fort William satisfy the criteria of Section 12.01(2) to be added to Schedule "F"?

(a) Was the child placed in a residence away from the family home by or under the authority of Canada for the purposes of education?

[38] While the Applicant and Canada agree that children were removed from an IRS by or under Canada's authority and placed at Fort William – specifically, at the Fort William Sanatorium – (which was away from their family home), they disagree about the role that "the purposes of education" plays in this stage of the test.

[39] Canada submits that in order to satisfy this part of the Article 12 test, the placement in a residence away from the family home by or under Canada's authority must be made "for the purposes of education". The purpose of this placement of children at the Sanatorium was to provide medical treatment, not education. As such, Canada submits that the Sanatorium cannot qualify as an IRS.

[40] Ms. Henry disagrees. She submits that the education component of section 12.01(2)(a) of the IRSSA relates to the reason why a child was taken away from his or her family home. As I

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[11] See *Andersen v. St. Jude Medical Inc.*, 2012 ONSC 3660 at paras. 306-307.

understand this submission, this means that where a child was removed from the family home by Canada for the purposes of education, any residence in which he or she was subsequently placed by Canada will necessarily satisfy this component of the Article 12 test.

[41] In my view, the interpretation urged by the Applicant is inconsistent with the plain wording of section 12.01(2)(a) and the discernable objective intent of the parties to the IRSSA. Adopting this interpretation would mean that if a student were removed from her community for the purposes of education, placed in a residence and received education while residing there, then was subsequently hospitalized by Canada with no access to education for a prolonged period of time, the hospital in which the student was confined would satisfy the first stage of the Article 12 inquiry. If that hospital was federally-owned and operated, it would almost certainly satisfy the second stage, qualifying it as an IRS. In my view, having regard to the plain language of the IRSSA and the surrounding circumstances, the factual nexus, when it was negotiated, this result is not what the parties intended.

[42] Ms. Henry's proposed interpretation is also inconsistent with the interpretation of section 12.01(2)(a) recently given by the Saskatchewan Court of Appeal in *Fontaine v. Canada (AG)*, [Timber Bay].[12] In that case, the Court identified the key question at this stage of the inquiry: "Were the children residing at the [residence] placed there by or under the authority of Canada for the purposes of education?" As such, I conclude that this stage of the Article 12 test requires determining whether students were placed at Fort William by or under Canada's authority for the purposes of education.

[43] Ms. Henry urges me to apply *Fontaine v. Canada (AG)*, [Kivalliq Hall][13] to the present matter and accept that Canada's redirection of students from a recognized IRS to Fort William satisfies the first criterion of Article 12. In [Kivalliq Hall], Justice Tulloch found that diverting students from a recognized IRS to Kivalliq Hall, where they lived while attending the Keewatin Regional Education Centre, invited the inference that the placement was by or under Canada's authority for the purposes of education. However, in that case, the diversion related to either a lack of space at the recognized IRS or low enrolment at Kivalliq Hall. There was no question that students were placed at Kivalliq Hall only for the purposes of receiving an education at the Keewatin Regional Education Centre.

[44] The present case is distinguishable. Students were removed from IRSs and placed at Fort William – specifically, in the Sanatorium – because they had contracted tuberculosis and fallen ill. They were placed in the Sanatorium for medical not educational purposes.

[45] This conclusion is supported by, for example, correspondence from an Indian Agent to the Department of Mine and Resources, Indian Affairs Branch, dated October 15, 1938. In this letter, the Indian Agent advises that some parents were willing to let children go to sanatoria "but there is no room at the Fort William Institution ... and if we send them home they will be a source of infection to other Indians and will be difficult to pick up when we have room in the Sanatorium." Put otherwise, the Indian Agent's primary concern was locating a placement for children where they would receive appropriate healthcare and, ideally, recover from their illness, without putting the health of others at risk.

