IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Holly C. Beard
Madam Justice Janice L. leMaistre

B E T W E E N :

LARRY FONTAINE et al	)	***C. A. Coughlan*** *and*
	)	***B. Thompson***
(Plaintiffs)	)	*for the Appellant*
	)	
- and -	)	
	)	***M. U. Kramer***
THE ATTORNEY GENERAL OF CANADA	)	*for the Respondents J. W. and Reo Law Corporation*
	)	
(Defendant) Appellant	)	
	)	
- and -	)	***W. S. Gange***
	)	*for the Respondent The Chief Adjudicator, Indian Residential Schools Adjudication Secretariat*
THE PRESBYTERIAN CHURCH IN CANADA et al	)	
	)	
(Defendants)	)	
	)	
- and -	)	
	)	***S. V. A. Wuttke*** *and*
J. W. and REO LAW CORPORATION	)	***V. M. Ford***
	)	*for the Respondent The Assembly of First Nations*
(Requestors) Respondents	)	
- and -	)	
	)	
THE CHIEF ADJUDICATOR, INDIAN RESIDENTIAL SCHOOLS ADJUDICATION SECRETARIAT and THE ASSEMBLY OF FIRST NATIONS	)	*Appeal heard:* ***March 28, 2017***
	)	
	)	*Judgment delivered:* ***May 30, 2017***
(Interveners) Respondents	)	

On appeal from *Fontaine v Canada (Attorney General)*, 2016 MBQB 159

BEARD JA

I. THE ISSUES

[1] The Attorney General of Canada (Canada) has appealed a decision by a supervising judge (SJ) appointed in relation to the implementation of the "Indian Residential Schools Settlement Agreement" (8 May 2006), online: <www.residentialschoolsettlement.ca/settlement.html> (the IRSSA). In that decision, the SJ overturned the decision of the re-review adjudicator on the basis that she failed to properly apply and enforce the terms of the IRSSA by not correcting the adjudicator's unreasonable interpretation of the applicable compensation rule.

[2] Canada has appealed on the following bases:

> (i) that the SJ erred in seizing jurisdiction in the absence of exceptional circumstances; and
>
> (ii) that the SJ erred in misinterpreting the terms of the IRSSA, including the Compensation Rules of the Independent Assessment Process (the IAP), thereby improperly amending the IRSSA.

[3] In my view, this appeal can be resolved on the basis of the first ground of appeal, so I will not address the second ground.

II. BACKGROUND

[4] The IRSSA is a complex agreement that was a negotiated resolution to the thousands of individual and class action law suits that were

filed against a large number of defendants, including the Government of Canada and several churches (the defendants), in relation to the operation of Indian residential schools over many decades. Without admitting liability, the defendants accepted that harms and abuses were committed against the Aboriginal children who attended those schools. All parties agreed to accept a settlement that was multifaceted and included: a procedure to settle individual claims by way of specialized adjudication outside of the court system; the provision of mental health and emotional support services for the former students; a national procedure for healing, education and reconciliation through the Truth and Reconciliation Commission; and the implementation of public projects to acknowledge and commemorate the broad and systemic impacts of the residential school system.

[5] The IRSSA was approved and implemented as a settlement of a class action proceeding in Ontario and, thus, required court approval. In *Baxter v Canada (Attorney General)*, 2006 CarswellOnt 7879 (Sup Ct J), Winkler RSJ approved the IRSSA on certain conditions. Ultimately, approval of the IRSSA and the conditions that followed the *Baxter* decision were set out in implementation orders that were granted in several Canadian jurisdictions to cover all Aboriginal students who were part of the Indian residential school system. (Regarding approval in Manitoba, see *Semple et al v The Attorney General of Canada et al*, 2006 MBQB 285.) The implementation orders include a procedure permitting an application to the courts for directions by way of a request for directions (RFD) regarding the implementation and administration of the IRSSA. An RFD is to be heard by an administrative judge or a designated supervising judge.

[6] The members of the various classes of plaintiffs and potential claimants, including the many individual plaintiffs, had the option of opting out of the IRSSA and pursuing their own individual litigation. With a few exceptions, those who chose to accept payments under the IRSSA gave up the right to pursue their individual claims through the courts.

[7] The aspect of the IRSSA that is at issue in this appeal relates to the settlement of individual claims. The IRSSA provides compensation to eligible individual claimants (the claimants) on two bases: a common experience payment (CEP), payable to all eligible claimants, and an individual payment to those claimants who could prove that they suffered a compensable act, as described in the IAP. The IAP also contains a system of adjudication for the determination of all individual compensation claims. The IAP is found in Schedule D to the IRSSA, and the compensable acts are described at pp 2-3 of Schedule D, online: <www.residentialschoolsettlement.ca/Schedule_D-IAP.PDF>.