[46] In a letter dated September 12, 1942 from the Acting Superintendent of Medical Services

[12] Timber Bay SKQB at para. 34, SKCA at para. 60.
[13] Kivalliq Hall.

to a "Doctor Ferguson" regarding beds reserved for Aboriginal children at the Sanatorium, the Acting Superintendent urged that "if there are any cases [of tuberculosis] that you know of, you should endeavour, with the assistance of the Indian Agent to have them sent to Fort William Sanatorium with as little delay as possible. After they are admitted to the Sanatorium a certain number, according to the stages of the disease, are sent to our own Squaw Bay Indian Hospital." This letter again suggests that the primary preoccupation with placing Aboriginal youth at the Sanatorium was for the purposes of healthcare, with the intention that they would be further diverted if the level of care available at the Sanatorium was not commensurate with the progression of their illness.

[47] A February 18, 1950 memorandum to the Deputy Minister of Indian Affairs regarding the "Fort William Indian Hospital Day School", an unnamed "Director" writes of "the Fort William Hospital" where "there are approximately forty (40) Indian children receiving treatment. This is a community sanatorium at which Indian patients are accepted for treatment." Again, this memorandum speaks of transferring children to the Sanatorium "for treatment", rather than for education.

[48] When answering questions regarding the education of Aboriginal youth at the Sanatorium during the time the Indian Day School existed, Canada's affiant gave evidence that not all Aboriginal patients of the Sanatorium were also pupils of the Day School; whether or not they were "would depend on the current level of health of the patient." In other words, whether students received education while at Fort William was entirely dependent on the state of their health.

[49] Though the Applicant urges me to accept that placement of Aboriginal children at Fort William was merely an extension of the education provided to them, in light of the aforementioned evidence, I cannot. Though I accept that at least some Aboriginal children received education while residing at Fort William, I do not accept that Canada placed them there "for the purposes of education", as is required to satisfy the first stage of the Article 12 test. Rather, I find that on a balance of probabilities, Aboriginal children were placed at Fort William for the purposes of receiving healthcare and medical treatment.

2. Was Canada jointly or solely responsible for the operation of the institution and care of the children resident there?

[50] Even if my conclusion with respect to the first stage of the Article 12 test is wrong, I would still find Fort William is not an IRS. While Canada had some involvement in aspects of its operation at various times, as well as the welfare of some of the children resident there, this level of involvement did not rise to the standard contemplated by Article 12.

[51] In *Fontaine v. Canada (AG)*, [Grouard/Moosehorn],[14] Justice Nation wrote:

> Section 12.01(2)(b) [of the IRSSA] calls for an examination of the totality of the relationship between Canada and the institution in question, and that the non-exhaustive indicators enumerated in Section 12.01(3) are neither a checklist or individually determinative. Rather, the enumerated indicators, together with appropriate other indicia, guide an evaluation of the broader nature of the relationship in issue. The weight to be assigned to any particular indicator will necessarily be dictated by the circumstances of the institution in question.

[14] Grouard/Moosehorn, ABCA at para. 12.

[52] While individual indicators can support different findings, it is for the Court to weigh all of the evidence to determine whether or not the institution is an IRS.[15]

[53] I will evaluate each of the Section 12.01(3) criteria in turn. While Canada has urged me in certain aspects of this analysis to focus only on the children's "residence", defined as the Sanatorium, I find that Section 12.01(3) contemplates that the analysis extend to the entire institution the Applicant seeks to add to Schedule "F". This is consistent with the approach the Courts appeared to take in *Fontaine v. Canada (AG)*, [Grouard/Moosehorn]. In that case, the analysis of whether the institution constituted an IRS included an analysis of both the residential and educational components of the institution. As such, I will not confine my analysis to Canada's involvement in the Sanatorium, but will consider Canada's role with respect to Fort William broadly understood as including the Sanatorium, the Provincial School, and the Indian Day School.

[54] The first factor to consider is whether the institution was federally-owned. Both Canada and the Applicant agree that it was not.

[55] The second factor is whether Canada stood as a parent to the child. The Saskatchewan Court of Appeal recently affirmed in *Fontaine v. Canada (AG)*, [Timber Bay] that "[i]n a circumstance where Canada was not actively running the Home, and assumed no obligation of regular inspection or control, there was no basis upon which one could conclude that it stood as a parent to the child."[16]

[56] With respect to Fort William, Canada was at least sometimes responsible for transferring a child to or from an IRS and the Sanatorium before or after medical treatment. There is also some evidence that the Department of Indian Affairs ordered an inquiry to be held into every death of a pupil enrolled in an IRS, including those who died at a hospital, at least in and around 1935. This is the totality of the evidence to which the Applicant points to establish that Canada stood as a parent to the children at Fort William. However, particularly in light of the standard articulated by the Court in [Timber Bay], the evidence falls well short of establishing this.