[8] An IAP claim is heard and determined, in first instance, by an adjudicator who is empowered to make "binding findings on credibility, liability and compensation within the standards set for the IAP" (see Schedule D at p 7). For issues that involve the determination of whether the adjudicator "properly applied the IAP Model to the facts", there is a two-level review procedure to a review adjudicator and then to a re-review adjudicator, being the Chief Adjudicator or his/her designate (see Schedule D at p 14).

[9] JW applied for compensation under the IAP. His claim changed somewhat over time, but, by the date of the adjudication hearing, his claim

was that an employee had touched his genitals over his clothing and that, as a result, he was entitled to compensation under category SL1.4 of Schedule D. The adjudicator accepted that JW had been touched and that the touch had caused him embarrassment. She found, however, that the acts did not meet the requirements of category SL1.4, as she interpreted that category, and, as a result, she rejected his claim.

[10] JW and the law firm acting on his behalf, REO Law Corporation (collectively, the requestors) applied for a review of the adjudicator's decision, which was upheld by both the review adjudicator and the re-review adjudicator. The requestors then filed a RFD under the Court Administration Protocol, which is a schedule to the implementation orders, to set aside the re-review adjudicator's decision. The essence of his RFD claim was as follows:

> 2. It is the Requestors' position that J.W. was wrongly denied compensation in the IAP as a result of the failure of adjudicators in the IAP to enforce the provisions of the Indian Residential Schools Settlement Agreement ("IRSSA").

[11] That application was successful, with the result that the SJ set aside the re-review adjudicator's decision and remitted the claim for a new adjudication in accordance with the SJ's directions.

[12] Canada has now appealed that decision. The Chief Adjudicator and the Assembly of First Nations were added to the proceedings before the SJ as interveners.

III. THE SUPERVISING JUDGE'S DECISION

[13] The SJ explained the jurisdictional issue before him as follows (at paras 25-27):

> The parties are generally agreed that a Supervising Judge has the power to issue directions when the court is satisfied that [a re-review adjudicator] has failed to properly implement the IRSSA (see the test articulated by the Ontario Court of Appeal in *Fontaine v. Duboff Edwards Haight & Schachter*, 2012 ONCA 471).
>
> However, the parties disagree on how broad this jurisdiction is. The [Assembly of First Nations] and the Requestors argue that this court, through its supervisory jurisdiction, is permitted to remedy any concerns it may have in regards to the implementation of the IRSSA.
>
> Canada and the Chief Adjudicator argue that the Court's jurisdiction is considerably narrower and intended to apply only to very limited circumstances. They both argue that opening up the decisions of IAP adjudicators to broad scrutiny by the courts risks undermining the integrity of the IRSSA and its important benefits of finality, certainty and efficiency.

[14] The SJ stated that he agreed with the parties that the principles in *Fontaine v Duboff Edwards Haight & Schachter*, 2012 ONCA 471 (*Schachter*), were the starting point regarding the jurisdiction of the courts to consider compensation decisions of re-review adjudicators. He then considered the jurisdictional analysis in *Fontaine et al v Canada (Attorney General) et al*, 2014 MBQB 200 (the Residents decision); *Fontaine v Canada (Attorney General)*, 2015 ABQB 225 (the Nation decision); and *Fontaine v Canada (Attorney General)*, 2016 ONSC 4326 (the Perell decision). Based on those decisions, he concluded that his jurisdiction was

as follows (at para 35):

> . . . I have the power to review the decision of the Re-Review Adjudicator to determine whether she failed to apply the terms of the IRSSA and specifically the IAP Compensation Rules. I accept that this is a limited form of curial review, reserved for exceptional cases, and that I must ensure that I do not engage in rewriting the IRSSA by effectively giving the Requestors a right of appeal and/or review for which they did not bargain.

[15] Finally, on the standard of review, the SJ stated as follows (at paras 38-41):

> I am not satisfied that applying the standard of correctness to an adjudicator's interpretation of the IAP provisions is consistent with the very limited role of courts in supervising the IRSSA's implementation.
>
> On the other hand, I accept that an unreasonable interpretation of SL1.4 could, in fact, amount to a failure to comply with the terms of the IRSSA, if an unreasonable interpretation results in claimants being denied the compensation that the IRSSA intended them to receive.
>
> Accordingly, I find that my jurisdiction in reviewing the substantive decisions of IAP adjudicators is confined to ensuring that the Re-Review Adjudicator did not endorse a legal interpretation that is so unreasonable that it amounts to a failure to properly apply the IAP to the facts of a particular case. . . .
>
> Put another way, on the facts of this particular case, the Adjudicator herself found that the only reason J.W.'s claim was not compensable was because it was a "technical requirement" of the IAP that J.W. had to prove that the nun had grabbed his penis for a sexual purpose. If her interpretation of this "technical requirement" of the IAP is not legally tenable, then in my view, it is not reasonable for the [re-review adjudicator] to fail to correct that error so as to ensure that the IRSSA has been properly implemented.

[16] The SJ went on to review the adjudicator's interpretation of the SL1.4 category of compensable acts on the standard of reasonableness. He concluded (at paras 54, 56-58):

> I am not satisfied that any reasonable and proper interpretation of SL1.4 supports a finding that the parties to the IRSSA intended that claimants under the IAP would be required to prove that perpetrators had a sexual intent or a sexual purpose in order to make out a compensable claim under SL1.4.
>
> Canada also argued that IAP adjudicators are entitled to give context and interpretation to the language used in the IAP. I agree. Again, however, when this context and interpretation exceeds the bounds of reasonableness, and when that unreasonable decision results directly in a claimant being denied compensation to which he would otherwise be entitled, the IAP adjudicators have failed in their task and claimants are denied the benefits promised by the IRSSA. The IAP has not been followed and enforced.
>
> In conclusion, there is simply no basis in the plain language of SL1.4 or in the case law defining "sexual assault" to justify the Adjudicator's conclusion that sexual intent or sexual purpose is a necessary element to be proven by the claimant. It was not a reasonable interpretation of SL1.4.
>
> This error should have been corrected on Review and/or on Re-Review. Regrettably, it was not. In my view, this resulted in a failure to properly apply and enforce the terms of the IRSSA and the IAP to J.W.'s claim.

IV. JURISDICTION OF THE COURT OF APPEAL

[17] In *Schachter*, the Chief Adjudicator applied to quash the appeal of the administrative judge's decision on the basis that there was no jurisdiction to appeal a decision by an administrative judge to the Court of Appeal. The Ontario Court of Appeal disagreed, finding that the administrative judge was

acting in a judicial capacity, rather than pursuant to the IRSSA, and, as such, his decisions were subject to appeal or review. While *Schachter* does not specifically address the standard of review applicable at the appellate stage, the wording of the decision suggests that the standard of correctness was applied.

[18] The issue on appeal in *Schachter* and in this matter relate to the jurisdiction of an administrative judge to hear and determine a RFD. In *Schachter*, Rouleau JA stated that "[r]ecourse to the courts is only available if it is provided for in the [IRSSA] or the implementation orders" (at para 52). Thus, the interpretation of the IRSSA and the implementation orders is at the heart of the court's jurisdiction.

[19] The analysis in *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37, which dealt with contractual interpretation, leads to the conclusion that, in this case, the question of jurisdiction is a question of law. Wagner J, for the majority, reviewed the issue of determining the appropriate standard of review by examining the roles of trial and appellate courts. He stated that, while the main function of a trial court was to resolve the particular dispute, the role of appellate courts extended to include a law-making function, which required them to delineate and refine legal rules (see para 35). He found that, where the interpretation of a contract, in that case a standard form contract, would have impact beyond the parties to the dispute, it would have precedential value. He stated (at paras 39, 43):

> . . . The mandate of appellate courts — "ensuring the consistency of the law" (*Sattva* [*Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53], at para. 51) — is

> advanced by permitting appellate courts to review the interpretation of standard form contracts for correctness.
>
> . . . Establishing the proper interpretation of a standard form contract amounts to establishing the "correct legal test", as the interpretation may be applied in future cases involving identical or similarly worded provisions.

[20] Finally, he concluded (at para 46):

> . . . Where, like here, the appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix specific to the particular parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.

[21] In this case, the question of the jurisdiction of the courts to review compensation decisions under the IAP and the implementation orders is applicable to a large number of individual compensation claims. Thus, the question of the SJ's jurisdiction to review the re-review adjudicator's decision will have precedential value beyond the present dispute.

[22] Further, the IAP is very much like a standard form contract, even though the parties negotiated the settlement that is found in the IRSSA. While each individual claimant had the option of opting out and having his or her claim determined by the courts, if there was no opt out within the mandated time period, the claimant was bound by the terms of the IRSSA and the implementation orders and could not negotiate an alternative resolution.

[23] Finally, there is no meaningful factual matrix specific to JW's claim that assisted the interpretation process to determine the

SJ's jurisdiction.

[24] For these reasons, the issue of the SJ's jurisdiction is a question of law and is, therefore, to be reviewed on the standard of correctness.

[25] This Court came to a similar conclusion when considering a different provision of the IRSSA in *Fontaine et al v Canada (Attorney General) et al*, 2014 MBCA 93 (the Cameron decision). Cameron JA stated (at para 40):

> . . . As was stated by Rothstein J. in *Sattva*, one of the purposes of drawing a distinction between questions of law and those of mixed fact and law "is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute" (at para. 51). In this case, the Agreement has applicability to thousands of claimants across the country and as such, the manner in which it is interpreted has great precedential value, and brings certainty to others involved in similar disputes. See *Sattva* at paras. 51-53.

[26] For all of these reasons, I would find that the question of the SJ's jurisdiction to hear and determine this RFD is a question of law and is to be reviewed by this Court on the standard of correctness.