[57] The third factor set out in section 12.01(3) is whether Canada was at least partially responsible for the administration of the institution. This factor "suggests a role in the management of the residence itself" including "involvement by Canada in any of the key aspects of [its] administration."[17] Though the Manitoba Courts referred to "residence" in the above quotation, in that case, it was the Teulon residence that was subject to the Article 12 application, rather than an institution at which children were both housed and received education. As such, I consider it appropriate to evaluate Canada's responsibility for Fort William facility, broadly understood.

[58] Ms. Henry points to a number of facts that she submits indicate "partial responsibility" for Fort William's administration, including: (a) that Canada had "an interest" in the management of Fort William, evidenced by a 1942 letter to the Deputy Minister of Indian Affairs referring to a memorandum containing information about the management of "the Fort William hospital"; (b) that Sanatorium staff corresponded with Indian Affairs; (c) a letter from the local Indian Agent suggested there may have been circumstances in which Treaty Indian patients were

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[15] Teulon, MBCA at para. 31.
[16] Timber Bay, SKCA at para. 117.
[17] Teulon, MBQB at para. 43, MBCA at para. 32.

admitted without prior authorization from Head Office; (d) Indian Affairs would receive reports regarding patients who had been attending IRSs and would pay some fees for various services, like x-rays; and, (e) that in 1952, Canada provided supplies to the Indian Day School and stipulated that all supplies at the School be marked "Indian Affairs, Fort William Sanatorium", rather than "Fort William Hospital."

[59] However, the evidence to which Ms. Henry points does not disclose that Canada had a role in the management of Fort William, nor that it was involved in "key aspects" of its administration.

[60] As Canada suggests, this is not surprising, given that Fort William was not federally-owned, and that the Sanatorium was the responsibility of the local Fort William Sanatorium Association and its independent board of directors.

[61] An interest in the affairs of Fort William and communications with it regarding Aboriginal patients admitted to the Sanatorium – recalling that the federal government was ultimately administratively responsible for their care, as opposed to being responsible for Fort William's administration – does not rise to the level of responsibility for the administration of this institution itself. Though Canada concedes "joint administration" of the Indian Day School during a brief period of time in the early 1950s, I do not find that this tilts the balance in favour of finding Canada had partial responsibility for Fort William itself.

[62] The fourth factor is whether Canada inspected or had a right to inspect the institution. In *Fontaine v. Canada (AG)*, [Grouard/Moosehorn], the Alberta Court of Queen's Bench held that "a contractual right of inspection of the sort contemplated by Section 12.01(3) necessarily implies a sweeping authority to conduct evaluations of the institution in question, to which a broad right of access would be a natural corollary."[18]

[63] Ms. Henry submits that Canada had a right to inspect the school housed within the Fort William facility. Canada admits to having a right to inspect the classroom at Fort William where the Indian Day School provided education and that two inspections of the "Fort William Sanatorium Indian School" took place in 1951 and 1952.

[64] There is also evidence of a further visit to "Fort William Sanatorium" in 1959 by a "Zone Superintendent" of the Department of National Health and Welfare, which is documented in a five-page report called "Report of Tour of Southern Part of Sioux Lookout Zone", that discusses visits to over 20 locations. The Report states that the "Sanatorium was … inspected and all the facilities noted." The context, purpose, and scope of this inspection, as well as the authority under which it was carried out, are unclear. As Canada notes, there is also no evidence that this Report resulted in any direct influence by Canada over Fort William's operations.[19]

[65] A time-limited right to inspect a classroom at Fort William (and two inspections carried out pursuant to that right), combined with a vague inspection of the Sanatorium in 1959 is not indicative of the "sweeping authority to conduct evaluations" that would satisfy this factor, as defined by the Court in *Fontaine v. Canada (AG)*, [Grouard/Moosehorn].[20] I find that this factor does not militate in favour of finding Fort William to constitute an IRS.

[18] Grouard/Moosehorn, ABCA at para. 42.
[19] Teulon, MBQB at para. 46, MBCA at para. 31.
[20] Grouard/Moosehorn.