V. THE PARTIES' POSITIONS

[27] Canada argues that, while the SJs have an ongoing supervisory jurisdiction to oversee the implementation of the IRSSA, there is no jurisdiction to conduct either an appeal or judicial review of an IAP compensation decision. Its position is that, in this case, the SJ erred in his interpretation and application of the very narrow supervisory jurisdiction set

out in *Schachter* by adopting an erroneous and much broader "curial review" jurisdiction. It points out that he came to this conclusion by following the Perell decision, which was subsequently overturned on appeal (see *Fontaine v Canada (Attorney General)*, 2017 ONCA 26 (the Perell appeal)), and the Residents decision, which it says was wrongly decided. Its position is that a much narrower view of the court's supervisory jurisdiction, as set out in *Schachter*, was endorsed by both the Ontario Court of Appeal in the Perell appeal and by Brown J, the western administrative judge, in *Fontaine v Canada (Attorney General)*, 2016 BCSC 2218 (the *Bundled RFDs*), both of which post-dated the SJ's decision.

[28] Canada argues that, when the SJ's analysis is examined, it is clear that he applied a reasonableness standard to review the adjudicator's interpretation of the SL1.4 compensation rule. This, it argues, was in essence an appeal or judicial review of the adjudicator's decision, which is not permitted. It states that, if this is the standard, then each IAP decision will be open to review on a reasonableness standard, which is not consistent with the finding in *Schachter* that there is a right to judicial recourse in only "very exceptional circumstances" (at para 53).

[29] Finally, Canada argues that, by applying a reasonableness standard, the SJ failed to treat the adjudicators' decisions with the extraordinary deference that was due to them.

[30] The Chief Adjudicator agrees with Canada's position. He explained, in some detail, the built-in safeguards to protect the rights of the claimants, including the extensive procedural provisions of the IAP, the detailed selection process and training for the adjudicators and the two-level

review procedure for decisions that form part of the IAP model.

[31] The Chief Adjudicator argues that, if the SJ's view of the court's jurisdiction prevails, it will open up the claims procedure in all cases to what is effectively judicial review and the further appeal of that decision. This, it argues, will result in both significant delays in the conclusion of the compensation procedure in each case and in increased costs to all parties, which would interfere with the IAP objective of providing a timely and cost-effective resolution of the individual claims outside of the court process.

[32] The requestors adopt the SJ's finding that an unreasonable interpretation of the compensation provisions in SL1.4 that leads to a claimant not receiving the compensation which would otherwise be payable is a failure to implement the provisions of the IAP and is subject to judicial review or recourse pursuant to the jurisdiction set out in *Schachter*. They argue that the requirement of "very exceptional circumstances" or "very limited circumstances" relates to the fact that it is available only in specific circumstances, but it does not mean that it must be limited to only very few claimants.

[33] JW points out that, while the Perell decision was overturned on appeal, the Ontario Court of Appeal appears to comment favourably on the standard of review adopted by the SJ at para 40 of his reasons (see the Perell appeal at para 54).

[34] He also points out that the adjudicators have not been consistent in their interpretation of SL1.4, some adopting the interpretation of the adjudicators in this case and others adopting that of the SJ. He argues that this is also an exceptional circumstance that requires resolution by the courts

so that the provision can be applied in a consistent manner.

[35] Finally, the Assembly of First Nations agrees with JW's position. It argues that the claimants bargained for compensation for abuse, one type being the abuse described in SL1.4. By erroneously interpreting that provision, the adjudicators have wrongly deprived JW of the compensation to which he is entitled under the IRSSA. This, it states, is a misapplication of the IAP, whereby the adjudicators have, effectively, re-written the agreement. It argues that it was within the jurisdiction of the SJ to correct this misinterpretation.

VI. THE LAW

[36] It is generally agreed that the parameters of the right to access the courts for directions in relation to a compensation decision by a re-review adjudicator under the IAP are those set out in *Schachter*. (See, for example, the *Bundled RFDs* at para 174; and the Perell appeal at para 49.) After confirming that there is neither a right of appeal (see para 50) nor a right to seek judicial review (see paras 51, 52), Rouleau JA explained the basis for the right to obtain directions from the court in *Schachter* (at paras 52-53, 55):

> . . . The terms of the [IRSSA] and the implementation orders set out the process for reviewing decisions of the IAP Adjudicators. Recourse to the courts is only available if it is provided for in the [IRSSA] or in the implementation orders.
>
> I turn now to whether a process, other than an appeal or judicial review, is available to review a decision by [a re-review adjudicator]. The Administrative Judge properly confirmed that the IAP Adjudicators "cannot ignore" the provisions of the implementation orders and that "it remains

> necessary for Adjudicators to apply the required factors" when conducting a legal fee review at first instance. In the perhaps unlikely event that the final decision of the [re-review adjudicator] reflects a failure to consider the terms of the [IRSSA] and implementation orders, including the factors set out in para. 18 of the implementation orders, then, in my view, the parties to the [IRSSA] intended that there be some judicial recourse. Having said that, I emphasize my agreement with the Administrative Judge's comment, at para. 22 of his reasons, that "there is no implicit right to appeal each determination made within the context of the claims administration or assessment process as an incident of the judicial oversight function." As I will go on to explain, the right to seek judicial recourse is limited to very exceptional circumstances.
>
> The implementation orders speak to the principles that are to be applied by the Adjudicator in carrying out a fee review in first instance. The parties provided for an ongoing right to seek the assistance of the courts to require compliance with the terms of the implementation orders. As noted, the implementation orders provide, at para. 23:
>
> > [T]he Courts shall supervise the implementation of the [IRSSA] and this order and, without limiting the generality of the foregoing, may issue such further and ancillary orders, from time to time, as are necessary to implement and enforce the provisions of the [IRSSA], the judgment dated December 15, 2006 and this order.
> >
> > [emphasis added]

[37] In finding that the right to judicial recourse in relation to the IAP would be available in only "very exceptional circumstances", Rouleau JA explained the purpose of the IAP (at para 54):

> The parties intended that implementation of the [IRSSA] be expeditious and not mired in delay and procedural disputes. As noted by the Chief Adjudicator, there are already many checks and balances in place to ensure that the process is administered fairly and in accordance with the terms of the

> [IRSSA]. The Chief Adjudicator is granted broad discretion by the terms of the [IRSSA].

[38] He then set out the parameters of the right to judicial recourse (at para 57):

> Thus, in the very limited circumstances where the final decision of the [re-review adjudicator] reflects a failure to comply with the terms of the [IRSSA] or the implementation orders, the aggrieved party may apply to the Administrative Judges for directions. These limited circumstances would include where the [re-review adjudicator] upholds a decision of the Adjudicator as fair and reasonable even though the Adjudicator failed to consider the factors set out in para. 18 of the implementation orders in arriving at his/her fee review decision in a specific case. By providing for recourse to an Administrative Judge in these limited circumstances, the parties will be able to ensure that the bargain to which they consented in respected.
>
> [emphasis added]

[39] Finally, he addressed the conflicting purposes of the IRSSA and the IAP (at para 58):

> Before leaving this issue, I note that I agree with the Chief Adjudicator's submission that allowing a party to request directions when it is alleged that the [re-review adjudicator]'s decision reflects a failure to apply the terms of the implementation orders raises concerns about finality, efficiency and has the potential to overburden the Administrative Judges. However, I am satisfied that these concerns are alleviated by the clear limits on when such a request is available. Moreover, the Administrative Judges who hear such requests are well aware of the concerns that led to the adoption of the implementation orders, namely, the need to protect vulnerable claimants and the need for timely resolution of disputes in light of the advanced age of many claimants: see *Baxter*, at paras. 74 and 85.

[40] The question of what constitutes "very exceptional circumstances" was at issue in the Perell decision, before both the administrative judge and the Ontario Court of Appeal. Perell J interpreted *Schachter* as providing the court with a "curial review jurisdiction" (at para 34) or a "general curial jurisdiction" (at para 41) over the performance of the IRSSA including the IAP (see the Perell decision at paras 34, 41, 44). This proposition was rejected on appeal. Sharpe JA, for the Court, stated (at paras 51-52):

> . . . The IAP represents a comprehensive, tailor-made scheme for the resolution of claims by trained and experienced adjudicators, selected according to specified criteria and working under the direction of the Chief Adjudicator. Allowing appeals or judicial review to the courts from IAP decisions is not contemplated by the IAP, the IRSSA or the Implementation Orders. Allowing appeals or judicial review would seriously compromise the finality of the IAP and fail to pay appropriate heed to the distinctive nature of the IAP and the expertise of IAP adjudicators.
>
> I disagree with the administrative judge's conclusion that *Schachter* created a "general curial jurisdiction" in relation to the IAP. This court did not use that phrase and the entire thrust of the judgment is to the contrary. As Brown J. explained in *Fontaine v. Canada (Attorney General)*, 2016 BCSC 2218, at para. 177: "the phrase 'curial review' suggests a right to seek review before the courts and a standard of review, both of which are untenable" in the light of *Schachter*.