[66] Both parties agree that the fifth factor set out in Section 12.01(3) – whether Canada stipulated the institution as an IRS – is not met in this case. Canada has not stipulated Fort William, or any of the entities that resided within its four walls, as an IRS.

[67] Finally, Ms. Henry raises the issue of Canada's funding of various aspects of the entities that operated at Fort William, as well as financial contributions to the building itself, as a factor that favours finding Canada was jointly responsible for the institution. Courts have found this to be a relevant factor at the second stage of evaluating an Article 12 application.[21]

[68] The evidence of Canada's funding of Fort William's operations and facilities consists of the following: (a) in 1944, Fort William requested a $75,000 contribution from Indian Affairs for an additional wing to the Sanatorium, though there is no evidence that the contribution was ultimately made; (b) Canada was aware of a grant made to the Sanatorium for construction sometime in the mid-1940s to 1950s and there is evidence that the amount of the grant was $200,000 for the purposes of building an addition to the Sanatorium; (c) Canada provided funds for beds for and treatment of Aboriginal children; and, (d) Canada employed two teachers in the Indian Day School until July 1953, while paying tuition thereafter for Aboriginal children who received education from the Provincial School.

[69] In *Fontaine v. Canada (AG),* [Teulon],[22] the Court rejected the submission that the fact Canada provided 80 per cent of Teulon's funding in its later years favoured a finding that Canada had joint responsibility for the operation of the residence. In *Fontaine v. Canada (AG)*, [Grouard/Moosehorn],[23]despite the fact Canada assisted in transporting students and paying their tuition, the Court concluded that "Canada's involvement was peripheral and best characterized as a funding source related to the number of students attending each school."

[70] Similarly, in this case, I conclude that Canada's financial contributions to the operations and facilities at Fort William, as described above, is not sufficient to signify joint responsibility for the operation of the institution and the care of the children resident there.

[71] In sum, none of the factors enumerated in Section 12.01(3), nor Canada's financial contributions to the institution, favour a finding of joint responsibility for Fort William at the second stage of the Article 12 test.

F. Conclusion

[72] To conclude, I sympathize with the situation of those who were transferred from IRSs to Fort William. These young people contracted serious illnesses while resident at an IRS, were subsequently diverted to the Sanatorium, and were away from their communities during times of significant health challenges, the very times at which children need their families the most. However, the task of the Supervising Judges is to interpret the IRSSA by applying the principles of contractual interpretation to determine what the parties to the IRSSA objectively intended. As has been recognized in other cases, not all residential placements were intended to be encompassed by the IRSSA; for example, those who lived in private homes, billeted homes or boarding and group homes while attending school away from their communities do not qualify

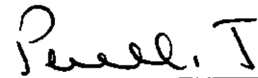
[21] Stirland Lake, at paras. 74-75; Grouard/Moosehorn, ABQB at para. 49, aff'd ABCA; Kivalliq Hall, at para. 80.
[22] Teulon, MBCA at para. 34.
[23] Grouard/Moosehorn, ABCA at para. 13.

for compensation under the IRSSA.[24]

[73] Interpreting Article 12 in accordance with the case law, I conclude that Fort William does not meet the criteria set out in Section 12.01(2) and is therefore not an IRS for the purposes of the IRSSA. The application to add it to Schedule "F" of the IRSSA is accordingly dismissed.

G. Costs

[74] Ms. Henry has renewed her application for advance costs. Rather than dealing with the costs issue on that basis, if the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Ms. Henry's submissions (I am inclined to award her costs notwithstanding her want of success on the RFD) within 20 days from the release of these Reasons for Decision followed by Canada's submissions within a further 20 days.



Perell J.

Released: January 4, 2018

[24] *Quatell v. Canada (AG)*, 2006 BCSC 1840 at paras. 22-24; Teulon, MBCA at para. 42; *Fontaine v. Canada (AG)*, 2014 BCSC 941 at paras. 58-61.

CITATION: Fontaine v. Canada (Attorney General), 2018 ONSC 24
COURT FILE NO.: 00-CV-192059
DATE: 20180104

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA et al.

Defendants

REASONS FOR DECISION

Perell, J.

Released: January 4, 2018