[41] Sharpe JA explained the error by Perell J (at para 55):

> In my respectful view, the administrative judge failed to respect the limits imposed by *Schachter*. His reasons reveal that he undertook a full-blown appeal of the IAP decisions on both law and fact. He engaged in a detailed review of the factual findings made by the Adjudicator, and thereby assumed the role of the Review Adjudicator. He was not entitled to assume a role the IAP specifically assigns to the

> Review Adjudicator. The Review Adjudicator had reviewed the evidence in some considerable detail and explained why she found that the Adjudicator made no palpable or overriding error. While the administrative judge may have disagreed with her conclusion, disagreement with the result does not equate to a failure to enforce the IRSSA agreement or apply the IAP model, thereby justifying judicial intervention. If it did, all IAP decisions would be appealable to the courts, the very thing *Schachter* forbids. The Review Adjudicator conducted the very review of the Adjudicator's factual findings that is mandated by the IAP by considering whether the Adjudicator had made a palpable and overriding error of fact. Both the Adjudicator's factual findings and the Review Adjudicator's review of them on the palpable and overriding error standard were entitled to the high level of deference imposed by *Schachter*.
>
> [emphasis added]

[42] In my view, there is an important distinction to be drawn between the failure to consider the terms of the IRSSA or the implementation orders, on the one hand, and the correctness/reasonableness of the interpretation or application of those terms, on the other. As is stated in *Schachter*, it is the failure to consider the terms of the IRSSA or the implementation orders that constitutes the very limited circumstances in which a party can have recourse to the courts. According to Rouleau JA, an example of this would be where an adjudicator failed to consider the factors set out in the implementation orders in arriving at his/her decision in a specific case (see para 57).

[43] As Sharpe JA stated in the Perell appeal, the SJ is not entitled to assume the role of the review adjudicator. While the SJ may disagree with the review adjudicator's decision, disagreement with the decision does not equate to a failure to enforce the IRSSA or to apply the IAP model, thereby

providing jurisdiction to intervene (see para 55). In my view, this applies whether the disagreement is with an adjudicator's finding of fact, the interpretation of the terms of the IAP or the application of the facts to the terms of the IAP.

VII. THE INDIVIDUAL ASSESSMENT PROCESS

[44] The IRSSA, the IAP and the role of the adjudicators and reviewing adjudicators under the IAP have been explained in detail in a number of decisions. (See, for example, *Fontaine v Canada (Attorney General)*, 2014 ONSC 283 at paras 34-104; and the *Bundled RFDs* at paras 1-28.)

[45] The role of the adjudicators is to assess the credibility of each allegation and, for those allegations which are proven on the civil standard, to determine whether what has been proven constitutes a continuing claim under the IAP (Schedule D at p 31). The SJ found, and I agree, that, as part of their role in applying the IAP, the adjudicators are entitled to give context to, and to interpret the language of, the IAP.

[46] The role of the reviewing adjudicators, as it relates to this appeal, is to determine whether an adjudicator's decision "properly applied the IAP Model to the facts as found by the adjudicator" (see Schedule D at p 14).

[47] As Brown J stated in the *Bundled RFDs*, the IAP adjudication process was intended to be a closed process. It is an extensive and detailed process, which provides many benefits for the claimants that are not available in the court process, including: closed hearings at a location of their choice; having their costs paid to attend a hearing; the choice of having a support person attend whose expenses were also paid; and trained

counsellors at the hearings, just to note a few. There are also litigation benefits for the claimants, including having an inquisitorial rather than an adversarial hearing so that, for example, there is only one examination by a trained and neutral adjudicator, rather than a direct and cross-examination by adversarial lawyers; having the alleged perpetrator excluded while they were testifying; and having a reduced standard of proof for causation in standard track claims, to name a few.

[48] What is not available is any right, within the IRSSA, to appeal or apply for judicial review of any decision of a re-review adjudicator under the IAP. This is in contrast to other provisions of the IRSSA which specifically provide for access to the courts for a variety of reasons—one such example is found in the Cameron decision. As Sharpe JA stated in the Perell appeal, "The IAP has been aptly described as 'a complete code' that limits access to the courts, preserves the finality of the IAP process and respects the expertise of the IAP adjudicators" (at para 53).

VIII. ANALYSIS

The SJ's Decision

[49] After correctly stating the limited basis upon which the courts have jurisdiction to review IAP compensation decisions as defined in *Schachter* (see SJ's decision at para 35), the SJ went on to re-state that jurisdiction (at paras 39-40):

> . . . I accept that an unreasonable interpretation of SL1.4 could, in fact, amount to a failure to comply with the terms of the IRSSA, if an unreasonable interpretation results in

> claimants being denied the compensation that the IRSSA intended them to receive.
>
> Accordingly, I find that my jurisdiction in reviewing the substantive decisions of IAP adjudicators is confined to ensuring that the Re-Review Adjudicator did not endorse a legal interpretation that is so unreasonable that it amounts to a failure to properly apply the IAP to the facts of a particular case. . . .
>
> [emphasis added]

[50] In that re-statement, the SJ modified the scope of the court's jurisdiction from that in *Schachter* as follows: (i) he found that he had jurisdiction to consider whether the adjudicators erred in their interpretation of the terms of the IAP; and (ii) he applied a new standard of review of "so unreasonable that it amounts to a failure to properly apply the IAP".

(i) Jurisdiction to Consider Errors in Interpretation of the IAP

[51] As stated earlier, there is a significant difference between an adjudicator failing to consider the correct terms of the IRSSA and misinterpreting the correct terms. An adjudicator cannot refuse or fail to consider the terms of the IRSSA and the IAP Model, or choose to consider others, as this would constitute a failure to comply with the IRSSA and the IAP Model (see *Schachter* at paras 53, 57 and the *Bundled RFDs* at para 183). The adjudicator is, however, entitled to interpret those terms, which is part of their adjudicative role (see Schedule D at pp 7, 31), and interpreting those terms, even if unreasonably, does not constitute a failure to consider the IRSSA and the IAP Model within the *Schachter* parameters of jurisdiction.

[52] The reason that this distinction is important relates to the review provisions of the IRSSA and the IAP. By considering whether the adjudicator properly interpreted the terms of the IRSSA and whether the review and re-review adjudicators failed to correct the adjudicator's interpretative error, the SJ was carrying out the same function as would be carried out on appeal or judicial review of the re-review adjudicator's decision, which he clearly cannot do because there is no right of appeal or to obtain judicial review of that decision.

[53] In my view, the SJ erred in focusing on the adjudicator's interpretation of the IAP rather than on whether the adjudicator considered the correct terms.

[54] There is another reason why this difference is important. The court's jurisdiction was described in *Schachter* as applying in "very exceptional" and "very limited" circumstances (at paras 53, 57). If the jurisdiction includes the right to determine whether there had been an unreasonable interpretation of a term of the IRSSA or IAP, the court's jurisdiction would be extended to many, rather than limited or exceptional, cases. As Sharpe JA said in the Perell appeal, the SJ's disagreement with the adjudicator's conclusion does not equate to a failure to enforce or apply the IAP and justify judicial intervention. If it did, all IAP decisions would be appealable (see para 55).

[55] Further, if the SJ's interpretation of jurisdiction is correct, it is difficult to see why it would not apply to Canada as well, so that Canada could argue that an unreasonable interpretation that resulted in it having to

pay compensation that the IRSSA did not intend it to pay was also a failure to properly apply the IAP. This would open the door to further applications to the courts, with the result that access to the courts would be available in many more cases.

(ii) Standard of Review

[56] The standard that the SJ introduced, being that of an interpretation that is "so unreasonable that it amounts to a failure to properly apply the IAP" (at para 40), is not found in the IRSSA, the IAP or the jurisprudence. This bears a striking similarity to the standard of "patent unreasonableness" that was once applicable in cases of judicial review. In *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corporation*, [1979] 2 SCR 227, the patently unreasonable standard was explained as an interpretation that was "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review" (at p 237). That standard was soundly rejected by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 34-50, and I see no basis upon which it can be resurrected in this matter.

[57] The SJ failed to explain how this new standard differed from the usual standard of reasonableness that is now applied in judicial review and on appeal. In my view, any attempt to do so would encounter the same difficulties that arose from the attempts to distinguish unreasonableness from patent unreasonableness and, ultimately, led to the rejection of the patently unreasonable standard.

[58] In my view, the SJ erred in adopting this standard of review.

Enforcing the Purpose of the IRSSA

[59] Should the court's jurisdiction be interpreted more widely to give effect to the compensatory purpose of the IRSSA, as the requestors argue? To answer this, it is necessary to consider the IAP in the context of the IRSSA.

[60] As Winkler RSJ stated in *Baxter*, the IRSSA "represents a compromise in which the defendants are not admitting liability but, rather, are joining with the plaintiffs in presenting the compromise to the court as a fair resolution of the outstanding issues" (at para 10). He also noted that "[s]ettlements represent a compromise between the parties and it is to be expected that the result will not be entirely satisfactory to any party or class member" (at para 21). Veale J stated, in *Fontaine et al v Canada et al*, 2006 YKSC 63 (at para 8):

> The settlement provides compensation for individual survivors as well as healing programs and benefits for their families and communities. It is a compensation package that is beyond the jurisdiction of any court to create. It is much more than the settlement of a tort-based class action; it is a Political Agreement.

[61] What, then, was the compromise referred to by Winkler RSJ in *Baxter*? While individual compensation was an important objective of the IRSSA, it was not the only one. Removing the individual compensation proceedings from the courts and resolving the claims on an expeditious basis were also important objectives. (See *Schachter* at para 58).

[62] The need for the timely resolution of disputes was and remains a significant objective of the IRSSA. The underlying proceedings that arose from the operation of the Indian residential schools were massive. Over 150,000 Aboriginal children attended the schools, and approximately 80,000 were still living in 2008. Legal proceedings had been commenced as early as 2000, and earlier alternate dispute resolution processes had been attempted, with little success (see 2014 ONSC 283 at paras 34-43). The IRSSA was concluded after years of negotiations involving many parties—there are 148 signatories. By that time, many of the students were elderly and they were passing away at an alarming rate. (See the Cameron decision at para 5.)

[63] Over 38,000 IAP claims had been filed by the end of 2016 and over 26,000 hearings were held in a period of less than ten years; this was possible only because the IAP provided an efficient, specialized procedure of adjudication. The delay caused by increasing access to the courts is demonstrated in this case. The adjudication process, from the submissions at the adjudication hearing to the release of the re-review adjudicator's decision on November 22, 2015, took approximately 7.5 months. The appeal, following the RFD hearing, was not heard until March 28, 2017, so the court process has added a further 16 months to the resolution of this matter. If this appeal is not successful, there will be another adjudication and the possibility of another round of reviews, further delaying a final resolution of this matter. It is clear that permitting the claimants to have recourse to the courts on the basis proposed by the SJ would fail to respect the objective of providing a closed and expeditious process for adjudicating the individual claims.

[64] When the objective of providing compensation to individual claimants is considered in light of the entire IRSSA, the very extensive and specialized adjudication and two-step review process under the IAP, and the objective of having an expeditious process for resolving the claims, I am of the view that the limited right to judicial recourse as described in *Schachter* and the Perell appeal should continue to be interpreted narrowly.

The Residents Decision

[65] In coming to his decision, the SJ relied on the Residents decision from Manitoba. In that decision, Schulman J provided directions overturning the re-review adjudicator's interpretation of certain terms in the IAP. That decision was not appealed, which Canada explained as being a mistake on its part arising out of a failure to appreciate its significance. Schulman J found that "this case raises a question relating to the interpretation of the [IRSSA] of the utmost importance" (at para 51) and that the fact that there had been conflicting decisions from the adjudicators required resolution.

[66] Canada pointed out in argument that there is an IAP Oversight Committee that is responsible to "monitor the implementation of the IAP and make recommendations to the National Administration Committee on changes to the IAP as are necessary to ensure its effectiveness over time" (see Schedule D at p 16). I agree with Canada that the problem of conflicting interpretations of the IAP by the adjudicators should have been resolved through this procedure, rather than by way of RFD to the courts.

[67] Canada also pointed out at the appeal hearing that, according to the terms of the IAP, there is specifically no *stare decisis*, so that adjudication decisions are not binding on other adjudicators (Schedule D at p 42). Each is free to arrive at his or her own interpretation; thus, it is anticipated within the IAP that there may be differing interpretations.

[68] In my view, the reasoning in the Residents decision related to the court's jurisdiction to hear the RFD in that case is not persuasive, and I would decline to follow it.

Favourable References to the SJ's Decision

[69] As I noted earlier, both Brown J and Sharpe JA commented favourably on the basis for jurisdiction set out by the SJ in para 40 of his reasons. While commenting favourably, neither court examined the underlying analysis on which he based his finding. Although the jurisdiction appears to be narrow and limited in scope and is, therefore, appealing on a superficial level, it does not survive a more probing review and, for the reasons set out above, I do not accept it as being correct.

Conclusion

[70] The SJ purported to respect the "very limited role of courts in supervising the IRSSA's implementation" by rejecting the standard of review of the correctness of the adjudicator's interpretation of the terms of the IAP, and, instead, substituting a higher standard of review of "so unreasonable that it amounts to a failure to properly apply the IAP to the facts of a particular case" (see paras 36-40).

[71] The problem with this analysis is that the elevation of the standard of review does not change the nature of the review. By determining whether the adjudicator's interpretation of the terms of the IAP was unreasonable (the standard actually applied) and whether the re-reviewing adjudicator's failure to correct that interpretation resulted in a failure to properly apply the terms of the IAP, the SJ was carrying out an appeal or judicial review of the adjudication and review decisions. This he was not entitled to do because the compensation decision of the re-review adjudicator under the IAP was final and not subject to either appeal or judicial review by the courts on any standard. By broadening the review process, the SJ went beyond the extremely limited recourse to the courts that was permitted in *Schachter* and in the Perell appeal. This would have the effect of significantly increasing the time required to complete the individual and overall claims process, thereby failing to respect the objectives of providing a closed and expeditious adjudication process.

[72] For these reasons, I would find that the SJ erred in his interpretation of his jurisdiction to hear and determine the RFD. In my view, his jurisdiction was limited to determining whether the adjudicator implemented the provisions of the IAP in the narrow sense of determining whether she considered the correct terms. Once it was determined that she considered the correct terms, being category SL1.4, his jurisdiction ended and he should have dismissed the RFD. Instead, he considered whether she erred by not properly interpreting that category, which was outside his jurisdiction.

IX. DECISION

[73] For these reasons, I would grant Canada's appeal, set aside the SJ's order and reinstate the decision of the adjudicator. In the result, JW's application for compensation under the IAP is dismissed.

[74] Counsel did not address the question of costs. If costs cannot be resolved by the parties, arrangements can be made with the registrar to make submissions in that regard.

Beard JA

I agree: Monnin JA

I agree: leMaistre JA